

NAAG Gazette

A Newsletter of the National Association of Attorneys General

September 2009

A Preview of the 2009 Supreme Court Term



DAN SCHWEITZER, SUPREME COURT COUNSEL

The first Monday in October is fast approaching, meaning a new Supreme Court term is about to get underway. As usual, the Court's docket includes a mixture of major cases sure to make the front pages of the papers and obscure matters of interest only to lawyers with niche practices. What may be most

unusual about the upcoming term is how much has taken place before it has even officially commenced.

Most notable was the Senate's confirmation in August of Sonia Sotomayor as associate justice to fill the seat formerly taken by David Souter. Any time a new justice joins the Court, its dynamics change — not just its voting patterns, but how the justices interact with each other at oral argument and off the bench. There is every reason to believe that Justice Sotomayor will vote similarly to Justice Souter on the major constitutional issues of the day. But, given her background as a former prosecutor and her voting record on the Second Circuit, it is possible she will be more sympathetic to the government's position in criminal law cases than was Justice Souter. One of the most interesting aspects of this term will be seeing Justice Sotomayor's voting record in those cases and seeing whether oral argument — already an ordeal in the Supreme Court — becomes even tougher with her on the bench.

The Court also took the unusual step of hearing oral argument in early September, while its 2008 term was still technically in session. The Court heard reargument in *Citizens United v. FEC*, No. 08-205, to address whether it should "overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Biparti-

san Campaign Reform Act of 2002." In plain English, at issue is whether the First Amendment permits Congress to ban corporations and unions from using their general funds to advocate expressly for a candidate for public office. The Court initially heard argument in the case last March, and could readily have ruled for the petitioner on statutory grounds. Based on the Court's decision to hear



U.S. SUPREME COURT JUSTICE SONIA SOTOMAYOR

reargument on the constitutional issue, and on the transcript of the recent oral argument, the Court appears almost certain to overrule at least part of *Austin* and hold that Congress may not limit the election-related expenditures of a non-profit ideological corporation such as *Citizens United*. The Court may well go further and hold that Congress may not limit the election-related expenditures of any corporation or union.

(Note that the case does not involve Congress' longstanding ban on corporate *contributions* to political campaigns.)

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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EXECUTIVE DIRECTOR

JIM MCPHERSON

EDITOR

MARJORIE THARP

Director of Communications

CONTRIBUTORS

DAN SCHWEITZER

Supreme Court Counsel

OFFICE OF NATIONAL DRUG CONTROL POLICY

CREATIVE

LISA JETER

Web Programmer/Designer

PRODUCTION & CIRCULATION

BRANDI GREEN

Communications &

Special Projects Assistant

ERIC THIBAUT

Communications Intern

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The Court has 46 other cases set for argument in the 2009 term, about one-third of which will be argued by state Attorney General offices. This makes the Attorney General offices, once again, the most frequent party in the Court. Here is an overview of the most important cases on the Court's docket, from the Attorney General perspective.

Criminal Law

The Court is addressing an array of issues that will significantly affect criminal law enforcement. Perhaps the most interesting of these cases are *Graham v. Florida*, No. 08-741, and *Sullivan v. Florida*, No. 7621, both of which present the question whether the Eighth Amendment's ban on cruel and unusual punishments bars states from imposing the sentence of life without parole (LWOP) on juveniles for the commission of non-homicide offenses. *Graham* and *Sullivan* rely heavily on *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Court held that the Eighth Amendment categorically forbids the execution of minors. The Court in *Roper* emphasized that minors are less culpable than adults and less susceptible to deterrence because they lack maturity, are especially susceptible to peer pressure, and have "more transitory, less fixed" personality traits. *Graham* and *Sullivan* argue that these same concerns make an LWOP sentence — which eliminates the possibility of their ever being released — a constitutionally disproportionate sentence. Florida responds that *Roper* (and *Atkins v. Virginia*, 536 U.S. 304 (2002)) are products of the Court's "death is different" jurisprudence, and is not properly extended to non-capital sentences. And, Florida argues, state legislatures can quite reasonably conclude that an LWOP sentence is proportionate to the crimes committed in these cases: armed burglary by a recidivist and rape. In the jargon of the Court's doctrine, such sentences are not "grossly disproportionate" to the crimes.

