

***Court of Federal Claims Significant Cases Lookback & Preview***  
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***Riley v. California***

The question in *Riley* was whether police officers who arrest someone may search the digital contents of that person's cell phone without a warrant. Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. After his arrest, an officer seized Riley's cell phone from his pocket, and officers later conducted a thorough search of the phone's digital contents. Among other things, the officers found photographs and videos indicating that Riley was a member of a gang. At Riley's trial on a gang shooting charge, the government introduced that evidence over Riley's objection. The California Supreme Court affirmed his conviction, holding that officers had a right to search Riley's phone incident to arrest without a warrant. The Supreme Court reversed, unanimously holding that the government may not search the digital contents of a cell phone without a warrant.

In a case called *U.S. v. Robinson*, the Supreme Court had held that the government has an automatic right to search a person incident to his arrest without a warrant. The rationale of *Robinson* is that such a search is justified in order to forestall a threat to the arresting officer's safety or the destruction of evidence. The Court made clear, however, that the government was not required to establish that these dangers are actually present in each case. Instead, the Court viewed these dangers as sufficiently inherent in all custodial arrests and the intrusion on privacy as sufficiently limited to justify a bright line rule giving the police an automatic right to search without a warrant.

In *Riley*, the Supreme Court acknowledged that a literal reading of *Robinson* supported the government's argument that it could search Riley's cell phone without a warrant and without any specific showing that there was a threat to officer safety or that evidence could be destroyed. But the Court refused to extend *Robinson* to this setting. It held that while a warrantless search is reasonable as applied to physical evidence, it is unreasonable as applied to the digital contents of a cell phone.

The Court first concluded that the digital contents of a cell phone do not present the same inherent risk of harm to officers or destruction of evidence. The Court explained that the digital contents of cell phones cannot be used as a weapon, and that once a phone is seized, there is no risk that the digital contents can be destroyed. The Court dismissed the government's concerns about cell phone encryption and remote wiping as too speculative to justify dispensing with the warrant requirement in every case.

Second, the Court viewed the level of intrusion as vastly different. Whereas a search of physical evidence is limited to what a person can carry on him, and only rarely leads to the acquisition of much sensitive private information, cell phone searches can give officers a window into a person's entire life. Because people now store private emails, contacts, videos, pictures, health information, and bank information on their cell phones, searching a cell phone is equivalent in intrusiveness to searching a person's home. Just as the search of a home requires a warrant, the Court held, so too does the search of a cell phone.

*Riley* continues the Court's trend in responding to the increasing threat that technology poses to our privacy by imposing new Fourth Amendment limits on government searches. Several Terms ago, the Court held that the government could not monitor a person's public

movements by putting a GPS device on a person's car. Before that, the Court held that the government could not use a thermal imaging device to obtain information on what is going on inside a person's house. In the coming Terms, the Court will be faced with new questions on how advancing technology should affect the scope of the Fourth Amendment's privacy protections, such as whether the government may monitor a person's comings and goings by accessing information from cell phone companies, whether it may search a person's computer at the border, whether it can amass metadata from phone companies to search for connections to terrorists, and whether it may search emails that are sent to foreign contacts. In each case, the government is relying on existing Supreme Court decisions to support its actions. The question is whether the Court will be willing to apply these older doctrines in these contexts, or whether it will once again establish new Fourth Amendment limits in light of the threat that advancing technology poses to our privacy.

### ***Burwell v. Hobby Lobby***

The Affordable Care Act requires employers to provide cost-free contraception coverage to their employees. The question in *Hobby Lobby* was whether closely held corporations that have a religious objection to providing such coverage are entitled to an exemption from the Affordable Care Act's contraception mandate. Hobby Lobby is a closely held corporation whose owners view certain kinds of contraception as abortifacients and whose religion prohibits them from facilitating access to such contraception. HHS regulations exempt churches from the requirement to provide contraception coverage to their employees, and it accommodates private nonprofits who have a religious objection to providing such coverage by requiring insurance companies to provide the coverage instead. Hobby Lobby claimed that it too should get an accommodation or exemption. It relied on the Religious Freedom Restoration Act, or RFRA,

which prohibits the federal government from imposing a substantial burden on a person's religion unless the government can show that the burden is the least restrictive way to further a compelling government interest. The government denied an exemption or an accommodation to Hobby Lobby, but the Supreme Court, in a 5-4 decision, held that Hobby Lobby was entitled to the accommodation that was offered to non-profits.

