SANGER SWYSEN & DUNKLE

The Supreme Court and Criminal Law

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Criminal Justice

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The Supreme Court and Criminal Law

Introduction

The United States Supreme Court has been quite active in the last few years in criminal justice matters. Under the leadership of Chief Justice John Roberts, precedent in many areas, including criminal law, has been subject to judicial reinterpretation. The Court has also interceded in areas where it has not previously found jurisdiction. States rights have been subordinated to federal legislative and judicial control.

This sounds like the traditional criticism of liberal "activist" justices who, in the Fifties and Sixties, had interpreted the Constitution of the United States to protect the individual against the exercise of state power. They expanded constitutional protection against state action violating the right against unlawful search and seizure and the rights of, equal protection, fair trial and due process of law. Yet, it is now the conservative justices who are taking an "activist" approach. Constitutional scholar Ronald Dworkin recently wrote, notwithstanding what Chief Justice Roberts and Justice Alito said in their confirmation hearings about abiding by precedent, "once they were confirmed they joined the other conservative justices in an overruling spree unparalleled in Court history."[1]

However, it is not easy to identify a Roberts Court jurisprudence. There are themes and there are trends but with so many 5 to 4 decisions, it is difficult to say that the Roberts Court has a consistent philosophical approach to the law. Even individual justices have been hard to peg philosophically. With Justice Stevens now retired -- the Justice who could be counted on for a calm and thoughtful review of precedent and his skepticism of executive power -- the Court may be even more adrift. Nevertheless, in the *Criminal Justice* column we will look at some of the themes and trends that seem to be emerging as the Court decides criminal justice issues.

Personnel on the Court, General Statistics and Trends

A quick review of the Court's personnel: For the October 2009-2010 Term which ended in July of this year, the Court was comprised of Chief Justice John Roberts (appointed by G. W. Bush, 2005), John Paul Stevens (Ford, 1975), Antonin Scalia (Reagan 1986), Anthony Kennedy (Reagan 1988), Clarence Thomas (G. H. W. Bush 1991), Ruth Bader Ginsberg (Clinton 1993), Steven Breyer (Clinton 1994), Samuel Alito (G. W. Bush 2006) and, the newest member, Justice Sonia Sotomayor (Obama, 2009).[2]

In general, during the October 2009-2010 Term, the Chief Justice has been in the majority over 90% of the time. The only other Justice with a similar record (in fact, identical at 90.2% each) is Justice Kennedy. The statistics show that since Sandra Day O'Connor left the court, Justice Kennedy has been the swing vole on many close cases. However, the swing was not necessarily in line with the Chief. That has now changed so that it is the Chief and Justice Kennedy voting together on close cases even more often than, say, the Chief and Justices Alito, Scalia or Thomas. It is also worth noting that Justice Stevens was the least likely to agree with the majority, at 72.5% reflecting his basic respect for precedent and reluctance to reinterpret the law.

Before getting to criminal justice issues specifically, it is worth noting that there is a trend, if not a jurisprudence, in the decisions of the Court and Justice Roberts in particular. Justice Roberts embodies the resolve of the neoconservatives to support a strong executive rather than to promote a passive Supreme Court, states rights or other traditional conservative agendas. As noted in this column before, Justice Roberts was not recruited based on views against judicial activism, he was recruited based on a commitment to promote what the conservative think-tanks have called the "unitary executive."[3] And that unitary executive was embodied by President George W. Bush – using executive power in international relations without regard to international treaties, protecting business and the wealthiest Americans from regulation and taxation and using federal power over state's authority when it suited the purposes of the administration. In this context, the rights of "ordinary" people accused of crime are not given as much protection. Some of these tendencies are reflected in the criminal justice opinions of the Court for the October 2009-2010 Term and we will look at a few of the cases that demonstrate these tendencies.

Criminal Justice Issues in the October 2009-2010 Term

Skilling v. United States, 130 S.Ct.2896 (June 24, 2010) and *Black v. United States,* 130 S.Ct. 2963 (June 24, 2010) actually upheld the "honest services" statute, 18 U.S.C. 1346 (contrary to my prediction in an earlier *Criminal Justice* column). Interestingly, Justice Scalia in dissent here, consistent with his dissent to denial of certiorari in *Sorich*,[4] would have stricken the statute as unconstitutional. The statute basically said that it was sufficient to show that there had been a deprivation of "honest services" to establish mail fraud or wire fraud under federal law. This had allowed federal prosecutors to obtain convictions where there had been no evidence of bribery or *quid pro quo* advantage. In essence, it allowed conviction for doing anything that might deprive someone (not even the public) of the honest services of anyone (not even public officials). The result was perceived as an assault on business people who could not determine from when and where a prosecution might be brought – in other words, unlike our typical criminal statutes which proscribe specific conduct we can all pretty much recognize in advance, this was a license for federal prosecutors to identify conduct they didn't like and use mail and wire fraud to prosecute it. Since practically every transaction involves the mail (which now includes other carriers) or the wires (e.g., the internet) and there is not definition of fraud other than the deprivation of honest services, practically anyone involved in a business transaction could be prosecuted.

However, seen another way, these decisions are consistent with the Roberts Court trends we discussed. The power of the federal government is being upheld in these cases. Federal prosecutors can indict for general federal crimes rather than leaving such prosecutions to the state and local authorities under state law. On the other hand, the biggest criticism of the business community was actually addressed in these decisions. While the statute was upheld in *Skilling*, it was only upheld where narrowly applied to bribery or kickback schemes. It was not extended in *Black* to undisclosed self dealing or other activities where a public or corporate official is promoting her or his own financial interests to the detriment of constituents or shareholders. Therefore, states rights is forgone, federal power is affirmed, "ordinary" criminal defendants can be prosecuted but business women and men are given protection.

