

# A Term in Turmoil:

## Select Criminal Cases from the 2017-18 Supreme Court Term

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This was a tumultuous year for the United States Supreme Court. On June 21, 2018, Justice Anthony Kennedy announced his retirement after 30 years on the Court. And President Trump nominated Judge Brett Kavanaugh to fill the seat.

Judge Kavanaugh's confirmation hearings riveted and polarized the nation. Late in the proceedings, multiple women accused him of sexual misconduct. One of those women, Professor Christine Blasey Ford, testified before the Senate Judiciary Committee, detailing how Judge Kavanaugh allegedly sexually assaulted her when they were in high school. Judge Kavanaugh denied the allegations in emotional testimony that triggered a letter from over 2,400 law professors asserting that he "did not display the impartiality and judicial temperament requisite to sit on the highest court of our land."<sup>1</sup> The Senate nonetheless confirmed Justice Kavanaugh to the high court.

With Justice Kavanaugh's confirmation arriving just 14 months after Justice Neil Gorsuch began his tenure, this is a Court in transition, both in terms of its personnel and its jurisprudence. This year's criminal cases put that flux on display. The Court decided a high number of Fourth Amendment cases this Term. The justices disagreed starkly over the future of Fourth Amendment law, especially in the area of standing. The Court also issued split decisions interpreting the First, Fifth, and Sixth Amendments.

But before summarizing the Court's criminal law cases from 2017–18, it's worth pausing to remember Justice Kennedy's contributions to criminal law over the past three decades.

### JUSTICE ANTHONY KENNEDY AND CRIMINAL LAW

In most criminal cases, Justice Kennedy voted with the conservative wing of the Court. He authored a number of significant criminal procedure decisions, including *Berghuis v. Thompkins*.<sup>2</sup> There the Court held that Thompkins's silence for two hours and forty-five minutes was insufficient to invoke his right to remain silent under *Miranda*. As one scholar put it, *Thompkins* gave "us an implied waiver doctrine on steroids."<sup>3</sup>

But Justice Kennedy's greatest impact on criminal law was in the death penalty area, where he commonly provided the

swing vote. Although never calling for complete abolishment, Justice Kennedy joined his more liberal colleagues in narrowing the penalty's scope.

Justice Kennedy joined the majority in *Atkins v. Virginia*,<sup>4</sup> which held that executing persons with mental disabilities violates the Eighth Amendment. He then expanded on *Atkins* in *Roper v. Simmons*.<sup>5</sup> He wrote for the 5–4 *Roper* majority that the "Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."<sup>6</sup> He pointed to the "comparative immaturity and irresponsibility of juveniles," to the fact that "juveniles have less control, or less experience with control, over their own environment," and that "the character of a juvenile is not as well formed as that of an adult."<sup>7</sup>

Justice Kennedy also wrote the majority opinion in *Graham v. Florida*,<sup>8</sup> which expanded on *Roper*. *Graham* held that the Eighth Amendment prohibits life without parole for juveniles who commit nonhomicide crimes. *Roper* and *Graham* then led to *Miller v. Alabama*,<sup>9</sup> where the Court held by 5–4 majority that a mandatory life sentence without parole for any juvenile offender violates the Eighth Amendment.

The swing vote again came from Justice Kennedy in *Kennedy v. Louisiana*.<sup>10</sup> That case abolished the death penalty for crimes not involving murder. "Evolving standards of decency must embrace and express respect for the dignity of the person," Justice Kennedy wrote for the majority, "and the punishment of criminals must conform to that rule."<sup>11</sup>

Justice Kennedy also advocated for human dignity within prisons. He wrote for the 5–4 majority in *Brown v. Plata*,<sup>12</sup> holding that California prison overcrowding violated the Eighth Amendment: "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in a civilized society."<sup>13</sup> And in a recent concurrence in *Davis v. Ayala*,<sup>14</sup> Justice Kennedy lamented the "terrible price"<sup>15</sup> of the widespread use of solitary confinement in American prisons. He cited numerous studies showing the harmful effects of extended isolation and ended by quoting Dostoyevsky: "The degree of civilization in a society can be judged by entering its prisons."<sup>16</sup>

### Footnotes

1. Susan Svrluga, 'Unfathomable': More than 2,400 Law Professors Sign Letter Opposing Kavanaugh's Confirmation, WASH. POST (Oct. 4, 2018), <https://www.washingtonpost.com/education/2018/10/04/unprecedented-unfathomable-more-than-law-professors-sign-letter-after-kavanaugh-hearing>.
2. 560 U.S. 370 (2010).
3. Charles Weisselberg & Stephanos Bibas, *The Right to Remain Silent*, 159 U. PA. L. REV. 69, 73 (2010).
4. 536 U.S. 304 (2002).
5. 543 U.S. 551 (2005).
6. *Id.* at 578.