The Court first held that closely held corporations whose owners have a religious objection to providing contraception coverage are persons exercising religion and therefore protected by RFRA. The Court rejected the government's argument that only religious organizations and non-profits could exercise religion. Closely held corporations, the Court held, are equally capable of exercising religion. As such, any substantial burden on Hobby Lobby's religion had to be justified as the least restrictive way to further a compelling interest.

Second, the Court held that requiring Hobby Lobby to provide contraception coverage imposed a substantial burden on Hobby Lobby's religion. The government argued that there was no substantial burden because Hobby Lobby's owners were not required to use contraception themselves, and any such use would be the result of independent decisions of Hobby Lobby's employees. The Court concluded, however, that the contraception mandate imposed a substantial burden on Hobby Lobby's religion because it required Hobby Lobby's owners to violate their religious belief that facilitating contraceptive use by their employees was a sin.

Third, the Court assumed without deciding that the government has a compelling interest in ensuring cost-free contraception coverage for employees. But it further held that the government had failed to show that the contraception mandate was the least restrictive alternative to further that interest. The Court noted that the government had already

accommodated the religious objections of non-profits by requiring the employer's insurance companies to offer such coverage, and it concluded that the government had failed to show that this alternative would not work equally well when expanded to include closely held corporations.

The scope of the Hobby Lobby decision is actually quite narrow. It applies only to closely held corporations whose owners practice their religion through their corporation. It requires only that the government offer the same option to closely held corporations that it offers to non-profits. And because that accommodation requires insurance companies to provide cost-free contraception coverage, it fully protects women seeking contraception. It is, as the Court explained, a win-win situation.

More difficult questions, however, loom on the horizon. The very accommodation that the Court relied on in *Hobby Lobby* for non-profits is currently being challenged by the non-profits on the ground that it still requires them to facilitate use of contraception in violation of their religious views. And immediately after *Hobby Lobby*, the Court issued a stay in a decision involving one of the non-profits that required the government to go further in accommodating the religious objection than it already had. Eventually, the rubber is going to meet the road, because some religious objectors will not be satisfied with any accommodation that requires their insurance companies to provide coverage to their employees. The only way for those objectors to be accommodated would be for the government to provide the coverage itself, something that the government has no authority to do under the Affordable Care Act, and that would not be in keeping with the basic structure of the Act to furnish health coverage through insurance companies. Four Justices in the five-person majority indicated that the government is required to accommodate religious objections by providing the contraception coverage itself. But Justice

Kennedy, in his concurring opinion, expressly reserved that question. Whether this Term or next, the Court is going to have to answer that question.

## *United States v. Wong*

This case presents the question whether the statutory deadline for filing suit in federal court under the Federal Torts Claim Act (FTCA) is subject to equitable tolling. The FTCA waives the immunity of the United States for damage claims arising out of torts committed by federal employees. Before filing suit in court, a party must first file a claim with the relevant federal agency. If the federal agency denies the claim, an action may be brought in federal district court, but if the claim is not brought within six months, it “shall,” in the words of the statute, “be forever barred.” The question presented is whether that statutory phrase precludes a court from tolling the six-month deadline for equitable reasons.

The facts are that while Wong was held in immigration detention, government officials strip-searched her and refused to give her vegetarian meals in accordance with the dietary requirements of her religion. Wong presented a claim to the Immigration and Naturalization Service (INS) under the FTCA, alleging negligence in the conditions of her confinement, which the INS rejected. Wong subsequently sought leave to amend a *Bivens* suit she had previously brought in federal court to add an FTCA claim, and she did so within the sixty-day period for filing an FTCA claim. The magistrate judge recommended that she be granted leave to amend within the sixty-day period, but the district court did not grant the motion until after the 60-day period had expired. When Wong then amended her complaint, she was well outside the 60-day period.

The government moved to dismiss for lack of jurisdiction, but the district court initially denied the motion. It concluded that the sixth-month period was subject to equitable tolling, and that the equities required tolling from the time the magistrate judge recommended allowing her

to amend her complaint until the time the district court acted on the motion. Once that period was excluded, Wong's amendment to her complaint was timely. On the government's motion for reconsideration, however, the district court concluded that the sixth month period was jurisdictional and therefore could not be equitably tolled. It therefore dismissed Wong's FTCA claim.

