

**Remarks for the American Constitution Society
June 15, 2012**

It is flood season at the Court, those who watch our work well know, so all I can offer this evening is an impressionistic view of what life has been like in at the Supreme Court in the 2011-2012 Term. And in doing that, I will borrow heavily from the annual report I made to my circuit, the Second Circuit at its Judicial Conference last week.

Some years ago, a former law clerk turned law professor, who may be in attendance tonight, ranked Justices by the number of laughs they provoked at oral

argument. He rated me, his former boss, the “least funny Justice who talks.”¹ I remained in last place this term.² A published tally for which I do not vouch rated Justice Scalia first among funny justices with 63 laughs, Justice Breyer next, with 47, the Chief, a distant third, with 26.³

It may be a promising sign, however, that the New York Times picked up my best laugh line this term.⁴

The case, *Zivotofsky v. Clinton*, concerned an Act of

¹ Adam Liptak, A Taxonomy of Supreme Court Humor, N. Y. Times, Jan. 25, 2011, p. A16.

² Tr. of Oral Arg. *Zivotofsky v. Clinton*, 566 U. S. ____ (2012) (GINSBURG, J.); *Gonzalez v. Thaler*, 565 U. S. ____ (2012) (GINSBURG, J.).

³ D. C. Dicta, The Funniest Justice, online at <http://lawyersusaonline.com/dcdicta/category/the-funniest-justice/> (as visited May 30, 2012).

⁴ Liptak, Dispute Over Jerusalem Engages Court, N. Y. Times, Nov. 7, 2011, p. A15.

Congress permitting U. S. citizens born in Jerusalem to designate “Israel” as the birthplace shown on their passports.⁵ The President resisted the law, urging that it intruded unconstitutionally on his foreign affairs prerogatives. In defense of the legislation, counsel for Mr. Zivotofsky argued that the statute didn’t trench on Presidential ground, it merely gave parents a choice.

Your argument would be stronger, Justice Kagan suggested, if U. S. citizens born in Jerusalem could similarly choose to list “Palestine” on their passports.

⁵ Foreign Relations Authorization Act of 2003, §214(d), Pub. L. No. 107-228, 116 Stat. 1350, 1366.

They can, counsel responded, if they were born before 1948. “Well,” Justice Kagan said, “you have to be very old to say Palestine.”⁶ I intervened, in defense of persons aged 64 and over, mindful that next year, I will be 80, God willing: “Not all that old,”⁷ I told the youngest Justice.

As in past years, lawyers and journalists paid rapt attention to remarks from the bench. Concerning our workload, which some misguided commentators think is too light, Justice Breyer quipped defensively: “I’m not

⁶ Tr. of Oral Arg. *Zivotofsky v. Clinton*, 566 U. S. ____ (2012).

⁷ *Ibid.*

trying to get out of the work.”⁸ Instantly stirred, Justice Scalia volunteered: “I’d like to get out of the work, to tell you the truth.”⁹

Argument often proceeds at a clip so rapid, it is sometimes hard to get a word in edgewise. Justice Kagan, as junior justice, takes great care not to step on questions of senior colleagues. One time, however, she tried to enter the fray, only to be silenced by louder voices. At last, Justice Breyer instructed counsel: “Go back to Justice Kagan. Don’t forget her question.”

⁸ Tr. of Oral Arg. *National Meat Assn. v. Harris*, 565 U. S. ____ (2012).

⁹ *Ibid.*

Many minutes having elapsed, Justice Kagan smiled and said: “*I’ve* forgotten my question See what it means to be the junior justice?”¹⁰

This term has been more than usually taxing. Some have even called it “the term of the century.” Perhaps that explains why the funniest justice called counsel’s argument “extraordinary” no fewer than ten times.

Argued cases 2011-2012 numbered 80, a decrease of six from last term. But that decline was offset by *per curiam* decisions issued in cases decided without full

¹⁰ Tr. of Oral Arg. *Department of Health and Human Servs. v. Florida*, ___ U. S. ___ (2012).

briefing or any argument. Summary dispositions of that order already number ten,¹¹ more than twice the number issued at this time last year.¹² Too many? I leave that for you to judge. To date, opinions have been released in 58 of the 80 argued cases, one petition was dismissed post-argument as improvidently granted,¹³ and 21 cases remain to be announced before the Justices scatter for the summer.

