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Trump's Clash With Obama's Legacy Pits Feds Against Feds

By **Ed Beeson**

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Then-President Barack Obama and President Donald Trump shake hands following their meeting in the Oval Office on Nov. 10. (AP)

The new U.S. Supreme Court term kicks off Monday with something it hasn't seen in perhaps a quarter-century: lawyers from two federal agencies taking opposite sides in oral arguments.

The case is National Labor Relations Board v. Murphy Oil USA Inc., and it is one of three consolidated matters concerning the legality of class action waivers in employment agreements.

Supreme Flip-Flops

Bob Jones University v. United States, 1983.

Probably the most infamous flip-flop by the solicitor general's office came in this case over whether the South Carolina private university and another school could keep their tax-exempt status after having engaged in racially discriminatory admissions practices.

President Ronald Reagan's solicitor general at first said the institutions weren't eligible under the law for tax exemptions but then argued a few months later that the law required such schools be granted exemptions, according to a New York Times report from the period.

The about-face spurred a deputy solicitor general named Lawrence Wallace to announce in the footnotes of the government's brief that he disagreed with his office's position. And so did the Supreme Court, which held that the IRS could revoke the university's tax-exempt status because the government has an overwhelming interest in wiping out racial discrimination.

Dirks v. SEC, 1983.

In this landmark insider trading case, the solicitor general filed a brief for the U.S. Securities and Exchange Commission but used a footnote to tell the court it disagreed with the agency's views on the law.

The Supreme Court also disagreed with the SEC and handed down a watershed decision that put important limits on when passing along nonpublic information actually breaks the law.

Metro Broadcasting Inc. v. Federal Communications Commission, 1990.

Chief Justice John Roberts, an alumnus of the solicitor general's office, is certainly familiar with this case. In 1990, when he was filling in as the acting solicitor general, Roberts filed an amicus brief in support of Metro Broadcasting, which was fighting a policy that gave minorities preferential treatment when seeking radio or television broadcast licenses. In his brief, the future chief justice argued that the FCC's policy unconstitutionally discriminated on the basis of race.

But his views didn't prevail. The court voted, on a 5-4 basis, to uphold the FCC's programs.

In one corner will be the NLRB and its general counsel Richard Griffin Jr., an appointee of President Barack Obama. He will urge the court to find that workers' right to collective action under the National Labor Relations Act extends to joining or bringing class actions against employers.

And in the other corner will be the Office of the Solicitor General and its principal deputy Jeffrey Wall, an appointee of President Donald Trump. He will push the high court to rule that federal law is clear when it says that arbitration provisions must be enforced unless Congress has given a command otherwise.

While not unheard of, it's exceedingly rare to see federal lawyers clashing on a case before the Supreme Court. So rare, in fact, that one veteran justice recently made note of it in public remarks.

"We will have two arguments by government representatives on opposites of an issue," Justice Ruth Bader Ginsburg told Georgetown University law students on Sept. 20. "That will be a first for me in the nearly 25 years I've served on the court."

It might not be the last.

Litigation over other aspects of Obama administration policy continues to make its way through the lower courts and eventually could reach the justices, giving Trump's solicitor general other opportunities to square off with lawyers from another federal agency.

There are pending cases over the constitutionality of the Consumer Financial Protection Bureau's directorship, the use of subsidies to help people pay for coverage under the Affordable Care Act and the U.S. Department of Labor's fiduciary duty rule. Depending on a number of factors, including how appeals courts rule on them, they eventually could land before the Supreme Court, attorneys noted.

The vast majority of the solicitor general's positions on legal questions don't change from one administration to the next, though there are always exceptions for the politically sensitive, high-profile issues, former members of the office say. While such reversals are inevitable, some worry a shift in the middle of a case could hurt the standing of the federal government's chief advocate before the Supreme Court, as the justices typically show they value consistency over political expediency.

"In the NLRB case, what it runs the risk of doing is making it seem like a partisan, polarized issue," said Ian Samuel, a former assistant solicitor general and Jones Day attorney who is now a lecturer at Harvard Law School. "When you've got a clear switch in position from one administration to the other, any kind of institutional credibility that the SG's office is going to draw on kind of goes away."

"It deprives them of a special status of gravitas," he said.

Reversal of Order

The split in the government's position in the NLRB case occurred over the summer when Wall, then the acting solicitor general, surprised the legal community with an amicus brief in support of employers that want to require workers to resolve employment disputes through individual arbitration.

The reversal was especially striking, lawyers said, because the solicitor general's office, just months earlier and under a different regime, petitioned the high court to hear the case.