The case of *Padilla v. Kentucky* may be even more important in terms of its practical effects. Virtually all criminal convictions result in collateral consequences, ranging from lost voting rights to sex offender registration requirements to professional disbarment to deportation. And virtually all criminal convictions arise from guilty pleas. *Padilla* arises from the juxtaposition of those two facts. *Padilla* (a non-citizen) argues his counsel mistakenly told him that he could not be deported under the Immigration and Nationality Act if he pleaded guilty to trafficking marijuana. In the Supreme Court, *Padilla* argues



not only that such affirmative *misadvice* can serve as the basis for withdrawing a guilty plea, but also that defense counsel have an affirmative obligation to advise defendants about the collateral consequences of conviction. In Padilla's view, "[f]or many criminal defendants, the deportation consequences of conviction will matter much more than the criminal punishment," and competent counsel may "need to shape defense strategy to avoid deportation." Kentucky responds that the Constitution requires only that a guilty plea be voluntary, which requires only that the defendant know the direct consequences of the plea and the rights being waived. If the Court were to adopt Padilla's proposed rule, it would dramatically expand the constitutionally imposed duties of defense counsel far beyond the criminal matters that are the concern of the Sixth Amendment.

Another criminal case of great practical consequence is *Maryland v. Shatzer*, No. 08-690 (U.S.), which bears on when police may question a suspect who has invoked his Fifth Amendment right to counsel. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court held that police are prohibited from initiating the interrogation of a suspect who has invoked the right to counsel. But does that prohibition last forever? Here, Shatzer was questioned about sexually abusing his child. After he invoked his right to counsel, questioning ceased, and he was returned back to prison (where he was serving time for a separate offense). More than two years later, police received new information about the sexual abuse allegations and therefore questioned him again. At issue in the case is whether the second questioning violated the *Edwards* rule, or whether the *Edwards* prohibition was no longer operative because of the break in custody, or the long lapse of time, between the initial and later questioning.

Finally, it's worth saying a few words about *Beard v. Kindler*, No. 08-992. The question presented is whether "a state procedural rule [is] automatically 'inadequate' under the adequate-state-grounds doctrine — and therefore unenforceable on federal habeas corpus review — because the state rule is discretionary rather than mandatory." On the surface, this is about as dry and technical a case as the Court could hear. To members of state Attorney General offices trying to defend convictions, however, this issue is often hugely important. One of the fundamental rules of habeas practice is that an inmate who has failed to assert a claim in the state courts, and thereby forfeited the claim in state court, has procedurally defaulted the claim and (subject to limited exception) may not assert it on federal habeas review. The rule is based on fundamental federalism principles, and serves to ensure that state courts be given the first opportunity to address inmates' claims for release. Several federal courts of appeal, however, have held that a state procedural rule is "inadequate" to procedurally bar a federal habeas claim if the state court has discretion in applying the rule, such as the discretion to waive its application in the "interests of justice." Applying that approach, the Ninth Circuit has for decades refused to recognize the validity — for procedural bar purposes — of many of California's core procedural rules, such as those barring unduly delayed applications and applications raising claims that could have previously been raised. *Beard v. Kindler* will resolve whether states must choose between giving their state judges some degree of discretion in applying their rules and having those rules count on federal habeas review.



VERONICA RICCA

Since joining the NAAG staff as a paralegal almost a year ago, Veronica Ricca has become an integral part of the Constitutional & Appellate Issues Division and the NAGTRI team. Her numerous duties for

NAGTRI include managing hotel logistics, securing speakers for the events, and preparing materials for the trainings. She also supports the Constitutional & Appellate Issues Division assisting with its moot courts throughout the Supreme Court terms, a key part of the Association.

