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U.S. Supreme Court Round-Up: October 2009 Term

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Issue Number: 2010-20

Q. The U.S. Supreme Court recently concluded its October 2009 Term. What cases did the Court decide this Term that are (or should be) of particular interest to the general public?

A. Although some in the general public may find a different selection of this past Term's cases of particular interest, two cases topping almost any list would be *Citizens United v. Federal Election Commission* and *McDonald v. Chicago*. *Citizens United* raised issues concerning the First Amendment; *McDonald* involved the Second and Fourteenth Amendments. The last of the top three cases this Term – and one which has received less media attention – is *Free Enterprise Fund v. Public Company Accounting Oversight Board*, which concerns separation of powers among the three branches of government.

Citizens United challenged a section of the McCain-Feingold Bipartisan Campaign Reform Act of 2002 ("BCRA"), which made it illegal for corporations and labor unions to use their general funds for political advocacy, that is, to pay for advertisements and other materials which are political in nature or content. Contrary to some news stories, the portion of the BCRA which was at issue in *Citizens United* did not involve direct contributions to political candidates or their campaigns.

Citizens United brought suit because the BCRA made it illegal for it to distribute during the 2008 presidential election season a movie critical of then-presidential candidate Hillary Clinton. During oral argument before the Supreme Court, Solicitor General Elena Kagan (the government's lawyer who was defending the constitutionality of the BCRA and whose own nomination to become a Justice of the

Supreme Court is now pending in Congress), informed the Court that the BCRA would allow the government to ban books.

In striking down the section of the BCRA which was at issue, Justice Kennedy, writing for the Court's 5-4 majority, said, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." So, "when government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."

McDonald v. Chicago was the second of two recent Supreme Court cases dealing with the Second Amendment's "right to keep and bear arms." The first case, *District of Columbia v. Heller*, decided in 2008 (5-4), held that the Second Amendment secures an individual, rather than a collective, right to keep and bear arms. *McDonald*, also 5-4, held that the Second Amendment applies to the States as well as to the federal government. The issue of whether the Second Amendment applies to the States did not arise in *Heller*, as the District of Columbia is a federal enclave.

Free Enterprise Fund concerned a provision of the Sarbanes-Oxley Act that protects members of the Public Company Accounting Oversight Board ("Board") from removal except for good cause. The Court held, 5-4, that the section at issue violates Article II of the Constitution because members of the Board, which is overseen by the Securities and Exchange Commission and whose members are

removable only for cause, also are removable only for cause. The Court said “such multilevel protection from [Presidential removal] power is contrary to Article II’s vesting of the executive power in the President.” The Court noted that the Constitution gives the President the responsibility to ensure that the laws are faithfully executed and that, in fulfilling this responsibility, the President must be empowered to select and remove inferior government officials. This case is important because it reaffirms that the President, who always can be voted out of office at the next election, must have the ability to direct and control the actions of bureaucrats for whom voters can hold the President to account.

Earle Law Offices provides trial and appellate litigation, as well as non-litigation, legal services in the areas of bankruptcy, business law, constitutional and civil rights law, family law, real estate law, tax law, and trusts and estates.

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