CAL program: Elite panel discusses “Blockbuster” opinions and future of the Supreme Court

By Brian Miller*

A Council of Appellate Lawyers program drew a full house at the American Bar Association’s Annual Meeting in Chicago. Approximately 100 lawyers and judges attended the program on Friday, August 3.

The free program, “Blockbuster Supreme Court Decisions in a Partisan Era,” featured three prominent Supreme Court experts: Kannon Shanmugam, Donald Verrilli, and Erwin Chemerinsky. Shanmugam has argued about two dozen cases before the Court and heads the

Supreme Court and Appellate Litigation practice group at Williams & Connolly LLP. Verrilli served as U.S. Solicitor General from June 2011 to June 2016 and is the founding partner of the Washington, D.C. office of Munger, Tolles & Olson LLP. Chemerinsky is Dean of the University of California’s Berkeley Law and a frequent author on the Supreme Court and the Constitution.

The panel focused on Supreme Court decisions covering four areas: presidential authority, pri-

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Editors’ Note

As the new co-editors of Appellate Issues, we plan to highlight the quality programming the Council of Appellate Lawyers puts on throughout the year. This Special Programming Edition highlights an outstanding program CAL sponsored at the August 2018 ABA Annual Meeting in Chicago.

Blockbuster panels, like this one, will hopefully encourage you to attend future CAL programs, including the quickly approaching AJEI Summit in Atlanta, Georgia, November 8-11, 2018. Although the Summit includes too many renowned speakers and cutting-edge panels to list, don't take our word for it. Check out the programming schedule, and please register before it's too late!

If you plan to attend and would like to write an article for the Winter 2019 Summit issue of Appellate Issues, please email us.

Nancy M. Olson & Wendy McGuire Coats
privacy, the conflict between religious-freedom claims and anti-discrimination laws, and political gerrymandering.

**Presidential Authority**

The five-to-four decision in Trump v. Hawaii, 138 S.Ct. 2392 (2018), provided the context for the panel’s presidential-authority discussion. There the Court considered a presidential order suspending entry into the United States of people from certain countries. Rejecting a claim that the president was motivated by religious animus towards Muslims, the Court upheld the “travel ban” as a permissible exercise of presidential authority.

The circumstances of Trump v. Hawaii, Verrilli explained, raised doubts about the rationale underlying the deference typically granted to the executive branch on national-security matters. Chemerinsky commented that, after conservative justices criticized exercise of presidential power during the Obama administration, the conservative majority was very deferential here. He noted that religious animus was found on far milder grounds in Burwell v. Hobby Lobby Stores Inc., 134 S.Ct. 2751 (2014), and Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 138 S.Ct. 1719 (2018). Shanmugam added that, in Trump v. Hawaii, the Court did not consider statements of the president to be dispositive of the Constitutional analysis.

**Privacy**

The panel focused on another five-to-four decision, Carpenter v. U.S., 138 S.Ct. 2206 (2018), to analyze privacy under the Fourth Amendment. In Carpenter, the Court concluded that the government’s acquisition of an individual’s location records from a cell-phone service provider amounts to a search that ordinarily requires a warrant.

Shanmugam noted that the case presented another example of the repeated challenge of applying old and sometimes amorphous principles to emerging technologies. He added that Chief Justice Roberts seemed to recognize a need for flexibility in addressing that challenge. The “reasonable expectation of privacy” standard, Shanmugam observed, may be a moving target as technology continues to shift, and originalist approaches championed by Justice Gorsuch and the late Justice Scalia continue to challenge that standard.

Chemerinsky commented that the new-technology old-law problem is not new, and he drew comparisons to early wiretapping and automobile-search cases. He questioned two aspects of Roberts’s reasoning. Chemerinsky noted that some decisions denied Fourth Amendment protection when an individual voluntarily allows a third party to collect records of the individual’s activity and other decisions denied protection to an individual’s public conduct. Chemerinsky also questioned whether the Court will treat collection of real-time location data differently from collecting past location data as in Carpenter.

