Sizing up the Supreme Court's latest term

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The U.S. Supreme Court’s term just ended was framed by blockbuster decisions.

Citizens United v. Federal Election Commission was argued before the term started and produced a decision that earned a high-profile rebuke from President Barack Obama at the State of the Union address in January. On the final day of the term, the Court decided McDonald v. Chicago, applying the Second Amendment to the states. Major and minor cases filled the space in between.

It was also Justice Sonia Sotomayor's first term and Justice John Paul Stevens' last term. The Court's oldest justice retired, to be replaced, almost certainly, by its youngest, Elena Kagan.

To discuss these and other developments, a panel of practitioners who argued before the Supreme Court last term gathered on July 7 for the ninth annual Legal Times/National Law Journal review of the Supreme Court term:

• O'Melveny & Myers' Sri Srinivasan, who argued and won in the "honest services" fraud case of Skilling v. U.S., among other cases.

• Deputy Solicitor General Michael Dreeben, who argued for the government in Skilling and the two companion cases on the issue.


• Rounding out the panel is Amanda Leiter of Catholic University of America Columbus School of Law. She argued in Kucana v. Holder and is a former law clerk to Justice John Paul Stevens.

• The moderator was NLJ Supreme Court correspondent Tony Mauro.

An edited transcript of the discussion follows.

TONY MAURO: We'll start with Amanda, and I'm hoping you can tell us your thoughts about Justice Stevens' departure, as someone who clerked for him and as someone who got an interesting phone call from him earlier this term.

AMANDA LEITER: I did get this call from Justice Stevens in the fall asking whether I was interested in being appointed as an amicus in support of the judgment below in what cannot be described by anyone as one of the more important cases of the term. [It was] probably one of the less important cases of the term, but very fun for me.

The answer to that kind of question if you ever get the phone call is, of course, “Yes.” And so I turned from what I was then doing, which was being at home on maternity leave with my three-month-old
daughter, to boning up on everything that has ever been said about motions to reopen board of immigration appeals decisions in asylum cases.

It's not my area. I had never argued before any court, let alone the Supreme Court. But it was nevertheless just a wonderful challenge to get. And I will always be grateful to him for really jump-starting my re-entry to the workplace after being home with my daughter....

Turning to what he has meant for the country and for jurisprudence, I have a couple of somewhat contrasting things to say. The first is: I really think that, looking back on his legacy, he will be remembered at least in part for being a real believer in judicial restraint. That may sound odd given that he now has the reputation of being the Court's most progressive member.

But I think probably one of his most famous cases was *Chevron [v. Natural Resources Defense Council]*, which sets the standard for judicial deference to the decision-making of executive agencies in any case where Congress has either expressly or impliedly left room for an agency to make its own decisions... At the same time, he has thought deeply about what is necessary for the exercise of political power to be legitimate. And you see that coming to the fore in a couple of famous cases from the last few years. One of course is *Rasul [v. Bush]* in which Stevens wrote the opinion holding that federal courts have jurisdiction to review the detentions of foreign nationals held at Guantánamo. Another is *Hamdan [v. Rumsfeld]*, in which he held that the Guantánamo military commissions, as then constituted, violated the Geneva Conventions.

And in both instances, if you look carefully and parse his opinion, he really was holding the executive branch to the task and Congress and finding that the power that they had supposedly wielded was illegitimate for some reason.... So you have this sort of funny dichotomy of someone who, on the one hand, firmly does believe in deference to the elected branches of government but, on the other hand, someone who wants to ensure... that the elected branches are wielding their power legitimately.

I think you see both of those strands coming together in his dissent in *Citizens United*. He himself describes it as an emphatic dissent. On legitimacy of power, he makes a big point of the fact that corporate involvement in elections threatens the legitimacy of those elections in his view. He says, for example, "The Court's ruling threatens to undermine the integrity of elected institutions across the nation. Our lawmakers have a compelling constitutional basis to make measures designed to guard against the potentially deleterious effects of corporate spending in local and national races." And, finally, the law in question "targeted a class of communications that is especially likely to corrupt the political process."

