Looking Ahead: October Term 2011

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After a fairly low-key 2010 term and the first June in three years with no retirement on the Supreme Court, the signs point to an interesting and potentially momentous year ahead for the Court. Already on tap are a host of important issues, including those involving individual rights, criminal law and procedure, separation of powers, and intellectual property rights. And several potential blockbuster cases, including constitutional challenges to the Patient Protection and Affordable Care Act, have either arrived at the Court in the form of certiorari petitions or will reach the Court in coming months.

This article previews some of the key cases that the Court has already agreed to hear and flags a few of the more interesting cases that could reach the Court this term. Especially in the wake of the Eleventh Circuit's recent decision holding that the Affordable Care Act's individual mandate is unconstitutional, much of the focus on the coming term is likely to center on whether—or when—the Court will step into the healthcare debate. But even putting that proverbial ''elephant in the room'' to one side, the Justices will have their hands

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full with an array of intriguing and challenging cases when they return to the bench on October 3, 2011.

Individual Rights

Broadcast Indecency

Once again, the First Amendment will play a marquee role at the Court. In recent years, the Court has considered the application of the First Amendment to violent video games,[1] depictions of animal cruelty,[2] and incendiary hate speech at military funerals.[3] Next term, the Court adds ''the F-word'' to the list, taking up the constitutionality of the FCC's so-called ''fleeting-expletives'' policy in *Federal Communications Commission v. Fox*.[4]

Since 1927, federal law has made it unlawful to utter ''indecent'' language by means of radio communications.[5] The FCC defines ''indecency'' as communications that ''describe or depict sexual or excretory organs or activities'' in terms that are ''patently offensive as measured by contemporary community standards for the broadcast medium.''[6] The determination of whether a communication is ''patently offensive'' turns on its explicit or graphic nature; whether the material ''dwells on or repeats at length'' the description or depiction; and whether it ''appears to pander,'' ''is used to titillate,'' or has been presented for ''shock value.''[7]

For many years, the FCC did not enforce the indecency restrictions against ''fleeting expletives''—the isolated utterance of indecent words. Then along came Bono. His use of the F-word during an acceptance speech at the 2003 Golden Globe Awards prompted the FCC to announce that it would begin enforcing its indecency policies even against fleeting expletives. The FCC later enforced the new

[1] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011).

[2] United States v. Stevens, 130 S. Ct. 1577 (2010).

[3] Snyder v. Phelps, 131 S. Ct. 1207 (2011).

[4] Fed. Comm'cns Comm'n v. Fox, 2011 U.S. LEXIS 4926 (2011) (No. 10-1293).

[5] 18 U.S.C. § 1464 (2006); see Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726, 735–38 (1978).

[6] Industry Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 F.C.C. Rcd. 7999, 8002 at ¶¶ 7–8 (2001).

[7] *Id.* at 8002 ¶ 10.

interpretation of its policy against various TV networks for the use of the F-word by Cher and Nicole Richie at back-to-back Billboard Music Awards.

The TV networks challenged the FCC's indecency policy, alleging violations of the First Amendment and the Administrative Procedure Act. In 2007, the Second Circuit struck down the policy as arbitrary and capricious under the APA based on the FCC's purported failure to adequately explain its adoption of a fleeting-expletives policy, but the Supreme Court reversed that ruling and remanded for consideration of the networks' First Amendment claim.[8]

On remand, the Second Circuit again invalidated the FCC policy, this time on the ground that the commission's definition of indecency is unconstitutionally vague and thereby promotes self-censorship.[9] Because the court decided the case on vagueness grounds, it did not reach the networks' broad-scale attack on the continuing validity of the Supreme Court's decision in *Federal Communications Commission v. Pacifica Foundation*—the ''seven dirty words'' case—which had upheld the FCC's prior indecency restrictions under a form of intermediate First Amendment scrutiny.[10]

The government asked the Supreme Court to once again review the Second Circuit's invalidation of the FCC's fleeting-expletives policy, and the Court obliged. The *Fox* case provides an opportunity for the Court not only to resolve the constitutionality of the FCC's fleeting-expletives policy once and for all but also to clarify the nature of the First Amendment inquiry in the broadcast media context. The Court will likely proceed without Justice Sonia Sotomayor, who recused herself from consideration of the certiorari petition. But the case will be ''Must See TV'' for Court watchers, especially if the Justices choose to revisit *Pacifica*.[11]

[8] Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 489 F.3d 444 (2d Cir. 2007), rev'd, 129 S. Ct. 1800 (2009).

[9] Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 613 F. 3d 317 (2d Cir. 2010).

[10] 438 U.S. at 777.

[11] In a related action, the government also sought review of a separate Second Circuit decision invalidating the FCC's enforcement of its indecency policy against the broadcast of fleeting nudity on the TV series *NYPD Blue*. See ABC, Inc. v. Fed. Commc'ns Comm'n, 2011 WL 9307 (2d Cir. 2011). The Court granted certiorari in that case as well, adding ''fleeting nudity'' to the issues that will be before the Court alongside *Fox*.

