

Looking Ahead: The 2018 Supreme Court Term

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As the October 2018 Supreme Court term begins, the Court has taken center stage in the news headlines and political debates due to Justice Anthony Kennedy’s retirement and the nomination of Judge Brett Kavanaugh to fill his seat. However, a deeper look at the cases before the Court reveal a term that, at least at this point, may be somewhat quiet and without many fireworks. Absent on the docket to-date are the Court’s frequent battles over technology and police searches, challenges involving the ability of same-sex couples to marry, and the continued fights over how to draw electoral districts and the roles courts can, and should, play in reviewing them. Nevertheless, the Court will hear arguments about several critical issues in the coming months.

Eighth Amendment

In October and November, the Court will again be confronted with high stakes cases involving the death penalty. *Madison v. Alabama* (Docket No. 17-7505), set for argument in October, asks the Court to consider whether a state may execute prisoners who, due to mental disabilities, have no memory of the crimes or their roles in them. The defendant, Vernon Madison, was convicted in the 1985 death of a Mobile, Alabama, police officer. Madison suffered a series of strokes while on death row, and currently suffers from vascular dementia, resulting in confusion and his inability to remember the crimes that placed him on death row. Madison’s lawyers will argue before the Court that his execution should be barred under the Eighth Amendment as cruel and unusual punishment.

Bucklew v. Precythe (Docket No. 17-8151) will present the Court with a slightly different challenge to the death penalty; rather than focus on procedural safeguards, *Bucklew* looks at the actual methods used during an execution. Russell Bucklew was convicted

and sentenced to death in Missouri for the 1996 murder of a man who was dating Bucklew’s former girlfriend, and a subsequent crime spree. Bucklew suffers from a rare medical condition that he claims makes it likely that he will suffer “gruesome” pain if lethal injection is used. Under the Court’s previous rulings, particularly the 2015 holding in *Glossip v. Gross*, an inmate who is challenging a state’s method of execution must offer an alternative method and provide evidence of the severity and duration of pain likely to be produced by the proposed method. In this challenge, Bucklew claims that the state’s use of its current lethal injection drug protocol will subject him to “cruel and unusual” punishment because an alternative method he proposed, using nitrogen gas, exists.

Later in the term, in *Timbs v. Indiana* (Docket No. 17-1091), the Court will hear another Eighth Amendment challenge to a punishment with much less at risk: monetary fines. Timbs asks the Court to consider whether the Eighth Amendment’s excessive fines clause is incorporated against the states. Tyson Timbs was arrested on drug charges and

sentenced to home detention and probation. Subsequently, the state of Indiana attempted to seize Timbs’s vehicle, worth approximately \$40,000. The state court held that the attempted civil forfeiture of the vehicle was disproportionate to the offense and in violation of the Eighth Amendment. On appeal, the state supreme court overturned the ruling after concluding that in the past the U.S. Supreme Court had not applied the Eighth Amendment’s prohibition on excessive fines to the states through the Fourteenth Amendment. Over the last century, the Supreme Court has slowly been incorporating most aspects of the Bill of Rights to the states through the Fourteenth Amendment’s Due Process Clause; whether this trend will extend to civil fines is to be seen. This case could have implications for law enforcement across the country: A ruling in favor of the state would allow states to continue the growing practice of including civil forfeitures as part of the prosecution of drug offenses.

Double Jeopardy

This term will also give the Court the chance to look at a well-known constitutional standard it rarely explores: The Double Jeopardy Clause. Under the Fifth Amendment, no person may be “subject for the same offense to be twice put in jeopardy of life or limb.” The Supreme Court has long held that the Fifth Amendment allows separate “sovereigns” to prosecute the same incident, for example, two different state govern-



This Sept. 27, 2011, file photo shows a gopher frog at the Audubon Zoo in New Orleans, La. The nonprofit Pacific Legal Foundation wants the U.S. Supreme Court to overturn a declaration that Louisiana timberland is critical habitat for the endangered frog. The U.S. Fish and Wildlife Service says a network of ponds so shallow they dry up in the summer makes the 1,500-acre tract the only potential breeding ground outside Mississippi for dusky gopher frogs. (AP Photo/Gerald Herbert, File)

