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On the Supreme Court docket

By Craig Smith, TRIBUNE-REVIEW
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About the writer

Craig Smith can be reached via e-mail or at 412-380-5646.

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Ilya Shapiro jumped at the chance to serve as special assistant/adviser to the Multi-National Force in Iraq on rule-of-law issues and spent two months there before joining the Cato Institute as a senior fellow in constitutional studies and editor-in-chief of the Cato Supreme Court Review.

He practiced international, political, commercial and antitrust litigation at Patton Boggs LLP and Cleary Gottlieb LLP and regularly comments on legal and political issues for various media outlets.

We spoke by phone Tuesday as the U.S. Supreme Court prepared for its fall session with a new justice and amid speculation over its next retirement.

•Q: Some court observers say the fact that Justice John Paul Stevens hired only one clerk for 2010 -- instead of the usual complement of four -- indicates he may be thinking about retiring next spring. Do you think this will be his last term?

•A: That is a very good indicator, yes. I know that he wants to get the longevity record for justices, and he's approaching the records both for number of years on the court and oldest serving justice. But this only hiring one clerk, I mean, he could pick up the phone today and hire three more. But that's generally a good indicator. We saw that proved to be the case for (David) Souter.

•Q: President Obama's second nominee isn't likely to change the ideology of the court, right?

•A: It just depends. I mean, it's re-entrenching essentially the current breakdown of the court and, you know, we don't know with (Sonia) Sotomayor what kind of justice she's going to be. But the conventional wisdom is that she will be similar to Souter, maybe a little more pro-government on criminal cases, a little less business friendly in civil litigation, but generally very similar.

The greater question mark is how she'll change the dynamic of the court. It's often said -- originally credited to Justice Byron White -- that every time a new justice comes, there's a new court. So will she be an intellectual or legal force on the court? Will she attract or repel Anthony Kennedy, the all-important swing vote in so many cases? ...

It takes a while for a justice to really get his or her bearings on the court, so even how she votes this year isn't going to be the whole ballgame. It will take a few years. (Samuel) Alito now is in his third full term and now he's starting to assert himself. In his first term he purposely decided to kind of hang back and get a lay of the land and not be as active in questioning, and his opinions weren't as notable. But he's really come into his own.

•Q: What about Justice Ruth Bader Ginsburg? She's undergone treatment for pancreatic cancer and she hopes to hang in there from what she's said.

•A: I wouldn't be surprised, if indeed Stevens goes after this term, that she would only stay one more term. The justices don't like to leave during an election year, making that replacement a big election issue. And you know, unless she makes the decision she's going to stay for at least two further terms and that she's confident that Obama will get re-elected, I can see her leaving.

•Q: What cases stand out in the coming term?

•A: Last year was a little bit of a dud. There was, you know, the *Ricci*



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tea leaves and following the court.

We've had a case already argued, this campaign finance case that was carried over from last year (*Citizens United v. Federal Election Commission*). I would assume an opinion is going to come out sometime before Christmas. And that could be significant. It could indicate that the whole campaign finance framework that we've gotten used to under *McConnell v. Federal Election Commission* and since *Buckley v. Valeo* could be subject to complete revision.

There's a First Amendment case called *United States v. Stevens*, which is about the depiction of animal cruelty. It involves videos of dog fighting and training and those sorts of things. ... Originally the statute meant to go against what are called "crush videos" -- stomping on animals and rodents and so forth that are taped to the floor and these sorts of weird things. ... Anyway that's what it was intended to criminalize, but it's written in a much broader manner. And this is troublesome -- the argument that the government is making in terms of there being a sliding scale in terms of the societal value of a given speech versus the government's interest in stopping it. It's a way that the First Amendment has never been treated. So there's an interesting array of animal rights groups on one side and Cato Institute and ACLU and other civil liberties groups on the other.

•Q: Sounds like an interesting term.

•A: Yeah, there is an establishment clause case, *Salazar v. Buono*. There's this cross in the middle of the Mojave Desert which somebody saw and got offended that this was the establishment of religion. So there is a question of whether they have standing to sue just because they saw this thing from a distance. But then what the federal government did was swap out the land from under the cross with some other private land. So that technically ... there is this doughnut hole that the government no longer owns. But you can see it from afar, from on government land. And it's kind of this quirky case.

There's an antitrust case involving the NFL called *American Needle v. NFL*, and it's about ... the NFL's exemption from antitrust laws: whether the agreements of NFL teams with Reebok are subject to the Sherman Act, or is the NFL and its members a single entity for this purpose? Because other companies are concerned that they are getting shut out of potentially lucrative deals with the various teams.



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