Mandatory Union Fees

The Court will address another recurring First Amendment question in *Knox v. SEIU*—the right of non-unionized state employees to avoid mandatory assessment of union fees for expenditure on political activities.[12] The Court has held that state employees who choose not to join unions that serve as their exclusive collective-bargaining representative can still be forced to pay their fair share of the union's expenses associated with collective bargaining, but cannot be forced to pay for the union's political activities.[13]

The plaintiffs in *Knox* are California state employees who argue that the union forced them to support political activities by garnishing their wages as an ''emergency'' fee for political purposes—to build a campaign fund for use on advertising, direct mail, voter registration and education, and get-out-the-vote activities—without giving them sufficient notice or opportunity to object. The activities funded by the fee included efforts to defeat a proposition that would have further restricted the use of union dues for political purposes. The union counters that its annual notice was sufficient to pass First Amendment muster. The Court has not been friendly to union claims involving fees for political activities in recent years.[14] Now the Court will decide if a union unconstitutionally compels nonmembers' political speech by coercing the payment of fees in this context.

Ministerial Exception

This fall the Court will also reconsider the scope of the First Amendment-based ''ministerial exception,'' which has been applied by the courts to insulate certain employment decisions made by religious institutions from challenge under labor and anti-discrimination laws. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a fourth-grade teacher at a Lutheran school sought to return to her job after a prolonged medical leave of absence for narcolepsy.[15] When the school did not take her back, she brought suit under the Americans with Disabilities Act. The school invoked the ministerial

[12] Knox v. Serv. Employees Int'l Union, Local 1000, 2011 U.S. LEXIS 4827 (2011) (No. 10-1121).

[13] Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[14] See, e.g., Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009).

[15] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 131 S. Ct. 1783 (2011) (No. 10-553).

exception to challenge the court's subject-matter jurisdiction. The district court granted summary judgment for the school. But the Sixth Circuit reversed, holding that the exception applies only to ministerial employees—and that the teacher, whose primary duties involved teaching *secular* subjects, did not qualify as such. *Hosanna-Tabor* provides the Court with an opportunity to clarify the contours of the ministerial exception and its intersection with anti-discrimination laws.

Property Rights

The Court will also have an opportunity to expound on the procedural protections that individuals enjoy from the government's encroachment on asserted property rights. In *Sackett v. EPA*, the Court will consider the rights of landowners to challenge mandatory compliance orders issued by the Environmental Protection Agency under the Clean Water Act.[16] As a first step in building a new home, the Sacketts filled a portion of their property with dirt and rock. Six months later, they received a house-warming present from the EPA in the form of an administrative compliance order. The order charged them with violating the Clean Water Act by filling a wetland on their property without a federal permit and directed them to restore the wetland immediately. The Sacketts challenged the EPA's conclusion that their property was a wetland subject to the act. When the EPA refused their request for a hearing, they challenged the compliance order in federal court, asserting a due-process right to pre-enforcement judicial review of the order.

Both the district court and the Ninth Circuit denied their claims, demonstrating little sympathy for the homeowners' predicament.[17] The courts reasoned that, to obtain review, the Sacketts were required either to wait for the EPA to enforce the order against them (and thereby to expose themselves to millions of dollars in potential penalties) or to seek a permit and then appeal any denial of the permit (despite the significant expense and delays associated with the permitting process). The Sacketts sought certiorari, arguing that the government had impermissibly intruded on their property rights without sufficient process. On the last day that the Court sat together

[16] Sackett v. EPA, 2011 U.S. LEXIS 5010 (2011) (No. 10-1062).

[17] Sackett v. EPA, 2008 WL 3286801 (D. Idaho), aff'd, 622 F.3d 1139 (9th Cir. 2010).

in June, the Court agreed to hear the case and address a property owner's right to pre-enforcement judicial review of the order under the Administrative Procedure Act and, alternatively, the Due Process Clause.

Federal-State Balance

Preemption

The relationship between federal and state power is familiar and important territory for the Supreme Court, especially in the preemption context. Last term, the Court decided several preemption cases, spanning a wide array of subject areas including immigration, automobiles, arbitration, and pharmaceuticals.[18] Not missing a beat, this term the Court will consider in *National Meat Association v. Harris* whether a California criminal statute mandating the immediate, humane euthanasia of nonambulatory livestock—animals that become unable to stand or walk on their own—is preempted by the Federal Meat Inspection Act.[19]

The regulation of livestock and general animal cruelty laws falls within the traditional purview of the states, but for decades Congress has mandated an inspection process to ensure that meat destined for human consumption is safe and unadulterated. The FMIA contains an express preemption clause barring states from imposing ''[r]equirements within the scope of this Act with respect to premises, facilities and operations [of slaughterhouses], which are in addition to, or different than those made under this Act.''[20] But the act also has a savings clause stating that it ''shall not preclude any State . . . from making requirement[s] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act.''[21] The California law at issue prohibits anyone from buying,

[18] PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011) (pharmaceuticals); Bruesewitz v. Wyeth, 131 S. Ct. 1068 (2011) (vaccines); Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011) (immigration); AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011) (arbitration); Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) (automobiles).

