As New Term Begins, Out With the Old, in With the New

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Stephen A. Miller

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Unity

The justices were an agreeable bunch in their most recently completed term. Nearly half of their opinions (48 percent) were decided unanimously.

That is the highest percentage of unanimity in any of the past five terms.

It is tempting to give credit for this nascent "Era of Good Feeling" to Justice Elena Kagan's arrival. Her personal diplomacy has been widely praised during her first year on the court — as an example, last October, she asked (allowed?) Justice Antonin Scalia to coach her in skeet shooting at his shooting club in Virginia.

While this is surely an oversimplified analysis, Kagan's installation indisputably heralded the arrival of an exciting new voice. Her opinions are eminently readable and are sprinkled throughout with disarming colloquialisms, like the Yiddish term chutzpah. (Though, it must be noted, she was not the first justice to deploy that term. That honor goes to Scalia in a 1998 dissent.) Her conversational style was featured nicely in a dissenting opinion in a campaign-finance case, *Arizona Free Enterprise Club's Freedom Club PAC v.*

Bennett :

"Pretend you are financing your campaign through private donations. Would you prefer that your opponent receive a guaranteed, upfront payment of $150,000, or that he receive only $50,000, with the possibility — a possibility that you mostly get to control — of collecting another $100,000 somewhere down the road? Me too."

The closing answer to her own rhetorical question is the kicker. The short sentence pops, rhetorically, and it self-consciously adopts a pose of common-sense logic to undercut the majority's legal reasoning.

Kagan will participate in a much higher percentage of the court's cases during the upcoming term. In her first term, because of her work as solicitor general, she was forced to recuse herself from 26 cases — roughly one-third of the cases decided by the court. Interestingly, her recusal was dispositive in only two cases in which the court split 4-4 (thereby affirming the lower court's decision on appeal).

'I'll Be Back'

Despite ruling against Arnold Schwarzenegger in a First Amendment case, the court can probably rest assured that it will not see the former governor again for a while (if ever). Nonetheless, the Justices probably do hear Schwarzenegger's familiar Terminator mantra in their heads in three other cases from the past term.

In all three of these cases, the justices deemed the issues worthy of review but circumstances prevented them from deciding the issues last term. Cases percolating through the lower courts that present these same issues should be viewed as likely candidates for eventual Supreme Court review.

The justices will likely be on the lookout for their next opportunity to consider the following three issues:

• *Costco v. Omega* , which considered whether the "first sale" doctrine applied only to copyrighted items that were made and distributed in the United States (affirmed by an equally divided court).

• *Flores-Villar v. United States* , which considered the constitutionality of a federal law that awarded U.S. citizenship differently to children born out of wedlock outside of the United States based on whether the child's mother or father was a U.S. citizen (affirmed by an equally divided court).

• *Tolentino v. New York* , which considered whether a criminal defendant's identity must be suppressed when it was discovered as a result of a search in violation of the Fourth Amendment (dismissed as improvidently granted following oral argument — usually indicative of a jurisdictional flaw that escaped the justices' attention when they granted certiorari).

School Discipline Coming Back, Too?

The court may find itself again confronting the issue of *Miranda* warnings for minors as a result of last term's decision in *J.D.B. v. North Carolina* . In that case, a majority of the justices held that courts need to consider a suspect's age when deciding whether the suspect was "in custody," thereby necessitating *Miranda* warnings from law enforcement officials.

Yet that rule can be easily circumvented in practice. Unlike police officers, school administrators are under no obligation to provide *Miranda* warnings to students. One can easily imagine both law enforcement officers and school administrators taking advantage of this loophole, and encouraging school officials to conduct interrogations in the first instance without *Miranda* warnings. Once a confession was obtained, law enforcement officers could always be summoned to receive the confession again — once the student understandably deemed further resistance to be futile and insubordinate to school administrators.

This would be cousin to the two-step interrogation process rejected by the court in *Missouri v. Seibert.* It is

likely that the court will soon be called upon to apply *Seibert* in the context of minors questioned about criminal activity inside a school.

Biggest Criminal Case?

The court considers important issues of criminal law every year, but the past term's most impactful criminal-law ruling may have come in a patent case, oddly enough. *Global-Tech Appliances v. SEC S.A.* considered whether patent infringement could be established under a theory of willful blindness. "Willful blindness" is an expansive notion of knowledge, and prosecutors understandably push for its inclusion in jury instructions whenever possible in order to broaden the grounds on which the jury can find criminal intent beyond a reasonable doubt. For this reason, criminal-law practitioners may have perked up a little when the court clarified that, in order to prove knowledge through willful blindness, a party must be shown to have taken "deliberate actions" and "active efforts" to avoid learning the facts in question; deliberate indifference, recklessness, or negligence do not suffice. In white-collar criminal prosecutions, where the issue of criminal intent is often paramount, this nugget from a patent-law decision may prove to have a significant impact.

More on Patent Cases

Patent cases often percolate to the Supreme Court from the Federal Circuit, if they get reviewed at all. For many years, the highly technical nature of most patent cases deterred the court from getting involved in all but what appeared to be the most flagrantly erroneous decisions of the Federal Circuit.

That trend seems to be changing. Last term, the justices decided three patent cases, including the *Global-Tech* case mentioned earlier. In all three cases decided last term, the court affirmed the Federal Circuit's decision. And in the upcoming term, with only half of their docket filled so far, the justices have already granted certiorari to review three more patent cases from the Federal Circuit (and a copyright decision from the 9th Circuit). It will be interesting to see whether the Federal Circuit's recent "success" carries over to this term.

Flurry of Activity

Next week, the Supreme Court will return from its summer sabbatical with a flurry of activity. It will hear oral argument in the first slate of cases for the term, and it will announce a large number of grants of certiorari — the first grants since June. The term will almost certainly be defined, however, by an eventual challenge to the Affordable Care Act.

Talk about the justices' rampant unity last term may seem quaintly naive in the wake of their handling of that hot-button issue. •

Stephen A. Miller *practices in the commercial litigation group at Cozen O'Connor's Philadelphia office. Prior to joining* ***Cozen O'Connor****, he clerked for Justice Antonin Scalia on the Supreme Court and served as a federal prosecutor for nine years in the Southern District of New York and the Eastern District of Pennsylvania.*