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Between September 28th and October 18th, the Court granted certiorari in 20 additional cases, raising the total to 59 grants for this Term. Of the additional cases, three raise constitutional issues (outside the business or criminal context), eight are business cases, and seven are criminal cases. The Court will also revisit for a second time a bankruptcy case and an Indian law case.

This update previews the 20 new grants. Section I discusses some especially noteworthy cases. Section II organizes the cases into subject matter categories and provides brief summaries.

SECTION I: ADDITIONAL HIGHLIGHTS

In *Ashcroft v. al-Kidd*, the Court will once again examine allegations that the federal government transgressed constitutional limits in fighting the war on terror in the wake of 9/11. The question here is whether former Attorney General Ashcroft is immune from a suit alleging that he misused the material witness statute. That statute authorizes the arrest of persons whose testimony is needed for a trial when securing the testimony would otherwise be impractical. The allegation in this case is that the former Attorney General used the material witness statute as a pretext to preventively detain and investigate terrorist suspects, rather than to secure their testimony for a trial. The Ninth Circuit rejected the former Attorney General’s claims to absolute prosecutorial immunity and qualified immunity, on the ground that those defenses are not available when a prosecutor is alleged to have an improper motive. The former Attorney General argues that as long as there is an objective basis for an arrest under the material witness statute, he is immune from suit, regardless of his motive. Embedded in the immunity question is the more important constitutional question whether the government’s use of the material witness statute for preventive detention, rather than for securing testimony, is consistent with the Fourth Amendment. An immunity ruling would insulate the former Attorney General from personal liability, but would not likely have significant implications beyond that. A ruling that the Constitution does not preclude the government from using the material witness statute as a pretext for preventive detention would have far more significant consequences.

In *General Dynamics Corp v. United States; Boeing Company v. United States*, the Court will examine the scope of the state secrets privilege. In *United States v. Reynolds*, 345 U.S. 1 (1953), the Court held that when the government is a defendant in civil litigation, it may assert the state secrets privilege, even when the consequence is that plaintiffs are denied access to information necessary to prove their claim. To the dismay of many civil liberties advocates, the Obama administration has asserted the state secrets privilege in cases challenging the government’s alleged program of transferring foreign terrorist suspects to foreign governments where they are tortured, and the government’s alleged program of intercepting the phone and internet communications of Americans without a warrant. This case raises the question of the scope of the state secrets privilege in a different context. After the government terminated contracts with the General Dynamics Corporation and the McDonnell Douglas Corporation (now Boeing) to build stealth aircraft and ordered the contractors to repay $1.35 billion, the contractors challenged the termination order in court. When the government invoked the state secrets privilege to bar inquiry into one of the contractor’s defenses, the contractors urged that the
consequence should be invalidation of the government’s termination order. The Federal Circuit held that, under Reynolds, the government could assert the state secrets privilege without having to rescind its termination order. The contractors argue that Reynolds does not permit the government to impose a sanction and then withhold evidence that is necessary to make out a defense to that sanction. This case will decide whether the Court is willing to make the government pay a price for asserting the state secrets privilege in this discrete context. But the decision may also have implications for whether the government may assert the state secrets privilege in a criminal prosecution without having to let the defendant go, an issue that has divided the lower courts.

In Goodyear Luxembourg Tires v. Brown and J. McIntyre Machinery, Ltd. v. Nicastro, the Court will consider the extent to which the Due Process Clause places limits on a state’s ability to provide a forum to its residents who have been injured by defective products manufactured by foreign corporations. In Asahi Metal Ind. Co. v. Superior Court of California, 480 U.S. 102 (1987), the Court divided on the standard for determining when a state may exercise personal jurisdiction over a manufacturer that has put products in the stream of commerce that end up in the forum state. Since then, courts have struggled with that issue. In these two cases, state courts held that foreign manufacturers are subject to nationwide personal jurisdiction when they place products in the stream of commerce through a distribution scheme that targets a national market unless they take reasonable steps to prevent distribution of their products in the state at issue. Goodyear Luxembourg presents the question whether this theory is valid when the particular product that caused the injury did not enter the forum state, but other similar products did, while J. McIntyre presents the question whether this theory is valid when the particular product that caused the injury entered the forum state. The foreign corporations argue that this theory cannot be validly applied in either circumstance. Goodyear Luxembourg argues that the Due Process Clause does not allow a state to assert personal jurisdiction when the product causing harm does not enter the state unless the entity itself does business in the state. J. McIntyre argues that the Due Process Clause does not allow a state to assert personal jurisdiction even when the product causing harm enters the state unless the foreign entity purposefully seeks to avail itself of the benefits of the forum state. In these cases, the Court will have the opportunity to finally decide when the stream of commerce theory of personal jurisdiction can be reconciled with fundamental due process principles. And that decision will determine the extent to which states may afford a remedy to residents who have been injured by products manufactured by foreign corporations.