[19] Nat'l Meat Ass'n v. Harris, 2011 U.S. LEXIS 4961 (2011) (No. 10-224). Latham & Watkins LLP represents several of the respondents in this case.

[20] 21 U.S.C. § 678 (2006).

[21] *Id.*

selling, or receiving nonambulatory animals and requires slaughterhouses to immediately euthanize such animals.

A national organization representing the meatpacking industry sued for an injunction to block enforcement of the California law, claiming it was preempted by the FMIA. The district court agreed that the provisions at issue were preempted and granted the injunction.[22] The Ninth Circuit reversed.[23] The Court granted certiorari over the solicitor general's opposition and will once again venture into the preemption thicket.

Sovereign Immunity

Next term, the Court will also revisit the scope of states' sovereign immunity from suit. In *Coleman v. Maryland Court of Appeals*, the Court will decide whether Congress validly abrogated state sovereign immunity in the self-care provision of the Family and Medical Leave Act.[24] Daniel Coleman alleges that he was fired from his job at a state court after taking sick leave for a documented medical condition. He sued under the FMLA, which has several provisions guaranteeing medical leave for an employee who is sick or has an ill relative. The district court dismissed his claim based on Maryland's sovereign immunity from suit,[25] and the Fourth Circuit affirmed.[26] The Supreme Court granted certiorari.

To subject a nonconsenting state to suit, Congress must abrogate state sovereign immunity through a clear legislative statement and pursuant to a valid exercise of its power. In the landmark case of *Seminole Tribe v. Florida*, the Court held that Congress could not use its Commerce Clause authority to abrogate such immunity.[27] In *Nevada Department of Human Resources v. Hibbs*, however, the Court held that the FMLA's *family-care* provision guaranteeing leave to take care of an ill family member was a valid exercise of Congress's authority to enforce the Fourteenth Amendment—there, to address state-fostered stereotypes found by Congress that caring for family

[22] National Meat Ass'n v. Brown, 2009 WL 426213 (E.D. Cal. 2009).

[23] National Meat Ass'n v. Brown, 599 F.3d 1093 (9th Cir. 2010).

[24] Coleman v. Md. Court of Appeals, 2011 U.S. LEXIS 4972 (2011) (No. 10-1016).

[25] Coleman v. Md. Court of Appeals, No. 1:08-cv-02464-BEL (D. Md. 2009).

[26] Coleman v. Md. Court of Appeals, 626 F.3d 187 (4th Cir. 2010).

[27] 517 U.S. 44 (1996).

members is ''women's work.''[28] The Court will now decide whether the FMLA's *self-care* provision is sustainable under the same line of analysis.

Arbitration

In recent years, the Court has shown great interest in the law of arbitration.[29] It appears that 2011 will be no different. In *CompuCredit Corp. v. Greenwood*, the Court will consider the relationship between a contract provision mandating arbitration and the private ''right to sue'' established in the Credit Repair Organizations Act.[30]

The CROA requires credit-repair organizations—that is, organizations that provide services aimed to ''improv[e] any consumer's credit record, credit history, or credit rating''—to inform their customers that they have the ''right to sue'' the organizations for violating the CROA.[31] The CROA also contains a provision invalidating ''[a]ny waiver by any consumer of any protection provided by or any right of the consumer'' under the statute.[32]

The plaintiffs in *CompuCredit* are consumers who applied for a subprime credit card marketed by a credit-repair organization, CompuCredit, which they alleged violated the CROA by failing to give them proper notice of the fees. In particular, they argued that the company was liable because it had purportedly buried the fees in fine print while misleadingly highlighting the card's credit limit and lack of deposit.

CompuCredit moved to compel arbitration based on the arbitration clause contained in the parties' contracts. The district court concluded that the CROA's nonwaiver provision voided the arbitration clause, and the Ninth Circuit affirmed.[33] It now falls to the Supreme Court to decide whether a contractual arbitration clause may be given effect in these circumstances.

[28] 538 U.S. 721, 731 (2003).

[29] See AT&T Mobility, L.L.C., 131 S. Ct. 1740 (2011); Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); 14 Penn Plaza L.L.C. v. Pyett, 129 S. Ct. 1456 (2009).

[30] CompuCredit Corp. v. Greenwood, 131 S. Ct. 2874 (2011) (No. 10-948).

[31] 15 U.S.C. § 1679c(a) (2006).

[32] 15 U.S.C. § 1679f(a) (2006).