The Court split 5-4 (or 5-3 with one Justice recused)

¹¹ See *Parker v. Matthews*, 567 U. S. ____ (2012) (*per curiam*); *Coleman v. Johnson*, 566 U. S. ____ (2012) (*per curiam*); *Wetzel v. Lambert*, 565 U. S. ____ (2012) (*per curiam*); *Marmet Health Care Center, Inc. v. Brown*, 565 U. S. ____ (2012) (*per curiam*); *Ryburn v. Huff*, 565 U. S. ____ (2012) (*per curiam*); *Hardy v. Cross*, 565 U. S. ____ (2011) (*per curiam*); *KPMG LLP v. Cocchi*, 565 U. S. ____ (2011) (*per curiam*); *Bobby v. Dixon*, 565 U. S. ____ (2011) (*per curiam*); *Cavazos v. Smith*, 565 U. S. 1 (2011) (*per curiam*).

¹² *Wilson v. Corcoran*, 562 U. S. 1 (2010) (*per curiam*); *Swarthout v. Cooke*, 562 U. S. ____ (2011) (*per curiam*); *Felkner v. Jackson*, 562 U. S. ____ (2011) (*per curiam*); *Bobby v. Mitts*, 563 U. S. ____ (2011) (*per curiam*).

¹³ *Vasquez v. United States*, 566 U. S. ____ (2012) (*per curiam*).

in 9 of the 58 cases so far handed down. In comparison to that close to 16% sharp disagreement record, we agreed, unanimously, on the bottom-line judgment in 26 (45%) of the already-announced cases. In 20 of the 26 unanimous judgments, opinions were unanimous as well. Quite collegial, would you not say? As one would expect many of the most controversial cases remain pending. It is likely that the sharp disagreement rate will go up next week or the week after.

I will now describe summarily some of the most-

watched cases. First, *United States v. Jones*,¹⁴ which presented a 21st-century Fourth Amendment question: If police attach a GPS tracking device to your car, and then use it to track the car's movements on public streets for several weeks, have you been searched within the meaning of the Amendment? The Court's unanimous answer, yes.

Justice Scalia, for the majority, observed that the Framers would have been aghast at the thought of a constable hidden beneath a coach, recording with quill

¹⁴ 565 U. S. ____ (2012).

and ink every turn the horse made. The tracking device physically invaded private property for the purpose of obtaining information, he explained. Indubitably, he said, attachment of the device caused a search within the meaning of the Fourth Amendment.

Physical invasion of private property, Justice Scalia's main theme, was not the motif sounded in Justice Alito's concurring opinion. Writing for four Justices, he said that the long-term monitoring of Jones's car tread on his reasonable expectation of privacy.

At the second stage, the Ninth Circuit was on the losing side of the split. Dissenting from the denial of rehearing en banc by that Court, Chief Judge Alex Kozinski got to the heart of the matter. “There is something creepy and un-American about such . . . behavior,” he wrote. “To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu.”¹⁵

The meaning of the Fourth Amendment was again at issue in *Florence v. Board of Chosen Freeholders of*

¹⁵ *United States v. Pineda-Moreno*, 617 F. 3d 1120, 1126 (CA9 2010).

[Burlington] County.¹⁶ Florence concerned the practice in New Jersey county jails of subjecting all arrestees to strip searches before admitting them to a jail's general inmate quarters. Florence was arrested for failure to pay a fine—wrongly as it turned out (he had in fact paid the fine). Transferred from one jail to another, he was strip searched twice. After all charges against him were dropped, Florence sued the jails in which the searches occurred, seeking damages under §1983.

By the time Florence's case reached the Supreme

¹⁶ 566 U. S. ___ (2012).