SECTION II: CASE SUMMARIES

Overview

Constitutional Law (Outside the Business or Criminal Context)

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Ashcroft v. al-Kidd

- First Amendment – Petition Clause
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Criminal Law

- Standing – 10th Amendment
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- Sixth Amendment – Confrontation Clause
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• Bankruptcy  
  *Stern v. Marshall*

**Constitutional Law**

**Fourth Amendment – Seizure/Immunity From Suit**  
*Ashcroft v. al-Kidd* (10-98)  
**Questions Presented:**

1. Whether the court of appeals erred in denying petitioner absolute immunity from the pretext claim.  
2. Whether the court of appeals erred in denying petitioner qualified immunity from the pretext claim based on the conclusions that (a) the Fourth Amendment prohibits an officer from executing a valid material witness warrant with the subjective intent of conducting further investigation or preventively detaining the subject; and (b) this Fourth Amendment rule was clearly established at the time of respondent’s arrest.

**Summary:**

The material witness statute authorizes the arrest of a person if that person’s testimony is material to a criminal trial and it may become impracticable to secure the presence of the person by subpoena. This case raises the question whether former Attorney General Ashcroft (petitioner) is immune from a suit alleging that he misused that statute to detain terrorist suspects.

Respondent Abdullah al-Kidd was arrested pursuant to the material witness statute based on an affidavit alleging that he was preparing to travel one-way to Saudi Arabia and that his testimony was needed in a criminal trial of another individual. During his detention, respondent was interrogated, handcuffed, shackled, and strip searched. Respondent filed a damages action against petitioner, alleging that petitioner had used the material witness statute as a pretext to preventively detain and investigate terrorism suspects. Respondent also alleged that petitioner was responsible for false statements in the material witness affidavit. The district court rejected petitioner’s claim that he was immune from suit, and the Ninth Circuit affirmed.

The Ninth Circuit held that petitioner is not entitled to absolute prosecutorial immunity because that immunity does not apply when the prosecutor’s immediate purpose is to investigate or detain rather than to secure testimony. It also held that petitioner is not entitled to qualified immunity because *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), put petitioner on notice that a policy of using the material witness statute as a pretext to investigate suspects without reasonable suspicion violates the Fourth Amendment.

Petitioner challenges each of the court of appeals’ holdings. He argues that absolute prosecutorial immunity protects a prosecutor from liability for prosecutorial acts, regardless of the prosecutor’s motive. And he argues that an arrest that is objectively reasonable under the material witness statute is not rendered invalid under the Fourth Amendment based on an improper motive.

**Decision Below:**  
580 F.3d 949 (9th Cir. 2009)
Petitioner’s Counsel of Record:
Neal Kumar Katyal, Acting U.S. Solicitor General

Respondent’s Counsel of Record:
Lee Gelernt, American Civil Liberties Union Foundation

First Amendment – Petition Clause

Borough of Duryea v. Guarnieri (09-1476)

Question Presented:
Whether the Third Circuit erred in holding that state and local government employees may sue their employers for retaliation under the First Amendment’s Petition Clause when they petitioned the government on matters of purely private concern, contrary to decisions by all ten other federal circuits and four state supreme courts that have ruled on the issue.

Summary:
In Connick v. Myers, 461 U.S. 138 (1983), the Court held that the First Amendment Free Speech Clause does not protect a public employee from retaliation for speech on a matter of no public concern. The question in this case is whether Connick’s public concern requirement also applies to claims under the First Amendment Petition Clause.

The Borough of Duryea Council (petitioner) dismissed respondent from his position as Police Chief. Respondent filed a successful arbitration grievance and was reinstated as Chief. Petitioner responded by issuing a series of directives severely limiting respondent’s authority. Respondent filed suit, alleging that the directives were retaliation for his filing of a constitutionally protected grievance in violation of the Petition Clause of the First Amendment. A jury found in respondent’s favor and awarded him money damages.

The Third Circuit affirmed. It held that Connick’s public concern requirement does not apply to claims under the Petition Clause that are based on retaliation for having petitioned the government through a formal mechanism, such as a lawsuit or a grievance procedure. That court reasoned that such an extension of Connick would nullify the independent scope of the Petition Clause.