[33] Greenwood v. CompuCredit Corp., 617 F. Supp. 2d 980 (N.D. Cal. 2009), aff'd, 615 F.3d 1204 (9th Cir. 2010).

Intellectual Property

The Supreme Court has also shown an increasing appetite for intellectual property cases in recent terms, particularly in the area of patents. Since 2005, the number of patent cases that the Court has taken has nearly doubled compared to the previous decade. The 2011 term is shaping up to be another big one in this important area of law.

Subject-Matter Eligibility for Patents

Section 101 of the Patent Act establishes patent eligibility for ''any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.''[34] The Supreme Court has long held that this language does not allow patents for ''laws of nature, physical phenomena, and abstract ideas.''[35] In *Mayo Laboratories v. Prometheus*, the Court will address whether a medical diagnostic method of calibrating the proper dose of drugs to give a patient is patent-eligible subject matter under Section 101.[36]

Prometheus's patented method claims a test that measures a patient's individual metabolism of a drug. The test is effective against certain chronic gastrointestinal disorders that are treated with drugs that can become toxic if they build up in a patient's body. Because the rate at which the human body metabolizes the drug varies greatly from person to person, doctors have a difficult time determining a standard dose that is both safe and effective. Prometheus's method measures each patient's metabolism of the drug by determining blood metabolite levels, so the doctor knows whether to increase or decrease the drug dosage for that individual patient. Mayo challenged the patent on the grounds that it improperly claimed ownership of a natural phenomenon—the correlation between metabolite levels and the efficacy and toxicity of the dose.

The district court held that Prometheus's patent was ineligible under Section 101.[37] But the Federal Circuit reversed, applying the so-called machine-or-transformation test for patent eligibility.[38] Mayo

[34] 35 U.S.C. § 101 (2006).

[35] See, e.g., Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980).

[36] Mayo Collaborative Servs. v. Prometheus Labs., 2011 U.S. LEXIS 4764 (2011) (No. 10-1150). Latham & Watkins LLP represents the respondent in this case.

[37] Prometheus Labs., Inc. v. Mayo Collaborative Servs., 2008 WL 878910 (S.D. Cal. 2008).

[38] Prometheus Labs., Inc. v. Mayo Collaborative Servs., 581 F.3d 1336 (Fed. Cir. 2009).

sought certiorari, but while its petition was pending, the Supreme Court decided *Bilski v. Kappos*.[39] In *Bilski* the Court held that the machine-or-transformation test was not the exclusive test of patentability, but still serves as a ''useful and important clue'' and ''an investigative tool.''[40] The Supreme Court then remanded *Prometheus* to the Federal Circuit for reconsideration in light of *Bilski*.

On remand, the Federal Circuit reaffirmed its original conclusion that Prometheus's medical diagnostic method was indeed patentable.[41] It explained that Prometheus's patent involved one application of certain natural phenomena, but did not preempt *all* applications of those phenomena.[42] It also found that the patent satisfied the ''transformation'' prong of the machine-or-transformation test, insofar as it involved transformations of the human body when the drugs were administered and the blood was tested.[43] Mayo again sought certiorari. And this time the Court agreed to hear the case on the merits.

Prometheus provides the Supreme Court with another opportunity to clarify Section 101's gateway eligibility standard for patentability—this time in the area of biotechnology and medical diagnostic testing, a rapidly growing and critical economic sector.

Copyright Law and Public Domain

A crucial aspect of copyright law is the concept of the ''public domain.'' Works in the public domain are available to all, without payment to the creator of the work. Although copyrights reward authors for the development of creative works, the ultimate goal is to ''allow the public access to the products of their genius after the limited period of exclusive control has expired.''[44] *Golan v. Holder* presents the question of whether Congress may lawfully remove works from the public domain and whether such a removal infringes

[39] Bilski v. Kappos, 130 S. Ct. 3218 (2010).

[40] *Id.* at 3227.

[41] Prometheus Labs., Inc. v. Mayo Collaborative Servs., 628 F.3d 1347 (Fed. Cir. 2010).

[42] *Id.* at 1355.

[43] *Id.* at 1356.

[44] Eldred v. Ashcroft, 537 U.S. 186, 227 (2003) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

the First Amendment rights of those using the works previously in the public domain.[45]

The Supreme Court addressed a similar issue several years ago in *Eldred v. Ashcroft*.[46] There, the Court held that Congress has the power to extend the duration of copyrights on works about to enter the public domain.[47] But the Court's decision in *Eldred* relied on the fact that the affected works were ''*not yet* in the public domain.''[48] *Golan* presents a new wrinkle: What happens when Congress seeks to impose copyright protection on works *already* in the public domain?