Court, eight Courts of Appeals had already held that strip searches of persons arrested for minor offenses were impermissible, absent reason to suspect that the person arrested was concealing contraband.¹⁷ In *Florence*, the Third Circuit disagreed, and upheld the jails' routine practice.¹⁸ Justice Kennedy, writing for the Court, affirmed the Third Circuit's decision. The strip searches at issue struck a reasonable balance, the majority held between inmate privacy on the one hand,

¹⁷ *Roberts v. RI*, 239 F. 3d 107, 113 (CA1 2001); *Weber v. Dell*, 804 F. 2d 796, 802 (CA2 1986); *Logan v. Shealy*, 660 F. 2d 1007, 1013 (CA4 1981); *Kelly v. Foti*, 77 F. 3d 819, 821 (CA5 1996); *Masters v. Crouch*, 872 F. 3d 1248, 1255 (CA6 1989); *Mary Beth G. v. City of Chicago*, 723 F. 2d 1263, 1273 (CA7 1983); *Jones v. Edwards*, 770 F. 2d 739, 742 (CA8 1985); *Hill v. Bogans*, 735 F. 2d 391, 394 (CA10 1984).

¹⁸ *Florence v. Board of Chosen Freeholders of County of Burlington*, 621 F. 3d 296 (CA3 2010). See also *Bull v. City and County of San Francisco*, 595 F. 3d 964 (CA9 2010) (en banc); *Powell v. Barrett*, 541 F. 3d 1298 (CA11 2008) (en banc).

and prison safety and administration on the other.

Justice Breyer dissented, joined by Justices Sotomayor, Kagan, and me. In our view, a strip search is “inherently harmful, humiliating, and degrading,”¹⁹— a “serious affront to human dignity and to individual privacy.”²⁰ As there was no cause to suspect that Florence was concealing drugs or otherwise presented a security risk, we judged the searches to which Florence was exposed unconstitutional.

¹⁹ *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U. S. ____ (2012) (BREYER, J., dissenting) (slip op., at 4).

²⁰ *Id.* (BREYER, J., dissenting) (slip op., at 6).

A third case, *FCC v. Fox Television Stations, Inc.*,²¹

asks whether the FCC's current indecency policy violates the First or Fifth Amendment. The Paris Hiltons of the world, my law clerks told me, eagerly await the decision. It is beyond my comprehension, I told the clerks, how the FCC can claim jurisdiction to ban words spoken in a hotel on French soil.

The case came to us on a return trip. In *Fox I*,²² we held that the FCC did not violate the Administrative

²¹ *FCC v. Fox Television Stations, Inc.*, ___ U. S. ___ (2012).

²² *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502 (2009).

Procedure Act²³ when it altered its longstanding indecency policy to regulate the broadcast of “fleeting expletives.” (The “we” does not include me. I dissented, agreeing with Justices Stevens, Souter, and Breyer.)

The Court remanded the case to the Second Circuit to consider in the first instance the constitutionality of the FCC’s newly minted “fleeting expletive” policy. The Court of Appeals did so and struck down the FCC’s broadcast-indecency policy in its entirety, not simply as applied to fleeting expletives. The policy, the Circuit’s

²³ 5 U. S. C. §551 *et seq.*

panel majority concluded, was void for vagueness.²⁴

We accepted the Government's petition for review.

During argument in *Fox I*, speculation abounded

whether counsel for Fox Television would speak the F

and S words before the Supreme Court as he did before

the Second Circuit. He did not.²⁵

This time, in *Fox II*, counsel for ABC Television one-upped his colleague. ABC's counsel first reported that

there had been nine seasons of unsanctioned NYPD

²⁴ *Fox Television Stations, Inc. v. FCC*, 613 F. 3d 317 (CA2 2010).

²⁵ Dahlia Lithwick, *Ifs, Ands, and Butts: The Supreme Court gets the full-monty treatment*, Slate, Jan. 10, 2012, online at http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/01/supreme_court_and_fcc_s_fleeting_expletives_policy_what_exactly_counts_as_indecent_on_tv_.html (as visited June 11, 2012).

Blue episodes that fleetingly displayed bare buttocks.

**He then pointed to the bare buttocks carved in the
friezes that adorn the Courtroom walls.²⁶ It was a
gesture perhaps worth a thousand words!**

**A fourth case on my select list will be reargued next
term. *Kiobel v. Royal Dutch Petroleum Co.*²⁷ originally
presented this question: Can corporations be sued
under the Alien Tort Statute (the ATS)?²⁸ The Second
Circuit held they cannot.²⁹ In a case argued the same**

²⁶ Tr. of Oral Arg. *FCC v. Fox Television Stations, Inc.*, ___ U. S. ___ (2012).