So, on the one hand, his dissent there is motivated by his view that the law that is being struck down was really necessary to protect the legitimacy of political power. On the other side of the same case, I think he viewed the Court majority as really reaching out to decide a facial challenge that in his view was not even properly in the case. So I think for him *Citizens United* really brought together these two strands of his jurisprudence. This was, in his view, an activist Court reaching out to undermine what he viewed as the very legitimate decisions of the elected branches that were trying to protect elections from what he viewed as the distorting effect of corporate funds.

**MAURO:** Mike Carvin, the case you argued on separation of powers [*Free Enterprise Fund v. Public Company Accounting Oversight Board*] has been written up variously as a victory for you and as a victory for the government. Please tell us about the case, the decision and who you think won. I think I know the answer.

**MICHAEL CARVIN:** Yeah. Obviously, I won. Look, part of the confusion about all this was that this case was always looked at from two different perspectives. The media, particularly the financial media, was interested in this case's effect on Sarbanes-Oxley, whereas I always thought about it and the Court thought about it as a case involving separation of powers. What the particular board was regulating was largely irrelevant.

Just to give you some basic background: There was some board called the PCAOB that regulates outside auditors and was, as I say, created by Sarbanes-Oxley. The separation-of-powers challenge was that the president couldn't appoint or remove any of the board members, which is in stark distinction to what he can typically do on what we think of as "fourth-branch independent agencies" — the SEC, the FCC, etc. He can appoint and remove the members. He's got some limitations on removal.

What Congress [said] in this instance [was that] the SEC, the independent agency itself, will appoint these guys and remove them under very narrow circumstances. So the issue essentially was: Could you create a fifth branch of government that had even a bigger buffer between the president than the "fourth-branch" agencies — which were...
themselves controversial? And the Court ruled that they didn't....

The Court simply said "from now on, you are removable at will by the SEC." So it doesn't affect the ongoing operations of the board, but it did establish in my mind an extraordinarily important principle about the degree of presidential control of those who are executing the law....They affirmed, in clearly the most explicit terms, what we call the unitary executive — that the executive power is contained only in the president; no one else has it, no one else can share it.

The key constitutional question is whether or not those executing the laws are controlled by the president. They pulled out this quote from Madison that I like — it has never been in Supreme Court opinions — saying the essence of the executive power is the ability to appoint, oversee and control those who are executing the law....

The SEC could remove these people, but only in narrow circumstances. And the key point was the president couldn't tell the SEC when they needed to remove these people. So that created too much of a buffer between the people executing the law at the board through the SEC to the president....

The other wrinkle in terms of the fourth branch of government ironically came from the dissenting opinion. And there, Justice [Stephen] Breyer took a very unusual approach that he had flagged at argument. He said, basically, "Why do you know the SEC is not removable at will by the president? Why aren't they just sort of the president's alter egos that he can do it?"...He pointed out that there was no restriction on removal in the statute. And he said that that might be significant in terms of the SEC, that they did intend for the president to have at-will removal.

Well, if he means any of that, then the next president, whoever that might be, who wants to change things at the SEC or the FCC could say, look, there's nothing in the statute that prevents me from firing these people because I don't like their policies, and the Supreme Court seems to indicate that I have got this power....

**MAURO:** Sri, I wanted to ask you about your case, the Skilling case, and how you went about trying to argue and win a case in favor of a criminal defendant before a Court that doesn't often side with criminal defendants.

**SRI SRINIVASAN:** In this case, the main issue before the Court, or at least the one that encompassed more than the Skilling case — it also encompassed two other cases that make up the trilogy of honest-services cases this term — was the extent to which Congress had validly enacted this statute called the honest-services fraud statute. [Honest services] takes the normal mail and wire fraud statute, which encompasses deprivations of money and property, and then extends it to encompass deprivations of the intangible right of honest services.