The en banc Ninth Circuit reversed. The court first held that the six-month deadline is not jurisdictional because Congress did not clearly express its intent to make it jurisdictional. The court reasoned that the time bar itself is not framed in jurisdictional terms, and it is located in a different section of the code than the FTCA's jurisdiction granting provision. The court then held that the time period, while phrased in mandatory terms, is nonetheless subject to equitable tolling. The court relied on the strong presumption that non-jurisdictional deadlines are subject to equitable tolling

The government argues that the presumption in favor of equitable tolling does not apply to jurisdictional limitations, and that the six-month deadline is jurisdictional. The government contends that the "forever barred" language in the FTCA was patterned on the Tucker Act, which has been repeatedly interpreted by the Supreme Court as a jurisdictional limitation not subject to equitable tolling. By borrowing that language, the government argues, Congress necessarily intended for the six month limitation to be a jurisdictional limitation on the right to sue the U.S. for a tort committed by its officers.

The Court has increasingly required Congress to specifically say something is jurisdictional if it wants it to be treated as jurisdictional. The one exception is where non-jurisdictional language has previously been interpreted by the Court to be jurisdictional in

analogous statutes. This case comes down to which of these two competing lines of authority should govern. Given the close connection between the Tucker Act and the FTCA, my guess is that the government will end up on the winning end.

***Kellogg Brown & Root Services, Inc. v. United States, ex rel. Carter***

The False Claims Act (FCA) imposes civil liability for submitting false claims to the government and allows private individuals to bring a *qui tam* action on the government's behalf to collect penalties. The Act imposes a six-year statute of limitations from the date of the violation for bringing a claim. The first question in this case, and the only one I will discuss, is whether the limitations period is subject to tolling under the Wartime Suspension of Limitations Act (WSLA). That Act tolls the statute of limitations for "any offense" of fraud against the United States during a "war" until three years after termination of hostilities.

The facts are these. KBR provided logistical support to the U.S. military in Iraq. Carter worked for KBR as a water purification operator. Carter filed a *qui tam* action against KBR in federal district court alleging that KBR made false claims to the United States relating to contaminated water and submitted false bills for labor costs. As relevant here, the claims were filed after the six-year limitations period expired. Carter argued, however, that the limitations period was subject to tolling under the WSLA because Congress authorized the use of force in Iraq, civil fraud against the US is an "offense" within the meaning of that Act, and the hostilities in Iraq have not yet terminated. The district court dismissed Carter's claims.

The Fourth Circuit reversed. As relevant here, the court of appeals held that the WSLA tolling provision applies to *qui tam* actions brought under the FCA, and that respondent's suit was therefore timely. The court reasoned that the term "offense" sometimes refers to crimes, but it can also refer to civil law violations. The term "offense" in the WSLA refers to both crimes

and civil law violations, the court concluded, by virtue of Congress having deleted the phrase “now indictable” in an amendment to the WSLA. The court also concluded that the WSLA was triggered by Congress’s authorization of the use of military force in Iraq. The term “war,” the court reasoned, encompasses not only formal declarations, but also congressional authorizations to use military force.

KBR argues that the WSLA’s tolling provision does not apply in this case. KBR first argues that the term “offense” in the WSLA refers to crimes, not to civil law violations. Not only is that the ordinary meaning of the term, KBR argues, but the WSLA is in Title 18, where Congress has codified all federal criminal offenses. KBR further argues that a crimes-only interpretation fits the structure of the Act, because the additional limitations period of three years exactly matches the limitations period for criminal fraud offenses. Congress deleted the phrase “now indictable” in order to eliminate surplus, KBR argues, not to fundamentally change the scope of the provision.

KBR next argues that that WSLA applies only when Congress has formally declared a war. Even though the term “war” has broadened in modern times to include authorized armed conflicts, KBR argues, war was understood at the time of the WSLA’s enactment to refer to a formally declared war. KBR also argues that any broadening of the term to encompass undeclared wars would place the judiciary in an untenable position of deciding when an armed conflict is actually a war. Finally, KBR argues that because the tolling period ends only on Presidential proclamation or concurrent resolution, neither of which would ordinarily occur in an undeclared war, the consequences of a broad definition of war is that the tolling period will end up being indefinite.

Because Carter has not yet filed his brief, it is hard to know whether there is another side to this story. But based on what has been submitted thus far, I suspect the Court will interpret “offense” to reach crimes and not civil law violations. The removal of the term “indictable” from a statute that has always been understood to apply only to criminal offenses is an awfully thin basis for a dramatic expansion of a tolling provision. Having decided that much, I would suspect that the Court will save for another day whether a formal declaration of war is required to trigger the tolling period.