Golan's roots lie in the United States' 1989 decision to join the Berne Convention for the Protection of Literary and Artistic Works, an international treaty that sets minimum standards of copyright protection and gives authors automatic protection in each member nation. The United States implemented its obligations under the convention in part by passing the Uruguay Round Agreements Act. Section 514 of the URAA grants copyright protection to millions of foreign works that were previously in the public domain.[49] The United States enacted Section 514 in order to strengthen the reciprocal copyright protections extended to American authors and artists by the other countries that are party to the convention.

The *Golan* plaintiffs include a variety of orchestra conductors, educators, and performers who claim that Section 514 curtails their ability to perform, distribute, or sell foreign-authored works that the statute removes from the public domain—and literally stops the orchestra from playing certain songs. They challenged Section 514's constitutionality on the grounds that it violates both the Copyright Clause and First Amendment. The Tenth Circuit rejected both arguments.[50] The Supreme Court, with Justice Elena Kagan recused, granted certiorari.

The case provides the Court with an opportunity to address the novel and important question whether or to what extent the Constitution limits Congress's right to grant new copyright protection to

[45] Golan v. Holder, 131 S. Ct. 1600 (2011) (No. 10-545).

[46] See Eldred, 537 U.S. 186.

[47] *Id.* at 199–222.

[48] *Id.* at 213 (emphasis added).

[49] 17 U.S.C. § 104 (2006).

[50] See Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010); Golan v. Holder, 501 F.3d 1179 (2007).

works that have traditionally been part of the public domain. Plaintiffs and amici—including the Cato Institute—have also asked the Court to clarify whether, in the absence of Copyright Clause authority, Congress is authorized to enact Section 514 as a necessary and proper means of executing the treaty power.

Patent Litigation

In the last week of June, the Supreme Court agreed to hear two additional patent cases. In *Kappos v. Hyatt*, the Court will address the rules that govern the introduction of new evidence in a civil action challenging the rejection of a patent by the Board of Patent Appeals and Interferences pursuant to 35 U.S.C. § 145.[51] And in *Caraco Pharmaceuticals v. Novo Nordisk*, the Court will address the circumstances under which generic-drug manufacturers may challenge, under the ''counterclaim'' provision of the Hatch-Waxman Act, the accuracy of patent descriptions submitted by name-brand manufacturers to the Food and Drug Administration.[52] In both cases, the government sought or recommended review—a request the Court almost always heeds in patent cases. Together, the cases will shape the nature of patent litigation in the federal courts. In addition, *Caraco* will likely have a significant impact on the streamlined generic-drug approval process.

Criminal Law and Procedure

GPS Surveillance

As always, there is no shortage of criminal law and procedure cases on the Court's docket. In *United States v. Jones*, the Court will decide the interesting and important question of whether police use of a GPS tracking device to conduct long-term surveillance constitutes a ''search'' that is subject to the Fourth Amendment's warrant requirement.[53]

The Court has never addressed the use of GPS technology in police investigations. But in *United States v. Knotts*, the Court held that police officers had conducted a Fourth Amendment ''search'' when they placed a ''beeper'' inside a chemical drum purchased by

[51] Kappos v. Hyatt, 2011 U.S. LEXIS 4908 (2011) (No. 10-1219).

[52] Caraco Pharm. Labs. Int'l v. Novo Nordisk, 2011 U.S. LEXIS 4901 (2011) (No. 10-844).

[53] United States v. Jones, 2011 U.S. LEXIS 4956 (2011) (No. 10-1259).

a suspect.[54] The beeper emitted radio signals that enabled police to track the drum to the defendant's cabin. Employing the ''reasonable expectation of privacy'' framework established by Justice John Marshall Harlan II in *United States v. Katz*, the Court concluded that ''[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movement from one place to another.''[55] Shortly thereafter, however, the Court held that *Knotts* does not allow police to use tracking devices to monitor ''property that has been withdrawn from public view.''[56]

Jones arose out of a police investigation of Antoine Jones, the owner of a local nightclub, for potential drug violations. The police obtained a warrant allowing them to place a GPS tracking device on Jones's Jeep Grand Cherokee.[57] But while the warrant required the device to be installed within 10 days, the police inexplicably waited until the 11th day to attach it to Jones's vehicle. Then they monitored the Jeep's movements 24/7 for close to a month. The investigation was a success. The police eventually raided Jones's car and various other locations, seizing hundreds of thousands of dollars in cash and wholesale quantities of drugs.[58]

Jones was convicted on drug charges, in part because of the GPS evidence of his movements. But the D.C. Circuit threw out that conviction after concluding that the GPS tracking had violated the Fourth Amendment.[59] The court distinguished *Knotts* on the ground that it applied only to the limited use of electronic signals to track a discrete journey—and not to the sort of longer-term, continuous monitoring to which the police subjected Jones.[60] And the court concluded that Jones had a reasonable expectation of privacy that his particular movements would remain discrete, disconnected, and disaggregated from the others.

The government sought certiorari, claiming that the D.C. Circuit's decision would ''stifle the ability of law enforcement agents to follow

[54] United States v. Knotts, 460 U.S. 276 (1983).