Petitioner argues that Connick is applicable to Petition Clause claims because the Petition Clause and the Free Speech Clause have equal status under the First Amendment. Petitioner also argues that the concern for disruption of the public workplace that animated the rule in Connick is equally applicable to claims under the Petition Clause.

Decision Below:
364 Fed. App’x 749 (3d Cir. 2010)

Petitioners’ Counsel of Record:
Daniel R. Ortiz, University of Virginia School of Law

Respondent’s Counsel of Record:
Eric Schnapper, University of Washington School of Law

Fourth Amendment – Seizure

Camreta v. Greene; Alford v. Greene (09-1454, 09-1478)
Question Presented:
Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child who they reasonably suspect was being sexually abused by her father?

Summary:
The Fourth Amendment generally requires a warrant or probable cause to justify the detention of a person suspected of committing a crime. For certain kinds of detentions, however, the Fourth Amendment does not require a warrant or probable cause. Instead, the Court balances the interests at stake to determine the appropriate standard. This case raises the question of the appropriate Fourth Amendment standard for detaining and interviewing a child at school when the child is suspected of being a victim of sexual abuse.

A case worker at the Oregon Department of Human Services received information that led him to believe that a child was a victim of sexual abuse by her father. The case worker went to the child’s school to interview the child, and a deputy sheriff accompanied him. During an interview conducted by the case worker, the child accused her father of sexually abusing her. The child’s mother filed a suit for damages against the case worker and the deputy sheriff, alleging that their detention and interview of her child violated the Fourth Amendment. The district court held that the officials’ actions were objectively reasonable and therefore complied with the Fourth Amendment, but the Ninth Circuit reversed that Fourth Amendment ruling.

The Ninth Circuit held that when a law enforcement officer is directly involved, the detention of a child at school who is suspected of being the victim of sexual abuse must be preceded by a warrant, a court order, exigent circumstances, or parental consent. Recognizing that it had created a new Fourth Amendment rule, however, the Ninth Circuit held that the state officials were entitled to qualified immunity from suit.

Petitioner argues that the Ninth Circuit erred in applying the Fourth Amendment standard that is applicable to the arrest of persons suspected of violating the criminal law. Instead, petitioners argue that the Fourth Amendment requires a less demanding standard for detaining a suspected victim, particularly when the detention occurs in a school setting.

Decision Below:
588 F.3d 1011 (9th Cir. 2009) (09-1454, 09-1478)

Petitioners’ Counsel of Record:
Mary H. Williams, Deputy Attorney General, Oregon Department of Justice (09-1454)
Christopher D. Bell, Office of Deschutes County Legal Counsel (09-1478)

Respondents’ Counsel of Record:
Carolyn A. Kubitschek, Lansner Kubitschek Schaffer

Business Law

Private Right of Action

Astra USA, Inc. v. Santa Clara County (10-76)

Question Presented:
Whether, in the absence of a private right of action to enforce a statute, federal courts have the federal common law authority to confer a private right of action simply because the statutory requirement sought to be enforced is embodied in a contract.

Summary:
A federal statutory provision requires the Secretary of Health and Human Services (HHS) to enter into agreements with drug manufacturers to provide discount rates on prescription drugs to federally funded medical clinics known as 340B covered entities. The question in this case is whether a 340B covered entity may sue a drug manufacturer for failing to sell a drug at the price specified in the agreement between the Secretary and the drug manufacturer.

Santa Clara County and its 340B covered entities filed suit against drug manufacturers, alleging that the manufacturers charged more for prescription drugs than their agreements with the Secretary of HHS allowed. The district court dismissed the suit on the ground that covered entities lack authority to enforce the agreements, but the Ninth Circuit reversed. The Ninth Circuit held that, under the federal common law of contracts, a third-party can sue to enforce the contract when it is the intended beneficiary of the agreement and that the 340B entities are the intended beneficiaries of the price agreements between the Secretary of HHS and drug manufacturers.

Petitioners argue that the court of appeals’ recognition of a federal common law right to sue constitutes an impermissible end-run around Congress’s decision not to create a private right of action. Petitioners further argue that recognition of such a federal common law contract action would interfere with HHS’s exclusive role in administering the 340B program.

Decision Below:
588 F.3d 1237 (9th Cir. 2009)

Petitioners’ Counsel of Record:
Lisa S. Blatt, Arnold & Porter LLP

Respondent’s Counsel of Record:
David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.

