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Overview of the U.S. Supreme Court's October 2014 Term

Elizabeth H. Slattery

Abstract

Anyone who uses Facebook, pays taxes, enjoys fishing, drives a car, or uses railroads should take note of the upcoming Supreme Court term. The justices will review cases touching on these and other important issues during the Court's term beginning on October 6, 2014. The previous term was marked by significant losses for the Obama Administration, even at the hands of justices appointed by President Barack Obama, and a high number of unanimous—but cautious—decisions. In its 2014–2015 term, the Court will hear significant cases involving free speech, voting rights, criminal law, religious freedom, and prisoners' rights, in addition to possibly taking on yet another challenge to Obamacare and the issue of same-sex marriage.

The Supreme Court of the United States begins its next term on October 6, 2014. The 2013 term featured a number of hot-button issues: campaign finance restrictions, racial preferences, pro-life speech outside abortion clinics, unions, legislative prayer, and a challenge to Obamacare's Health and Human Services (HHS) mandate. Nearly two-thirds of the decisions were unanimous (at least in the result)—a level of agreement unmatched since before World War II. This led to a number of incremental, cautious opinions that left both liberals and conservatives somewhat unsatisfied.

Another defining feature of the past term was the continuing trend of significant losses for the Obama Administration, sometimes even at the hands of the justices appointed by President Barack Obama. The Administration lost 9–0 in *National Labor Relations Board v. Noel Canning* (recess appointments); *United States v. Wurie* (cellphone searches); and *Bond v. United States* (prosecution

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Key Points

- The U.S. Supreme Court's next term begins on October 6, 2014.
- Last term, nearly two-thirds of the decisions were unanimous (at least in the result)—a level of agreement unmatched since before World War II.
- This led to a number of incremental, cautious opinions that left both liberals and conservatives somewhat unsatisfied.
- The Obama Administration continued to suffer significant losses, with the justices appointed by President Obama voting against him in some of the major cases, such as *National Labor Relations Board v. Noel Canning*; *United States v. Wurie*; and *Bond v. United States*.
- In the 2014–2015 term, the Court will look at free speech issues, prisoners' religious freedom, voting rights, the "dormant" Commerce Clause, criminal law, and the seemingly abandoned nondelegation doctrine, among other issues.
- The Court may also take on another challenge to Obamacare and the issue of same-sex marriage.

under a chemical weapons treaty), to name a few. Now that the 2013 term is behind us, the focus turns to the upcoming term.

With the start of a new term, what issues are likely to come before the justices? There are always plenty of cases involving legal housekeeping issues such as when lawsuits must be filed to be timely and how cases must be litigated or settled. Generally, the Supreme Court does not take on major legal issues until they have percolated in the lower courts for a while. After the Court does address a major legal issue, its decision may lead to a host of related questions on which the lower courts, the academy, the media, and Congress have the opportunity to reflect and identify solutions.

For example, in *Burwell v. Hobby Lobby* (2014), the Supreme Court held that the Obamacare HHS mandate violated the rights of some business owners who objected to paying for or providing abortion-inducing drugs through their employee health insurance plans. This left open questions about the decision's impact on pending challenges to the Administration's "accommodation" for nonprofit employers, whether and how HHS would modify the mandate to comply with the Court's decision, and whether Congress would amend or repeal the federal law protecting the exercise of religious liberty by for-profit businesses.

Likewise, in *Fisher v. University of Texas at Austin* (2013), the Court held that lower courts had been too deferential to the university in evaluating its use of race in admissions decisions. On remand, the appellate court upheld the university's program (again), so the issue may be heading back to the Supreme Court (again).

Cases on the Supreme Court's 2014–2015 Docket

The Court typically reviews between 70 and 80 cases per term. It has already agreed to hear 40 cases and will likely add more to the schedule at its "megaconference" on September 29. Ten cases have been set for oral argument in October. The upcoming term includes a handful of free speech cases and other cases involving accommodation of prisoners' religious exercise, the possible return of the seemingly-abandoned nondelegation doctrine, and a white-collar prosecution for "shredding" fish, among others. The following cases are just some of the likely highlights of the next term.