7. *Id.* at 569–70.
8. 560 U.S. 48 (2010).
9. 567 U.S. 460 (2012).
10. 554 U.S. 407 (2008).
11. *Id.* at 420.
12. 563 U.S. 493 (2011).
13. *Id.* at 511.
14. 135 S. Ct. 2187 (2015) (Kennedy, J., concurring).
15. *Id.* at 2210.
16. *Id.* (quoting THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed., 2006)).

Now on to the cases from the 2017–18 Term.

#### FOURTH AMENDMENT

This Term was chock-full of significant Fourth Amendment cases. The Court took particular interest in the concept of “standing”: what a person must show to have a cognizable Fourth Amendment interest allowing her to seek relief for an unconstitutional search. Perhaps the most groundbreaking Fourth Amendment opinion was *Carpenter v. United States*,<sup>17</sup> where the Court held that a person has a reasonable expectation of privacy in her cell phone location information turned over to a third party. *Carpenter* limits the so-called “third party doctrine,” though it’s not clear how much. Another important standing case, *Byrd v. United States*,<sup>18</sup> held that a person has a reasonable expectation of privacy in a rental car even if she’s not listed in the rental agreement. In *Collins v. Virginia*,<sup>19</sup> the Court decided officers need a warrant to search a vehicle parked in the curtilage of a home. And in *District of Columbia v. Wesby*<sup>20</sup> the Court concluded that officers had probable cause to arrest a group of trespassing partygoers and that the court below erred by viewing facts in isolation.

In *Carpenter*, police arrested four men suspected of robbery, including Timothy Carpenter. Federal prosecutors obtained telecommunications records from Carpenter’s wireless carriers. Those records included cell-site location information (CSLI), time-stamped location data from each time Carpenter’s phone connected to one of the carrier’s cell sites. The government obtained 12,898 data points cataloging Carpenter’s movements over 127 days. These data points created a map of Carpenter’s location that placed him at the robbery. The Sixth Circuit held that Carpenter lacked a reasonable expectation of privacy in the CSLI because he had turned that information over to third parties: his wireless carriers.

The Supreme Court reversed in a majority opinion written by Chief Justice Roberts. “[A]n individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”<sup>21</sup> The government therefore needed a warrant, supported by probable cause, to obtain Carpenter’s CSLI.

This was significant because the Court has long held that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>22</sup> This is the so-called third-party doctrine. The doctrine originated in *United States v. Miller*,<sup>23</sup> where the Court held that a person lacked an expectation of privacy in bank records turned over to the bank. In *Smith v. Maryland*, another foundational third-party doctrine case, the Court similarly held that a person didn’t have a reasonable expectation of privacy in outgoing phone numbers dialed on a landline telephone and conveyed to the phone company.

CSLI is, the Court held in *Carpenter*, “qualitatively differ-

ent.”<sup>24</sup> Unlike the information turned over to third parties in *Miller* and *Smith*, “cell phone location information is detailed, encyclopedic, and effortlessly compiled.”<sup>25</sup> The Court reasoned that, “when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.”<sup>26</sup> And “CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers.”<sup>27</sup> So even though *Carpenter* conveyed his data to a third party, he could claim Fourth Amendment protection in it.

The Court also relied on *United States v. Jones*,<sup>28</sup> which held that attaching a GPS tracking device to a vehicle was a Fourth Amendment search. CSLI presents an even greater privacy concern than the GPS monitoring considered in *Jones* because individuals “compulsively carry cell phones with them all the time . . . into private residences, doctor’s offices, political headquarters, and other potentially revealing locales,”<sup>29</sup> allowing the government to achieve near-perfect, retroactive surveillance of almost anyone.