Freedom of Information Act

Federal Communications Commission v. AT&T, Inc. (09-1279)

Question Presented:
Whether Exemption 7(C)'s protection for "personal privacy" protects the "privacy" of corporate entities.

Summary:
Exemption 7(C) of the Freedom of Information Act (FOIA) exempts from mandatory disclosure records or information compiled for law enforcement purposes when such disclosure could reasonably be expected to constitute an unwarranted invasion of "personal privacy." The question in this case is whether Exemption 7(C)'s protection for personal privacy extends to corporate entities.

The FCC conducted an investigation into whether AT&T committed certain irregularities and ultimately entered into a consent decree with AT&T. One of AT&T's competitors then filed a request under FOIA for the material in the FCC’s investigative file. The FCC granted the request in part, rejecting AT&T’s argument that Exemption 7(C) protects the personal privacy of corporate entities.
The Third Circuit reversed. It held that because the term “person” is defined for purposes of FOIA to include a corporation, and the term “personal” is the adjective form of the term “person,” the phrase “personal privacy” necessarily encompasses a corporation.

The government argues that the phrase “personal privacy” should be interpreted in light of the background understanding that the law generally protects only the privacy of individuals. The government also argues that extending the protection for personal privacy to abstract entities would make the exemption unmanageable because it would allow not only corporations but also state, local, and foreign governments to fall under the Exemption.

**Decision Below:**
582 F.3d 490 (3d Cir. 2009)

**Petitioners’ Counsel of Record:**
Neal Kumar Katyal, Acting U.S. Solicitor General

**Respondents’ Counsel of Record:**
Geoffrey M. Klineberg, Kellogg, Huber, Hanson, Todd, Evans & Figel, P.L.L.C.

**Patent Infringement**

**Global-Tech Appliances v. SEB** (10-6)

**Questions Presented:**
Whether the legal standard for the state of mind element of a claim for actively inducing infringement under 35 U.S.C. § 271(b) is "deliberate indifference of a known risk" that an infringement may occur, as the Court of Appeals for the Federal Circuit held, or "purposeful, culpable expression and conduct" to encourage an infringement, as this Court taught in *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937, 125 S. Ct. 2764, 2780, 162 L. Ed. 2d 781, 801 (2005)?

**Summary:**
The patent laws subject to liability any person who actively induces infringement of a patent. In *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Court held that a party could be held liable for inducing infringement when it has an affirmative intent that the product be used to infringe. This case presents the question whether an inducement claim can be established based on proof that a party is deliberately indifferent to a known risk that the product will infringe.

Pentalpha, a subsidiary of petitioner Global-Tech Appliances, copied respondent SEB’s deep fryer. Petitioner asked its counsel for an opinion on whether its product infringed any patent, but it did not inform counsel that it copied respondent’s deep fryer. After counsel rendered an opinion that petitioner’s deep fryer did not infringe any patent, petitioner sold its deep fryers to Sunbeam, which resold them in the U.S. Respondent sued petitioner for inducing infringement of its deep fryer patent. The Federal Circuit held that liability for inducing infringement could be established by proof that a party is deliberately indifferent to a known risk that a product is covered by a patent. And it concluded that petitioner’s failure to inform counsel that it had copied respondent’s deep fryer manifested deliberate indifference.

Petitioner argues that the Federal Circuit’s deliberate indifference standard conflicts with *Grokster* because it permits the imposition of liability based on mere knowledge of infringing potential when *Grokster* requires proof of an affirmative intent.
to induce infringement. Petitioner further argues that the Federal Circuit’s rule undermines the ability of foreign sellers of goods to rely on their lack of knowledge of a patent covering their goods.

**Decision Below:**
594 F.3d 1360 (Fed. Cir. 2010)

**Petitioners’ Counsel of Record:**
William Dunnegan

**Respondent’s Counsel of Record:**
Norman H. Zivin, Cooper & Dunham LLP

**State Secrets – Due Process**

*General Dynamics Corp v. United States; Boeing Company v. United States* (09-1298, 09-1302)

**Questions Presented:**
1. Whether the government can maintain its claim against a party when it invokes the state secrets privilege to completely deny that party a defense to the claim. [09-1298]
2. Whether the Due Process Clause of the Fifth Amendment permits the Government to maintain a claim while simultaneously asserting the state secrets privilege to bar presentation of a prima facie valid defense to that claim. [09-1302]

**Summary:**
The state secrets privilege protects the government from being required to disclose matters that would harm national security. In *United States v. Reynolds*, 345 U.S. 1 1953), the Court held that when the government is a defendant in civil litigation, it may assert the state secrets privilege, even when the consequence is that plaintiffs are denied access to information necessary to prove their claim. This case raises the question of how *Reynolds* applies when the Government terminates a contract and orders repayment and then invokes the state secrets privilege in a proceeding challenging the termination.