Elonis v. United States. Aspiring rapper Anthony "Tone Dougie" Elonis was convicted of making criminal threats after he wrote several Facebook posts discussing such violent acts as killing his estranged wife, committing a school shooting, and blowing up an FBI agent. Elonis says his Facebook posts were simply rap lyrics.

At trial, Elonis argued that the First Amendment requires the government to prove he intended to make a "true threat," because the "essence of crime is wrongful intent." The district court held that the government was not required to prove that Elonis had the subjective intent to make a threatening statement; it only had to prove that a reasonable person would have viewed his statements as true threats.

The Supreme Court suggested in *Virginia v. Black* (2003) that a speaker's intent matters when it comes to true threats, and the Court has been increasingly skeptical of overbroad laws that might chill lawful speech. For example, the Court struck down a federal law criminalizing false claims of having received military decorations or medals in *United States v. Alvarez* (2012) and also struck down a federal law criminalizing the making of animal "crush" videos in *United States v. Stevens* (2012).

Reed v. Town of Gilbert, Arizona. Like most other towns in America, Gilbert, Arizona, regulates when and where signs may be displayed. Noncommercial signs are classified as political, "qualifying events," homeowners' association, or real estate (among other categories), and each category has its own set of regulations. For example, real estate signs may be up to 80 square feet, and political signs may be up to 32 square feet; political signs may be displayed for four and a half months before an election; and homeowners' association event signs may be displayed for 30 days.

The Good News Community Church uses signs that fall under the "qualifying events" category to announce when its services are held. Pursuant to town policy, such signs may not be bigger than six square feet and may remain up for only 14 hours; in addition, there are limitations on the number of such signs that can be displayed at any given time.

The church challenged the town's sign code as an impermissible content-based restriction on speech in violation of the First Amendment. The district court upheld the sign code, and an appellate court agreed, finding that there was no evidence that the town adopted its sign code for a discriminatory purpose.

The Supreme Court has held that the First Amendment forbids the government from favoring some noncommercial speakers while discriminating against others based on their content, but there are three competing tests used by the federal appellate courts to evaluate whether a sign code is content-neutral or content-based. With this case, the Supreme Court has the opportunity to clarify how lower courts should determine whether sign codes are content-based or content-neutral.

Holt v. Hobbs. Incarcerated individuals lose many rights while in prison, but the Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits the government from substantially burdening an inmate's religious exercise unless that burden advances a compelling interest in the least restrictive way possible.

Gregory Holt (also known as Abdul Maalik Muhammad), who is serving a life sentence at the Arkansas Department of Corrections, wishes to maintain a half-inch beard to comply with his faith. Under Arkansas's grooming policy, while all inmates may have trimmed mustaches, only those diagnosed with a dermatological problem are permitted to have a quarter-inch beard.

Holt filed suit challenging the policy under RLUIPA, and Arkansas argued that its grooming policy was intended to prevent inmates from concealing contraband and address concerns about an inmate's ability to quickly change his appearance or be targeted by other inmates for receiving special privileges. In light of these justifications and other religious accommodations that the prison made for Holt, the district court found that Arkansas had met its burden under RLUIPA.

In *Cutter v. Wilkinson* (2005), the Supreme Court noted that RLUIPA does not place religious accommodations above the need to maintain order and safety in prisons. As Holt points out, however, 39 states and the District of Columbia allow inmates to maintain beards; thus, Arkansas's grooming policy may fail to meet the high level of scrutiny under RLUIPA.

Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter. The False Claims Act (FCA) is a Civil War–era law that provides civil penalties for contractors that defraud the government. It includes a whistleblower provision that allows a private party with inside knowledge of fraud to bring suit (known as a "*qui tam* suit") within six years from the alleged fraud.

The FCA also provides that "no person...[may] bring a related action based on the facts underlying the pending action." This "first-to-file" requirement was intended to encourage timely disclosure and prevent multiple whistleblowers from filing suits on the same facts.