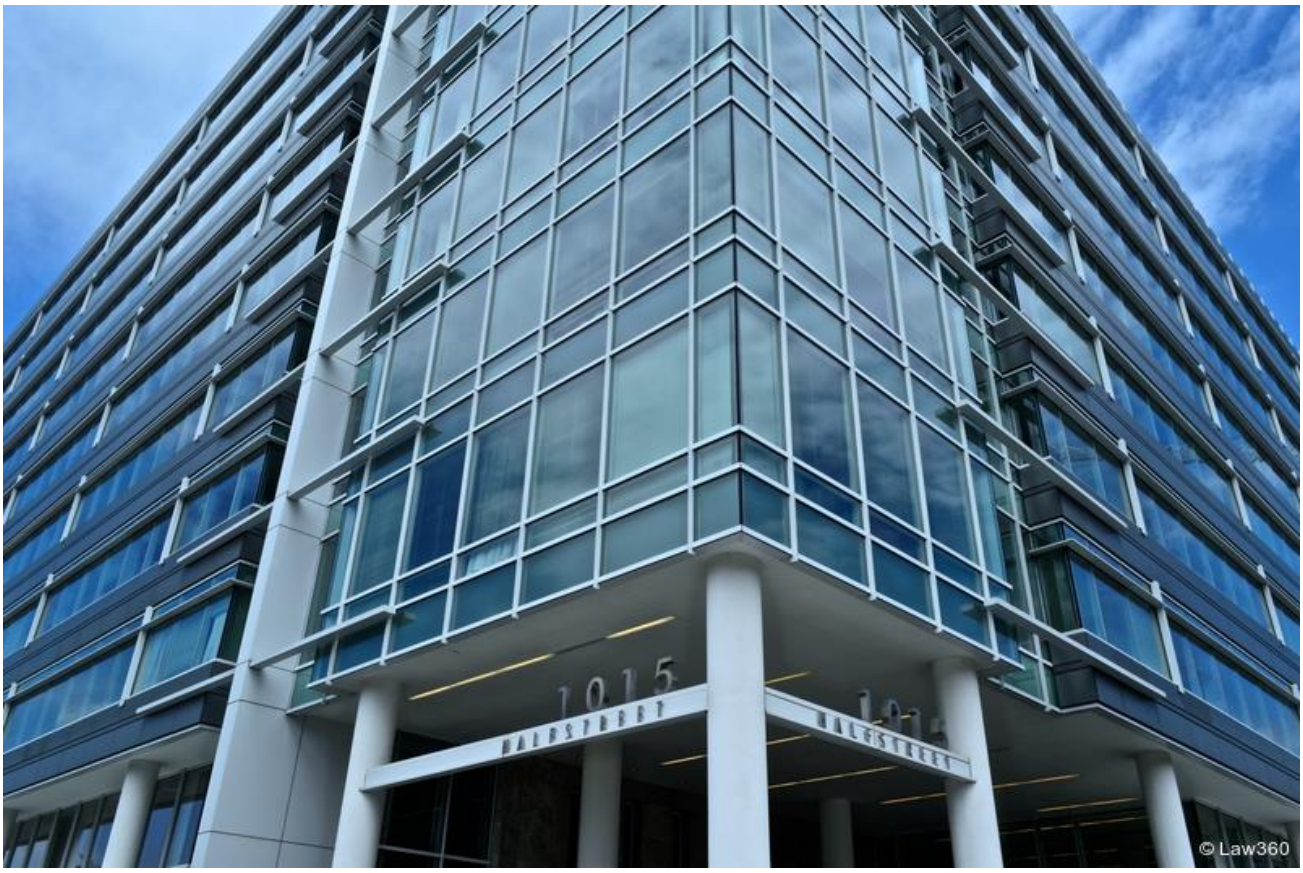
Wall, however, gave the NLRB the go-ahead to represent itself before the Supreme Court. With a few

exceptions, agencies and federal offices have to receive permission from the solicitor general to proceed with appeals or serve as amicus in cases. The SG's office usually argues on behalf of federal agencies to the Supreme Court, making the dynamic here especially unusual.

He also made no mystery about why his office was flip-flopping on its stance toward the enforceability of employee arbitration clauses. "After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion," Wall wrote about a third of the way through his brief.

Former members of the office called this admission quite candid and said it could keep Wall from enduring any awkward moments before the justices. Chief Justice John Roberts has upbraided government lawyers in the past for switching sides on cases but not explaining why.

Still, it's likely the switch will come up during oral arguments Monday.



The National Labor Relations Board headquarters in Washington. (Jimmy Hoover | Law360)

"The SG's office may get some poking from the bench about the change," said Daniel Ortiz, a University of Virginia law professor representing Jacob Lewis, one of the parties fighting for the right to bring class actions in employment matters in the Murphy Oil cases. "There may be a little laughter about it. I don't think it's going to change the overall dynamic of the oral argument, except in the fact that you have the government in a sense arguing against itself."