Cell phone users also take no affirmative steps to turn over CSLI to the third-party carrier. Because carrying a cell phone is indispensable to modern life, *Carpenter* “in no meaningful sense” voluntarily turned his information over to a third party.

No fewer than four dissenting opinions were filed in this case. Justice Kennedy argued that the majority unnecessarily departed from the Court’s third-party doctrine precedents. In a separate dissent, Justice Thomas argued that the CSLI wasn’t Carpenter’s property, so he did not have a reasonable expectation in it. He called the *Katz* reasonable expectation of privacy test “a failed experiment”<sup>30</sup> and would get rid of it entirely. Justice Alito’s dissent criticized the majority for destabilizing Fourth Amendment law and argued that “the records are not Carpenter’s in any sense.”<sup>31</sup>

Justice Gorsuch would get rid of the third-party doctrine and the *Katz* reasonable expectation of privacy test. He does “not agree with the Court’s decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared.”<sup>32</sup>

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17. 138 S. Ct. 2206 (2018).

18. 138 S. Ct. 1518 (2018).

19. 138 S. Ct. 1663 (2018).

20. 138 S. Ct. 577 (2018).

21. *Carpenter*, 138 S. Ct. at 2217.

22. *Smith v. Maryland*, 442 U.S. 735 (1979).

23. 425 U.S. 435 (1976).

24. 138 S. Ct. at 2216.

25. *Id.*

26. *Id.* at 2217.

27. *Id.* at 2222.

28. 565 U.S. 400 (2012).

29. *Carpenter*, 138 S. Ct. at 2218.

30. *Id.* at 2246 (Thomas, J., dissenting).

31. *Id.* at 2260 (Alito, J., dissenting).

32. *Id.* at 2272 (Gorsuch, J., dissenting).

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He’d overrule those cases and “look to a more traditional Fourth Amendment approach.”<sup>33</sup>

Although the majority called this a “narrow” decision,<sup>34</sup> it’s likely to have broad impact. The third-party doctrine now appears to be, as Justice Gorsuch wrote, “on life support.”<sup>35</sup>

This was a welcome development for those concerned with privacy rights in the digital age. The third-party doctrine has faced mounting criticism in recent years, most notably from Justice Sotomayor, who in 2012 called the doctrine, “ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”<sup>36</sup>

And CSLI isn’t the only type of encyclopedic information people reveal to third parties on a daily basis: “Emailing, tweeting, instant messaging, surfing searching liking, and downloading all create an inescapable trail of third-party records that may raise constitutional concerns on par with CSLI.”<sup>37</sup> Advocates can now plausibly argue that an officer needs a warrant to obtain various kinds of digital data turned over to third parties. The Electronic Frontier Foundation and American Civil Liberties Union have already filed lawsuits in Massachusetts and Maine seeking to expand *Carpenter* to warrantless searches of real-time (as opposed to historical) cell phone location information.<sup>38</sup>

Like *Carpenter*, *Byrd* tackled Fourth Amendment “standing,” but in a different context. There, an officer had stopped and searched a rental car driven by Terrence Byrd. Byrd wasn’t listed on the rental agreement as an authorized driver. The Court unanimously held, in an opinion by Justice Kennedy, that “as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.”<sup>39</sup> Byrd could therefore challenge the search of the car. On remand, the Supreme Court invited the court below to address whether a person who intentionally uses a third party to rent a car by fraudulent scheme is no better than a thief.

Byrd had argued in the alternative that he had Fourth Amendment standing because of his common-law property interest in the rental car as a second bailee. This argument arises from *Jones*, where the Court found that attaching a GPS device to a vehicle was a Fourth Amendment search based on common-law trespass law, rather than on the reasonable expect-

tation of privacy test from *Katz v. United States*.<sup>40</sup> But Byrd failed to raise this argument in the District Court or Court of Appeals, so the majority declined to address it.