Benjamin Carter filed a series of *qui tam* suits alleging that his employer, Kellogg Brown & Root Services, fraudulently billed the U.S. government for services in Iraq during the hostilities in 2005. A federal district court dismissed his most recent suit, both for being time-barred and due to the existence of an earlier *qui tam* suit arising from the same facts, but a federal appellate court in Richmond, Virginia, reversed, finding that Carter's suit was not barred because the earlier suit had been dismissed. In another FCA case, a federal appellate court in Washington, D.C., disagreed with this reading of the statute, finding that a later suit relying on the same facts remains barred even if the earlier suit is dismissed.

The appellate court in *Carter* also determined that the Wartime Suspension of Limitations Act (WSLA)—a 1942 law tolling the statute of limitations for criminal prosecutions for fraud against the United States during wartime—allowed the case to continue. Kellogg Brown & Root Services argues both that the WSLA does not apply to civil actions brought by private parties since it was intended to give the government more time to investigate potential fraud when it was otherwise occupied with a war and that the appellate court's ruling turns the FCA's "first-to-file" provision on its head. The case also raises the questions of whether a formal declaration of war is required to trigger the WSLA and how courts determine when the limitations period goes back into effect.

The Supreme Court's decision in this case could have huge consequences for a variety of industries that do business with the federal government.

Heien v. North Carolina. The Fourth Amendment protects individuals from unreasonable searches and seizures. "Reasonableness" is the lodestar for courts assessing the constitutionality of warrantless searches and seizures made by the police. Consistent with the Fourth Amendment, a police officer may make a traffic stop if he has a reasonable suspicion that a law is being violated. However, what happens if the officer's suspicion is based on a mistaken view of the law?

A police officer stopped Nicholas Heien after noticing that one of his brake lights was out. North Carolina law requires that vehicles must have "a stop lamp" and that "rear lamps" must be in working condition. After asking Heien some questions and checking his license and registration, the officer asked to search the vehicle and found a baggie of cocaine. Heien was charged with trafficking cocaine and sought to suppress the evidence that had been taken from his car, arguing that the initial traffic stop was unreasonable because the officer misinterpreted the law.

As a matter of first impression, an appellate court determined that the relevant statutes require vehicles to have at least one working brake light (which Heien's car had) and ruled that the search of Heien's car was unconstitutional. The Supreme Court of North Carolina reversed, finding that the traffic stop did not violate the Fourth Amendment since the officer's mistake was objectively reasonable.

In *Brinegar v. United States* (1949), the Supreme Court explained that police officers must be given some room for operating under mistaken facts—as long as they are reasonable. For example, in *Maryland v. Garrison* (1987), police officers obtained a warrant to search Lawrence McWebb's apartment on the third floor of a building without realizing there were two apartments on that floor. The Supreme Court upheld the search of Harold Garrison's apartment on that floor (where evidence of criminality was uncovered), noting that the officers' mistake of fact as to which apartment was covered by the warrant was objectively reasonable.

North Carolina argues that the same logic applies to mistakes of law, but Heien maintains that the reasonable suspicion standard leaves no room for an officer's mistaken interpretation of the law.

Yates v. United States. In the wake of the Enron accounting fraud scandal and its infamous "document-shredding parties," Congress passed the Sarbanes–Oxley Act of 2002, setting new corporate accountability standards and providing criminal penalties for related white-collar crimes. One provision, 18 U.S.C. § 1519, makes it a crime to knowingly destroy "any record, document, or tangible object with the intent to obstruct an investigation...."

John Yates, a commercial fisherman and captain of the *Miss Katie*, was issued a citation for catching undersized red grouper in the Gulf of Mexico. While inspecting the *Miss Katie*, a federally deputized Florida Fish and Wildlife Conservation Commission officer noticed red grouper that looked as if they were less than 20 inches long, the minimum size allowed under law. The officer counted 72 red grouper that measured less than 20 inches and instructed Yates to return to port, where the fish would be seized.

The government alleges that between the point of inspection and the vessel's arrival at port, Yates's crew threw the undersized fish overboard and replaced them with larger fish. When the Fish and Wildlife officer measured the fish at port, 69 of them still measured less than 20 inches.

