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SECOND CIRCUIT REVIEW

Expert Analysis

The Second Circuit In the Supreme Court

With the Supreme Court beginning its 2013 term next week, we conduct our 29th annual review of the performance of the U.S. Court of Appeals for the Second Circuit over the past term, and briefly discuss the Second Circuit decisions scheduled for review during the upcoming term.

During its 2012 term, the Supreme Court handed down merits opinions reviewing decisions by the U.S. Courts of Appeals in 67 cases, including one summary reversal. The performance of the circuit courts is described in the chart accompanying this article, with the Supreme Court affirming (in whole or in part) 19 decisions (or 28 percent), and reversing 48 (or 72 percent) of these 67 cases.

The Supreme Court decided 10 cases from the Second Circuit last term (up from just two during the 2011 term). The court affirmed the Second Circuit in four cases, and reversed or vacated it in six cases. We discuss in this article[1] five of the 10 Second Circuit decisions reviewed by the Supreme Court.[2] We also briefly describe the cases that have been granted certiorari for the 2013 term.

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* SHANE AVIDAN, *an associate at the firm, assisted in the preparation of this column.*

By **Martin Flumenbaum**

And **Brad S. Karp**

Fourth Amendment

In *Bailey v. United States*, the court considered whether the authority to detain individuals pursuant to the execution of a search warrant—recognized in *Michigan v. Summers*—permits the detention of individuals away from the premises searched.[3] The Second Circuit's decision extended *Summers* to approve detention outside the location covered by the warrant, so long as the individual detained was observed leaving the premises and detained "as soon as reasonably practicable."[4] In a 6-3 decision, the Supreme Court reversed, holding that the Fourth Amendment permits such detentions only within the "immediate vicinity" of the premises searched.

The police obtained a warrant to search Chunon Bailey's residence for a handgun. Prior to the search, officers in an unmarked car conducting surveillance outside the residence noticed two men entering a car parked in the driveway and driving away. The officers followed the car, pulled the car over about a mile away, and detained and searched Bailey and his passenger. The officers found a ring of keys and elicited statements that tied Bailey to the residence, which contained drugs and guns.

The district court denied Bailey's motion to suppress, finding the search and seizure lawful both under *Summers* and also as an investigatory detention supported by reasonable suspicion under *Terry v. Ohio*.[5] The jury convicted Bailey of drug and weapons offenses. The Second Circuit affirmed the convictions, holding that the police conduct was lawful under *Summers*. The Second Circuit did not reach the district court's alternate holding.

Summers is an exception to the ordinary rule that the Fourth Amendment prohibits detention in the absence of probable cause to arrest an individual for a crime. Under *Summers*, when the police execute a search warrant, they are permitted "to detain the occupants of the premises while a proper search is conducted." *Summers* does not require an individualized determination of probable cause or reasonable suspicion; rather, the authority is "categorical."[6] The rationale of *Summers* is that such detentions are justified by three law enforcement interests: officer safety, facilitating the completion of the search, and preventing flight.

The majority opinion, authored by Justice Anthony Kennedy, concluded that these three law enforcement interests did not justify the Second Circuit's extension of the *Summers* doctrine to individuals away from the premises. Officer safety could be adequately protected by detaining such an individual when

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Supreme Court October 2012 Term
Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	Affirmed/ Reversed in Part	% Reversed or Vacated
First	1	0	1	0	100
Second	10	4	6	0	60
Third	7	1	6	0	83.3
Fourth	5	2	3	0	60
Fifth	7	1	6	0	85.7
Sixth	3	0	3	0	100
Seventh	4	2	2	0	50
Eighth	2	1	1	0	50
Ninth	13	2	11	0	84.6
Tenth	2	2	0	0	0
Eleventh	6	1	5	0	83.3
D.C.	3	1	2	0	66.7
Federal	4	2	1	1	25

and if he returns to the premises. Nor do far away individuals pose a significant threat to the orderly completion of a search.

As for the interest in preventing "flight," the court concluded that *Summers'* concern was not with "flight itself," but only with the "damage that potential flight can cause to the integrity of the search."[7] In short, the court reasoned that none of the three justifications identified in *Summers* applied with the "same or similar force" in the case of persons away from the scene, particularly in light of the "additional level of intrusiveness" involved.[8] The Supreme Court reversed and remanded to the Second Circuit to consider whether the detention was lawful under *Terry*.