²⁷ *Kiobel v. Royal Dutch Petroleum Co.*, ___ U. S. ___ (2012).

²⁸ 28 U. S. C. §1350.

²⁹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111, 145 (CA2 2010).

day as *Kiobel, Mohamad v. Palestinian Authority*,³⁰ we held that under a much newer, differently worded law, the Torture Victim Protection Act,³¹ corporations are not amenable to suit. Respondent raised an alternative ground for affirmance in *Kiobel*: the ATS should not apply at all to conduct in a foreign nation. At oral argument, some of the justices showed a keen interest in pursuing that theory. Soon after argument, we ordered the parties to brief whether, and under what circumstances, the ATS provides a claim for relief for

³⁰ 566 U. S. ___ (2012).

³¹ 106 Stat. 73, note following 28 U. S. C. §1350.

violations of the law of nations occurring outside the United States.

Next, a pair of cases: *Lafler v. Cooper*³² and *Missouri v. Frye*.³³ Both presented this question: Does the Sixth Amendment right to effective assistance of counsel extend to the negotiation and consideration of plea offers the defense rejected or allowed to lapse? Justice Kennedy, writing for the majority, held that it does.

Galin Frye was charged with driving with a revoked license. The prosecutor offered a choice of two

³² 566 U. S. ___ (2012).

³³ 566 U. S. ___ (2012).

plea bargains: a recommended 3-year suspended sentence plus ten days in the county jail, or a recommended 90-day sentence on a lesser charge.

Frye's attorney did not inform Frye that these offers had been made by the prosecution, and both offers lapsed. Frye later pleaded guilty, without a plea agreement, and was sentenced to three years' imprisonment. When ineffective assistance of counsel causes the failure to accept a plea offer, the majority held, and further proceedings then lead to an outcome less favorable than a proffered plea bargain, a

defendant may be entitled to a remedy.

In dissent, Justice Scalia pointed out that many countries forbid American-style plea bargaining, at least in serious cases. These foreign systems, Justice Scalia said, adhered to the “admirable belief that the law is the law, and those who break it should pay the penalty provided.”³⁴ Has anyone in Congress noticed that Justice Scalia is not allergic to foreign law sideglances?

Next, a pair of cases, *Miller v. Alabama*³⁵ and

³⁴ *Lafler v. Cooper*, 566 U. S. ____ (2012) (SCALIA, J., dissenting) (slip op., at 11-12).

³⁵ 567 U. S. ____ (2012).

Jackson v. Hobbs,³⁶ prompted by this Court's 2010 opinion in *Graham v. Florida*.³⁷ *Graham* held that the Eighth Amendment's prohibition on cruel and unusual punishment bars a life-without-parole sentence for a juvenile convicted of a non-homicide crime. *Miller* and *Jackson* present these further questions: First, does a life-without-parole sentence imposed on a 14-year-old who *is* convicted of homicide violate the Eighth Amendment? Second, if the sentence can be imposed on a juvenile at all, does it violate the Eighth Amendment

³⁶ 567 U. S. ____ (2012).

³⁷ 560 U. S. ____ (2010).

when decreed under a mandatory sentencing scheme that allows no consideration of the child's age?

Finally, two cases that attracted the term's largest headlines, also knee-high amici briefs. I will mention first the case argued on the term's very last day, *Arizona v. United States*.³⁸ In April 2010, Arizona enacted legislation titled Support our Law Enforcement and Safe Neighborhoods Act, S. B. 1070. Its provisions are designed to "discourage and deter the unlawful entry and presence of aliens and economic activity by

³⁸ ___ U. S. ___ (2012).

persons unlawfully present in the United States.”³⁹

Arizona described the policy the statute implements as

“attrition through enforcement.”⁴⁰ Before the law took

effect, the United States sued Arizona, alleging that the

federal Immigration and Nationality Act⁴¹ preempts S.

B. 1070.

The District Court, finding that the United States was likely to succeed on the merits, preliminarily enjoined enforcement of four provisions of the Arizona Act. The Ninth Circuit affirmed, and the State

³⁹ S. B. 1070, §1.