And the table, to some extent, had been set on this because Justice [Antonin] Scalia a couple of terms ago had dissented from the denial of certiorari in a case that raised the question of the validity of this statute and its scope. And he posed some interesting hypotheticals about the reach of the statute. And so the issue had in some sense been teed up already. And this term presented the Court with an opportunity to weigh in on the reach of the statute in the Black, Skilling and Weyhrauch cases.

We felt like this is an issue that the Court had already thought about to some extent in connection with the dissent from denial of certiorari a couple of terms ago. And we felt...that we had some pretty strong arguments about the ambiguity surrounding the contours of the statute. The Court had before it a [few] ways in which it could have ruled. I'll categorize them in three respects.

One is to say that the statute was unconstitutionally vague and therefore essentially invalid in all of its applications. Another was one step short of that, which is what the Court ultimately did: To say that the statute is invalid except insofar as it encompasses bribes or kickbacks, sort of quintessentially dishonest conduct. And a third way was to extend the statute beyond the category of bribes and kickbacks and to encompass another species of prosecutions that the government had undertaken involving undisclosed conflicts of interest. And then within that third branch there were also some questions about what the exact permutations and reach of the statute would be.

The Court chose, in some sense, the middle path and read the statute so as to encompass bribes and kickbacks and nothing more. They did that by a 6-3 vote because Justice Scalia joined by Justice [Clarence] Thomas and Justice [Anthony] Kennedy would have struck down the statute as unconstitutionally vague in all of its applications.

And I think one of the interesting jurisprudential issues that arises from this opinion is how a court goes about the task of deciding whether a statute — whether parts of a statute can be saved. You saw a pretty vigorous debate
between Justice [Ruth Bader] Ginsburg's majority opinion and Justice Scalia's concurring opinion on whether it was proper for the Court to read the statute to encompass only bribes or kickbacks.

And I think the debate roughly breaks down as follows. Everybody sort of assumed that, when Congress enacted this language dealing with the deprivation of the intangible right of honest services, they did have in mind bribes and kickbacks. That at least the statute did go that far. They were kind of quintessential applications of this honest-services fraud theory which predated Congress' enactment of the language.

I think everybody also essentially agreed that, if you look at the terms of the statute, it reached beyond that. And everybody — everybody on the Court at least — seemed to agree that, if you read the statute to encompass something going beyond bribes and kickbacks, it was unconstitutionally vague because it was hard to figure out where you would draw the line as to what came within the statute and what didn't. And then the question is: What do you do in that situation?

One approach is to say, well, we know that Congress meant to encompass bribes and kickbacks so we're going to sustain the statute as far as that goes and then we're going to strike it down apart from that because any other application would be unconstitutionally vague. Another approach would be to say, well, we may know that Congress meant to encompass bribes and kickbacks, but when you look at the words of the statute, you can't read in that limitation in the text and so we have to put Congress back to the drawing board and we need to strike it down in all of its applications. It's unconstitutionally vague.

And that was really the debate between Justice Ginsburg's majority opinion and Justice Scalia's concurring opinion. Justice Scalia would have, of course, struck down the statute as unconstitutionally vague. Justice Ginsburg saved the statute, so to speak, as it encompasses bribes and kickbacks. But I think it gave rise to a kind of interesting jurisprudential debate that's worth keeping an eye on in the future about the way in which the Court goes about the task of narrowing statutes that are asserted to be unconstitutionally vague....

I wanted to touch on quickly the other issue involved in Skilling, because I think it raises an interesting point about a development this year on the Court, which is Justice Sotomayor's ascension to the Court.

The other issue [in the honest-services cases] was whether there was a fairly constituted jury in Houston and whether the jury pool was so poisoned that a fairly constituted jury couldn't be had or whether the trial judge at least had to do more with voir dire. And I thought one interesting part of that, from the perspective of somebody who argued the case and witnessing the dynamic firsthand at argument and then what ultimately happened in the opinion, is that Justice Sotomayor — one of her unique attributes is that she is the one justice who comes to the Court with experience as a trial judge. And I felt this at oral argument, that she asked a series of questions about the adequacy of this voir dire, and it seemed from the perspective of someone who had been through that process before. This was someone who had the benefit of experience.