Justice Stephen Breyer, joined by Justices Clarence Thomas and Samuel Alito, dissented. The dissent argued that all three law enforcement interests identified in *Summers* were "as likely or more likely to support detention" of an individual observed leaving the premises and detained as soon as reasonably practicable. While agreeing with the majority that a bright line rule was necessary, the dissent criticized the majority for relying on "indeterminate geography" rather than "realistic considerations."[9]

Article III Standing

In *Clapper v. Amnesty International USA*, the court held that various plaintiffs lacked Article III standing to seek declaratory and injunctive relief against future surveillance authorized by Section 702 of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §1881a, which allows the targeting of communications by non-U.S. persons outside the country to gather foreign intelligence information.[10] In a 5-4 decision by Alito, the court held that plaintiffs' theory of future injury was too speculative to satisfy Article III's requirements that such injury be "certainly impending" and "fairly traceable." The court also rejected plaintiffs' alternative theory of present injury based upon the burdensome precautions the plaintiffs took to avoid surveillance.

Under traditional FISA, the Foreign Intelligence Surveillance Court (FISC) is authorized to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that the target is a foreign power or an agent of a foreign power and that the target uses or is about to use the facilities or places at which the surveillance is directed.[11] Section 1881a, enacted as part of the FISA Amendments Act of 2008, granted the executive a new and independent source of intelligence collection authority. Unlike traditional FISA surveillance, §1881a: (i) does not require that the target be a foreign power or an agent of a foreign power, (ii) does not require the government to specify the target or the places at which the electronic surveillance will occur to the FISC, and (iii) limits the FISC's authority to insist upon minimization procedures.[12]

The plaintiffs—individual attorneys and certain organizations—alleged that the FISA Amendments Act violated the Fourth Amendment, First Amendment, Article III, and separation-of-powers principles. The district court granted summary judgment to the government, holding that the plaintiffs lacked standing.[13] A panel of the Second Circuit reversed, holding that plaintiffs had standing both because there was an "objectively reasonable likelihood" that their future communications would be intercepted and because they were suffering present injuries due to their precautions to avoid surveillance.[14] An equally divided Second Circuit denied rehearing en banc.[15]

The Supreme Court reversed, holding that the plaintiffs lacked standing. The court held that the Second Circuit erred by applying a standard of an "objectively reasonable likelihood" of injury rather than "certainly impending" injury.[16] In a footnote, the court acknowledged that it has sometimes stated the standard as a "substantial risk" of future injury, but held that plaintiffs would not satisfy even that lower standard.[17]

The court held that plaintiffs' fears of future injury did not satisfy either standard because they relied on a "highly attenuated chain of possibilities," to wit that: (1) the government will target the non-U.S. persons with whom plaintiffs communicate; (2) the government will invoke §1881a for such surveillance, as opposed to some other authority; (3) the FISC will approve the surveillance; (4) the government will successfully intercept the communications; (5)

the plaintiffs will be parties to the communications intercepted. In addition, the court held that plaintiffs' future injuries were not "fairly traceable" to §1881a based on the second link in the chain alone.

Breyer dissented, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. The dissenting justices argued that the future harm alleged by the plaintiffs was based on "commonsense inferences" and of a "very high likelihood" given the nature of the plaintiffs' communications and the government's past behavior, motive, and capacity to conduct surveillance. The dissent also disagreed with the standard adopted by the majority, arguing that "certainty is not, and has never been, the touchstone of standing."[18]

First Sale Doctrine

In *Kirtsaeng v. John Wiley & Sons,* the court held that copyright law's "first sale" doctrine, codified at 17 U.S.C. §109, applies to copies lawfully made outside of the United States.[19] In statutory terms, *Kirtsaeng* held that §109's reference to a copy "lawfully made under this title" referred simply to a copy made "in accordance with" or "in compliance with" the Copyright Act, rather than a copy also made "where the Copyright Act is applicable."[20]

