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MATERIAL HARM TO OUR SYSTEM OF JUSTICE

THE CONSEQUENCES OF AN EIGHT-MEMBER SUPREME COURT

END-OF-TERM SUPPLEMENT

CONSTITUTIONAL ACCOUNTABILITY CENTER

PEOPLE FOR THE AMERICAN WAY FOUNDATION

Introduction

About a month before the end of the Supreme Court Term that concluded in late June, Justice Ruth Bader Ginsburg commented that eight is "'not a good number for a multi-member court.'"[1] That statement echoed the words of many of her present and former colleagues on the Court and on other federal courts. This includes the late Justice Antonin Scalia himself, who wrote in 2004 that proceeding with eight justices "'impairs the functioning of the Court.'"[2] This was also a key finding of our report earlier this year, entitled *Material Harm to our System of Justice: the Consequences of an Eight-member Supreme Court.*

In fact, the last month of the Supreme Court's Term has proven Justice Ginsburg and Justice Scalia correct. In two important cases decided in June—including a significant case on immigration affecting literally millions of people across the country—the Court was unable to issue a decision on the merits and tied 4-4, leaving the lower court decision in place but setting no national precedent. In total, the number of equally divided votes by the Court this Term was the largest in more than 30 years.[3] This end-of-Term supplement strongly reinforces the conclusion of our original report: "having a short-handed Court for an extended period of time is harmful to the proper functioning of the Court and to the nationwide rule of law."[4]

I. Effects of the Vacancy on Decisions in the October 2015 Term

As we discussed when we released our initial report, the impact of the vacancy on the Court's October 2015 Term was already obvious. Since the release of our report, the Court has issued two more 4-4 split decisions: *United States* v. *Texas*[5] and *Dollar General Corporation* v. *Mississippi Band of Choctaw Indians*.[6] Both of these non-decision decisions create uncertainty in important areas of the law and have the potential to affect significant numbers of individuals across the country.

In *Texas*, the Court was considering a challenge to the Obama Administration's 2014 immigration initiatives that, among other things, directed federal immigration officials to exercise their discretion on a case-by-case basis to defer removal of certain parents of U.S.

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[1] Arlane De Vogue, *Supreme Court Justice Ruth Bader Ginsburg: 8 is Not a Good Number*, CNN Politics (May 26, 2016, 7:42 PM), http://www.cnn.com/2016/05/26/politics/ruth-bader-ginsburg-eight-justices/ (quoting remarks by Justice Ginsburg at Second Circuit Judicial Conference).

[2] *Cheney v. U.S. Dist. Court,* 541 U.S. 913, 915-16 (2004) (Scalia, J.) (quoting Chief Justice William H. Rehnquist et al., *Statement of Recusal Policy* (1993)).

[3] *See* Adam Feldman, *Quick Note: 5-4 Decisions and Equally Divided Court Votes Since 1946*, Empirical SCOTUS (June 27, 2016), https://empiricalscotus.com/2016/06/27/quick-take-5-4-decisions/.

[4] Constitutional Accountability Ctr. & People For the Am. Way Found., *Material Harm to our System of Justice: the Consequences of an Eight-member Supreme Court*, Const. Accountability Ctr. 13 (May 21, 2016), http://theusconstitution.org/sites/default/files/briefs/20160521%20-%20Issue%20Brief%20-%20CAC%20and%20PFAW%20-%20Material%20Harm%20to%20Our%20System%20of%20Justice--%20The%20Consequences%20of%20an%20Eight-Member%20Supreme%20Court.pdf.

[5] No. 15-674, 2016 WL 3434401 (U.S. June 23, 2016) (per curiam).

[6] No. 13-1496, 2016 WL 3434397 (U.S. June 23, 2016) (per curiam).

citizens or lawful permanent residents. A district court judge in Texas concluded that the initiatives were likely unlawful because the Administration had failed to comply with the Administrative Procedure Act's notice-and-comment requirement and issued a nationwide preliminary injunction.[7] The Fifth Circuit, in a divided decision, agreed with the district court and also held that the initiatives were inconsistent with the nation's immigration laws.[8] In both the lower courts and the Supreme Court, the federal government argued not only that the initiatives were procedurally and substantively lawful, but also that Texas and the other challenger states lacked standing to bring the lawsuit in the first place. This case was of obvious importance to millions of undocumented immigrants and their families who stood to be affected by the Court's decision. The case also raised significant legal questions—both about the scope of the executive branch's discretion under the nation's immigration laws and the standing of states to bring suit in court.

On June 23, 2016, the Supreme Court issued a per curiam order in *Texas* providing simply that the "judgment [was] affirmed by an equally divided Court."[9] Because the Court split 4-4, the judgment of the Fifth Circuit was automatically affirmed, and the district court's nationwide injunction was left in place. Thus, the President's initiatives—which were supposed to go into effect well over a year ago—remain blocked throughout the country, even though a number of states filed a brief in the Supreme Court in support of the initiatives and the benefits that they would bring to their states.[10] Moreover, the Court was unable to provide guidance on the many significant issues raised in the case, including the standing question, which could have implications in many other contexts.

It bears emphasis that if the Supreme Court splits 4-4 and is thus unable to issue a binding precedent for the nation, courts in different parts of the country typically can continue to consider the legal questions presented in the case. Here, however, because of the nationwide injunction, it is unclear whether federal courts in other parts of the country will feel comfortable addressing the legality of President Obama's immigration policies. Thus, as problematic as it is for the Court to be unable to do its job in any case, it is particularly problematic when the result is to leave in place a nationwide injunction.

