Colorado Municipal League
October 6, 2017
Legal Update from Around the Country

Charles W. Thompson, Jr.
Executive Director and General Counsel
International Municipal Lawyers Association, Inc.

Today's discussion

- Supreme Court Practice
- Federal Agency Actions to be aware of
  - IRS – Independent Contractor or Employee
  - SEC – Disclosure – Qualified Immunity
- Last Term – Murr v. Wisconsin
- Coming Term –
  - Gill v. Whitford
  - D.C. v. Wesby
  - Hays, KS v. Vogt
- And much more

- Trending issues
  - Malicious Prosecution
  - Qualified Immunity
  - Establishment Clause
- First Amendment – Free Speech
- Municipal Autonomy – Preemption
- Follow up to David Broadwell – Caesar's Municipal Code

Importance of Associations

- Networking
- Shared experience
- CML a great resource
- IMLA a supplemental resource
  - State Chair Chris Daly
  - Legal assistant workgroup

- Court agrees to hear a little less than 1% of the cases brought to it.
- Roughly 80% of the cases seeking review are *in forma pauperis* cases.
- In 1982 the court heard 184 arguments.
- For the past several years, the court has been accepting about 75 cases a year for argument on the merits.
- The Court generally reverses between 70 % to 80% of the cases it reviews. Last year 79%.
- Tenth Circuit in OT16 – reversed 100%.

Handling cases at the SCT

- Petitions for cert-
  - Need to ID a reason for the court to take the case
    - Primarily a split among circuits or states
    - An interpretation of an important federal law
    - Get amicus support
  - Consider carefully whether to file a response

Handling Cases at the SCT

- A word on the response –
  - Look at a couple that were really bad
    - *Plumhoff v. Rickard*
    - *Manuel v. City of Joliet*
  - Look at one that was well done
    - *Hillman v. Chicago*
  - What made them differ
    - Timely – no extensions
    - Rule 10 – reasons why cert shouldn't be granted
      - Correct decision below not a good reason
      - No real split in circuits
      - Issue not ripe

Handling Cases at the Court

- Need 4 Justices to agree to grant cert
  - Ideological bases for decision-making
  - The big picture
  - Example: *Whitley v. Hanna*
    - Do officers violate a person's constitutional rights when they allow the person to be victimized in an effort to secure evidence to prosecute a defendant?

Handling Cases at the Court

- The Amicus Brief
  - Can add facts not found in the record
  - Can suggest a different question presented (petition stage) and reword the question
  - Cannot be authored by a party or financed by a party
  - Helpful to a Petitioner to highlight significant and varied interests in court granting cert.
  - Helpful by expanding on arguments made by a party.
  - Must be a member for IMLA to file an amicus.
- Supreme Court Counsel

Future Supreme Court Nominations

- If President Trump gets a **second (third** or **fourth)** nominee the Court could really change
- Average retirement age for Supreme Court Justices is 79
- Oldest Justices are liberals and Justice Kennedy
  - Justice Ginsburg (83)
  - Justice Breyer (78)
  - Justice Kennedy (80)

IRS

- Independent contractor vs. employee
  - Under Obama Administration this issue was significant
  - Affected city attorneys and cities
    - Retainer Agreement needs to make clear not employment
    - Watch out for benefits
  - IMLA model agreements
    - No guarantees

SEC enforcement initiatives

- Focus on Municipal Markets
- Tower Amendment
  - prohibits the Commission and the MSRB from requiring municipal securities issuers to submit information to them prior to the sale of securities.
  - prohibits the MSRB from requiring any municipal issuer to furnish it, or any purchasers or prospective purchasers, with any information either before or after the sale of securities.
  - Instead, the Commission indirectly regulates municipal securities offerings through its Rule 15c2-12, which requires underwriters of municipal securities offerings to obtain issuers' disclosures for the securities they intend to sell and provide them to purchasers.

SEC enforcement actions

- Trying to find a problem for a solution
  - In the period from 1970 through the end of 2015, out of the thousands of muni bonds issued across the country, there were just 99 defaults. That translates into an annual default rate of 0.09% for all-rated municipal bonds throughout the 46-year period.5 In fact, investment grade "Aaa" and "Aa" rated munis experienced zero defaults.
- Underfunded pension plans likely to cause the most serious problem going forward.
- Disclosure and Continuing Disclosure

SEC Enforcement Action

- Miami
  - SEC found Miami and its Budget Officer violated continuing disclosure
    - Moved money from Capital Budget to Operating Budget to balance budget during Recession
    - Did not disclose full nature of action
    - Miami and Budget Officer – complied completely with GAAP
    - No Qualified Immunity
- Ramapo, NY
  - Town supervisor and attorney convicted of securities fraud
- Beaumont, CA
  - City Manager settled and agreed to pay fine $37,500.