Kirtsaeng answered a question left open by the Supreme Court more than a decade earlier in *Quality King Distributors v. L'anza Research International*, which held that the first sale doctrine is a defense to unauthorized importation under 17 U.S.C. §602.[21] Just three terms ago, in *Omega S.A. v. Costco Wholesale*, the court was unable to resolve this question due to Kagan's recusal. In that case, an equally divided court affirmed the U.S. Court of Appeals for the Ninth Circuit's holding that the first sale doctrine applies to foreign-made copies only if the first sale occurs in the United States.[22]

In *Kirtsaeng*, Supap Kirtsaeng asked his family and friends to purchase English language textbooks in Thailand and mail them to him in the United States, where the books sold at much higher prices than in Thailand. John Wiley & Co., a publisher of academic textbooks, sued Kirtsaeng for infringement.[23] The district court ruled that the first sale doctrine did not apply to copies manufactured abroad, and a jury found Kirtsaeng liable for $600,000 in statutory damages. The Second Circuit affirmed, agreeing that no first sale defense is available for foreign-made copies.

The majority opinion, by Breyer, found that the text of the Copyright Act favored Kirtsaeng's interpretation, while Wiley's interpretation "bristles with linguistic difficulties." For example, the court found that Wiley's interpretation "gives the word 'lawfully' little, if any, linguistic work to do" and raises the question of how a copy could "be unlawfully 'made under this title.'"[24] The court also found that Kirtsaeng's interpretation was supported by the statutory history, reasoning that the predecessor statute—which read "possession of which has been lawfully obtained"—had been amended to prevent unauthorized transfers of films leased to theatres.

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Ginsburg dissented, joined by Kennedy and (except for the portions citing legislative history) Justice Antonin Scalia. The dissent complained that the majority's interpretation "shrinks to insignificance" §602, while placing the United States "at the vanguard of the movement for 'international exhaustion.'" The dissent also downplayed the majority's "parade of horribles," arguing that they could be addressed by other exceptions in the Copyright Act, such as fair use.[25]

Extraterritoriality

In *Kiobel v. Royal Dutch Petroleum*, after reargument, the court applied the presumption against extraterritoriality to hold that the Alien Tort Statute (ATS), 28 U.S.C. §1350, does not confer jurisdiction on federal courts to hear claims arising from conduct occurring within the territory of another sovereign.[26]

The ATS was enacted as part of the Judiciary Act of 1789, but invoked only twice during that era.[27] In *Sosa v. Alvarez-Machain*, the court held that the ATS vested federal courts with jurisdiction to hear federal common law claims based on international law norms with "definite content and acceptance among civilized nations."[28]

A group of Nigerian nationals granted asylum in the United States filed a putative class action alleging that Dutch and British oil companies, and their joint Nigerian subsidiary, aided and abetted various conduct by the Nigerian military and police in Nigeria in the early 1990s. Applying *Sosa*, the district court denied defendants' motion to dismiss with respect to crimes against humanity, torture, and arbitrary arrest and detention.[29] In a certified interlocutory appeal, the Second Circuit dismissed the entire complaint, holding that the law of nations does not provide for corporate liability.[30]

The Supreme Court granted certiorari on that question, but after oral argument ordered the parties to brief the extraterritorially issue. After renewed oral argument, the court affirmed the dismissal on this alternate ground.

Chief Justice John Roberts, for the court, held that the presumption against extraterritoriality applies to jurisdictional statutes as well as statutes that regulate primary conduct and nothing in the ATS rebutted the presumption against extraterritoriality. The court held that the statute's references to aliens and the law of nations did not rebut the presumption because violations against aliens could occur within the United States.