[55] *Id.* at 281 (relying on Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[56] United States v. Karo, 468 U.S. 705, 716 (1984).

[57] Petition for Writ of Certiorari at 3, United States v. Jones, No. 10-1259 (Apr. 15, 2011).

[58] *Id.* at 4.

[59] United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010).

[60] *Id.* at 556–63.

leads at the beginning stages of an investigation, provide no guidance to law enforcement officers about when a warrant is required before placing a GPS device on a vehicle, and call into question the legality of various investigative techniques used to gather public information.''[61] The Court granted review and will now decide how the Fourth Amendment applies to GPS tracking.

Jailhouse Strip Searches

In *Florence v. Chosen Board of Freeholders*, the Court will consider whether the Fourth Amendment prevents a jail from adopting a blanket policy of strip-searching individuals arrested and admitted for entry without any particularized suspicion of danger.[62]

The police arrested Albert Florence during a traffic stop based on an erroneous bench warrant for a civil contempt violation. Florence was strip-searched several times before eventually being released. He then filed a civil rights lawsuit under 28 U.S.C. § 1983 charging the local government and officials with violating his Fourth Amendment rights. The district court granted summary judgment for Florence,[63] but the Third Circuit reversed, holding that the Fourth Amendment permitted a blanket policy of strip-searching *all* arrestees.[64]

In *Bell v. Wolfish*, the Supreme Court upheld strip searches of all inmates returning to their cells from loosely supervised ''contact'' meetings with outside visitors.[65] Explaining that the Fourth Amendment ''requires a balancing of the need for the particular search against the invasion of personal rights that the search entails,'' the Court rejected any blanket requirement of probable cause.[66] Instead, the Court held that the proper inquiry required consideration of four factors: ''the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.''[67]

[61] Petition for Writ of Certiorari at 24, United States v. Jones, No. 10-1259 (Apr. 15, 2011).

[62] Florence v. Chosen Bd. of Freeholders, 131 S. Ct. 1816 (2011) (No. 10-945).

[63] Florence v. Bd. of Chosen Freeholders of Burlington, 595 F. Supp. 2d 492, 519 (D. N.J. 2009).

[64] Florence v. Bd. of Chosen Freeholders of Burlington, 621 F.3d 296 (3d Cir. 2010).

[65] Bell v. Wolfish, 441 U.S. 520 (1979).

[66] *Id.* at 559.

[67] *Id*.

In *Florence*, the Court will clarify the application of the Fourth Amendment to strip searches in the jailhouse context in the absence of individualized suspicion.

Miranda *Warnings*

Miranda is a frequent presence at the Court. In *Howes v. Fields*, the Court will consider when police must give an incarcerated inmate a *Miranda* warning in order to interrogate him about a different crime.[68] The general rule is that *Miranda* warnings are necessary when a suspect is in police custody, unable to leave, and subject to coercive pressures that might compel him to speak when otherwise he might remain silent.[69] *Howes* tests whether these conditions are necessarily met when a suspect is isolated from the general prison population for interrogation.

Randall Lee Fields was incarcerated in a Michigan jail on a charge of disorderly conduct. Police then sought to interview him concerning different allegations of sexual misconduct with an underage boy. Fields was taken to a conference room at the jail and interrogated for five to seven hours. The officials in the room informed Fields that he could leave and return to his cell whenever he wished. While Fields reportedly stated multiple times that he did not wish to speak any further, he was never taken back to his cell. Fields eventually confessed, and he was later convicted in Michigan court of two counts of third-degree criminal sexual conduct. His conviction was upheld on appeal.[70]

Fields then filed a federal habeas petition. The district court granted the petition and the Sixth Circuit affirmed, reasoning that the Supreme Court's precedents establish a bright-line rule that a *Miranda* warning is required whenever a prisoner is isolated from the general population and questioned regarding conduct outside of prison.[71]

[68] Howes v. Fields, 131 S. Ct. 1047 (2011) (No. 10-680).

[69] See Maryland v. Shatzer, 130 S. Ct. 1213, 1224 (2010).

[70] People v. Fields, No. 249137, 2004 Mich. App. LEXIS 2524 (Mich. Ct. App. Sept. 28, 2004), appeal denied, 698 N.W.2d 394 (Mich. 2005).

[71] Fields v. Howes, 2009 WL 304751, *6 (E.D. Mich. 2009); Fields v. Howes, 617 F.3d 813, 818 (6th Cir. 2010).

