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## SYMPOSIUM

### INTRODUCTION: THE OCTOBER 1997 SUPREME COURT TERM\*

The Honorable Sven Erik Holmes<sup>†</sup>

Today marks the fourth year of this conference, and I would like to congratulate the University of Tulsa College of Law for its continuing sponsorship of this important event.

Today also marks the fourth year that I have had the privilege of giving the introduction to this symposium. In each of the last three years, I had the honor of sharing the podium with Professor Bernard Schwartz, who would hold us all spellbound with his closing lecture. For all that he contributed personally and as a preeminent constitutional scholar, he will be missed very much. I am very proud to report that I will teach one of the classes he taught, Constitutional Law II, here this spring.

In September, I visited The People's Republic of China with four other judges selected from around the country as part of the Clinton Administration's Rule of Law exchange. During our many discussions, we were asked about the role of the Supreme Court in the United States. It was widely believed, of course, that the Supreme Court was the final appellate level in our legal system. In considering this view, keep in mind the following facts. The Supreme Court is under no general legal obligation to take appeals from decisions by lower courts, and the statistics are compelling. Over the last ten years, the eleven circuit courts of appeals and the D.C. Circuit have averaged a total of 24,048 decisions each year.<sup>1</sup> By contrast, over the

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\* Based on remarks delivered at the Conference, *Practitioners' Guide to the October 1997 Term of the United States Supreme Court*, at the University of Tulsa College of Law, December 11, 1998.

<sup>†</sup> United States District Judge for the Northern District of Oklahoma.

same period the Supreme Court has decided an average of 100 cases each year.<sup>2</sup> Consistent with this average, the Court decided 91 cases in the 1997 Term.<sup>3</sup> Based on these numbers, it can be concluded that in fact the Supreme Court rarely acts as the final appeals court in our system of justice.

If the primary responsibility of the Court is not to adjudicate disputes, then what role does the Supreme Court play? It can be persuasively argued the role of the Supreme Court is to articulate fundamental principles of law. Its decisions, whether based on the Constitution or federal statutory construction, are intended to provide guidance to government actors, including lower court judges, local state and federal legislatures, and executives at all levels of government. These are the primary consumers of Supreme Court opinions.

In the first two years of this seminar, I noted certain opinions by the Supreme Court that were inconsistent with this mandate. Among those was *Romer v. Evans*,<sup>4</sup> which I suggested failed to establish specific rules of law that could be applied by future courts to any other set of facts. Indeed, in November 1998 the Supreme Court itself declined to accept *certiorari* in a case, *Equality Foundation of Greater Cincinnati v. City of Cincinnati*,<sup>5</sup> in which the Eighth Circuit Court of Appeals upheld a Cincinnati ordinance virtually identical to the Colorado statewide referendum that was overturned in *Romer*.<sup>6</sup> In short, there were no legal principles articulated in *Romer* upon which an effective analysis of the Cincinnati ordinance could be based.

Over the last two years, the work of the Court has changed dramatically. The 1996 Term was one of the most important and productive in history. While the opinions handed down by the Court in the 1997 Term were not as dramatic, there is no question the 1997 Term also deserves very high marks. The Court clearly met its responsibility to provide guidance to lower courts on important issues of sexual harassment, disabilities, and other areas where the need for established principles was clear.

Since coming on the federal bench in 1995, over one-third of all of the civil trials I have conducted involved some area of employment law, including Title VII of the Civil Rights Act ("Title VII"),<sup>7</sup> the Americans with Disabilities Act ("ADA"),<sup>8</sup> the Age Discrimination in Employment Act ("ADEA"),<sup>9</sup> and the Family and Medical Leave Act ("FMLA").<sup>10</sup> Due to a number of conflicting circuit court opinions, the area was ripe for Supreme Court guidance. During the 1997 Term, the Court

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1. See Memorandum from Leslie McGuire, Branch Librarian for the Tenth Circuit Library-Tulsa to Judge Holmes, United States District Judge for the Northern District of Oklahoma (Nov. 3, 1998) (compiling statistical data) (on file with author).

2. See *id.*

3. See *id.*

4. 116 S. Ct. 1620 (1996).

5. 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 119 S. Ct. 365 (1998).

6. See *id.* at 296-300.

7. 42 U.S.C. §§ 2000(e) to 2000(e)(17) (1994).

8. 42 U.S.C. §§ 12101-12117 (1994).

9. 29 U.S.C. §§ 621-634 (1994).

10. 29 U.S.C. §§ 2601-2654 (1994).

responded by addressing four cases in the area of sexual harassment and two cases under the ADA. Primary among the sexual harassment cases were *Burlington Industries v. Ellerth*<sup>11</sup> and *Faragher v. City of Boca Raton*.<sup>12</sup> In these cases, the Court determined under Title VII, an employer may be held vicariously liable to an employee for a sexually hostile work environment created by a supervisor.<sup>13</sup> The importance of these cases lies in the creation of an affirmative defense. The Court, recognizing the need to maintain an incentive for employers to develop and enforce effective sexual harassment policies, determined that an employer may interpose an affirmative defense to a claim of hostile environment sexual harassment by demonstrating (1) the employer has in place an effective sexual harassment policy, and (2) the employee did not reasonably avail herself or himself of that policy.<sup>14</sup> The significance of these two cases cannot be understated. As I noted, my docket, like the dockets of so many other trial judges, is jammed with these cases. These two opinions promote employer efforts to deal effectively with sexual harassment in the workplace, instruct employers on how to address sexual harassment issues, and give clear and useful guidance to trial courts on how to adjudicate disputes that arise under the statute.