In series of three cases, the Court modified or contorted precedent to find that confessions or admissions of criminal defendants admissible. *Florida v. Powell*, 130 S. Ct. 1195 the Court upheld a Florida admonition of rights that the Florida Supreme Court had found to be deficient because it did not tell the suspect that he had the right to consult with a lawyer during questioning (somewhat inexplicably, the Florida officer had deviated from the standard Miranda text). The United States Supreme Court reversed the Florida Court and held that, while the warnings did not comply with the specific warnings set forth in Miranda, they were close enough. Justice Stevens and Breyer dissented citing the clear language of Miranda as a precedent to be followed.

In *Maryland v. Schatzer* 130 S.Ct. 12131 the Court actually legislated a prophylactic time period for the expiration of a person's right not to be re-interrogated after invoking his rights under Miranda. Reversing the Maryland Court of Appeals, the United States Supreme Court deemed the time period to be 14 days after a break in custody. Prior to this the precedent, *Edwards v. Arizona*, prohibited such re-interrogation.

The third case is *Berghuis v. Thompkins*, 130 S.Ct. 2250 (June 1, 2010) in which the Court in a 5 to 4 decision held that a person who remains silent after being advised of his rights has not invoked his right to remain silent. After remaining silent for three hours, Thompkins eventually made a response to an ambiguous question – whether he prayed to God for forgiveness – and it was used against him. The dissent, written by Justice Sotomayor contended that this decision not only ignored precedent but turned Miranda on its head.

Another interesting case, that pits rights of individual privacy against government control, with the later coming out on top, is *City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619 (June 17, 2010). It was a federal civil rights action and not a criminal prosecution but it does implicate the warrantless seizure of evidence. There the Court held in a *per curiam* decision that a police officer did not have a Fourth Amendment right to be free from warrantless searches and seizures where the department obtained personal text messages sent on his government owned device. The Court found that this was a work related search and not excessive in scope.

Not everything is predictable. In a 6 to 3 decision by Justice Kennedy, the Court held in *Graham v. Florida* 130 S.Ct. 2011 (May 17, 2010), that life without the possibility of parole (LWOPP) was cruel and unusual punishment for a juvenile who was convicted of a non-homicide offense. We discussed juvenile LWOPP in a previous column and noted that the United States is our of step with rest of the world on this. While this decision does not address juvenile LWOPP in general – only for non-homicide cases – it can be viewed as progress. The Justices, including Kennedy, who look to international precedent have been criticized but, Justice Kennedy is still willing to do this. *Graham* could be an indication of trends in the future which might impact juvenile LWOPP for homicide cases, LWOPP for adults and, perhaps the death penalty. As we allow ourselves to realize how far out of the mainstream of thought among free nations on these subjects, the Justices may be willing to re-evaluate.

In *McDonald v., City of Chicago, Ill.,* 130 S.Ct. 3020 (June 28, 2010), the Court held that the Fourteenth Amendment incorporates the Second Amendments right of citizens to keep and bear arms in self-defense. Therefore, the City of Chicago could not make it a crime to posses a firearm in the home. What is remarkable about this case is that the selective incorporation of the Bill of Rights into the Due Process clause of the Fourteenth Amendment has been considered an affront to state rights by

conservatives for decades. Here, suddenly, a conservative Court makes new law by incorporating a right heretofore not held applicable to the states.

The court struck down an animal cruelty statute, rendered several decisions in death penalty cases and other criminal procedural matters. But the last case we will discuss here is the rather remarkable case of *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (June 21, 2010). That case, rather remarkably, held that a person may be prosecuted criminally under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) for any sort of conduct that supports an organization on the list of terrorist groups even if the conduct is monetary aid or legal advice on how to facilitate lawful and non-violent purposes. Chief Justice Roberts wrote for the majority upholding the poser of the federal government to regulate political and speech related behavior even if it did not directly promote violence or unlawful activity.

Conclusion

The Roberts Court is showing a trend toward supporting federal power over states rights, being activist in overruling or significantly modifying precedent, creating judicial law, promoting conservative substantive values, such as gun rights, and making exceptions to long-standing protections for the "ordinary" individual while enhancing protections for business people. Given the limited sampling of cases that any Term of the Supreme Court offers, and even going back for the five Terms over which the Chief Justice presided, it is not possible to define a clear legal philosophy but these emerging trends are currently visible. Of course, the composition of the Court is changing. Justice Kegan may or may not replace the strong voice for reason that Justice Stevens had. Other personnel changes may occur. Justice Kennedy may be persuaded to break further from Alito, Scalia and Thomas. But for now, the Roberts Court seems to be aggressively pursuing an emerging agenda. Time will tell.

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[1] Ronald Dworkin, "*The Temptation of Elena Kegan*," New York Review of Books, August 19, 2010.

[2] Justice Sevens has retired and as of August 5, 2010, Justice Elena Kegan has been confirmed and will be sitting for the October 2010-2011 Term. She, of course, did not participated in the October 2009-2010 Term decisions.

[3] The "unitary executive" has been considered a "code" among neoconservative activists for right thinking about virtually unlimited Presidential power. The theory goes that Article II of the United States Constitution vests powers in the Executive branch but that both the Legislative and Judicial branches are expressly limited. Congress can "strip" the Judicial branch of powers and the courts can find

acts of Congress unconstitutional. There is (or should be, so the argument goes) no corollary regarding the Presidency. See, e.g., Steven Calabresi and Kevin Rhodes, "*The Structural Constitution: Unitary Executive, Plural Judiciary,*" 105 Harv.L.R. 1153 (1992).

[4] Sorich v. United States, 531 F.3d 501 (7th Cir. 2008), cert denied, 129 S. Ct. 1308 (No. 08-410) (Scalia, J., dissenting).