Justice Alito wrote a concurrence listing factors that may bear on a driver’s ability to claim a Fourth Amendment interest in a rental car. Justice Thomas authored an additional, intriguing concurrence that Justice Gorsuch joined. He expressed “serious doubts about the ‘reasonable expectation of privacy’ test from *Katz v. United States*.”<sup>41</sup> He then explains the types of arguments he’d like to hear from future litigants on common-law property rights concepts and the Fourth Amendment. He asks litigants to argue “what kind of property interest . . . individuals need before something can be considered ‘their . . . effec[t]’ under the original meaning of the Fourth Amendment” and “what body of law determines whether that property interest is present.”<sup>42</sup>

The Third Circuit has now considered *Byrd* on remand from the Supreme Court. It initially declined to suppress the fruit of the search because it was authorized by circuit precedent at the time it was conducted, so the good-faith exception to the exclusionary rule applied. On rehearing, though, the court vacated that ruling and sent the case back to the district court for additional fact-finding.<sup>43</sup>

*Collins* also involved a vehicle search—this time of a motorcycle parked in a driveway adjacent to a home. A police officer had probable cause to believe that the motorcycle was stolen. So he walked up the driveway, lifted a tarp covering the motorcycle, and found the license plate and vehicle identification numbers. The officer then ran the numbers, confirming the theft. The parties agreed that lifting the tarp was a search under the Fourth Amendment. The issue was whether the officer needed a warrant, which he didn’t have, to do the search.

The majority, in an opinion by Justice Sotomayor, said yes. A house’s curtilage includes its driveway. The automobile exception to the warrant requirement didn’t apply because that exception’s scope “extends no further than the automobile itself.”<sup>44</sup> The officer invaded the space of the curtilage before reaching the motorcycle, and the Fourth Amendment protects that space, so he needed a warrant. This is no different from an officer who sees a stolen motorcycle through the window of a living room and then enters the house to search the vehicle.

Justice Thomas wrote another concurrence favoring major changes to settled Fourth Amendment law. He argued that the exclusionary rule does not apply to the states because it “appears nowhere in the Constitution, postdates the founding by more than a century, and contradicts several longstanding principles

33. *Id.*

34. *Id.* at 2220.

35. *Id.* at 2272 (Gorsuch, J., dissenting).

36. *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

37. Michael Price, *Carpenter v. United States and the Future of the Fourth Amendment*, 42 *CHAMPION* 48, 49 (2018).

38. *EFF to Maine, Massachusetts Courts: Rule Requiring Warrants to Access Cell Phone Location Data Applies to Real-Time Searches*, EFF (Aug. 30, 2018), <https://www.eff.org/press/releases/eff-maine->

[massachusetts-courts-rule-requiring-warrants-access-cell-phone-location](https://www.eff.org/press/releases/eff-maine-massachusetts-courts-rule-requiring-warrants-access-cell-phone-location).

39. *Byrd*, 138 S. Ct. at 1524.

40. 389 U.S. 347, 360 (1967).

41. *Id.* at 1531 (Thomas, J., concurring) (citation omitted) (quoting *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring)).

42. *Id.*

43. *United States v. Byrd*, 742 Fed. Appx. 587 (3d Cir. 2018).

44. 138 S. Ct. at 1671.

of the common law.”<sup>45</sup> As federal common law, Justice Thomas asserts, the exclusionary rule doesn’t bind the states.

Justice Alito wrote the lone dissent, arguing that the search was reasonable because the motorcycle “could have been uncovered and ridden away in a matter of seconds” and the officer’s “brief walk up the driveway impaired no real privacy interests.”<sup>46</sup> He quoted *Oliver Twist*: “If that is the law” then “the law is a ass—a idiot.”<sup>47</sup>

*Wesby* is an odd little case. It considered a lawsuit by sixteen individuals against officers of the District of Columbia for illegally arresting them during a debauchorous party in a house they didn’t have permission to occupy. The officers arrived at the house at 1:00 AM in response to a noise complaint. Upon entry, they smelled marijuana and saw beer bottles and cups of liquor on a filthy floor. There was no furniture downstairs except a few metal chairs. A makeshift strip club was operating in the living room and a naked woman and several men were in an upstairs bedroom, where open condom wrappers were strewn about on a bare mattress. The partygoers scattered and hid when the officers arrived. The partygoers also gave conflicting stories as to why they were there. The Court held that these facts gave the officers probable cause to arrest the partygoers for trespassing. The court below erred by finding innocent explanations for each fact in isolation: “The totality-of-the-circumstances test ‘precludes this sort of divide-and-conquer analysis.’”<sup>48</sup>

## DOUBLE JEOPARDY

The Court decided one double jeopardy case of note this Term. *Currier v. Virginia*<sup>49</sup> was a 5–4 decision holding that a defendant can waive a double jeopardy claim by agreeing to a severance. Michael Currier was acquitted of burglary and larceny charges, then tried separately on a felon-in-possession charge. The government’s theory in its felon-in-possession case was that Currier had the gun during that same burglary and larceny. Currier argued that this violated his double jeopardy rights, even though he’d consented to the severance.

