

## 'Hot' issues and cases from the 8th U.S. Circuit

By Timothy J. Droske

One of the biggest headlines this past year regarding the 8th Circuit—and indeed the federal courts in general—has been its changing composition under the current presidential administration. In 2018, the 8th Circuit further cemented its status as one of the most conservative circuits in the country, with three more Trump appointees confirmed by the Senate.<sup>1</sup> It remains to be seen, however, whether this will result in a higher affirmation rate for those 8th Circuit cases before the Supreme Court, which has similarly become more conservative with the retirement of Justice Anthony Kennedy and appointment of Justice Brett Kavanaugh. And while none of the specific cases before the Supreme Court from the 8th Circuit are particularly headline-grabbing, the circuit will likely be placed in the spotlight over the hot-button issue of abortion. Likewise, and closer to home, the District of Minnesota and 8th Circuit can be expected to continue to gain attention regarding the high number of terrorism-related prosecutions coming out of the State.

### The 8th Circuit's composition and operation

In 2018, three new judges were confirmed to the 8th Circuit: Judge L. Steven Grasch of Nebraska, Judge David R. Stras of Minnesota, and Judge Jonathan A. Kobes of South Dakota.<sup>2</sup> This marks a remarkable amount of turnover in the Court. Together with Judge Ralph R. Erickson's appointment in 2017, more than a third of the 8th Circuit's active bench of eleven judges are new appointees under the current administration.<sup>3</sup>

While the composition of the 8th Circuit is different, its operations remain relatively unchanged. This includes business-as-usual despite the ongoing government shutdown. The 8th Circuit has made clear that even with the exhaustion of funds, it "anticipates that it will continue all or most operations with essential staff," while also expressing a willingness to "work with" any office or agency affected by the shutdown.<sup>4</sup>

### 8th Circuit cases before the United States Supreme Court

The Supreme Court in its current term will hear approximately 75 cases, four of which are from the 8th Circuit. These include a death penalty case, Freedom of Information Act challenge, a case involving the Armed Career Criminal Act, and a discrete railroad taxation issue.

Of these four cases, the only one that the Supreme Court has already decided is the Armed Career Criminal Act ("ACCA") case, *United States v. Sims*, No. 17-766. There, the Supreme Court, in a unanimous decision, vacated and remanded the 8th Circuit's opinion, holding that the ACCA's reference to "burglary" for purposes of the armed career criminal enhancement, "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation."<sup>5</sup>

All of the other cases are still pending before the Supreme Court. The death penalty case comes from the State of Missouri, and involves the standards surrounding an Eighth Amendment as-applied challenge to the state's proposed method of execution based on the convict's unique medical condition. *Bucklew v. Precythe*, Sup. Ct. No. 17-8151. There, the District Court rejected Russell Bucklew's claim that execution by lethal injection would constitute cruel and unusual punishment as applied to him because of a unique medical condition, and that instead, only use of lethal gas would be adequate. A divided 8th Circuit panel affirmed, and the three votes for en banc review were not enough to grant rehearing.<sup>6</sup> No decision by the Supreme Court has been issued, which appeared divided at the argument in November.<sup>7</sup>

The Supreme Court has also already heard arguments in *BNSF Railway Co. v. Loos*, on whether a railroad's pay-

ment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.<sup>8</sup> While the issue is discrete and the 8th Circuit's answer to the question in the negative was unanimous, the 8th Circuit's decision deepened a split among the courts over the issue and staked out a position contrary to that of the United States.<sup>9</sup>

The last case from the 8th Circuit taken by the Supreme Court this term, *Food Marketing Institute v. Argus Leader Media*, concerns the Freedom of Information Act ("FOIA").<sup>10</sup> The 8th Circuit's opinion was a short, six page decision that unanimously held that FOIA's Exemption 4—which protects from disclosure all "confidential" private-sector "commercial or financial information" within the government's possession—did not apply to a newspaper's request to the U.S. Department of Agriculture for annual redemption totals for grocery stores that participate in the Supplemental Nutrition Assistance Program ("SNAP").<sup>11</sup> The standard the 8th Circuit used for whether the information was "confidential" was whether the release of the data was likely "to cause substantial harm to the competitive position of the person from whom the information was obtained."<sup>12</sup> But while variations of this same "substantial harm" requirement are prevalent among the circuits, the Supreme Court granted review on the question of whether this standard for the statutory term "confidential" in FOIA Exemption 4 is contrary to the ordinary meaning of the term, which would instead simply require "the Government to withhold all 'commercial or financial information' that is confidentially held and not publicly disseminated—regardless of whether a party establishes substantial competitive harm from disclosure."<sup>13</sup>

### Hot-button national issues before the 8th Circuit

While nationwide injunctions challenging policies by the presidential administration have garnered headlines and were the focus of then-U.S. Attorney General Jeff Sessions' remarks at the 8th Circuit Judicial Conference last summer,<sup>14</sup> those cases have largely been venued in other federal courts.

