Podcast Transcript

Supreme Court Cases and Trends

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Kattman: The U.S. Supreme Court's October term started earlier this month and promises to be an unprecedented session. How is the Court responding to the pandemic and adapting to a virtual environment? Which cases should you be keeping an eye on in the coming term and what makes them so relevant? I'm Amy Kattman and you're listening to BakerHosts. On today's episode, we will highlight Supreme Court cases and trends and the most important things to note for the upcoming term, with our guest, Kyle Cutts. Kyle is a litigator in BakerHostetler's Commercial Litigation and Appellate Groups and hosts the firm's annual Supreme Court Update program. Welcome to the show Kyle.

Cutts: Thanks so much for having me.

Kattman: Kyle, obviously a lot has happened this year that impacted the Court. What are your big takeaways from the October 2019 term?

Cutts: It was a fascinating term. From a jurisprudence standpoint, I think the big takeaway from this term was that, for at least this year, it was truly Chief Justice Roberts' court. He was in the majority in nearly every decision the Court issued, he dissented only twice and he sat at the ideological center of the Court. He joined his colleagues on the right often to create strong, conservative majorities and yet he pulled the Court leftward in some very unexpected ways. At that center of the Court he could influence the Court greatly and exercise significant sway. Now, I think the interesting thing to keep an eye on going forward, is whether this sway will last. As most listeners will know, we're right in the middle

of the confirmation process for Judge Amy Coney Barrett of the Seventh Circuit. It's widely expected by both the administration and other commentators that Justice Barrett would pull the Court rightward. If that's true, and she provides a reliable fifth vote for a conservative majority, the Chief will lose some of his influence at the center of the Court. He may find himself writing separately or writing more dissents.

Kattman: We're experiencing an unprecedented time amid the pandemic, could you give us a little historical context or even trivia? I mean, has the Court ever experienced such a disruption in history?

Cutts: Yeah it's an interesting question, the Court cancelled oral argument this year in March and April. Now, it's not the first time that the Court has cancelled oral argument in the past in response to a pandemic. It did so in 1918 due to the influenza outbreak at the time and it also cancelled arguments back in the late 1700s in response to outbreaks of yellow fever. Interestingly, when the Court announced it was cancelling oral arguments this term, it cited those precedents as if to say, we've been here before, we've done this before and we will be back and sure enough, they were.

Kattman: What measures has the Court adopted in the wake of working remotely? Do you think they're effective?

Cutts: So like nearly everything else, the Court has needed to adapt to the current environment and all things considered I think they've been very successful with where they've landed. As I mentioned, the Court cancelled oral arguments in March and April of this year. They began arguments back up again in May but this time they did it telephonically, and that's a first for the Court. Another first for the Court, they began allowing people to listen into those oral arguments live. They made their live audio feeds available to news outlets and listeners could sign in and listen to the oral arguments as they were going on and I think that was an effective way to engage the public with those oral arguments. Because the arguments were being conducted telephonically, the Court also needed to change how those oral arguments played out. So what the Court did was, it allows attorneys a few minutes of time to present their case at the outset of the arguments and then the questions are structured, so the Chief Justice begins the questioning and then the questioning progresses among the justices, or through the justices, starting with order of seniority. And so I think this has been a very effective way to conduct oral argument. It does seem to make oral argument a little longer and the oral argument loses some of the electricity that it has live, I think, with the justices interrupting one another or piggybacking off of questions but overall I think that's a small criticism in light of everything that the Court is facing. And I should note, that the Court recently announced that they're going to continue to conduct these live telephonic oral arguments through the end of the year.

Kattman: That's great that they were able to adapt so quickly.

Cutts: Absolutely.

Kattman: So let's talk about cases. Which cases created the most buzz in the prior term? I don't mean, not only in the legal community, but impacting business decisions and even civil rights.

Cutts: There were so many this term. Obviously one of the major cases from this term was *Bostock v. Clayton County*, 590 U.S. ___ (2020), and its companion cases. There the Court held that Title 7's prohibition of employment discrimination because of sex, applied to discrimination based on sexual orientation and gender identification. There were several cases dealing with access to the president's papers, these cases are continuing to be litigated and there's a good chance that we'll see another case reach the court this term addressing similar issues. There were religious liberties cases in which the majority of the Court sided with, sided in favor of the religious institutions or groups but there were also cases involving religious institutions' challenges to COVID restrictions where the Court upheld the restrictions on gatherings for example in religious, at religious gatherings. There was an important case of out Oklahoma concerning the state's ability to prosecute major crimes committed on Native American reservations and there was an important trademark case where the court held that a generic word combined with a .com, and there the case was booking.com, could be trademarked.