The Supreme Court has been closely divided on *Miranda* issues over the past few terms.[72] One different wrinkle here is that *Howes* arises on federal habeas review. It is therefore possible that the Court could decide the case on narrower statutory grounds under the Anti-Terrorism and Effective Death Penalty Act—which would bar habeas relief unless the Michigan court's application of federal law in granting Fields's habeas petition was not merely wrong, but *unreasonable*.[73]

Ineffective Assistance of Counsel

The Court has granted review in several cases involving Sixth Amendment claims of ineffective assistance of counsel, including two raising these claims in the context of plea bargaining (circumstances in which the jurisprudence is relatively undeveloped). In both of these cases, *Missouri v. Frye* and *Lafler v. Cooper*, defendants rejected plea deals and ended up with longer sentences as a result—one following a later guilty plea, the other after a trial.[74]

The Court has applied *Strickland v. Washington*[75] to pretrial errors, but only in cases where the error affected the trial process itself or led to a waiver of the defendant's trial rights altogether. *Frye* and *Cooper* provide an opportunity for the Court to address whether the Sixth Amendment right to counsel applies to the plea-bargaining process. Because the vast majority of criminal cases are resolved by guilty pleas, the Court's decisions here could potentially have significant consequences for criminal defendants.

In a separate case, *Martinez v. Ryan*, the Court will consider whether the Sixth Amendment guarantees a convicted inmate the effective assistance of counsel in a state postconviction proceeding that represents the inmate's first opportunity to seek relief based on the allegedly ineffective assistance of his trial counsel.[76]

[72] See, e.g., J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

[73] 28 U.S.C. § 2254(d)(1) (2006).

[74] Missouri v. Frye, 131 S. Ct. 856 (2011) (No. 10-444); Lafler v. Cooper, 131 S. Ct. 856 (2011) (No. 10-209).

[75] Strickland v. Washington, 466 U.S. 668 (1984).

[76] Martinez v. Ryan, 2011 U.S. LEXIS 4217 (2011) (No. 10-1001).

Foreign Affairs

In *Zivotofsky v. Clinton*, the Court will address whether the political-question doctrine bars the judiciary from considering whether the State Department is violating a federal statute addressing the status of Jerusalem on federal passports and identity documents.[77]

For decades, U.S. foreign policy has declined to recognize any state as having sovereignty over Jerusalem. The State Department has therefore historically refused requests by U.S. citizens born in Jerusalem to have their place of birth listed as ''Israel'' on their passports and other official documents. Congress sought to change this policy in 2002, when it passed a bill directing the secretary of state to identify such citizens, at their request, as having been born in ''Israel.'' President Bush signed the bill into law but simultaneously issued a statement announcing that he would construe the statutory provision as ''advisory'' in light of ''the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch.''[78] The State Department subsequently declined to enforce the provision.

Menachem Binyamin Zivotofsky was born in Jerusalem to parents who are U.S. citizens.[79] Zivotofsky's mother requested that the U.S. Embassy list her son's birthplace as ''Jerusalem, Israel'' on his U.S. passport.[80] The embassy refused; it simply listed Zivotofsky's birthplace as ''Jerusalem.''[81] Zivotofsky's parents sued, challenging the secretary's violation of the 2002 statute's plain terms.

The district court dismissed the case under the political question doctrine.[82] The D.C. Circuit affirmed, explaining that the doctrine prevents courts from considering ''claims that raise issues whose resolution has been committed to the political branches by the text of the Constitution.''[83] The court concluded that Article II of the

[77] Zivotofsky v. Clinton, 131 S. Ct. 2897 (2011) (No. 10-699).

[78] Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1229 (D.C. Cir. 2009); President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, 38 Weekly Comp. Pres. Doc. 1659 (Sept. 30, 2002).

[79] Zivotofsky, 571 F.3d at 1229

[80] *Id.*

[81] *Id.*

[82] Zivotofsky v. Sec'y of State, 511 F. Supp. 2d 97, 107 (D.D.C. 2007) (citing Baker v. Carr, 369 U.S. 186 (1962)).

[83] Zivotofsky, 571 F.3d at 1230 (citing Baker v. Carr, 369 U.S. at 217.).

Constitution grants the president the authority to recognize foreign governments—and that any decision directing the State Department to list ''Israel'' on Zivotofsky's documents would conflict with that recognition power.[84]

Zivotofsky provides the Court with an opportunity to address a number of interesting and important separation-of-powers issues, including the scope of the political-question doctrine and the president's power to recognize foreign sovereigns.

Certiorari Pipeline

At this point, nearly half of the Court's docket for the 2011 term remains unfilled and thus unknown. While the Court has already taken a number of interesting cases, much of the focus for the upcoming term is centered on a question that the Court has not yet even agreed to hear—the constitutionality of the Affordable Care Act and its individual mandate provision requiring Americans to purchase qualifying health insurance policies.