Yates was convicted of knowingly destroying tangible objects with the intent to obstruct an investigation into his harvesting of undersized red grouper. A federal appellate court upheld his conviction, finding that a fish is a "tangible object" according to the statute's plain meaning and that throwing the fish overboard constituted destruction. Yates argues that, read in context, "tangible object" refers to something used to preserve information such as a computer or other storage device and that a broader reading of the statute produces absurd results.

The Supreme Court has the opportunity to determine whether a federal criminal law aimed at those who would destroy documents and computer records relevant to a criminal investigation also covers "shredding" fish.

Department of Transportation v. Association of American Railroads. Article I, Section 1 of the Constitution states that "All legislative Powers herein granted shall be vested in a Congress...." Derived from this grant of power, the nondelegation doctrine prohibits Congress from delegating legislative functions to the executive branch.

In *J.W. Hampton, Jr. & Co. v. United States* (1928), the Supreme Court noted that Congress may delegate regulatory authority to an executive branch agency so long as it specifies an "intelligible principle" to limit and guide the agency in the exercise of its discretion. To date, the Supreme Court has struck down only two statutes—both in the 1930s—as unconstitutional delegations because of Congress's failure to provide a sufficient "intelligible principle" to guide the applicable agency.

It is another issue, however, when Congress attempts to delegate regulatory authority to a private entity. While private entities may be involved in an advisory capacity in making regulations, delegation of legislative authority to private entities is strictly prohibited.

Amtrak is a unique creature—created by an act of Congress but run as a for-profit corporation. Congress delegated to Amtrak the ability to co-author regulations governing the railroad industry in Section 207 of the Passenger Rail Investment and Improvement Act of 2008, and a freight railroad association challenged this delegation of authority. In finding that Amtrak is indeed a private entity and that Section 207 unconstitutionally delegates regulatory authority, a federal appellate court pointed out that such a delegation undermines the political accountability of government.

In *Carter v. Carter Coal Company* (1936), the Supreme Court struck down a New Deal–era law for improperly delegating to a commission of coal producers the ability to set minimum wages and maximum hours, stating that allowing private parties to regulate their competitors was "the most obnoxious form" of legislative delegation. But the government argues that Amtrak is not a private entity for purposes of the nondelegation doctrine because Congress created it and the executive branch maintains sufficient oversight over and control of it.

***Alabama Democratic Conference v. Alabama* and *Alabama Legislative Black Caucus v. Alabama*.** With limited exception, it is entirely within the discretion of the Supreme Court to determine whether or not to review a case. One such exception is a constitutional challenge to a statewide redistricting plan brought under 28 U.S.C. § 2284(a).

Two groups of Alabama Democratic legislators challenged the Republican-controlled legislature's redistricting plan, which purportedly packs black voters into majority-minority districts (thereby reducing their influence in other districts), enacted after the 2010 Census. This is the latest skirmish in the ongoing battle in Alabama over redistricting that previously led a state court to draw up new districts. The Democrats argue that the 2010 plan violates the Equal Protection Clause's "one person, one vote" guarantee, dilutes the strength of black voters, and is unconstitutional gerrymandering.

A three-judge panel in Alabama ruled for the state across the board, finding that the Democrats failed to prove vote dilution under the standard articulated by the Supreme Court in *Thornburg v. Gingles* (1986) and also failed to show that the redistricting plan was motivated by an invidious discriminatory purpose. The Democrats appealed to the Supreme Court, which last considered voting rights issues in the landmark *Shelby County, Alabama v. Holder* decision during the Court's 2012–2013 term.

***Maryland State Comptroller of the Treasury v. Wynne*.** Benjamin Franklin once wisely remarked, "Nothing can be said to be certain except death and taxes." This case involves Brian and Karen Wynne, Maryland residents who want to avoid paying duplicative taxes on pass-through income from their stake in an S corporation that operates in 39 states that collect personal income taxes.

Maryland has a state income tax as well as a county income tax. Under Maryland law, residents are allowed to claim a tax credit against the state (but not county) income tax for taxes paid to other states. Thus, Maryland refused to provide a credit against the Wynnes' county income tax for the more than $80,000 they paid in taxes to other states.