MAURO: OK. Michael, we'll hear your thoughts about the trio of cases and the impact that you're seeing. Skilling is already being cited in trials and appeals.

MICHAEL DREEBEN: One thing I'd like to do with Skilling is tie it back to Justice Stevens, because the statute that was at issue, Section 1346, was enacted after the Court — in what was at the time considered a blockbuster of a surprise — overruled all of the other federal circuits that had considered the issue, and said that the mail fraud statute protected both against deprivations of money or property and against any scheme to defraud, which included schemes to defraud public offices of the honest services of public officials.

This was a very natural reading of the statute, actually. It had some pretty good support in Supreme Court case law. It lost before the Supreme Court, 7-2. And the author of the dissenting opinion is Justice Stevens. It was a good illustration of Justice Stevens' real-world appreciation for the way that laws affect public officials. He said it's really odd that the Supreme Court is going out of its way to protect some of the most savvy and sophisticated members of our society against prosecution for what is clearly and indisputably fraudulent conduct.

Congress came back immediately after the McNally decision in 1987 and enacted in 1988 the honest-services statute, which was clearly designed to restore the state of the law to where it had been, although there is some debate about exactly where it had been. And over the next 20 years what happened is that, in some ways, I think you could say the Justice Department was a little bit of a victim of its own success. The words of the statute didn't refer to bribery and kickbacks even though most pre-McNally cases did involve them. It referred to the intangible right of honest services. And that language has a little bit of an "eye of the beholder" feel to it.
Over time, as prosecutors are wont to do, they applied the statute to new situations. Courts of appeals upheld new applications of the law outside of bribery and kickbacks...And in the 5th Circuit, where Skilling arose, it was actually extended to provision of false information by a fiduciary that had a material effect for the person who was the holder of the fiduciary duty.

So it expanded really to its kind of logical limit. Sort of like a bathtub with water pouring into it, and gradually the level rose. And I think what happened is that basically the water continued to flow, and it just overflowed onto the floor and it created a huge mess.

There were three circuit splits that the Court took in sequence to resolve. The first was in the Black case. And that is whether the crime required a foreseeable economic impact on the victim. Then it took the Weyhrauch case, which had to do with whether you needed a state law duty to be violated in order to have an honest-services violation in the concealed-conflicts case. And it took Skilling both to resolve the constitutional question and also to determine ostensibly whether you needed to have a showing of private financial gain by the defendant. And when it was confronted with all of these conflicts, I think the Court, as Sri accurately said, took a middle path that reflects in many ways working with Congress rather than working against it.

In many respects, this Court gets a lot of press for being an aggressive Court, not deferential to Congress, striking down campaign-finance laws, striking down laws dealing with depictions of animal cruelty, invalidating on separation-of-powers grounds, institutional arrangements in governments that may threaten thousands and thousands of employees, extending gun rights to the rest of the country, a subject that I think we'll talk about a little bit later. But I also saw a distinct trend in the Court's cases this term to work with Congress and to find solutions that implement what the Court surmised was what Congress would have intended had it only thought about the problems that the general language of the statutes engendered.

And so it did that in the Skilling case by taking the statute back to its core: bribery and kickbacks. And I think, to some extent, the litigation strategy that was followed [in] Skilling reflected a view of: Put out the issue that the Court wanted to hear talked about, the sort of nuclear option, just destroy the statute entirely, and at the other end of the spectrum was give the government everything that it wants. And in the middle was something of the brier patch that the government was not entirely unhappy to be thrown into, which is we're not going to throw out the statute, we're going to cut it back to where it has his core paradigm applications. So in that sense I think that Justice Ginsburg showed a lot of respect institutionally for Congress and was joined by six members....

As far as the impact goes of Skilling, I think that it remains to be seen. Both in the Skilling case and in the Black case, the Court did not vacate the convictions. It sent them back to the courts of appeals for harmless-error analysis to determine whether the convictions could be upheld on other theories of prosecution that were included in those cases. Some cases will fall under Skilling because they were purely concealed-conflict cases. Other cases will be able to be re-characterized as kickbacks or bribes because of the underlying facts or maybe even as money or property.