"Compared to other firms I was looking into, I really liked the idea of working at NAAG because I would be doing several different things," she said. "Now, I support five supervisors in different areas of NAAG, I get to travel, and the atmosphere is laid back but professional at the same time."

After graduating from Louisiana State University with a bachelor's in art history in 2006, she moved to D.C. for an internship at the Art Museum of the Americas at the Organization of American States (OAS). Veronica ended her tenure at the OAS as an assistant for the Department of Cultural Services. There she coordinated and managed events and correspondence for the director of Cultural Services, and assisted in their first annual art auction and fundraiser for the museum. Leaving the art industry behind for now, Veronica plans to attend law school next fall.

Veronica said she especially enjoys the atmosphere and her co-workers at NAAG. "I love the NAGTRI trainings and meeting people from Attorneys General offices all around the country."

A native of the Greater New Orleans area, Veronica now resides in the Dupont Circle neighborhood where she enjoys running, painting, playing intramural co-ed soccer, and volunteering around the District. She was most recently spotted in *The Washington Post's* July 26th "Street Style" section, where she was photographed for her stylish work apparel.

Federalism

For the first time in several years, the Court will address whether Congress exceeded its powers under the Commerce Clause when it enacted a particular statute. In this case, *United States v. Comstock*, No. 08-1224, the statute in question is Congress' sexually violent predator law, which authorizes the civil commitment of dangerous sexual predators after they complete their federal prison sentences. The Fourth Circuit rejected the United States' contention that the statute is a "component of Congress's unquestioned power to enact criminal laws prohibiting conduct within the scope of its Article I powers and to punish persons convicted of violating those laws by committing them to federal custody." In the court's view, previous lawful federal custody is not a basis for commitment "after a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted." Notably, Kansas filed an amicus brief on behalf of 30 states in support of the federal law. The amicus brief noted that states have been the leaders in adoption of sexually violent predator laws, and they view the federal statute not as an intrusion on state prerogatives but "as complementary to state efforts in this area."

Takings

The Roberts Court will hear its first takings case in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151. As part of a beach restoration project, and acting under Florida's Beach and Shore Preservation Act, county officials established a fixed "erosion control line" that set the boundary between private beachfront property and the state's sovereign lands. The Florida Supreme Court rejected petitioner's contention that this action constituted a taking without just compensation of their common-law littoral right to accretion. The principal issue before the U.S. Supreme Court is whether the Florida Supreme Court's



decision, which purportedly reversed longstanding state law regarding littoral rights, constitutes a "judicial taking." This issue may prove particularly important because in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court held that property owners cannot claim a taking based on a land-use restriction that was part of the "existing rules or understandings," such "background principles of the State's law of property and nuisance." The *Stop the Beach* case will tell us the leeway that state courts have to define (or re-define) the contours of those background principles.

Establishment Clause

The Court will tackle the intersection of religion and the law in *Salazar v. Buono*, No. 08-472, a contentious case arising from efforts by the Veterans of Foreign Wars (VFW) to maintain a cross as a memorial to fallen service members in a remote area within a federal preserve. The cross had been there for 70 years, until a district court held that its presence violated the Establishment Clause and the Ninth Circuit affirmed. The first issue before the Court is whether the plaintiff has standing to maintain the action, given that he does not object to the public display of the cross, but rather complains that the land should be open to other symbols. The second issue is "[w]hether, even assuming [the plaintiff] has standing, the court of appeals erred in refusing to give effect to [an] Act of Congress providing for the transfer of the land to private hands."

Free Speech

Several years ago, Congress enacted a statute making it unlawful to create, sell, or possess, for commercial gain, a depiction of a live animal being intentionally wounded, tortured, or killed. The Court will decide whether the statute violates the First Amendment in *United States v. Stevens*, No. 08-769. The United States argues that the speech covered by the statute is, like child pornography and obscenity, not protected at all by the Free Speech Clause. Alternatively, the United States argues that the facial challenge to the statute must fail because "numerous applications of the statute, including crush videos and animal fighting videos, would satisfy even the strict scrutiny standard." Respondent counters that the statute would cover documentaries depicting the clubbing of baby seals and other mistreatment of animals, as well as similar images in passages by Hemingway and in popular movies. In the end, argues Respondent, "Congress enacted a statute, the net effect of which is to hinge the freedom to speak on the speaker's willingness to run the gauntlet of *post hoc* value assessments by prosecutors and juries with a five-year felony sentence hanging over his head."