Others expect the justices will have taken note of the political change behind the solicitor's shift and adjusted their views accordingly.

“It’s not something that will strike them as unexpected, but I do think it probably reduces any ‘thumb on the scale’” that the solicitor general usually enjoys, said Scott Nelson, an attorney with the Public Citizen Litigation Group, which has filed an amicus brief in the Murphy Oil case.

“It’s a serious legal issue,” Nelson also said. “I think that the court is very likely to give the solicitor general’s brief the same consideration as the board’s and the other parties’.”

The switch in Murphy Oil is emblematic of how much has changed in Washington since September 2016, when the Obama administration asked the Supreme Court to review a Fifth Circuit decision striking down an NLRB ruling in favor of workers bringing class actions.

Yet it also reflects the fact that, nine months into the Trump administration, there are still agencies where Obama-era holdovers still exercise some control over the government. At the NLRB, for example, a Republican majority only took control last Monday when the U.S. Senate confirmed former Littler Mendelson LLP partner William Emanuel as the fifth and final member of the board.

“Because of the way some independent agencies are structured, there can be a lag time in a new administration’s ability to appoint a majority of the agency,” Joseph Palmore, a Morrison & Foerster LLP partner and former assistant solicitor general, said in an interview prior to Emanuel’s confirmation. “That has been true here — this is still the Obama NLRB.”

The Murphy Oil case, he said, represents the “Trump DOJ versus the Obama NLRB.”

A spokesman for the Department of Justice, which oversees the solicitor general’s office, didn’t respond to a request for comment on instances where the office has reversed course on Obama-era legal positions. An NLRB representative declined to comment.

The U.S. Department of Justice headquarters in Washington. (Jimmy Hoover | Law360)

Making a Point

As the White House continues to fill the federal government with its appointees, there will be fewer opportunities for intra-governmental fights. But Murphy Oil won't be the only time the solicitor general's office uses the court to makes an about-face on a legal question from the Obama administration.

One such matter is already before the justices. In the case of Husted v. A. Philip Randolph Institute, Trump's solicitor general filed an amicus brief in support of efforts by Ohio's secretary of state to purge inactive voters from its registration rolls. The Justice Department under Obama took the opposite position when the matter was before the Sixth Circuit. The case, which has attracted an amicus brief from Obama's former attorney general, Eric Holder, currently is set for oral arguments Nov. 8.

Down the road, the Supreme Court could take a crack at the constitutionality of the CFPB's directorship, creating an opportunity for the solicitor general to argue against a hallmark accomplishment of the Obama era. The high-profile case brought by PHH Corp. is pending before the full D.C. Circuit, but the Justice Department has already stated it won't defend the single-directorship structure of the agency, and its lawyers squared off with CFPB attorneys during the en banc hearing over the summer. Should the appeals court side with the CFPB and find its structure constitutional, it is certain that the challengers would seek a review from the Supreme Court.

Another case where the Trump administration is striking a decidedly different position than its predecessors is in Masterpiece Cakeshop v. Colorado Civil Rights Commission, involving a Colorado baker who refused to make a cake for a gay wedding and claimed he had a First Amendment right to do so. Over the summer, Wall, then the acting solicitor general, filed a brief in support of the baker, something the Obama administration certainly wouldn't have done, former members of the office said.

"They were making a point to come in on the other side," said one former member of the office, who like others spoke on the condition of anonymity because they didn't want to be seen publicly commenting on their former employer.

The solicitor general may get another opportunity to argue against the Obama administration's efforts to expand the rights of LGBT people.

In the case of Evans v. Georgia Regional Hospital, the Supreme Court has been asked to resolve a circuit split over whether Title VII of the Civil Rights Act protects workers from being discriminated against over their sexual orientation. The Equal Employment Opportunity Commission under Obama argued in amicus briefs before two circuit courts that it does. But if the Supreme Court takes up the matter, the Trump administration likely will take the opposite side and argue, as it recently did in the Second Circuit, that Congress didn't intend for Title VII to cover LGBT status when it passed the law in 1964.

As other cases concerning the Obama era bubble up, the solicitor general may find it worth its while to advocate for Supreme Court review, lawyers said.

"The more interesting dynamic to watch is whether the SG's office seeks cert more often than it has in prior years," said Roman Martinez, a former assistant solicitor general who's now a partner with Latham & Watkins LLP.

Noting that there are four conservatives and one leaning conservative on the court, Martinez said that "the Supreme Court is probably a friendlier venue for this administration than the previous administration."

Ed Beeson is a feature reporter for Law360. Editing by Jocelyn Allison and Jeremy Barker.

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