The Court disagreed. Justices Alito and Thomas and Chief Justice Roberts joined Justice Gorsuch’s plurality opinion. It held that Currier gave up his right to challenge the second trial on double jeopardy grounds by agreeing to the severance. The plurality then wrote that the Double Jeopardy Clause doesn’t include a right to issue preclusion at all. Justice Kennedy concurred but only on the grounds that Currier consented to the second trial and so can’t complain of it.

Justice Ginsburg wrote a dissent, which Justices Breyer, Sotomayor, and Kagan joined. She argued that Currier’s consent to a severance didn’t waive his right to rely on the issue-preclusive effect of acquittal. After all, courts must indulge every reasonable presumption against waiver of a constitutional right. Justice Ginsburg also took issue with the plural-

ity’s quest to “take us back to the days before the Court recognized issue preclusion as a constitutionally grounded component of the Double Jeopardy Clause.”<sup>50</sup> She “would not engage in that endeavor to restore things past.”<sup>51</sup>

## SIXTH AMENDMENT

This Term the Court decided two noteworthy Sixth Amendment cases: an important case on decision making in the attorney-client relationship and one per curiam reversal.

In *McCoy v. Louisiana*,<sup>52</sup> Court considered a defendant’s right not to admit guilt at his capital murder trial. Robert McCoy was charged with three counts of murder. He expressly objected to his attorney’s strategy of admitting guilt at trial to try to avoid the death penalty. The attorney reasonably believed that the evidence against McCoy was overwhelming and so told the jury at the guilt phase that McCoy was guilty to gain credibility and ask for their mercy at the sentencing phase.

Justice Ginsburg wrote the majority opinion. It held that “a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty.”<sup>53</sup> Like the decisions whether to plead guilty, waive the right to a jury trial, testify, and forgo an appeal, the decision whether “the objective of the defense is to assert innocence” belongs to the defendant. The Sixth Amendment “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.”<sup>54</sup> This is true even if the client has mental health issues, as McCoy himself appears to have had.

In *Florida v. Nixon*,<sup>55</sup> the Court had held that defense counsel could concede a capital defendant’s guilt at trial when the defendant neither consents nor objects to that strategy. The majority opinion in *McCoy* distinguished *Nixon* in that McCoy “vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt.” It is therefore error for defense counsel to admit a capital defendant’s guilt over his express objection but not if he says nothing.

The Court further held in *McCoy* that the Sixth Amendment violation was structural error not amenable to harmless error review. It also noted that McCoy’s lawyer wouldn’t have violated his ethical obligations by presenting his client’s proposed alibi defense, as there was no avowed perjury.

Justice Alito wrote a dissent that Justices Thomas and Gorsuch joined. He argued that McCoy’s attorney didn’t actually admit guilt because he told the jury that McCoy lacked the requisite intent. McCoy’s attorney thus only admitted one element

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45. 138 S. Ct. at 1678 (Thomas, J., concurring).

46. *Collins*, 138 S. Ct. at 1682–83.

47. *Id.* at 1681 (quoting Charles Dickens, *THE ADVENTURES OF OLIVER TWIST* 277 (1867)).

48. *Wesby*, 138 S. Ct. at 588 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

49. 138 S. Ct. 2144 (2010).

50. *Currier*, 138 S. Ct. at 2164 (Ginsburg, J., dissenting).

51. *Id.*

52. 138 S. Ct. 1500 (2018).

53. *Id.* at 1505.

54. *Id.* at 1508 (quoting *Faretta v. California*, 422 U.S. 806, 819–20 (1975)).

55. 543 U.S. 175 (2004).

**The Court decided two remarkable Free Exercise and Establishment Clause cases this Term.**

of the offense—that McCoy killed three people—but not that he was guilty.