SEC Enforcement Actions

- Consult Bond Counsel
- Understand Disclosure requirements
- No Nuremburg Defense
- No "relied on professionals" Defense
- Doty Book available through IMLA

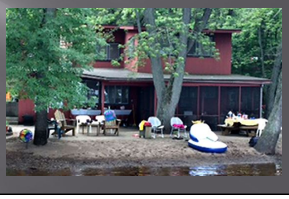
- Last Term - Murr

Murr v. Wisconsin

- The question presented is whether, in a regulatory taking case, the "parcel as a whole" concept as described in Penn Central Transportation Company v. City of New York, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.

- William and Margaret Murr bought a 1¼-acre riverfront lot in 1960 and built a three-bedroom cabin. Three years later they purchased an adjacent 1¼-acre lot with 100 feet of frontage for investment purposes. About 30 years later, the couple gifted the properties to their children. In 2004, the family contacted the county about selling the vacant lot to help finance remodeling of the cabin, which had deteriorated, in part by being flooded five times.

- County ordinances call for properties to have at least an acre of buildable area, but the vacant lot and cabin lot together had only an acre because of slope, wetlands and other deductions.



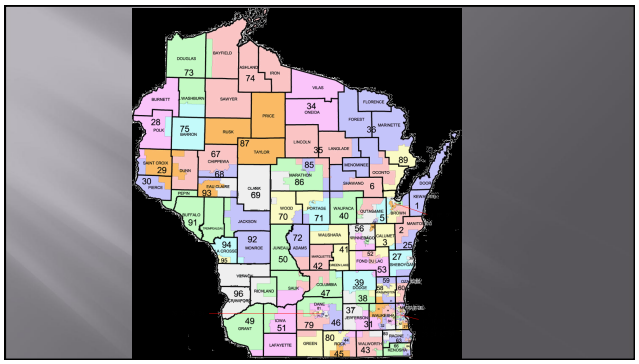
- No Taking: The Court of Appeals of Wisconsin was correct to analyze the lot owners' property as a single unit in assessing the effect of the challenged governmental action.
- 5-3 – Opinion by Kennedy. Dissent Roberts, Alito and Thomas

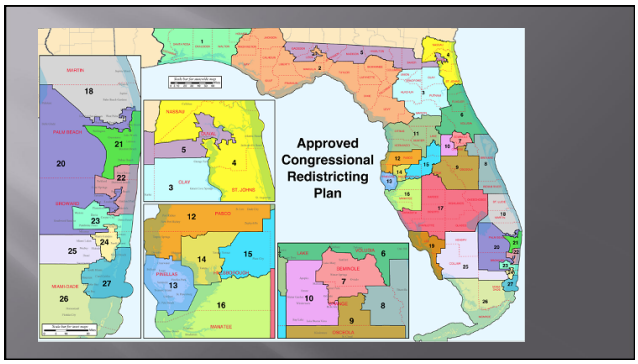
- "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"
  - (1) the treatment of the land under state and local law;
  - (2) the physical characteristics of the land; and
  - (3) the prospective value of the regulated land.
- Roberts: But giving the state the power to define allows it to undermine the question of what's been taken – stick with traditional boundary lines.