In *McCullough v. Maryland* (1819), the Supreme Court advised that states have the ability to tax their residents, seemingly without limits, and the Court often has rejected residents' attempts to limit a state's ability to tax out-of-state income. The Supreme Court suggested in *Oklahoma Tax Commission v. Chickasaw Nation* (1995) that a state's decision to credit income taxes paid to other states is a policy choice, not one required by the Constitution.

The Wynnes argue that the Constitution in fact places two limits on a state's ability to tax its residents: Under the Fourteenth Amendment's Due Process Clause, there must be a minimum connection between the state and the person or property it would tax, and the "dormant" Commerce Clause prohibits states from levying taxes that discriminate against interstate commerce. The Maryland Court of Appeals (its highest court) agreed with the Wynnes, finding that Maryland's refusal to credit out-of-state income taxes to the county tax violates the "dormant" Commerce Clause.

Cases on the Horizon

Attempting to predict what the Supreme Court will or will not do is always a gamble. The Court receives nearly 10,000 petitions for a writ of certiorari each term, and the justices grant review in roughly 1 percent of cases. Some issues, though, are relatively safe bets, and the following two are more than likely to be reviewed by the Supreme Court in the near future.

Same-Sex Marriage. In *United States v. Windsor* (2012), the Supreme Court struck down the federal

definition of marriage in Section 3 of the Defense of Marriage Act. This decision did not address state definitions of marriage or whether or not states can refuse to recognize lawful same-sex marriages from other states.

Since the *Windsor* decision, traditional marriage laws and constitutional amendments have fallen across the country. In cases from Indiana, Oklahoma, Utah, Virginia, and Wisconsin, parties have already petitioned the Supreme Court for review, asking whether the Equal Protection or Due Process Clauses of the Fourteenth Amendment prohibit states from defining marriage in the traditional way and refusing to recognize out-of-state same-sex marriages.

To bolster their argument that such issues should be left to the individual states to decide, defenders of traditional marriage have seized on language from last term's decision in *Coalition to Defend Affirmative Action v. Schuette* in which the Supreme Court upheld the right of voters in Michigan to ban the use of racial preferences in admissions decisions at state-funded schools. In so doing, the Court wrote, "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."

Obamacare's Federal Exchanges. President Obama's signature health care law seems to be a full-employment act for Supreme Court litigators. The latest round of challenges involves Section 36B of the Internal Revenue Code (enacted as part of Obamacare), which allows the Internal Revenue Service to make subsidies available to individuals who buy health insurance through state-run exchanges.

Lawmakers assumed that every state would open an exchange, but 27 states chose not to do so. In those states, the federal government opened up shop, and the IRS claimed it could extend the subsidies to individuals purchasing insurance through these federally run exchanges. Several challenges to the IRS's interpretation were filed in federal courts.

In *Halbig v. Burwell*, a federal appellate court in Washington, D.C., found that the text of Section 36B unambiguously restricts subsidies to insurance bought on an exchange "established by the State." Hours later, a federal appellate court in Richmond, Virginia, reached the opposite conclusion in *King v. Burwell*, concluding that the IRS's interpretation was reasonable and entitled to deference.

The court granted the government's request for a rehearing en banc in *Halbig*, and the *King* plaintiffs have asked the Supreme Court to review their case. Given the significant implications that these decisions have for the practical implementation of the law, it looks as though once again, Obamacare may be heading back to the Supreme Court.

Conclusion

Are your Facebook posts unknowingly threatening? Could you be prosecuted for "shredding" a fish in violation of federal white-collar criminal laws? Are you paying too much in state income taxes? Is Amtrak unconstitutionally making laws?

The Supreme Court will hear cases touching on these and other important questions in its upcoming term beginning on October 6, 2014. The Court will also hear significant cases in the areas of free speech, voting rights, criminal law, religious freedom, and prisoners' rights, among others, and may also take on yet another challenge to Obamacare as well as the issue of same-sex marriage.

*—**Elizabeth H. Slattery** is a Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.*