Attorneys General Participate in Anti-Meth Ad Campaign Launch

FROM THE OFFICE OF NATIONAL DRUG CONTROL POLICY

State Attorneys General played key roles in the September launch of a new federal methamphetamine advertising campaign to build public awareness about meth prevention and recovery. The director of the White House Office of National Drug Control Policy (ONDCP), Gil Kerlikowske, launched the 2009 Anti-Meth Campaign, part of the agency's National Youth Anti-Drug Media Campaign, at a Sept. 1 press conference in St. Louis, Mo. The launch also included roundtable meetings the same day in St. Louis, and Carterville, Ill., with leaders from local law enforcement, criminal justice, and drug prevention and treatment in attendance.

At the St. Louis press conference, Missouri Attorney General Chris Koster spoke along with ONDCP Director Kerlikowske, U.S. Rep. Russ Carnahan (MO-03) and Josh Palmer, a recovering meth addict and substance abuse counselor, among others.

Following the St. Louis events, Director Kerlikowske headed to nearby Carterville, for an afternoon roundtable discussion hosted by Illinois Attorney General Lisa Madigan, who convened a group of key members of Illinois law enforcement, and drug prevention and treatment community, to discuss methamphetamine issues in the state. Director Kerlikowske is traveling throughout the country in a

"listening tour" with local and state officials to hear more about local drug issues – including meth – as he prepares his office's drug control strategy over the coming months.

Elsewhere, Nevada Attorney General Catherine Cortez Masto participated in a discussion about methamphetamine use in Nevada at a meeting of the Inter-Tribal Council of Nevada (ITCN) in Reno. The Attorney General also completed media interviews on behalf of the Anti-Meth Campaign.

The National Youth Anti-Drug Media Campaign has coordinated the National Anti-Meth Campaign since 2007. Using national data as a guide, the campaign has reached out to areas and populations hardest hit by meth, through TV, radio, print, and online advertising, as well as news media events. The new 2009 Anti-Meth Campaign focuses on preventing methamphetamine use – and raising awareness about treatment and recovery. The target audience for this campaign is young adults ages 18 to 34, as well as family and friends of someone who may be using meth. This young adult target was specifically chosen because methamphetamine initiation and usage rates are highest in this age group nationwide.

The 2009 Anti-Meth Campaign's TV, billboard, radio, print, and online ads will run from September to November in states with high methamphetamine use rates, as well as a small group of Midwest states with high levels of reported meth lab seizures and incidents, according to national data. These 16 states are: Alaska, Washington, Oregon, Nevada, Wyoming, Arizona, New Mexico, Oklahoma, Arkansas, Missouri, Iowa, Minnesota, Illinois, Indiana, Kentucky, and Nebraska. Additionally, radio ads and online search ads will run in all states during the same time period.

Are we making strides in the fight against meth? **Absolutely.**



Just ask Josh.



GIL KERLIKOWSKE

The campaign also includes an open letter print ad featuring Josh, a meth addict in recovery, with a focus on hope for treatment and recovery for methamphetamine addiction. The National Association of Attorneys General was featured as a signatory, along with the National Association of Drug Court Professionals, Major Cities Chiefs Association, Community Anti-Drug Coalitions of America, and

the Partnership for a Drug-Free America. The open letter advertisement ran in daily newspapers, regional issues of news magazines, and trade publications in early September, and it is now available as a free customizable open letter public service announcement (PSA) for state and local government offices and organizations.