Conversely, however, the 8th Circuit may be on the front lines of the legal battle surrounding abortion.<sup>15</sup> Notably, one such case is currently pending before the 8th Circuit after the District Court preliminarily enjoined four Arkansas laws that it found likely to be unconstitutional, characterized as the "D&E Mandate," Act 45 (H.B. 1032); "Medical Records Mandate," Act 722 (H.B. 1434); "Local Disclosure Mandate," Act 1018 (H.B. 2024); and "Tissue Disposal Mandate," Act 603 (H.B. 1566).<sup>16</sup> Oral argument in that case was heard on December 13, 2018, and the case has garnered broad amicus participation, including by the attorney generals of 15 other states and the District of Columbia.<sup>17</sup>

### Terrorism cases

Finally, terrorism cases arising out of the District of Minnesota can be expected to continue to be part of the 8th Circuit's docket. With foreign terrorist organizations recruiting heavily from Minnesota's Somali population, the District of Minnesota over the past decade has faced "the highest number of jihadist terrorism-related cases and identified travelers or attempted travelers" of any federal judicial district in the country.<sup>18</sup> Some of these cases have already reached the 8th Circuit, including the Court's affirmation this past year of three Twin Cities men convicted for conspiracy to commit murder abroad in relation to their conspiracy to join the ISIL foreign terrorist organization.<sup>19</sup>

And others can be expected in the future. For example, the trial of former St. Catherine University student Thunza Jamal Hassan, who allegedly set fires on the universi-

ty's campus and is facing counts including attempting to provide material support to a designated foreign terrorist organization and arson, is scheduled for this spring.<sup>20</sup>

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### Endnotes

1. See Richard Wolf, *President Trump's conservative court shift may slow down as liberal judges avoid retirement*, USA TODAY (Nov. 19, 2018), available at <https://www.usatoday.com/story/news/politics/2018/11/19/donald-trumps-judges-making-courts-more-conservative-slowly/2005281002/> (see "Trump's judges" graphic showing circuit composition based on nominees by democratic and republican presidents).
2. Judge Grasch was appointed January 4, 2018; Judge Stras was appointed on January 31, 2018; and Judge Kobes was appointed on December 18, 2018. See Active and Senior Judges, United States Court of Appeals for the 8th Circuit, available at <https://www.ca8.uscourts.gov/active-and-senior-judges> (last visited Jan. 22, 2019).
3. See *id.*
4. Announcement Regarding Partial Government Shutdown, United States Court of Appeals for the 8th Circuit (Jan. 10, 2019), available at <https://www.ca8.uscourts.gov/news/announcement-regarding-partial-government-shutdown> (last visited Jan. 22, 2019).
5. *United States v. Sims*, 139 S. Ct. 399, 403-04 (2018), *vacating and remanding United States v. Sims*, 854 F.3d 1037 (8th Cir. 2017).
6. *Bucklew v. Precythe*, 883 F.3d 1087 (8th Cir. 2018), *rehearing and rehearing en banc denied*, 885 F.3d 527 (8th Cir. 2018).
7. Amy Howe, *Argument Analysis: Relatively subdued court is divided in lethal-injection case*, SCOTUSBlog (Nov. 6, 2018), available at <https://www.scotusblog.com/2018/11/argument-analysis-relatively-subdued-court-is-divided-in-lethal-injection-case/>.
8. *BNSF Railway Co. v. Loos*, Sup. Ct. No. 17-1042 (Questions Presented), available at <https://www.supremecourt.gov/ap/17-1042qp.pdf>.
9. See Petition for a Writ of Certiorari at 12-19, available at [https://www.supremecourt.gov/DocketPDF/17/17-1042/28862/20181023105937357\\_BNSF%20Railway%20Company%20v%20Loos\\_Petition.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1042/28862/20181023105937357_BNSF%20Railway%20Company%20v%20Loos_Petition.pdf).
10. See *Food Marketing Institute v. Argus Leader Media*, Sup. Ct. No. 18-481 (docket; review granted Jan. 11, 2019), available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docket-files/html/public/18-481.html>.
11. *Argus Leader Media v. United States Dep't of Agric.*, 889 F.3d 914 (8th Cir. 2018) (the slip opinions is six pages long).
12. *Id.* at 915.
13. See *Food Marketing Institute v. Argus Leader Media*, Sup. Ct. No. 18-481 (Questions Presented), available at <https://www.supremecourt.gov/ap/18-00481qp.pdf>.
14. See William Petroski and Stephen Gruber-Miller, *In Des Moines stop, U.S. Attorney General Jeff Sessions assails power of judges to stop policy*, Des Moines Register (Aug. 17, 2018), available at <https://www.desmoinesregister.com/story/news/politics/2018/08/17/attorney-general-jeff-sessions-speaking-des-moines-immigration-iowa-injunctions-court-donald-trump/946793002/>.
15. See Sabrina Tavernise, *The Future of Abortion Under a New Supreme Court? Look to Arkansas*, The New York Times (Sept. 7, 2018), available at <https://www.nytimes.com/2018/09/07/us/abortion-supreme-court-arkansas.html>; see also Lisa Belkin, *The 8th Circuit strategy: How abortion foes are lining up cases to challenge Roe*, Yahoo News (Jun. 11, 2018), available at <https://news.yahoo.com/8th-circuit-strategy-abortion-foes-lining-cases-challenge-roe-100049925.html>.
16. See *Hopkins v. Jegley*, 267 F. Supp. 3d 1024 (E.D. Ark. 2017), on appeal at 8th Cir. No. 17-2879.
17. *Hopkins v. Jegley*, 8th Cir. No. 17-2879 (docket).
18. Kevin D. Lowry, *Responding to the Challenges of Violent Extremism/Terrorism Cases for United States Probation and Pretrial Services*, 17 Journal for Deradicalization 28, 37 (Winter 2018/19); see also *id.* at 40.
19. *United States v. Farah*, 899 F.3d 608 (8th Cir. 2018); see also Laura Yuen, *Appeals court upholds sentences of MN men who tried to join ISIS*, MPR News (Aug. 10, 2018), available at <https://www.mprnews.org/story/2018/08/10/isis-minnesota-sentences-upheld-federal-appeals-court>.
20. *USA v. Hassan*, Crim. Dkt. No. 0:18-cr-00026-PJS-SER, Dkt. Entry 70 (D. Minn. Jan. 22, 2019).