So the long-term impact of the decision in a negative sense for upholding prosecutions is unknown. What is known is that the Court has actually provided definitions, metes and boundaries and a methodology for interpreting the honest-services statute that we didn't have before as prosecutors. And so, in many senses, the Court undertook a job of sort of finishing Congress' work and providing a road map for going forward that I think will actually put the law on a more stable foundation than it was before.

MAURO: Any other thoughts about the term?

SRINIVASAN: I really feel like there's an argument to be made that Citizens United dominated the term. And it's kind of interesting to see the historical arc of the case because it starts out — it's reminiscent of a case called Ledbetter [v. Goodyear Rubber and Tire Co.] from a couple of terms ago because, when Citizens United first comes up, it seems like, as some of our colleagues in the solicitor general's office used to refer to cases, a nothing burger, because it dealt with a quite narrow issue about disclosure.

Well, then a re-argument is granted on the question of whether Austin [v. Michigan Chamber of Commerce] should be overruled, and it becomes a much bigger case. And then it sort of dominated the judicial and political landscape for an entire year. If you sort of see the arc of the case, it had this brooding omnipresence quality about it.

I mean, General Kagan has her first oral argument. The Court comes down with a 5-4 ruling that raises a lot of hackles in certain quarters. You know, the president sort of visibly confronts the Court at the State of the Union address. Chief Justice [John] Roberts [Jr.] then responds in a speech. Congress puts together legislation that potentially responds. A new Supreme Court justice is nominated, at least...in part on the basis that she argued
Citizens United and that it stands for something about the powerful versus the powerless.

And then you add...the Court summarily affirming the ruling that raised the possibility of revisiting the implications of Citizens United. You almost got the sense the Court sort of said, we've dealt with this for an entire term and maybe we should put this one to rest, although three justices would have heard oral argument on the issue. So I feel like that case was, in some sense, the gift that keeps on giving over the course of the entire term.

CARVIN: I thought it was an interesting term because I think it revealed the conservatives to be civil libertarians, who are advocates for freedom for American citizens — and the liberals deciding that, if they didn't much like a constitutional value, they weren't going to enforce it. It has become a bizarre debate really, this notion that the conservatives are more activist and the liberals are not. I mean, I never have heard any serious person think a conservative justice is one who doesn't enforce constitutional provisions. The argument has always been that you enforce the constitutional provisions that are there quite vigorously. You just don't make up these rights.

Citizens United was a very brilliant and obvious application of that principle. The First Amendment says Congress shall make no law abridging freedom of speech. And this was a law that said you couldn't criticize congressmen running for re-election near an election period. And I can't think of a law that's more obviously unconstitutional, and I can't think of a law that no one would think is constitutional unless it applied to corporations.

And the argument there is that corporations aren't people, which of course makes no difference on the First Amendment because the First Amendment doesn't apply to people. The free speech clause applies to anybody. I don't think anybody in this room would really say the First Amendment doesn't protect corporations. If [corporations] don't really have free speech rights, then presumably they don't have free press rights, either, and no one would really say you can drown out their voices close to an election.

And the fact that this incredibly straightforward application of the First Amendment could be controversial I think says more about the skewed values we have of interpreting the text of the Constitution than anything about judicial activism. The activism argument is that it overturned Austin [v. Michigan Chamber of Commerce], which is true. But Austin, of course, had overturned Buckley [v. Valeo] in terms of Buckley saying that the ability to drown out other voices is not a First Amendment vice. We don't level one person's voice in order to enhance others. And Austin clearly overruled that. And Austin had clearly overruled [First National Bank of Boston v.] Bellotti in terms of the First Amendment rights of corporations. So, to make the jurisprudence even comprehensible in this area, Austin had to be thrown overboard as the insane outlier that it clearly was.

MAURO: I want to bring Michael Dreeben into this. I know he has some thoughts about the McDonald decision.