Verrilli agreed that new technologies may be changing traditional understandings of the Fourth Amendment and privacy. What might have been viewed in the past as differences in degree, he said, are now viewed as differences in kind. He added that the Court is struggling to
find even narrow bases for their decisions in this context.

Narrow rulings in two key areas

The panel next turned to two areas in which, Shanmugam explained, the Court “punted” on broader issues and instead ruled on narrow grounds. The first case, Masterpiece Cakeshop, involved a cake-shop owner who refused to make a custom cake for a same-sex couple’s wedding celebration. At issue was whether Colorado’s anti-discrimination laws were subject to the cake-shop owner’s claim of religious freedom. The second case, Gill v. Whitford, 138 S.Ct. 1916 (2018), involved claims of unconstitutional partisan gerrymandering in drawing Wisconsin’s state legislative districts.

Verrilli noted that Masterpiece Cakeshop and Gill were very challenging cases with strong interests on both sides. The Masterpiece Cakeshop opinion, he explained, came with an escape clause that a supermajority coalesced around—the manner in which the administrative agency reviewed the case. As for political gerrymandering, the Court decided Gill by finding a lack of standing. Verrilli commented that the Court faces an elusive search for a neutral principle that can be fairly applied across political-gerrymandering cases.

Chemerinsky explained that liberty and equality exist in tension because any anti-discrimination law limits liberty. He questioned Justice Kennedy’s rationale in Masterpiece Cakeshop for finding religious animus by the agency based on three mild pieces of evidence. He also expressed doubts about the standing conclusion in Gill because the parties did not dispute and the trial court did not consider standing.

Future of the Court

The panel then discussed the Supreme Court vacancy, the nomination of Circuit Judge Brett Kavanaugh, and the future of the Court. Shanmugam predicted a fight over Kavanaugh’s views and methodology and thus over the direction of the court.

Verrilli compared the confirmation battle to Senate Republicans’ decision not to conduct a vote on the confirmation of Obama’s last nominee, Circuit Judge Merrick Garland. Verrilli opined that this refusal resulted from a concern that putting Garland, a moderate, distinguished jurist, on the Court would generate different results in cases. Against this backdrop, Verrilli added, it becomes harder to justify claiming that the confirmation process should avoid questions of how the justice would decide issues. This trend, he said, is bad for the rule of law and for perception of the judiciary as apolitical.

Chemerinsky noted that confirmation fights about nominee ideology began well before the failed confirmation of Robert Bork during the Reagan administration. George Washington unsuccessfully nominated John Rutledge to serve as Chief Justice, but Rutledge made controversial comments about neutrality in the British-French war. Chemerinsky added that, in the twentieth century, the Senate rejected about 20 percent of nominees, including two of Richard Nixon’s nominees. But today, he said, our country is at perhaps the most partisan and polarized time since Reconstruction. When presi-
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Students are more ideologically defined, he noted, nominees reflect this sharpening of views.

Shanmugam expressed concern that, in the current political climate, we may not have new justices whenever the Senate majority and the president come from different parties. Verrilli agreed this causes concern. He added that the demand for ideological purity makes it difficult to imagine consensus-building justices such as Lewis Powell or Sandra Day O’Connor being nominated today.

Chemerinsky noted that, so long as the Senate is controlled by the same party as the president, we would see an exercise of every minority-party senator trying to undermine a nominee, with every majority-party senator painting the nominee as open-minded. He noted a broad range of areas—abortion, affirmative action, gay rights, the exclusionary rule, juvenile punishment, the death penalty, and executive power, among others—in which the substitution of Kavanaugh for Kennedy could generate different results.

Chemerinsky added that, following Justice Kennedy’s retirement, Chief Justice Roberts will now be viewed as the “median” justice. In this climate, Verrilli commented that Chief Justice Roberts’s concern with public perception of the Courts may have an effect on how cases are decided, with more incremental, rather than sweeping, decisions resulting. As a result, Shanmugam expects some change in the types of cases the Court may hear, but does not expect a significant increase in the number of cases decided.

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