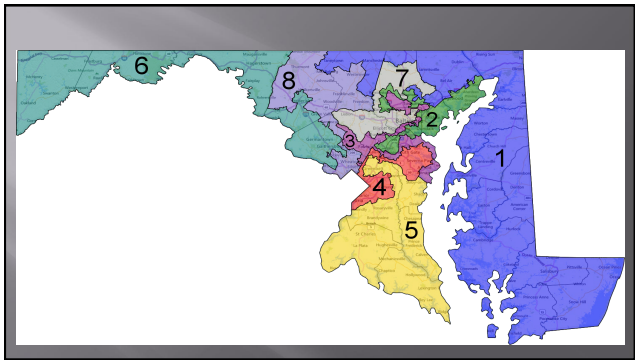
This Term – Coming Attractions

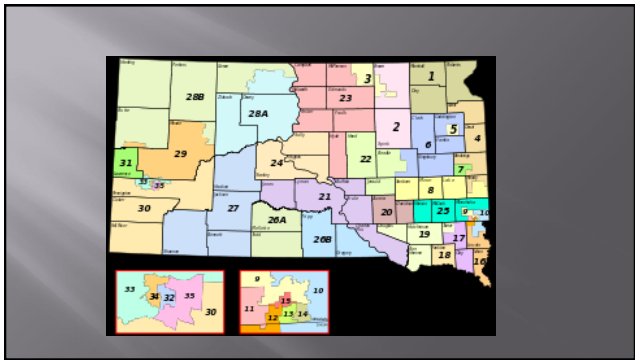
Gill v. Whitford,

- Issue(s): Partisan Gerrymandering
- Are issues of political gerrymandering justiciable?
  - *Vieth v. Jubelirer* 541 U.S. 267 (2004)
    - No: Scalia, Rehnquist, **THOMAS**, O'Connor
    - Should be: **KENNEDY**
    - Yes: Stevens, **BREYER, GINSBURG**, Souter
    - To Be Decided: Alito, Roberts, Sotomayor, Kagan, Gorsuch









DC v. Wesby

- Issue(s): (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and (2) whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.

Hays, Kansas v. Vogt

- Issue(s): Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial.

Malicious Prosecution

- Section 1983 Claims for Malicious Prosecution
  - Generally involve fabricated probable cause
  - Generally survive Motions for Summary Judgment
  - No qualified immunity for lying

Manuel v City of Joliet

- An example of how not to file a response
  - Asked for extensions of time
  - Did not address issues of circuit splits
  - Tried to argue why lower court was correct

Manuel v. City of Joliet

- The question presented is whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.
- Circuit split on whether a Malicious prosecution claim lies as a Fourth Amendment cause of action for an illegal seizure or for a due process violation. If the latter, state process forestalls a federal claim; if the former a federal cause of action may lie.

- The decision:
  - Continuing detention not supported by probable cause violates the 4th Amendment.
    - Reason why ICE 48 hour notice requirement flawed.
  - Not going to decide the question presented as to whether a malicious prosecution claim can be made or if the claim is timely.
  - Accordingly, we hold today that Manuel may challenge his pretrial detention on the ground that it violated the Fourth Amendment (while we leave all other issues, including one about that claim's timeliness, to the court below).

- " Because the Seventh Circuit wrongly held that Manuel lacked any Fourth Amendment claim once legal process began, the court never addressed the elements of, or rules applicable to, such a claim. And in particular, the court never confronted the accrual issue that the parties contest here.[10]"

- [10] The dissent would have us address these questions anyway, on the ground that "the conflict on the malicious prosecution question was the centerpiece of Manuel's argument in favor of certiorari." Post, at 2. But the decision below did not implicate a "conflict on the malicious prosecution question"—because the Seventh Circuit, in holding that detainees like Manuel could not bring a Fourth Amendment claim at all, never considered whether (and, if so, how) that claim should resemble the malicious prosecution tort. Nor did Manuel's petition for certiorari suggest otherwise.

Alito's dissent

- For all these reasons, malicious prosecution is a strikingly inapt "tort analog[y]," Wilson, 471 U. S., at 277, for Fourth Amendment violations. So the answer to the question presented in Manuel's certiorari petition is that the Fourth Amendment does not give rise to a malicious prosecution claim, and this means that Manuel's suit is untimely. I would affirm the Seventh Circuit on that basis.

Malicious Prosecution 6th Cir. -Mills v. Barnard, decided August 28, 2017.

- Child gives varying stories about an evening spent with a next door neighbor and the use of drugs and sex.
- He's arrested based on her story and indicted.
- Subsequent DNA analysis for trial confirms his involvement and concludes no other males involved. He's convicted. After 11 years in jail, further DNA analysis shows that other males were involved and does not confirm his DNA.
- 6th Circuit says that despite the independent action of the Grand Jury to indict before the incorrect DNA report, that the prosecution should have been wary of a child's story as a basis for probable cause.

Malicious Prosecution 6th Circuit

- An exception to the rule that independent probable cause vitiates a malicious prosecution claim.
- Where probable cause can be demonstrated to be based on intentional, knowing, or reckless falsehood.
- There was a dissent. We may see more of this at the petition stage.
- Ninth Circuit calls these types of case "judicial deception."

Qualified Immunity

- Qualified Immunity is designed to shield government officials from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known".
- Requires a "particularized" application of law as a more generalized application would destroy its value.

Hunter v. Cole

- IMLA filed an amicus supporting the police.
- Per Curiam GVR
- Lower court had denied immunity affirmed by 5th Circuit.
- The facts----
- The Amicus Brief ---
- April 24 – denial of cert in *Salazar-Limon v. City of Houston*
  - Sotomayor and the police.