Of the three violations of the law of nations identified by English commentator William Blackstone at the time of the ATS's passage—violation of safe conducts, infringement of the rights of ambassadors, and piracy—only piracy had extraterritorial implication.[31] Assuming the ATS applied extraterritorially to pirates, the court held that they were a "category unto themselves." Having determined that the ATS did not generally apply to foreign conduct, the court concluded that, even claims that "touch and concern the territory of the United States" must "do so with sufficient force to displace the presumption against extraterritorial application," and that "mere corporate presence" did not suffice.[32]

Writing separately, Breyer, joined by Ginsburg, Sotomayor and Kagan, would not have

invoked the presumption against extraterritoriality. The concurring justices would have limited the ATS to situations "where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[33]

Arbitration

In *American Express v. Italian Colors Restaurant*, the court held that a contractual waiver of class arbitration was enforceable under the Federal Arbitration Act (FAA) despite the fact the cost of individual arbitration would exceed a plaintiff's potential recovery for its federal antitrust claim.[34]

Several New York and California merchants filed class actions alleging that the Honor All Cards (HAC) provision in American Express' form merchant agreement violated the antitrust laws. The merchants alleged that HAC clause allowed American Express to charge supra-competitive merchant discount fees. After the actions were consolidated, the district court granted American Express' motion to compel arbitration and dismissed all claims against American Express.[35]

In a series of panel opinions, the Second Circuit thrice reversed the district court, invalidating the arbitration agreement and permitting an antitrust class action to proceed in federal court. The first panel opinion was vacated by the Supreme Court in light of its subsequent decision in *Stolt–Nielsen S.A. v. AnimalFeeds International*, which held that a party could not be compelled to submit to class arbitration absent an agreement to do so. The second panel opinion was reconsidered sua sponte in light of *AT&T Mobility v. Concepcion*, which held that the FAA preempted a California law barring the enforcement of class action waivers. After the Second Circuit again adhered to its prior dispositions, five circuit judges dissented from the denial of rehearing en banc.[36]

In a 5-3 decision authored by Scalia, the court held that neither the antitrust laws nor Federal Rule of Civil Procedure 23 authorized a federal court to invalidate a class waiver in an arbitration agreement. The court held that the "effective vindication" doctrine[37] was not implicated by an arbitration provision that merely raised the expense of proving a federal statutory violation, as opposed to eliminating the right to pursue that remedy. According to the court, individual suits "did not suddenly become 'ineffective vindication'" upon the adoption of Rule 23. To consider the plaintiff's expected costs in arbitration before enforcing an arbitration clause would erect a "preliminary litigating hurdle" that would destroy the benefits of arbitration.

Kagan, joined by Ginsburg and Breyer, dissented. The dissent would have held that the totality of restrictions in the arbitration agreement—the class action waiver, the bar on joinder, consolidation, and cost-shifting, and the confidentiality provision (complicating a common expert report)—impermissibly impeded the "effective vindication" of the plaintiffs' federal antitrust claims.[38]

October 2013 Cases

While Second Circuit cases likely will be added during the upcoming months, the Supreme Court currently is slated to review at least three Second Circuit decisions during its 2013 term. First, in *Heimeshoff v. Hartford Life & Accident Insurance*, the court will consider when the statute of limitations accrues for judicial review of an ERISA disability adverse benefit determination.[39]

Second, in *Town of Greece v. Galloway*, the court will decide whether the Town of Greece violates the Establishment Clause by opening its monthly board meetings with prayer.[40]

Third, in *Lozano v. Alvarez*, the court will decide whether a district court considering a petition under the Hague Convention for the return of an abducted child may equitably toll the running of the one-year filing period when the abducting parent has concealed the whereabouts of the child from the left-behind parent.[41]

1. We do not address four decisions in which all or most justices joined the majority. In *Already v. Nike*, the court held unanimously that Nike's unilateral and irrevocable covenant not to enforce its footwear trademark against Already's existing products and any future "colorable imitations" of Already's existing products mooted Already's counterclaim to have Nike's trademark declared invalid. 133 S. Ct. 721 (Jan. 9, 2013). In *Gabelli v. SEC*, the court unanimously held that a discovery rule did not apply to 28 U.S.C. §2462's five-year statute of limitations applicable to civil proceedings for the enforcement of a fine, penalty, or forfeiture. 133 S. Ct. 1216 (Feb. 27, 2013). In *Agency for International Development v. Alliance for Open Society International*, the court held, 6-2 (with Kagan recused), that a federal statute that prohibited the receipt of HIV/AIDs funding by an organization without an explicit policy of opposing prostitution violates the First Amendment. 133 S. Ct. 2321 (June 20, 2013). Finally, in *Sekhar v. United States*, the court unanimously held that defendant's threat to expose an extramarital affair of the general counsel of the New York State Comptroller unless the general counsel recommended that the comptroller approve an investment by the New York State Common Retirement Fund in defendant's company did constitute "obtaining of property" under the Hobbs Act. 133 S. Ct. 2720 (June 26, 2013).