In addition to the open letter ad, many of the print ads will be available in December 2009 as free, customizable public service announcements for use by local non-profits, state government offices, and other organizations. The television advertisements, created by Publicis & Hal Riney, the pro bono advertising agency, in coordination with the Partnership for a Drug-Free America, will be available as free customizable PSAs in early 2010.

There are also a number of free resources currently available on www.MethResources.gov, including a series of “Life After Meth” posters and targeted ads for the Native American communities (www.MethResources.gov/native_american_campaign.html).

Details about ordering these resources and requesting customization are available on www.MethResources.gov in the “Anti-Meth Campaign” section of the site.

DOJ Intergovernmental Affairs Director Appointed



PORTIA ROBERSON

Portia Roberson was appointed this summer as the director of the U.S. Department of Justice’s (DOJ) Office of Intergovernmental Affairs and Public Liaison (OIPL). This office coordinates DOJ activities related to state and local government and law enforcement officials, and outside organizations. OIPL also ensures that the state and local perspective is taken

into account as DOJ policies and programs are discussed and implemented. Prior to this position, she worked in Michigan as an associate general counsel for the Detroit Medical Center and as an assistant prosecuting attorney for Wayne County. She recently sat down to answer a few questions about her plans as director and expected interaction with Attorneys General.

What are your office’s priority issues?

I am really interested in working to change the perception of DOJ from being separate from state and local governments but truly working with them and other constituent groups. As far as working with state Attorney Generals, we want to establish a partnership with them. They are on the frontline and deal with the everyday issues that people are facing. We want to make sure that the DOJ is working with and listening to Attorney Generals on their priority issues. The Executive Working Group on Prosecutorial Relations (EWG) is definitely a priority that the U.S. Attorney General, the Department of Justice, OIPL

and NAAG share. I have met with NAAG leadership and certainly look forward to forming a partnership in working with EWG.

How is your office structured?

There are seven people in my office including myself, two associate directors, a legal advisor, a confidential assistant, a research coordinator, and a secretary. Basically, we are a small office looking to complete big tasks.

What is a day-in-your life look like?

Well, I recently moved to the city so I still adjusting to life in the District of Columbia. Professionally, I attend quite a few meetings in an effort to make sure that we are working towards the goals of the Department of Justice. I have an open door policy with my team as we determine the direction of the office. The associate directors and the senior legal advisor continue to do outreach to various constituency groups and we listen and try to address any concerns that people may have surrounding the Justice Department.

Is there anything else you’d like our readership to know about you or your office?

I would just like them to know that U.S. Attorney General Eric Holder is committed to working with the Attorneys General on law enforcement issues and those issues that are important to the American people. The Department of Justice represents many different things to many different people. This Department and OIPL will work tirelessly to answer the questions and address the concerns of everyone.

For more information about OIPL, visit <http://www.usdoj.gov/oipl/>.

NAAG Winter Meeting Preparation Underway



State and federal cooperation and the changing contours of preemption will be the focus of discussion during the NAAG Winter Meeting, December 1-3 in Phoenix, Arizona. This closed meeting allows Attorneys General and their staff to discuss the latest state legal issues and potential solutions, as well as conduct internal NAAG business.

Arizona Attorney General Terry Goddard is the host, and invited speakers include Secretary of the Department of Homeland Security and former Arizona Attorney General Janet Napolitano, Assistant Secretary of Indian Affairs within the Department of Interior and former Idaho Attorney General Larry Echo Hawk, and executive health expert, Dr. Joseph Thompson. Panel discussions will cover such substantive and informative issues as the U.S. border, Pacific legal issues, and prescription drug abuse.

Contact Jeffrey Hunter, jhunter@naag.org, for more information about the program or to register (Attorneys General or their staff only).