White v Pauly

- Per curiam GVR
- Road rage
- Police respond to 911 call interview two women who complain about another driver who had already left.
- Police trace license tag to home not far away.
- Police go to interview driver.

- Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers.
- As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Anderson v. Creighton, 483 U. S. 635, 640 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."

- Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here.

Los Angeles County v. Mendez

- Everyone agrees police officers used reasonable force when they shot Angel Mendez
- As officers entered, unannounced, the shack where Mendez was staying they saw a silhouette of Mendez pointing what looked like a rifle at them
- The Ninth Circuit awarded him and his wife damages because the officers didn't have a warrant to search the shack thereby "provoking" Mendez
- Mendez kept a BB gun in his bed to shot rats when they entered the shack. Mendez claimed that when the officers entered the shack he was in the process of moving the BB gun so he could sit up in bed

Los Angeles County v. Mendez

- "Provocation" rule: "[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force"
- In *Graham v. Connor* (1989) the Supreme Court articulated a non-exhaustive list of factors to consider in determining reasonableness in an excessive force claim
- Los Angeles County argues the provocation rule conflicts with *Graham* by subjecting a police officer to liability for a use of force that was reasonable *at the moment it occurred*

Los Angeles County v. Mendez

- Facts are sympathetic to both sides
- Only the 9th Circuit has adopted the provocation rule
- Police officers make mistakes all the time that could mean invoking the provocation rule
- Arguably the same sequences of events would have happened if police officers had a warrant

Los Angeles County v. Mendez

- When sympathy clashes with jurisprudence –
  - Justice Sotomayor: The question is when does the police officer pay the victim who is suffering for that loss if the victim had nothing to do with causing the loss?
- Unanimous Court reverses.
  - Provocation rule clashes with the Court's jurisprudence and cannot be supported under a proximate causation theory.
    - A different 4th Amendment violation doesn't transform reasonable force into unreasonable force.
  - The proper analysis for excessive force claims is set out in *Graham* and "[i]f there is no excessive force claim under *Graham*, there is no excessive force claim at all."

Scott v. Albuquerque

- SRO – arrests 13 year old student with disabilities
  - For skipping class
  - NM statute prohibits disrupting school willfully
- No PC because no willfulness
- QI because no case holding the child's acts weren't a violation at time of arrest
- Handcuffs hurt – need significant injury
- Emotional distress – no violation a this time
- ADA – arrest for manifestation of disability not an arrest for disability

Woodward v. Tucson (9th Circuit)

- Provocation Rule no longer applies.
- A 'guest' of a tenant who has been evicted and knows she's been evicted has no more rights than the tenant.
- No privacy interest as a squatter.
- Officers shooting deceased who came at them aggressively brandishing a hockey stick and growling, not a violation of any clearly established right.

Hall v DC (DC Circuit August 11)

- Woman books restaurant for birthday, gives them credit card and license when she enters.
- Woman enjoys birthday party at restaurant.
- Thinks check is too high – thought she'd get two free bottles of liquor but was charged for all three.
- Leaves her purse and some friends haggling over bill to meet other friends across the street.
- Restaurant calls police, describes her and says she's bolted on bill.

Hall v. DC

- Police respond and find her in bathroom of place across the street.
- Handcuff her and put her in patrol car. (She's none too happy about the handcuffs and how tight they are.)
- About 45 minutes in – she asks an office why she's being held and he tells her she ran out on the bill.
- She explains about the credit card, he brings her the bill, she signs it and is let go.
- Circuit Court finds no immunity – officers should have investigated before seizing her.

A Tenth Circuit Disaster

- "Law-abiding tea drinkers and gardeners beware:"
- "The defendants in this case caused an unjustified governmental intrusion into the Hartes' home based on nothing more than junk science, an incompetent investigation, and a publicity stunt."
- April 20-
- Sheriff's Dept. begins working on a press conference to celebrate success of April 20 operation in mid-March – no probable cause yet.