*Sexton v. Beaudreaux*<sup>56</sup> was a per curiam reversal of the Ninth Circuit's grant of habeas relief on ineffective assistance of counsel grounds. Nicholas Beaudreaux was convicted of murder in California and sentenced to fifty years to life. A witness to the shooting

identified Beaudreaux at a pretrial hearing and then at trial. He'd been shown two photo lineups of Beaudreaux earlier but had only tentatively identified him from those. Beaudreaux argued in his habeas petition that his trial attorney was ineffective for failing to file a motion to suppress the identification. The Ninth Circuit agreed, holding that the circumstances surrounding the identification were unduly suggestive because Beaudreaux's photo was in both photo lineups.

The Supreme Court disagreed. "The Ninth Circuit's opinion was not just wrong. It also committed fundamental errors that this Court has repeatedly admonished courts to avoid."<sup>57</sup> Because this was a federal habeas petition, the Ninth Circuit needed to give the state court decision more deference. Once again, the Supreme Court is seen reigning in the Ninth Circuit in a habeas case.<sup>58</sup>

**FIRST AMENDMENT RELIGION CLAUSES**

The Court decided two remarkable Free Exercise and Establishment Clause cases this Term: *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*<sup>59</sup> and *Trump v. Hawaii*.<sup>60</sup> These weren't criminal cases but will likely impact future criminal cases that implicate the religion clauses, such as those where a criminal defendant alleges that the charged statute discriminates against her religion.

In *Masterpiece Cakeshop*, the Court held that the Colorado Civil Rights Commission's treatment of a baker who objected to baking a cake for a same-sex wedding violated the baker's right to freely exercise his religion. The Commissioner made statements on the record that the Court found hostile to the baker's sincerely held religious beliefs:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to jus-

tify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>61</sup>

The Commission also treated other bakers' conscience-based objections differently from *Masterpiece Cakeshop's* claim. This "violated that State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."<sup>62</sup>

Justice Kagan wrote a concurrence that Justice Breyer joined. It argued there were permissible ways in which the Commission could have distinguished the other conscience-based objections. Justice Gorsuch wrote a separate concurrence, which Justice Alito joined, disagreeing with Justice Kagan's concurrence. Justice Thomas, joined by Justice Gorsuch, wrote yet another concurrence, arguing that the Commission violated the baker's freedom of expression in addition to his free exercise rights. Justice Ginsburg authored a dissent that Justice Sotomayor joined. In her opinion, the "different outcomes the Court features don't evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below."<sup>63</sup>

*Trump v. Hawaii*<sup>64</sup> was a closely watched case in which the Court considered the constitutionality of Trump's second executive order limiting immigration from designated countries. Trump's first executive order suspended people from entering the country from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. This caused massive protests at airports across the country.<sup>65</sup> The Western District of Washington entered a restraining order blocking that executive order and the Ninth Circuit affirmed. Trump then replaced his first executive order with a Proclamation restricting entry from Iran, North Korea, Syria, Chad, Libya, Yemen, Somalia, and Venezuela.

The plaintiffs in *Trump v. Hawaii* argued that the Proclamation violates the Establishment Clause because it was motivated by animus toward Islam. They relied on statements Trump made during his campaign, such as his "Statement on Preventing Muslim Immigration," where he called for a "total and complete shutdown of Muslims entering the United States until our Country's representatives can figure out what is going on" and his statement that "Islam hates us."<sup>66</sup> They also noted that, after Trump's inauguration, Rudolph Giuliani said in a television interview that Trump had asked him to find a way to do his "Muslim ban" legally.<sup>67</sup>

But the Court held, in a 5–4 opinion authored by Chief Jus-

56. 135 S. Ct. 2555 (2018) (per curiam).

57. *Beaudreaux*, 138 S. Ct. at 2560.

58. See, e.g., Robert Bames, *Supreme Court Reversals Deliver a Dressing-down to the Liberal Ninth Circuit*, WASH. POST (Jan. 31, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/30/AR2011013003951.html>.

59. 138 S. Ct. 1719 (2018).

60. 138 S. Ct. 2392 (2018).

61. *Id.* at 1729.

62. *Id.* at 1731.

63. *Id.* at 1749.

64. 138 S. Ct. 2392 (2018).

65. James Doubek, *PHOTOS: Thousands Protest at Airports Nationwide Against Trump's Immigration Order*, NPR (Jan. 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/29/512250469/photos-thousands-protest-at-airports-nationwide-against-trumps-immigration-order>.

66. 138 S. Ct. at 2417.

