

**District Court of Guam's 60th Anniversary Celebration &  
Annual District Conference  
December 7, 2010  
US Supreme Court Update  
Kathleen M. Sullivan**

**I. Freedom of Speech**

- a. *Citizens United v. Federal Election Commission*: 5-4 decision invalidates provisions of the federal election campaign laws barring corporations and unions from making independent expenditures from their general treasuries on political advertisements in support of or opposition to political candidates
  - i. Majority opinion by J. Kennedy
    1. Holds distinctions based on speaker identity suspect and finds no basis to distinguish corporations from other speakers based on their use of the corporate form
    2. Overrules *Austin v. Michigan Chamber of Commerce*, which had upheld requirement that for-profit corporations make political expenditures from segregated funds
    3. Expressly reserves whether corporations might have right to contribute directly to political candidates; for now preserves preventing *quid pro quo* corruption as a plausible justification
  - ii. Dissent by J. Stevens
    1. Would have upheld the segregated-fund requirement as serving government interest in preventing corruption construed broadly construed as undue influence
    2. Would have treated corporations as categorically different from other speakers in the political context because they amass aggregations of wealth not correlated to strength of their ideas
  - iii. The Aftermath of *Citizens United*: the DISCLOSE Act and other legislative responses
- b. *United States v. Stevens*: 8-1 decision (per C.J. Roberts) invalidates as overbroad a federal criminal ban on depictions of animal cruelty, reasoning that such depictions are not unprotected as a category, and that, even if “crush” videos that are made for sexual fetishists might be unprotected, the law sweeps in too many instances of protected speech like hunting magazines
- c. *Christian Legal Society Chapter of Univ. of Cal., Hastings College of Law v. Martinez*: 5-4 decision (per J. Ginsburg) rejects free speech challenge by Christian student organization that excludes gay students from membership and leadership positions to its exclusion from official recognition under UC Hastings Law School “all comers” policy because; holds that a public university may set viewpoint-neutral ground rules for exclusion from a “limited” public forum (affirming CA9)
- d. *Holder v. Humanitarian Law Project*: 6-3 decision (per Roberts, J.) holds that the First Amendment does not bar application of a criminal statute banning material support of terrorism to supporters of designated foreign terrorist organizations even where those efforts are directed at peaceful advocacy efforts, reasoning that

money is fungible and so any support aids terrorism; upholds application despite apparent application of strict scrutiny (reversing CA9 in part)

- e. *Doe v. Reed*: 8-1 decision (per C.J. Roberts) upholds against First Amendment challenge a Washington public records law provision requiring disclosure of the identity of citizens who sign petitions to get election measures on the ballot; while rejecting general First Amendment right of anonymity in signing ballot measure petitions, allows for as-applied challenges demonstrating particularized danger of retaliation or harassment (affirming CA9)

## II. Federalism and Separation of Powers

- a. *McDonald v. City of Chicago*: 5-4 decision (per J. Alito) holds that the Second Amendment right to keep and bear arms announced as against the federal government in *Heller* extends to states and municipalities by virtue of the Due Process (and not the Privileges and Immunities Clause) of the Fourteenth Amendment; leaves open the question what regulations might still be justified by important state interests
- b. *United States v. Comstock*: 7-2 decision (per J. Breyer) upholding 18 U.S.C. § 4248, which authorizes federal district courts to order the civil commitment of mentally ill, sexually dangerous federal prisoners beyond the date they would otherwise be released, as within Congress's powers under the Necessary and Proper Clause because sufficiently related to federal control over prison population
- c. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*: holds 5-4 (per C.J. Roberts) that removal provision governing public accounting board created under Sarbanes Oxley violates separation of powers because board members cannot be removed by the President and are removable by the SEC (who appoints them) only for cause; severs that provision, saving the rest of SarbOx

## III. Business cases

- a. Patent law: *Bilski v. Kappos* assumed that business methods may be patentable under Section 101 of the Patent Act, but held unanimously (per J. Kennedy) that the patent at issue, a method for hedging risk in the energy market, was too abstract to be a patentable process; rejects the Federal Circuit's machine-or-transformation test as the exclusive standard; declines to say whether software is patentable. Justice Stevens' concurrence in the judgment argued that business methods categorically should not be patentable.
- b. Civil Procedure. *Hertz Corp. v. Friend* adopts the "nerve center" test for a corporation's "principal place of business" under the diversity jurisdiction statute, locating corporate residence where a corporation's officers direct, control and coordinate the activities of the corporation—typically, a corporation's headquarters—rather than the state in which it does predominant share of its business (reversing CA9)
- c. Arbitration. *Stolt-Nielsen S.A. et al. v. AnimalFeeds Int'l Corp.* holds that a party may not be compelled under the Federal Arbitration Act to arbitrate a class action where it did not agree to arbitrate class claims; does not determine whether arbitration agreements must expressly authorize class arbitration; unusual scrutiny of the arbitrators' decision interpreting arbitration clause broadly.
- d. Securities Law.

- i. *Morrison v. National Australia Bank Ltd.*, unanimously holds that Section 10(b) of the 1934 Act does not cover “foreign cubed” claims—that is, claims involving foreign investors, foreign issuers, and foreign exchanges; applies presumption against the extraterritorial application of U.S. laws and rejects the “effects and conduct” test developed by Judge Friendly; but Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act would restore the “effects and conduct” test by giving district courts jurisdiction over some securities claims involving foreign conduct.
- ii. *Merck & Co., Inc. v. Reynolds*, which concerned alleged misrepresentations about the arthritis drug Vioxx, interpreted statute of limitations for securities fraud claims to extend to claims brought within two years “after the discovery of the facts constituting the violation,” not facts putting a would-be plaintiff on notice that he or she may have a claim.
- e. Antitrust. *American Needle, Inc. v. National Football League* unanimously held that National Football League Properties is not a single entity for purposes of licensing teams’ intellectual property, and thus the NFL teams could be sued under Section 1 of the Sherman Act.

#### **IV. Criminal Law and Procedure**

- a. *Skilling v. United States* and *Black v. United States* together hold (per J. Ginsburg) that 18 U.S.C. § 1346, which extends the federal mail and wire fraud statutes to cover deprivation of “the intangible right of honest services,” was not unconstitutionally vague if narrowed to apply only to bribery and kickback schemes, not undisclosed self-dealing or other activities furthering public or corporate officials’ own financial interest to the detriment of constituents or shareholders
- b. *US v. Quon* (per J. Kennedy) holds that a police department’s warrantless search of text messages sent on a government-issued pager was reasonable under the Fourth Amendment as related to a work-related purpose and not excessive in scope (reversing CA9)
- c. *Graham v. Florida* holds 6-3 (per J. Kennedy) that sentencing a juvenile offender to life imprisonment without parole for a nonhomicide crime violates the Eighth Amendment’s prohibition on cruel and unusual punishment

#### **V. Cases to Watch in the October 2010 Term**

- a. Preemption cases
- b. Freedom of Speech cases
- c. Church-State cases