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# In New Term, Supreme Court Shifts Focus to Crime and First Amendment

By **ADAM LIPTAK**

WASHINGTON — The Supreme Court, which has been focused in recent terms on the rights of corporations and on curbing big lawsuits, returns to the bench on Monday with a different agenda. Now, criminal justice is at the heart of the court's docket, along with major cases on free speech and religious freedom.

"The docket seems to be changing," Justice Anthony M. Kennedy [told reporters at a judicial conference in August](#).

"A lot of big civil cases are going to arbitration," he said. "I don't see as many of the big civil cases."

Still, the shift in focus toward criminal and First Amendment cases will soon be obscured if, as expected, the justices agree to hear a challenge to the 2010 [health care overhaul](#) law. That case promises to be a once-in-a-generation blockbuster.

In the meantime, the justices will hear an extraordinary set of cases that together amount to a project that could overhaul almost every part of the criminal justice system.

The court will decide whether the police need a warrant to use advanced technology to track suspects, whether jails may strip-search people arrested for even the most minor offenses, whether defendants have a right to competent lawyers to help them decide whether to plead guilty, when eyewitness evidence may be used at trial, and what should happen when prosecutors withhold evidence.

"The Supreme Court has positioned itself to improve the quality of the criminal justice process from beginning to end," said Eric M. Freedman, a law professor at Hofstra University.

The court will continue its intense engagement with the First Amendment. But where earlier

cases involved quirky issues like [dog fights](#), [funeral protests](#) and [the Seven Aphorisms of a fringe church called Summum](#), the marquee First Amendment cases this term involve issues of sweep and consequence.

In one, the court will rule on whether the government may ban swearing and nudity on broadcast television. In another, the justices will decide for the first time whether there is a “ministerial exception” to employment laws that allows religious institutions to discriminate in ways others employers cannot.

The health care case is not the only juggernaut looming on the horizon. In the next term or two, the court may well address [same-sex marriage](#), affirmative action and illegal [immigration](#). For now, the justices are focused on criminal cases, especially ones concerning the Fourth Amendment’s protections against unreasonable searches and the Sixth Amendment’s guarantee of a fair trial.

In *United States v. Jones*, No. 10-1259, the justices will consider whether the police need a warrant to attach a GPS device to a suspect’s car and track its movements for weeks at a time. Some appeals court judges have said that such surveillance put them in mind of George Orwell’s novel “1984.” Prosecutors say that electronic enhancement of the ability of the police to stake out and track suspects raises no constitutional concerns.

A second [Fourth Amendment](#) case, *Florence v. Board of Freeholders*, No. 10-945, asks whether people arrested and held for minor offenses may be routinely strip-searched.

The court will also consider, in *Maples v. Thomas*, No. 10-63, whether a mix-up in the mailroom of a big New York law firm should mean that a death row inmate in Alabama must lose an opportunity to appeal a decision against him.

In a pair of cases to be argued on Oct. 31 — *Lafler v. Cooper*, No. 10-209, and *Missouri v. Frye*, No. 10-444 — the justices will consider whether defendants who were not told of favorable plea deals or were advised to reject them may pursue claims for ineffective assistance of counsel. A great majority of prosecutions are resolved with guilty pleas, and more vigorous judicial supervision of how the pleas are reached would have a broad practical impact.

The court will also consider the use of eyewitness evidence, in *Perry v. New Hampshire*, No. 10-8974. Such evidence, as the New Jersey Supreme Court found in [a major decision in August](#), is often unreliable and has been the cause of many [wrongful convictions](#). The justices will consider whether trial courts must be particularly wary of allowing such

evidence to be presented when it has been tainted by suggestive circumstances not created by the authorities.

And the justices will return to a subject that sharply divided them in last term's [Connick v. Thompson](#) case, which threw out a \$14 million jury award to a former death row inmate who was cleared after prosecutorial withholding of evidence in New Orleans came to light. The new case, *Smith v. Cain*, No. 10-8145, also comes from New Orleans and concerns similar claims of prosecutorial misconduct.

The case most likely to capture the public's attention is *Federal Communications Commission v. Fox Television Stations*, No. 10-1293, which concerns "fleeting expletives" uttered by giddy celebrities at awards shows and partial nudity on the old ABC drama "NYPD Blue."

The case is making a return appearance at the court. In a [5-to-4 decision in 2009](#), the justices upheld the commission's authority to start punishing impromptu cursing as a matter of administrative law but noted that there was a looming constitutional question in the background. That question, Justice Antonin Scalia wrote, correctly as it turned out, "will be determined soon enough, perhaps in this very case."

There is reason to think the voting alignments will shift this time around. Justice Clarence Thomas voted with the majority in 2009 but criticized what he called the "doctrinal incoherence" of the court's First Amendment jurisprudence in this area, which allows the regulation of broadcast television but not cable programming or the Internet.

In *Hosanna-Tabor Church v. Equal Employment Opportunity Commission*, No. 10-553, the court will consider whether a Michigan school run by a Lutheran church is subject to a federal law banning discrimination based on a disability. The church fired a teacher with narcolepsy who was a commissioned minister but taught mostly secular subjects.

The church told the justices that allowing courts to second-guess employment decisions involving its religious employees "would be a revolution in relations between church and state." The employment commission responded that accepting the church's position "would critically undermine the protections" in federal antidiscrimination laws.

The cases the justices are hearing these days look different from those of recent years, and frequent litigants at the court have started to notice.

In the last term, the U.S. Chamber of Commerce participated in more cases than in any

other term in its 33-year history, Robin S. Conrad, executive director of the chamber's litigation unit, [said at a news briefing](#) last month. By contrast, she said, "we're starting off this term in fewer cases than usual."

That is not to say that there are no significant business cases. And the court will continue to explore issues of patent law and the pre-emption of state regulation by federal law.

Mayo Collaborative Services v. Prometheus Laboratories, No. 10-1150, for instance, asks whether observations about how varying the dosage of a medicine affects patients may be patented. And National Meat Association v. Harris, No. 10-224, will consider the tension between a federal law regulating slaughterhouses and a California law requiring the immediate [euthanasia](#) of livestock unable to walk.

Still, Ms. Conrad said, "there's a smaller percentage of the docket that is comprised of business cases." She added, "We hope that this is not a downward trend."