67. *Id.*

tice Roberts, that the facially neutral Proclamation didn't violate the Establishment Clause because "the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"<sup>68</sup>

The Court also took the opportunity to overrule *Korematsu v. United States*, albeit in meticulously narrow language: "The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority."<sup>69</sup>

In dissent, Justice Sotomayor highlighted the apparent inconsistencies between *Masterpiece Cakeshop* and *Hawaii v. Trump*. She also criticized the majority's deference to the executive branch:

By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

The Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments.<sup>70</sup>

## TIDBITS

This Term the Court also decided a couple federal habeas cases worth brief mention. It also avoided ruling on the merits of two important criminal cases likely to come back before the Court in the future.

*Wilson v. Sellers*<sup>71</sup> held that when a federal court considers a federal habeas petition challenging an unexplained state ruling, it should "look through" the summary decision to the last related state-court decision providing a rationale. *Tharpe v. Sellers*<sup>72</sup> was a per curiam reversal of the Eleventh Circuit, which had disposed of Tharpe's petition to reopen his federal habeas proceeding. Tharpe claims that his jury was biased against him based on his race. He has a sworn affidavit from a white juror stating that "there are two types of black people: 1. Black folks and 2. Niggers" and that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did;" the juror also said he wondered if "black people even have souls."<sup>73</sup>

In *Kansas v. Vogt*,<sup>74</sup> the Court was set to decide whether using statements at a pretrial hearing violates the Fifth Amendment's prohibition against compelling a person to be a witness against himself. The Court dismissed the case as improvidently granted, leaving a circuit split in place.

The Court similarly declined to decide the merits in *United States v. Sanchez-Gomez*.<sup>75</sup> There the Ninth Circuit had held that shackling pretrial detainees violates the Fifth Amendment. The Supreme Court held that the case was moot because the defendants were no longer in pretrial detention.

## THE TERM AHEAD

The 2018–19 Term is now underway, with the Court set to decide many important criminal cases this year. It has granted cert in *Gamble v. United States*, which asks it to overrule the separate sovereigns exception to the Double Jeopardy Clause and hold that a person can't be convicted of the same crime at the state and federal levels.

In *Timbs v. Indiana*, the Court will decide if the Excessive Fines Clause is incorporated against the states through the Fourteenth Amendment. At stake is whether the states can impose excessive civil forfeiture and other fines on criminal defendants, who are usually already impoverished.<sup>76</sup>

*Garza v. Idaho* is a Sixth Amendment case worth watching. The Court will decide whether there's a presumption of prejudice when a client tells her attorney to file a notice of appeal and the attorney doesn't do so because the client's plea agreement included an appeal waiver.

The Court will also consider two death penalty cases of note—without, of course, the input of retired Justice Kennedy. In *Madison v. Alabama*, the Court will consider whether the Eighth Amendment prohibits executing an inmate with severe dementia that prevents him from remembering his crime and understanding his execution. Renowned civil rights attorney Bryan Stevenson argued on Madison's behalf.

*Bucklew v. Precythe* involves an inmate with a rare medical condition, who seeks to bring an as-applied Eighth Amendment challenge to Missouri's lethal injection protocol. The case may very well turn on Justice Kavanaugh's vote. He seemed sympathetic to the inmate's claim at oral argument, asking Missouri's attorney: "Are you saying even if the method creates gruesome and brutal pain you can still do it because there's no alternative?"<sup>77</sup>

The real question is how Justice Kennedy's replacement will alter the course of death penalty law in the years to come.



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68. *Id.* at 2418.

69. *Id.* at 2422.

70. *Id.* at 2448 (Sotomayor, J., dissenting) (citation omitted).

71. 138 S. Ct. 1188 (2018).

72. 138 S. Ct. 545 (2018) (per curiam).

73. *Id.* at 546.

74. 138 S. Ct. 1638 (2018).

75. 138 S. Ct. 1532 (2018).

76. U.S. DEP'T OF JUSTICE, OFFICE OF JUST. PROGRAMS, BUREAU OF JUST. ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 N.1 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (estimating that 60–90% of all criminal cases involve indigent defendants).

77. Official Transcript of Oral Argument at 43, *Bucklew v. Precythe* (2018) (No. 17-8151), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/17-8151\\_8n59.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-8151_8n59.pdf).