Kattman: So quite a few. Are there any cases from the term that might have fallen through the cracks that you think are worth mentioning?

Cutts: So there was a curious Fourth Amendment case that I think is worth discussing and worth keeping in your back of the mind as we move forward into this upcoming term. It involved a deputy sheriff who observed a truck driving down the road. The deputy sheriff decided to run the vehicle's plates and the run came back and showed that the owner of the vehicle's license was suspended. Based on that fact and that fact alone, the deputy pulled the driver over. The deputy discovered that the driver of the vehicle was also the owner of the vehicle, the owner's license was suspended, and so the owner was cited. The question in this case is whether there was reasonable suspicion to stop the truck in the first place and in an 8–1 vote the court held there was. Writing for the majority, Justice Thomas held that all the deputy needed to have reasonable suspicion, was his commonsense belief that driver of the vehicle was also the owner of the vehicle. And although the Court stressed that this was a narrow holding, it'll be interesting to see what the Court does with this commonsense doctrine in other Fourth Amendment search and seizure cases going forward. I think it's a really interesting one to watch.

Kattman: It sounds that way. It's important to understand the past in order to anticipate what's to come. Has the Court encountered any cases throughout its history that have had an impact on health and safety measures in place today?

Cutts: So I think there's some really interesting cases from the Court's past to revisit in light of the pandemic going on now. And the first is *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). This case involved a mandatory vaccination requirement put in place in Massachusetts to combat smallpox. Jacobson was a Lutheran

minister who refused to be vaccinated and therefore he was fined $5. He took his challenge to that $5 fine all the way up to the Supreme Court and the Supreme Court 7–2 upheld Massachusetts' mandatory vaccination requirement. It said that clearly Massachusetts' police power expanded to mandatory vaccination requirements because of the importance those requirements play in protecting public health. So that's one to keep in mind, that was a case from 1905. The second case is from 1941, it's *Edwards v. People of State of California*, 314 U.S. 160 (1941). And this case involved a law out of California at the time that made it illegal to bring indigent people, people with no money, into the state. And the facts are pretty interesting, it involved a Mr. Edwards who was a California resident, and his wife asked Mr. Edwards to travel to Texas and bring her brother into California. Mr. Edwards did this, he traveled to Texas, he met the brother-in-law, a Mr. Duncan, and learned that Mr. Duncan had been out of work for some time and had about $20 to his name.

Together they traveled back to California and by the time they got there the $20 was about spent and it took Mr. Duncan awhile to find work in California. Somehow the authorities got wind of this and Mr. Edwards was tried under this law that made it illegal to bring indigent people into the state. When Mr. Edwards challenged this law, California defended it on the grounds that the law was necessary to protect public health. But the Supreme Court disagreed and so the police power of the state was not so broad as to prevent people, or certain people, from coming into the state, effectively picking and choosing who comes in and struck down that California law. So those are two cases from the Court's past that I think are going to be revisited more and more as issues related to the pandemic are litigated in both state and federal courts.

Kattman: Kyle, lets shift to the current term. Can you tell me the top few cases you'll be following and why?

Cutts: First and foremost, like much of the country, I'll be watching what the Court does with the latest challenge to the Affordable Care Act. That is set to be argued before the Court next month. The Court will determine, among other things, whether a portion of the law is unconstitutional and if it makes that determination, whether that unconstitutional portion of the law can be severed from the remainder. There were an interesting set of personal jurisdiction cases that were argued before the Court last week as well. The Court will decide there whether or not an automobile manufacturer can be hauled into a state based on general contacts with the state, even if those contacts didn't necessarily lead to the specific injuries suffered that is the subject of the lawsuit. So it's an interesting personal jurisdiction case that the Court is taking up.

Kattman: Are there any others?

Cutts: There's an interesting immigration case that the Court recently granted certiorari on involving the credibility of the applicant that I'll be watching. And this is, in many respects, cert grant season, so there's a lot of activity by the Court right now. Not only hearing oral arguments but also granting cert for cases for this coming term. I watched this closely because I give a presentation, a yearly

presentation on the term and the review and the upcoming term. So, in order to keep up pace with that, it's a busy time for court watching right now.

Kattman: Thank you, Kyle, this has been a great summary.

Cutts: I've really appreciated it. Thank you so much.

Kattman: If you have any questions for Kyle, his contact information is in the show notes. As always, thanks for listening to BakerHosts.

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