In addition, the Court held in *Oncale v. Sundowner Offshore Services*<sup>15</sup> Title VII protects individuals from being sexually harassed in the workplace by others of the same sex,<sup>16</sup> and held in *Gebser v. Lago Vista Independent School District*<sup>17</sup> under Title IX a school district is not liable for a teacher's sexual harassment of a student unless school district officials with authority to take corrective action had actual notice of the harassment and deliberately failed to intervene.<sup>18</sup> The *Oncale* decision is notable primarily because every circuit to consider the question, other than the Fifth Circuit from which this case arose, reached the same conclusion as the Supreme Court. I myself expressly rejected the Fifth Circuit's view three years ago in a case here in the Northern District entitled *Ladd v. Sertoma Handicapped Opportunity Program, Inc.*<sup>19</sup>

The Court also decided two important cases under the ADA. In *Pennsylvania Dept. of Corrections v. Yeskey*,<sup>20</sup> the Court held a prison may not discriminate against an inmate because of his disability.<sup>21</sup> In this case, the correctional facility had denied a prisoner admission to motivational boot camp because of hypertension.<sup>22</sup> In *Bragdon v. Abbott*,<sup>23</sup> the Court held a person with asymptomatic HIV may not be

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11. 118 S. Ct. 2257 (1998).

12. 118 S. Ct. 2275 (1998).

13. See *Burlington*, 118 S. Ct. at 2270-71; *Faragher*, 118 S. Ct. at 2292-93.

14. See *Burlington*, 118 S. Ct. at 2270-71; *Faragher*, 118 S. Ct. at 2293.

15. 118 S. Ct. 998 (1998).

16. See *id.* at 1001-02.

17. 118 S. Ct. 1989 (1998).

18. See *id.* at 1997.

19. 917 F. Supp. 766 (N.D. Okla. 1995).

20. 118 S. Ct. 1952 (1998).

21. See *id.* at 1955.

22. See *id.* at 1953.

23. 118 S. Ct. 2196 (1998).

discriminated against by a health care provider, in this case a dentist, on the basis of this disability.<sup>24</sup> These opinions were not surprising. In fact, the legislative history of the ADA clearly anticipates that AIDS would be covered by the Act.<sup>25</sup> The opinions are significant to trial courts, however, because of the Supreme Court's clear statement that the ADA means precisely what it says, and that cases arising under its provisions are best resolved by strict statutory construction.

In my judgment, at least two other cases decided last term will have an immediate impact on the work of trial courts. In *Campbell v. Louisiana*,<sup>26</sup> the Court held that a white criminal defendant has third-party standing to object to discrimination against African-Americans in the selection of grand jurors when the court arbitrarily selected grand jury forepersons from outside the randomly selected grand jury panel.<sup>27</sup> In addition, in *County of Sacramento v. Lewis*,<sup>28</sup> the Court held that a police officer who engages in a high speed automobile chase resulting in death does not violate the Fourteenth Amendment if the officer did not intend to harm the suspects he was trying to apprehend.<sup>29</sup> The Court unanimously held that the appropriate test is whether the officer's alleged abuse of power "shocks the conscience."<sup>30</sup> This will make future cases of this kind very difficult to maintain.

The final two cases I would like to highlight briefly are noteworthy in large part because they are newsworthy. First, in *Clinton v. New York*,<sup>31</sup> the Court declared unconstitutional the granting by Congress of the line item veto power to the President.<sup>32</sup> Second, in *Swidler & Berlin v. United States*,<sup>33</sup> the Court held the attorney-client privilege survives the death of the client with no exception for criminal cases.<sup>34</sup>

Of course, the *Swidler & Berlin* case is just one of the cases arising out of the investigation into the activities of President Clinton. At the present rate, this category of cases may become the subject of an entire annual seminar all by itself. In the 1996 Term, of course, the Court decided the case of *Clinton v. Jones*,<sup>35</sup> stating:

We think the district court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office. If and when that should occur, the court's discretion would permit it to manage those actions in such fashion (including deferral of trial) that interference with the President's duties would not occur. But

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24. See *id.* at 2210-11.

25. See, e.g., S. REP. NO. 102-39, at 52-53 (1991); H. REP. NO. 101-674, at 89 (1990).

26. 118 S. Ct. 1419 (1998).

27. See *id.* at 1424.

28. 118 S. Ct. 1719 (1998).

29. See *id.* at 1720.

30. *Id.* at 1717.

31. 118 S. Ct. 2091 (1998).

32. See *id.* at 2108.

33. 118 S. Ct. 2081 (1998).

34. See *id.* at 2087.

35. 117 S. Ct. 1636 (1997).

no such impingement upon the President's conduct of his office was shown here.<sup>36</sup>

In the 1998 Term, the Supreme Court has refused to hear cases involving the attorney-client privilege between the President and attorneys in the Office of the White House Counsel,<sup>37</sup> and whether the President's communications overheard by the Secret Service are privileged.<sup>38</sup>

Moreover, if the Independent Counsel continues his work, the Whitewater grand juries continue to serve, Congress continues to conduct impeachment proceedings, and the legal system continues to grind against the political system, the possibility of new constitutional law cases defining presidential authority is limited only by our collective imagination.

These are just some of the important cases of the 1997 Term of the Supreme Court. Again, I congratulate the University of Tulsa College of Law for its continued good work in the area of constitutional law.

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36. *Id.* at 1651.

37. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 466 (1998).

38. *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998), *cert. denied*, 199 S. Ct. 461 (1998).