⁴⁰ *Ibid.*

⁴¹ 8 U. S. C. §1101 *et seq.*

petitioned for review, urging that Arizona's law complements, and does not conflict with, federal law.

One indication of the importance of the case: five States have passed similar legislation, and bills modeled on the Arizona scheme have been introduced in most other States.

Last but surely not least, the Affordable Health Care cases. No contest since the Court invited new briefs and arguments in *Citizens United*⁴² has attracted more attention: in the press, the academy, and the

⁴² *Citizens United v. Federal Election Comm'n*, 558 U. S. ____ (2010).

ticket line outside the Supreme Court—a line that formed three days before oral argument commenced.

Some have described this controversy as unprecedented. They may be right if they mean the number of press conferences, prayer circles, protests, and counter-protests going on outside the Court while oral argument was underway inside.

Arguments consumed more than six hours spanning three days. Remarkable in modern times, but recall that in one of the cases prominently cited in the

Health Care briefs, *McCulloch v. Maryland*,⁴³ oral argument, in 1819, ran on for nine days over the course of two months.⁴⁴

The three cases challenging the constitutionality of the Health Care Act present four questions: First, does Congress have the authority under Article I of the Constitution (the Commerce Clause or the power to tax and spend for the general welfare) to enact the so-called individual mandate? Second, if the individual mandate—requiring the purchase of insurance or

⁴³ 4 Wheat. 316 (1819).

⁴⁴ See Plous & Baker, *McCulloch v. Maryland: Right Principle, Wrong Time*, 9 Stanford L. Rev. 710, 720 (1957).

payment of a penalty—is unconstitutional, must the entire Act fall invalid? Or may the mandate be chopped, like a head of broccoli, from the rest of the Act?

Third, does the Act’s expansion of Medicaid exceed Congress’ spending power? Fourth, the big question, inviting the answer everyone is waiting for: Do federal courts lack jurisdiction to entertain a pre-enforcement challenge to the individual mandate in light of the Anti-Injunction Act of 1867.⁴⁵ That Act prohibits “any

⁴⁵ 26 U. S. C. § 7421(a).

**person” from suing the federal government to restrain
“the assessment or collection of any tax.”⁴⁶**

**To accommodate an audience enormously larger
than our Courtroom will hold, we released same-day
audio recordings of the arguments. And though our
deliberations are private, that has not dissuaded the
media from publishing a steady stream of rumors and
fifth-hand accounts. My favorite among the press
pieces wisely observed: “[A]t the Supreme Court . . .
those who know don’t talk, and those who talk don’t**

⁴⁶ *Ibid.*

know.”⁴⁷

Nevertheless, a rumor circulated that the opinion hand-down session on May 24th would reveal the outcome of the healthcare cases.⁴⁸ Rumor followers attended the session anticipating announcement of the momentous decisions. They got their just desserts. They learned, from the only decision announced from the bench that day, that §8(b) of the Real Estate Settlement Procedures Act does not prohibit all unearned fees, it bars only unearned fees split between

⁴⁷ Joan Biskupic, As U. S. Supreme Court mulls healthcare, rumors fly, Reuters, Apr. 27, 2012, online at <http://www.reuters.com/article/2012/04/26/us-scotus-rumormill-idUSBRE83P1HZ20120426> (as visited June 11, 2012).

⁴⁸ Politico Pulse, SCOTUS rumor mill churning, May 24, 2012, online at <http://www.politico.com/politicopulse/0512/politicopulse751.html> (as visited May 30, 2012).

two or more persons.⁴⁹

I have spoken on more than one occasion about the utility of dissenting opinions, noting, in particular, that they can reach audiences outside the Court and propel legislative or executive change. A fit example, the dissent I summarized from the bench in 2007 in *[Lilly] Ledbetter v. Goodyear Tire*.⁵⁰ The case involved a woman, Lilly Ledbetter, who worked as an area manager at a Goodyear tire plant in Alabama. Her starting salary (in 1979) was in line with the salaries of

⁴⁹ *Freeman v. Quicken Loans, Inc.*, 566 U. S. ___ (2012).