Supreme Court Fellows Arrive

The NAAG Supreme Court Fellows program gives state lawyers an opportunity to obtain direct and intensive hands-on exposure to U.S. Supreme Court practice. The Fellows work in NAAG's Washington, D.C., office for three- to four-month periods during the Court's argument session. They watch oral arguments, participate in moot courts, prepare an amicus brief in a Supreme Court case, and draft the Report. The following Fellows joined NAAG for the fall term:



MATTHEW KANAI

Matthew Kanai is the capital crimes unit coordinator and assistant solicitor general in the Ohio Attorney General Office. In this role, he is responsible for all phases of federal habeas corpus cases involving a state, capital cases in district court, and on appeal to the Sixth Circuit Court of Appeals. Selected to serve in the state's Major Appellate Group, he

also wrote initial drafts of briefs in opposition of certiorari to the U.S. Supreme Court and amicus briefs to the Sixth Circuit Court of Appeals. Prior to joining the Ohio Attorney General Office, Matthew served in various roles over his eight years with the Columbus City Attorney's Office. He most recently served as director of the appellate unit where he was responsible for all appeals arising from the Prosecutor Division of the City Attorney's Office,

and taught as an adjunct law professor at The Ohio State University College of Law. Matthew received his bachelor's degree in political science from Hiram College. He is also a graduate of The Ohio State University College of Law.



SUSAN LEACH

Susan Leach is a deputy attorney general for the California Office of the Attorney General, Civil Division, Government Section. She has defended the state's constitutional officers in state and federal court in various matters, defended a state law banning violent video games, and defended the constitutionality of a state law prohibiting the processing

of "downer" animals. Susan previously worked as a litigation associate in private practice in New York and Los Angeles. There she was responsible for preparing and cross-examining witnesses at Securities and Exchange Commission hearings, drafting appeals, and summary judgments. Susan received her bachelor's degree from Gonzaga University in 1995, graduating magna cum laude. She also graduated cum laude from the Georgetown University Law Center in 1998.

Law Clerk Joins NAAG



SARAH BERTOZZI

NAAG is pleased to welcome recent Harvard Law School graduate Sarah Bertozzi to our staff. Over the next year, Sarah will serve the Association as an advanced law clerk, and as visiting counsel upon admission to the New York bar. She will be responsible for researching and drafting briefs for the Constitutional & Appellate Issues Division, as well as conducting legal

research for the Energy & Environment Project.

“The work so far has been both challenging and interesting, and this is a great environment in which to do it,” Sarah said.

Sarah spent several summers working in the legal field before joining NAAG. She first put her skills to use in the legal counsel office of the up-scale fashion company, Chanel, Inc. Sarah also worked at Cravath, Swaine & Moore LLP as a litigation and corporate summer associate and plans to return to the firm upon the completion of her time at NAAG.

Working for the Pennsylvania Governor’s Office during college and the city of New York during law school, Sarah has always been interested in law at the state and local level.

“States are increasingly engaged in affirmative litigation, going out and making sure that the laws, particularly environmental laws, are enforced,” she said. “I think this will be a great experience for me.”

Sarah received her bachelor’s degree from the University of Pennsylvania in 2006, where she graduated summa cum laude and Phi Beta Kappa, and received the President’s Award for Undergraduate Research. The award is only given to 10 undergraduates. She also received her J.D. from Harvard Law School this past June, where she served as executive editor of the *Journal of Law and Gender*.

This Belmont, Mass., native now resides in Arlington, Va., and has enjoyed exploring D.C. in her first few weeks here. Sarah also likes running, baking, visiting museums, and following the fashion industry.

Calendar

Moving Into Management

October 5-6, 2009

Madison, WI

Contact: Mary Winzenburg

Antitrust Federalism: Enhancing the Federal/State Relationship

October 7, 2009

Columbia Law School, New York, NY

Contact: Jon Comas

Technology-Based Crimes Against Children: Cutting Edge Issues

October 13-15, 2009

Oxford, MS

Contact: Hedda Litwin

Bankruptcy from a Government Perspective

October 25-28, 2009

Nashville, TN

Contact: Karen Cordry

NAAG Winter Meeting

November 30 - December 3, 2009

Attorneys General and AG staff only

Phoenix, AZ

Contact: Jeffrey Hunter

Presidential Initiative Summit: “Virtual World-Real Crime”

February 8-10, 2010

Ft. Lauderdale, FL