- Harte's both former CIA with top security clearance
- Mrs. Harte an attorney, her brother former JAG and also an attorney
- No criminal record, two kids
- No probable cause except surveillance of a garden store 7 months before
  - Where Mr. Harte went to buy tomato plants
- And leaves in the trash (turns out they were tea leaves)

- SWAT style raid on Harte's home
  - No plan to deal with children
  - Intrusive search once it was obvious they weren't growing marijuana
- Sheriff tries to cancel press conference but couldn't
- Goes ahead using previously photo'd marijuana as if raids had been successful

8th Circuit Dean v. Gage County

Dean vs. Gage County


Omaha World-Herald

Today's Mortgage Rates

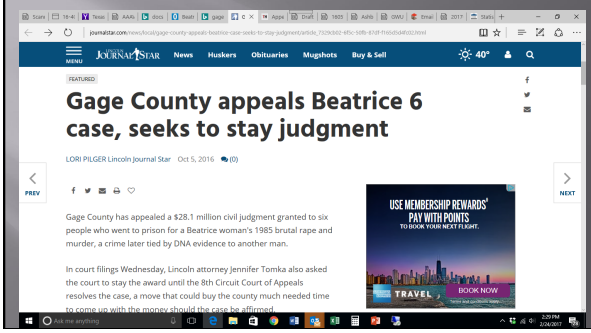
Beatrice Six win millions in civil rights claims, but 'no amount of money' will replace years lost, one family says


Omaha World-Herald

Gage County asks to delay $28 million Beatrice Six payment to stave off bankruptcy


Omaha World-Herald

Judge rejects Gage County's request to delay $28 million payment to Beatrice Six

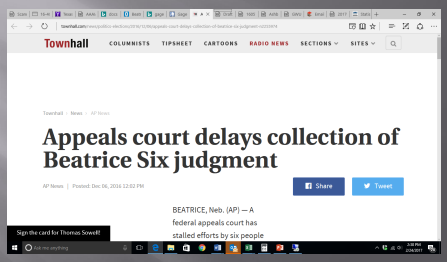

Journal Star

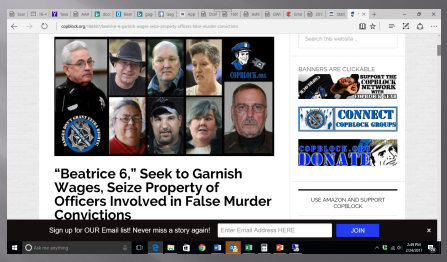
Gage County appeals Beatrice 6 case, seeks to stay judgment

LORI PILGER Lincoln Journal Star Oct 5, 2016

Gage County has appealed a $28.1 million civil judgment granted to six people who went to prison for a Beatrice woman's 1985 brutal rape and murder, a crime later tied by DNA evidence to another man.

In court filings Wednesday, Lincoln attorney Jennifer Tomka also asked the court to stay the award until the 8th Circuit Court of Appeals resolves the case, a move that could buy the county much needed time





Gage County

- Population 22,300

- The Facts –
- Intermediate appeal - Sheriff is policy maker for county, not state.
- Trial – County found liable, but not sheriff
- Issue on appeal - Can a government be found liable when the policy maker through which the government is liable has been found not to have violated the Plaintiffs' rights?
  - Also raising the issue again of whether the sheriff is a state or county policy maker.

Establishment Clause

- Legislative Prayer -
  - 4th Circuit Rowan County – Commissioners offer prayers themselves violates Establishment Clause
  - 6th Circuit Jackson County – Commissioners offer prayers themselves does not violate Establishment Clause - 4th Circuit wrong
- Religious Symbols
  - Pensacola Cross

Bloomfield NM petition pending

First Amendment

- Signs
- Panhandling

Josephine Havlak Photographer, Inc. v. Village of Twin Oaks

- Twin Oaks is a small community in Missouri outside of St. Louis
- Among its assets is a park with beautiful settings for photo shoots
- Due to level of interest by commercial photographers, city sought to limit the times when the park could be used by photographers and required registration, $100 fee and approval of use.
- Photographer sued asserting First Amendment violation.

Sharp v. Orange County (9th Circuit Sept 19)

- Deputy- "if you weren't being so argumentative, I'd probably just put you on the curb" (as opposed to handcuffed in the patrol car).
- Sufficient basis to overcome qualified immunity defense on retaliation for exercising First Amendment right.

Ela v. Destefano

- Driver's Privacy Protection Act – DPPA
- Destefano, an employee of Sheriff, accessed personal information of her husband's ex via law enforcement data base
- Destefano did not do anything with the information, so no actual damage
- Act provides for statutory damages of $2500
- Act provides for attorney's fees
- Are statutory damages per violation or total?
- She accessed database 101 times.

Ela v. Destefano

- Ela sought damages for each violation; i.e., 101 times $2500
- Court awarded damages of $2500 and limited attorney's fees to 10% of what was sought

IMLA Niagara Falls
October 14 to 18, 2017

IMLA's Annual Seminar and Section 1983 Defense Conference - April 20-April 23, 2018 Washington, DC