Written by **Bob Adelmann** on October 8, 2013

Supreme Court's Docket Full of Potential Mischief

As the Supreme Court opens its review of pending cases this week, there is substantial risk of constitutional mischief in many of them. The court will be ruling on the constitutionality of Obama's recess appointments dating back to 2012, the constitutionality of the present caps on individual political contributions, the constitutionality of restricting protesters at abortion clinics, the constitutionality of ObamaCare's mandate that employers provide insurance coverage for contraception, the authority of police to search the cellphones of people they arrest, and whether or not the practice of the city council of the tiny town of Greece, New York, to open its legislative sessions with prayer is constitutional.

In *National Labor Relations Board v. Noel Canning*, the court may confirm the District of Columbia Court of Appeals' unanimous ruling that the president's recess appointments were, in fact, unconstitutional. Writing for that court, Chief Judge David Stentelle concluded that

> An interpretation of "the recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement [in the Constitution] giving the President free reign to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction.
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> This cannot be the law.

Although the president withdrew his nominations for Richard Griffin and Sharon Block to the National Labor Relations Board, such a ruling to confirm the lower court's decision could seriously dampen the enthusiasm for future presidents to attempt to exercise such excessive authority in making recess appointments while the Senate is still in session. It also would confirm the present president's disregard for limitations placed in the Constitution to prevent just such excesses.

On the other hand, failure to confirm would validate the president's usurpation of powers delegated to Congress which no doubt future presidents would be only too happy to exercise.

In *McCutcheon v. Federal Election Commission*, the Supreme Court has a chance to revisit its decision in *Buckley v. Valeo* in 1976, in which it invalidated several provisions of the Federal Election Campaign Act of 1971 that restricted political contributions, but let stand a restriction on individual contributions for fear of "corruption or its appearance" reflecting the danger of a "quid pro quo" deal whereby political influence is bought through the support of a candidate who agrees to taking "certain actions in exchange for the contribution." Two present members of the court, Justices Clarence Thomas and Antonin Scalia, have argued that this decision should be overturned on the basis of the First

Amendment, stating that such contributions are expressions of free speech guaranteed by that amendment.

However the Supreme Court rules, the First Amendment is at risk unless the court carefully and clearly defines the line between the *support for* a candidate and the *ownership of* him.

In *McCullen v. Coakley*, the court will have the opportunity to determine whether the Massachusetts First Circuit Court erred in upholding the state law that makes it a crime for citizens other than "employees or agents … acting within the scope of their employment … to enter or remain on a public way or sidewalk [within 35 feet of] a reproductive health care facility … under the First and Fourteenth Amendments," as the Scotusblog explained it. The court will also have the opportunity to revisit another case, *Hill v. Colorado*, decided in 2000, which ruled, 6-3, that an eight-foot rule was deemed constitutional.

That case was decided by two justices since retired, Sandra Day O'Connor and David Souter, who said that the ruling had nothing to do with free speech but instead was to prevent "unwanted approaching" designed to protect vulnerable citizens from unwanted communication with protesters opposed to abortion. In the minority at the time, Justices Scalia and Thomas wrote that "this law is not content neutral," that "protecting citizens from unwanted speech is not a compelling state interest," and that it "removes one of the few outlets in which peaceful and civil pro-life citizens could get their point across to women considering abortion; now only inappropriate bullying groups will be heard."

Here the Supreme Court could right a wrong by striking down the Massachusetts law and reversing *Hill v. Colorado*. If it fails to do so, the First Amendment once again will be allowed to be compromised by the dictates of unelected judges.

In *Schuette v. Coalition to Defend Affirmative Action* the court will consider whether the state of Michigan violated the Equal Protection Clause of the Constitution when it amended its state constitution to prohibit race- and sex-based discrimination or preferential treatment in public university admissions decisions. Will the Supreme Court let stand Michigan citizens' decision as expressed through the state's amendment process, or will it override those efforts in favor of the Fourteenth Amendment's Equal Protection Clause?

The one case most likely to catch citizens' attention is *Greece v. Galloway,* as the court will determine, as it did in 1983 in *Marsh v. Chambers,* that the practice of opening legislative sessions with a prayer is constitutional and doesn't violate the First Amendment's "establishment clause" as Susan Galloway claims it does.

Susan Galloway, who is Jewish, and Linda Stephens, who is an atheist, protested that the town of Greece, New York, was allowing "Christian clergy [to] deliver explicitly Christian prayers" at the start of each city council meeting. They enlisted the help of Americans United for the Separation of Church and State, whose legal director, Ayesha Khan, complained:

> A vast majority of the time, the Christian clergy have delivered explicitly Christian prayers. Meanwhile, the people in the audience are there to petition their government, receive honors or take the oath of office and they are asked to stand or bow their heads for these kinds of prayers that their conscience doesn't permit them to participate in.

The case wound its way up to the Supreme Court, where Greece is being represented by David Cortman of the Christian advocacy group Alliance Defending Freedom. Cortman responded that if the Supreme Court rules in favor of Galloway and Stephens,

> It would have to abandon prior precedent, it would have to abandon hundreds of years of practice going back to the founders of our country, and [it would] put in jeopardy the many practices and events that reflect our religious heritage throughout the country….
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> The folks who have volunteered to pray before the meetings are merely reflective of the demographics of the town. Just because a town may happen to be more Christian that a different religion doesn't automatically create a constitutional issue….
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> [If the court decides in favor of Galloway and Stephens] the new test would be: "If I see or hear something that may offend me, and it happens to be religious, that creates some sort of constitutional violation."
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> We would have challenges to all of these [traditions]. That would create not only more disarray but not reflect the true meaning of the Constitution.

If instead the court rules in favor of Greece, it would be following the precedent set in *Marsh v. Chambers* that such prayers are constitutional because of the "unambiguous and unbroken history" of legislative prayer dating back to the very first Congress.

As the Supreme Court opens its session, it's helpful to remember that each decision is "of the case" and doesn't automatically become "the law of the land." That power of creating laws resides firmly in the legislative branch of the government, not in the judicial. It's also helpful to know that the case selection process by which the court determines which cases to hear by necessity leaves out many that deserve to heard, but won't be.

Photo of U.S. Supreme Court building

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