DREEBEN: I think that McDonald [v. Chicago] is an extremely interesting case on a number of levels just as a snapshot illustration of different members at the Court at work showing themselves off in their most characteristic, quintessential nature. I'll make one general point about the decision itself and then talk somewhat about the different approaches that the justices took in the case.

The first is that this case did come out I think as was predicted, that [D.C. v.] Heller applies to the states. I don't think that there was any huge surprise that that was the outcome that the Court was going to reach, although the vote count and the way that the Court got there might have been something of a surprise. But what I thought was fascinating is the way that the Court got there, both the plurality and Justice Thomas, who did take different constitutional routes, even though the constitution is clear on its face. Textually, it could be only read one way. The five conservatives read it two [ways].

What I thought was most fascinating about McDonald is that the Court changed the narrative in my view about what the Second Amendment meant. The central narrative that I took away from Heller was that the right to bear arms had at its quintessential core the right to have arms in case of confrontation. And there's a very strong connotation in the opinion that that confrontation was individual confrontation between members of society. You know, protecting yourself in your home against an invader. And that's what Heller stood for, the right of a law-abiding, responsible citizen to have a gun in his home for self-protection. The handgun, the means that most Americans have chosen as their preferred means of self-defense today, that's what Heller held is protected by the Second Amendment.

Now, there was at the time of Heller, and I think even to a larger degree after Heller, a very strong historical argument that was made that that was not the kind of confrontation that the framers of the Second Amendment had in mind at all. What they had in mind, and what the English Bill of Rights had in mind, was protection against a despotic government or an invading foreign force.
And in that sense the Second Amendment could be viewed as the most radical provision in the Constitution, the right to bear arms to resist your government or some other invading government, but primarily your own government from usurping your individual civil rights. And it could be viewed as the most central of all aspects of personal liberty. If you can't protect yourself against despotism, you can't have the right to free speech, you can't have any other right that's protected in the Constitution.

That was not, however, the mainstream of the Heller narrative. And in some ways I think the self-protection, self-defense narrative, is only modestly powerful as an organizing theme of the Second Amendment. What you saw happen in *McDonald* is that the majority seized a much different high ground of the narrative, in part in an answer to potential liberal critics. That is that the Second Amendment is incorporated through the Fourteenth Amendment and applicable to the states. In the 14th Amendment, a large motive of the Reconstruction Congress was to ensure that newly freed black slaves had the means to protect themselves against rogue violence in the South, against the remnants of the Confederate army and Jim Crow.

And that narrative is actually powerfully associated with a liberal perspective, as opposed to a more conservative self-defense-in-the-home perspective. It consumed a large amount of Justice [Samuel] Alito [Jr.}'s plurality opinion. It was featured very prominently in Justice Thomas' separate opinion, in which he eschewed any reliance whatsoever on incorporation through the due process clause and instead relied on the privileges and immunities clause, resurrecting it from the exile that it's been in ever since the Slaughterhouse cases basically restricted it to rights of national citizenship.

These were hardly the only fascinating things about it. I think Justice Stevens in some way delivered his swan song, maybe his ultimate statement about what he thinks it means to be a justice on the Supreme Court, in his separate opinion in *McDonald*. In that opinion, he very strongly attacked an originalist historicist method of determining both the content of substantive due process and in determining whether a right that's protected in the Bill of Rights is incorporated and applicable to the states.

He said that history alone is malleable. It can be misunderstood and distorted. And most importantly, it vastly underrates the purpose and task of a Supreme Court justice in incorporating a totality of values of the American people, its history, its traditions, its prior opinions, the impact on democratic organs of government. All of those things go into the process of judgment on whether a right should be recognized and incorporated and applied to the states. He said that what's right for the federal government may not be right for the states and it has to be tailored and shaped. And he came up with an extremely eloquent and lengthy, subtle, sophisticated list of considerations that inform his job of judgment....

Shooting back from the originalist side was Justice Scalia, who took this opportunity to launch a full-scale defense of originalist methodology and to show why it's not subjective, why it's not malleable and why it's the best and really the only appropriate way for an Article III judge to decide things in a democratic society. The dialogue between those two is priceless.