2. We also do not discuss *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013), in which the authors' firm represented plaintiff Edith Windsor. In a 5-4 decision authored by Kennedy, the court held that §3 of the Defense of Marriage Act was unconstitutional. That decision has already received substantial attention and analysis.

3. *Bailey*, 133 S. Ct. 1031 (Feb. 19, 2013); *Summers*, 452 U.S. 692 (1981).

4. 652 F.3d 197, 208 (2d Cir. 2011).

5. 468 F.Supp.2d 373, 378-85 (E.D.N.Y. 2006); Terry, 392 U.S. 1 (1968).

6. See *Muehler v. Mena*, 544 U.S. 93, 98 (2005).

7. 133 S. Ct. at 1041.

8. Id.

9. Id. at 1046, 1049 (Breyer, J., dissenting).

10. 133 S. Ct. 1138 (Feb. 26, 2013).

11. See 50 U.S.C. §1805.

12. See 50 U.S.C. §1881a(d)(1), (e), (g), (i)(3)(A).

13. 646 F.Supp.2d 633 (S.D.N.Y. 2009).

14. 638 F.3d 118 (2d Cir. 2011).

15. 667 F.3d 163 (2d Cir. 2011).

16. 133 S. Ct. at 1147.

17. Id. at 1150 n.5 (quoting *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754–55 (2010)).

18. Id. at 1160 (Breyer, J., dissenting).

19. 133 S. Ct. 1351 (March 19, 2013).

20. Id. at 1358.

21. 523 U.S. 135 (1998); see id. at 154 (Ginsburg, J., concurring) ("[W]e do not today resolve cases in which the allegedly infringing imports were manufactured abroad").

22. 541 F.3d 982 (9th Cir. 2008), aff'd, 131 S. Ct. 565 (2010).

23. Under 17 U.S.C. §602, the unauthorized importation of a copyrighted work acquired outside the United States "is an infringement…under [17 U.S.C. §] 106, actionable under [17 U.S.C. §] 501."

24. 133 S. Ct. at 1358, 1359.

25. Id. at 1373 (Ginsburg, J., dissenting).

26. 133 S. Ct. 1659 (April 17, 2013).

27. Act of Sept. 24, 1789, §9, 1 Stat. 73, 77. See *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

28. 542 U.S. 692, 732 (2004).

29. 456 F.Supp.2d 457, 464-67 (S.D.N.Y. 2006).

30. 621 F.3d 111 (2d Cir. 2010), panel reh'g denied, 642 F.3d 268 (2d Cir. 2011), reh'g en banc denied, 642 F.3d 379 (2d Cir. 2011).

31. 133 S. Ct. at 1666 (citing 4 W. Blackstone, Commentaries on the Laws of England 68 (1769)).

32. Id. at 1669.

33. Id. at 1671 (Breyer, J., concurring).

34. 133 S. Ct. 2304 (June 20, 2013). Sotomayor recused, having participated in the first Second Circuit panel decision prior to her elevation to the Supreme Court.

35. *In re Am. Express Merchants Litig.*, No. 03 CV 9592(GBD), 2006 WL 662341 (S.D.N.Y. March 16, 2006).

36. 554 F.3d 300 (2d Cir. 2009), vacated in light of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*, 599 U.S. 662 (2010), 130 S. Ct. 2401 (2010), on remand, 634 F.3d 187 (2d Cir. 2011), reconsidered in light of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), 667 F.3d 204 (2d Cir. 2012), reh'g en banc denied, 681 F.3d 139 (2d Cir. 2012).

37. See *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 637, 614 n.19 (1985) ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy").

38. 133 S. Ct. at 2313, 2316, 2318 (Kagan, J., dissenting).

39. 133 S. Ct. 1802 (April 15, 2013).

40. 133 S. Ct. 2388 (May 20, 2013).

41. 133 S. Ct. 2851 (June 24, 2013).

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