In *Dollar General*, the Court was considering whether American Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers. While American Indian tribes possess "sovereign authority over their members and territories,"[11] thousands of nonmember corporations and individuals do business on tribal reservations and interact with tribe members. Dollar General is a chain of basic household merchandise and consumable goods stores, with an outlet located on the reservation of the Mississippi Band of Choctaw Indians. In

[7] *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).
[8] *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).
[9] *Texas*, 2016 WL 3434401.
[10] Amicus Brief of the States of Washington et al. in Support of Petitioners at 1, *Texas*, No. 15-674 (U.S. Mar. 8, 2016), *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/March-8-AG-Amicus.pdf ("The reality is that the Guidance is lawful, will substantially benefit States, and will further the public interest.").
[11] *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

2003, a thirteen-year-old Choctaw child who was working in the Dollar General outlet as part of an internship program claimed that the store manager, who was not a member of the Tribe, had sexually molested him. The Tribe member sued Dollar General in Choctaw tribal court, alleging that the company was vicariously liable for the harassment. Seeking to halt the litigation, Dollar General filed suit in federal court in the Southern District of Mississippi, arguing that it had not actually consented to tribal court jurisdiction for the purposes of the sexual harassment suit. A federal judge disagreed, holding that by agreeing to take on a member of the Choctaw Tribe as an unpaid intern, Dollar General had "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship."[12] The Fifth Circuit affirmed.[13]

On June 23, 2016, the Supreme Court issued a per curiam order providing that the "judgment [was] affirmed by an equally divided Court."[14] Again, because the Court split 4-4, the judgment of the court below was automatically affirmed, and the Court was unable to establish a binding precedent for the country on this significant question that has the potential to impact countless numbers of individuals and businesses that enter into consensual relationships with American Indian tribes. Because the Court was unable to resolve the legal question presented in the case, businesses and individuals will be uncertain whether they subject themselves to tribal court jurisdiction by operating or doing business on American Indian reservations, and tribes will be uncertain whether their courts have the authority to offer redress when one of their members is harmed by a nonmember.

In sum, these two cases—just like the previous cases in which the Court split 4-4 this Term—highlight the impact of the vacancy on the Court's ability to do its job, as well as the very real consequences that can result.

II. Other Problems Posed by an Eight-Justice Court

As discussed in our previous report, a major problem that a Court with only eight justices faces is the prospect that the Court's failure to take action on requests for immediate stays of lower court decisions or for injunctions temporarily blocking laws or other actions may not be the product of a majority decision by the Court. As we also discussed in our previous report, the Court often receives stay requests in advance of elections, when new laws can have a huge impact on Americans who want to vote and when courts, including the Supreme Court, are sometimes narrowly divided on the question whether such laws can properly take effect.

As elections approach this November, this potential problem could be significant. In part because of the Supreme Court's 2013 ruling in *Shelby County v. Holder*,[15] which effectively eliminated the requirement that some jurisdictions pre-clear voting changes with the Justice

[12] *Dolgencorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011).
[13] *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014).
[14] *Dollar Gen. Corp.*, 2016 WL 3434397.
[15] 133 S. Ct. 2612 (2013).

Department or a federal court, a large number of states have enacted new laws or other voting requirements that will take effect this year, and many are being challenged in court. In fact, court challenges are now pending in more than half of the seventeen states that have adopted new voting provisions.[16] Based on past election years, including 2014 when the Supreme Court issued orders granting or denying pre-election stays in four states,[17] the odds are high that requests for stays will come this fall. Indeed, the Court may be asked "to play its most important role [in federal elections] since 2000" at "a time when Justice Antonin Scalia's death has left it with only eight members and at risk of deadlocking."[18]

Our previous report also discussed the concern that the potential for tie votes has affected the Court's decisions on what cases to hear next Term. Commentators continue to suggest that the Court is generally less willing to agree to review major cases. As one recently wrote, the 2016-17 Term "is shaping up to be a quieter term with fewer contentious cases of national sweep." [19]

III. Conclusion

As discussed above and in our earlier report, until the current vacancy on the Supreme Court is filled, both the Court itself and its ability to protect the rights and liberties of all Americans will continue to suffer.

[16] *See* Richard Wolf, *Courts May Play Pivotal Role on Voting Rights in 2016 Election*, USA Today (May 15, 2016, 6:20 PM), http://www.usatoday.com/story/news/politics/elections/2016/05/15/voting-rights-election-lawsuits-supreme-court-democrats-republicans/84151084/. Since that article, several additional court challenges have been filed. *See* Bob Christie, *New Suit Seeks Court Oversight of Maricopa County Elections*, Wash. Times (June 2, 2016), http://www.washingtontimes.com/news/2016/jun/2/new-suit-seeks-court-oversight-of-maricopa-county-/; Laura Vozzella, *GOP Sues to Block McAuliffe Order to Let 200,000 Virginia Felons Vote*, Wash. Post (May 23, 2016), https://www.washingtonpost.com/local/virginia-politics/gop-sues-to-strip-209k-felons-from-va-voter-rolls/2016/05/23/ef2587a8-20e4-11e6-aa84-42391ba52c91_story.html.

[17] *See* Constitutional Accountability Ctr. & People For the Am. Way Found., *supra* note 4, at 11.

[18] *See* Wolf, *supra* note 16.

[19] Todd Ruger*, Supreme Court Sets up Low-key Term*, CQ News (June 28, 2016, 11:47 AM).