ments or the federal and state governments. The Court has now been asked to directly address this precedent and overturn it. In *Gamble v. U.S.* (Docket No. 17-646), the Court will review the appeal of Terance Martez Gamble who had previously been convicted of second-degree felony robbery. As a consequence of his conviction, Gamble was barred from owning a firearm. In 2015, police in Alabama stopped Gamble for a traffic violation, and discovered drug paraphernalia and a gun in his car. Alabama prosecuted Gamble for illegal possession of a firearm and he served one year in prison. The federal government subsequently charged Gamble with illegal possession for the same incident. Gamble argued this second indictment violated his Fifth Amendment Double Jeopardy protections. The federal courts hearing Gamble's appeals rejected his argument and found him guilty, and he is currently serving time in federal prison. Gamble's case gives the Court the unique chance to overturn precedent. By granting certiorari to hear the case in the first place, the justices at least acknowledged that they are willing to open the door to overturning this long-standing standard. The Court's ruling in this case could have

wide-sweeping impact in light of the federal government taking on increased policing and prosecutorial activities as they relate to drugs and firearms offenses.

Land Use

This term, the Court will also be dealing with a handful of cases concerning land use by the federal government, state governments, and Indian tribes. These cases deal with a variety of issues including federalism, a court's ability to review an agency ruling, and the ability of private landowners to control their own land. They include:

Royal v. Murphy (Docket No. 17-1107), which will ask whether the 1866 territorial boundaries of the Creek Nation, which are within the former Indian Territory of eastern Oklahoma, constitute an "Indian reservation" today. A ruling in the case could have "wide-ranging and serious implications for law enforcement," according to a brief submitted by the federal government. Under law, the state and local authorities have jurisdiction over certain tribal affairs, while the federal government retains jurisdiction over others. The Trump administration has argued that a "reservation"

designation could change longstanding balances of power among local, state, and federal authorities in the region.

Weyerhaeuser Co. v. Fish and Wildlife Service (Docket No. 17-587) challenges a federal agency decision to designate private land as a critical habitat for an endangered species when the species does not live on that land. In 2010, the U.S. Fish and Wildlife Service designated land in Louisiana that included a parcel owned by Weyerhaeuser as critical habitat for the dusky gopher frog. The frog had not been known to inhabit the land, but the land contained known historic breeding locations. The designation thwarted Weyerhaeuser's plans to use the land for residential development and timber harvesting.

Washington State Dept. of Licensing v. Cougar Den, Inc. (Docket No. 16-1498), which will explore the ability of tribal members to avoid taxes on commercial activities conducted off-reservation on a public highway. Specifically, the case concerns a Yakama-owned fuel importer, Cougar Den, that imports fuel to an on-reservation gas station via an off-reservation public highway, and whether the State of Washington may tax the fuel imports according to state laws because it involves a public highway. The Yakama Treaty of 1855, which the Yakama argue includes a right-to-travel clause that exempts them from this taxation, will come under scrutiny, along with Washington State tax laws.

In the repeat case of *Sturgeon v. Frost* (Docket No. 17-949), the Court will once again be presented with a challenge to the Alaska National Interest Lands Conservation Act. This case came previously before the justices in 2016 as a result of a suit by an Alaska resident, Jim Sturgeon. Sturgeon had been told by the National Park Service that federal government regulations limited his use of land that was owned by Alaska but fell within a national park (specifi-

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cally, that he could not operate his hovercraft on the Nation River). In 2016, the Court essentially dodged the major issues by remanding the case back to the Ninth Circuit for specific fact finding; and now, with those facts found (the Ninth Circuit ruled that the land at issue is “public land” thereby falling under the control of the Park Service), the case is back before the Court. Assuming the Court gets to the merits of the case this term, it has the potential to issue a sweeping ruling defining which lands fall under the federal government’s power across the country.

Justice Kennedy’s Legacy

Of course, no discussion of the upcoming term would be complete without looking at the legacy of Justice Anthony Kennedy and the vacancy created by his retirement. Particularly in the last five to seven years, Justice Kennedy has played a central role on the Supreme Court and its place in our political discourse. What does a Court without Justice Kennedy as its “swing” or “middle” look like? Do advocates alter their arguments to focus on Chief Justice John Roberts? Does another justice eventually shift into the swing vote position? Will the Court’s docket change in focus? At the time of writing, the confirmation hearings for President Trump’s replacement, Brett Kavanaugh of the D.C. Circuit, were ongoing. What his impact on the Court might be obviously remained to be seen. But one thing is certain: even with a somewhat quiet term on the horizon, the Supreme Court will continue to dominate political debates and serve as a litmus test for the state of our political discourse. ●

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