⁵⁰ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U. S. 618 (2007).

men performing similar work. But over time, her pay slipped. By the end of 1997, there was a 15 to 40 percent disparity between Ledbetter's pay and the salaries of her fifteen male counterparts.

Ledbetter filed charges of discrimination with the EEOC. Eventually, a jury favorably resolved her Title VII suit, awarding Ledbetter backpay and damages.

The Supreme Court nullified that verdict. Ledbetter filed her claim too late, the Court held. It was incumbent on her, the Court said, to file charges of discrimination each time Goodyear failed to increase

her salary commensurate with the salaries of her male peers. Any annual pay decision not contested within 180 days, the Court ruled, became grandfathered, beyond the province of Title VII to repair.

The Court's ruling, I wrote for the dissenters, ignored real-world employment practices that Title VII was meant to govern: Sue early on, the majority counseled, when you may not know that men are receiving more for the same work. (Of course, you would likely lose such a less-than-fully baked case.) If you sue only when the pay disparity becomes steady

and large enough to enable you to mount a winnable case, you will be cut off for suing too late. That situation, I urged, could not have been what Congress intended. “The ball is [now back] in Congress’ court,” was my bottom line. “[T]he Legislature may act to correct th[e] Court’s parsimonious reading of Title VII.”⁵¹ Nineteen months later, Congress passed the Lilly Ledbetter Equal Pay Act, overruling a Court decision I considered out of touch with the real world.⁵²

In the Court’s first opinion of the current term,

⁵¹ *Id.*, at 661 (GINSBURG, J., dissenting).

⁵² Pub. L. No. 111-2, 123 Stat. 5.

Cavazos v. Smith,⁵³ I addressed a dissent to a different audience. Shirley Ree Smith, abysmally represented at trial, was convicted of shaking her seven-week-old grandson to death. Her sentence, 15 years to life. The Ninth Circuit, on habeas review, held there was no convincing support for the State's theory that the infant died of so-called shaken baby syndrome.⁵⁴ The Supreme Court had twice remanded the case to the Court of Appeals, admonishing the Ninth Circuit each time to

⁵³ 565 U. S. 1 (2011) (*per curiam*).

⁵⁴ *Smith v. Mitchel*, 437 F. 3d 884 (CA9 2006).

heed AEDPA.⁵⁵ Third time round, the Court of Appeals struck out. The Supreme Court summarily reversed the Circuit's grant of habeas relief and told the Court of Appeals not to tamper with the state court's conviction.

Justices Breyer and Sotomayor joined my dissenting opinion. "The Court's summary disposition of this case," we said, was "a misuse of [the Court's certiorari] discretion."⁵⁶ "What is now known about shaken baby syndrome," we noted, "casts grave doubt on the charge leveled against Smith; and

⁵⁵ See *Patrick v. Smith*, 550 U. S. 915 (2007); *Patrick v. Smith*, 130 S. Ct. 1134 (2010).

⁵⁶ 565 U. S. 1 (2011) (GINSBURG, J., dissenting) (slip op., at 1).

uncontradicted evidence showed she poses no danger whatever to her family or anyone else in society.”⁵⁷

In December of last year, Smith filed an Application for Commutation of Sentence with California Governor Jerry Brown. The application borrowed words from my dissenting opinion.⁵⁸ On April 6th, Governor Brown commuted Ms. Smith’s sentence to time served, noting “significant doubts” about her guilt.⁵⁹ It was the Governor’s first grant of clemency in his current term.

⁵⁷ *Id.* (slip op., at 3).

⁵⁸ See Statement in Support of Application for Commutation of Sentence for Shirley Ree Smith, online at https://docs.google.com/document/d/1bI_mthhJjhuXyKnS9f558y62kk8hNTwml60eZcSabvA/edit?pli=1 (as visited May 31, 2012).

⁵⁹ Emily Bazelon, Jerry Brown Shows Mercy to Shirley Ree Smith, *Slate*, Apr. 6, 2012, online at http://www.slate.com/articles/news_and_politics/crime/2012/04/jerry_brown_pardons_shirley_ree_smith_in_an_old_sad_shaken_baby_case_.html (as visited June 11, 2012).

Justice, at last, prevailed, do you not agree?