A number of cases presenting constitutional challenges to the ACA are currently pending before the federal courts of appeals, and a petition for certiorari has just reached the Court from a divided Sixth Circuit.[85] The odds that the Court will grant certiorari to address the constitutionality of ACA during the 2011 term jumped considerably on August 12, 2011, when a divided panel of the Eleventh Circuit held that the individual mandate exceeded Congress's power under the Commerce Clause.[86] The plaintiffs in that case include 26 states, two private individuals, and the National Federation of Independent Business. The Eleventh Circuit's decision creates a direct circuit split on the constitutionality of the individual mandate. It is now up to the government to decide whether to seek rehearing *en banc* in the Eleventh Circuit or go directly to the Supreme Court. The Fourth Circuit has yet to issue a decision in an ACA case that was argued in May, while the D.C. Circuit will hear argument in

[84] *Id.* at 1231.

[85] Thomas More Law Ctr. v. Obama, No. 10-2388, 2011 U.S. App. LEXIS 13265 (6th Cir. June 29, 2011); Petition for Writ of Certiorari, Thomas More Law Ctr. v. Obama, No. 11-117 (July 26, 2011), available at http://aca-litigation.wikispaces.com/file/view/Petition+for+cert+%2807.27.11%29.pdf.

[86] Florida v. U.S. Dep't of Health & Human Servs., Nos. 11-11021 & 11-11067, 2011 WL 3519178, (11th Cir. Aug. 12, 2011).

yet another ACA case this coming September.[87] But neither of these cases can undo the conflict that now exists between the Sixth and Eleventh Circuits.

Perhaps the biggest question hanging over the upcoming term as of this writing is whether it will grant certiorari in one of these cases—and when. But, even if the Court grants certiorari in one of the healthcare cases, it is unclear whether the case would be argued and decided during the 2011 term or carried over to the next term. Usually only those cases in which certiorari is granted by early January are argued and decided the same term. But the Court makes exceptions from time to time for especially important or time-sensitive cases. So while it is fair to say that ACA has officially arrived at the Court, it is unclear whether the Court will actually decide its fate this term.

Healthcare is just one of the blockbuster issues that could reach the Court this term. Last April, the Ninth Circuit upheld a preliminary injunction barring Arizona from enforcing components of its initiative to address unauthorized immigration (S.B. 1070).[88] The court concluded that four different provisions of the law—including its requirement that state officials check the immigration status of those being released after any arrest, its prohibition on any effort by illegal immigrants to seek or obtain work, and its authorization of state police to arrest individuals without a warrant when there is probable cause to suspect they have committed an offense that would render them removable from the United States—are preempted by the text and purpose of federal immigration laws. Arizona has recently filed a petition for certiorari seeking review of the Ninth Circuit's decision.[89]

There is also an array of other high-profile issues that could reach the Court this term in some form, including in the areas of affirmative

[87] Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va., 2010), argued, No. 11-1057 (4th Cir. May 10, 2011); Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) appeal docketed sub nom., Seven-Sky v. Holder, No. 11-5047 (D.C. Cir. Mar. 17, 2011); see generally, http://www.acalitigationblog.blogspot.com.

[88] See United States v. Arizona, 641 F.3d 339 (9th Cir. 2011).

[89] Petition for Writ of Certiorari, Arizona v. United States, No. 11-____ (Aug. 10, 2011), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/08/AZ-petition-on-SB-2070.pdf.

action,[90] Second Amendment rights,[91] campaign finance,[92] gay rights,[93] and the Alien Tort Statute.[94] The Court's decision to grant certiorari in one or more of these cases could have a major impact on the 2011 term.

* * *

If history is any guide, the Court will hear argument and issue signed opinions in somewhere between 70 and 80 cases this term. That means that the Court still has much to say about what October Term 2011 will look like. But the 43 cases granted thus far—along with the healthcare cases and others in the certiorari pipeline—have the potential to make it an extremely interesting and perhaps even a blockbuster term. And no matter how the Court fills out its docket, the Justices will have their hands full starting the first Monday in October.

[90] See Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., Nos. 08-1387, 08-1389, 08-1534, 09-1111, 2011 WL 2600665 (6th Cir. July 1, 2011) (affirmative action in public institutions of higher education); Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011) (same).

[91] See, e.g., Williams v. Maryland, 10 A.3d 1167 (Md. 2011) (right to carry); Nordyke v. King, No. 07-15763, 2011 WL 1632063 (9th Cir. May 2, 2011) (gun shows on county property); Heller v. District of Columbia, 698 F. Supp. 2d 179 (D.D.C. 2010) (registration requirements) (now pending in D.C. Cir.).

[92] See, e.g., Bluman v. FEC, No. 10-1766, 2011 U.S. Dist. LEXIS 86971 (D.C. Cir. Aug. 8, 2011) (right of foreign nationals to make campaign contributions and expenditures).

[93] See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (same-sex marriage referendum), question certified, 628 F.3d 1191 (9th Cir. 2011); Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010) (Defense of Marriage Act) (now pending in 1st Cir.); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (same).

[94] See, e.g., Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010) (corporate liability under Alien Tort Statute); Doe v. Exxon Mobil Corp., No. 09-7125, 2011 WL 2652384 (D.C. Cir. July 8, 2011) (same).