The General Dynamics Corporation and the McDonnell Douglas Corporation (now Boeing) contracted with the Navy to develop the A-12 Avenger, a stealth aircraft. The government canceled the contract for default and ordered petitioners to repay $1.35 billion. Petitioners challenged the government’s action in the Court of Federal Claims, asserting as a defense to the government’s claim of breach of contract that the government had caused their failure to perform by withholding its superior knowledge of stealth technology. When the government invoked the state secrets privilege to bar inquiry into the superior knowledge defense, petitioners urged that the consequence should be invalidation of the government’s termination. The Court of Federal Claims rejected petitioners’ contention, and the Federal Circuit affirmed.

The Federal Circuit held that, under *Reynolds*, petitioners are in the position of a civil plaintiff suing the government under the terms of a waiver of sovereign immunity. Accordingly, it concluded that the Due Process Clause does not require that petitioners be able to litigate the defense of superior knowledge.

Petitioners argue that the applicable principle from *Reynolds* is that when the government is the moving party, it may not continue to pursue its case after invoking the state secrets privilege to deprive the other party of a valid defense. They further argue
that while they are nominally the plaintiffs in this proceeding, the government is really
the moving party because it issued a termination order that would have been final and
enforceable had petitioners not challenged it in court, and because petitioners’ challenge
automatically shifted the burden to the government to prove its default claim.

Decision Below:
567 F.3d 1340 (Fed. Cir. 2009) (09-1298, 09-1302)

Petitioners’ Counsel of Record:
Paul M. Smith, Jenner & Block LLP (09-1298)
Charles Cooper, Cooper & Kirk PLLC (09-1302)

Respondent’s Counsel of Record:
Neal Kumar Katyal, Acting U.S. Solicitor General

Personal Jurisdiction – Due Process

Goodyear Luxembourg Tires v. Brown (10-76)

Question Presented:
Whether a foreign corporation is subject to general personal jurisdiction, on causes of
action not arising out of or related to any contacts between it and the forum state, merely
because other entities distribute in the forum state products placed in the stream of
commerce by the defendant.

Summary:
In Asahi Metal Ind. Co. v. Superior Court of California, 480 U.S. 102 (1987), the Court
divided on the standard for determining when a state may exercise personal jurisdiction
over a defendant who has put products in the stream of commerce that end up in the
forum state. Justice O’Connor’s plurality opinion concluded that the plaintiff must
demonstrate that the defendant actually intended that the products reach the forum, while
Justice Brennan’s four-justice concurrence concluded that a plaintiff need only show that
the defendant was aware that its products were being marketed in the forum state. This
case raises the question whether the stream of commerce theory can give rise to general
jurisdiction over a defendant when the claim at issue does not arise from the contacts
between the defendant and the forum state.

Respondents are administrators of the estates of two children from North Carolina
who died in a bus accident in France. Petitioners, three foreign subsidiaries of Goodyear,
manufactured the tires on the bus. Respondents sued petitioners in North Carolina state
court for negligent design and construction of the tires. Petitioners moved to dismiss on
the ground that subjecting them to personal jurisdiction in North Carolina would violate
due process, but the North Carolina Court of Appeals rejected that claim.

The court held that a state may assert general jurisdiction when the defendant has
continuous and systematic contacts with the state. That standard can be satisfied, the
court held, when a defendant purposefully injects products into the stream of commerce
without any effort to limit the area of distribution to exclude North Carolina.

Petitioners argue that mere injection of goods into the stream of commerce can
never establish general jurisdiction. A state may assert general jurisdiction, petitioners
contend, only when the defendant’s contacts with the state are tantamount to physical
presence in the state, a test that is never satisfied by injection of goods into the stream of
This case will be argued in tandem with *J. McIntyre Machinery v. Nicastro* (09-1343), a case that raises the question whether injection of goods into the stream of commerce can establish jurisdiction when the goods cause injury in the forum state.

**Decision Below:**

681 S.E.2d 382 (N.C. App. 2009)

**Petitioners’ Counsel of Record:**

Meir Feder, Jones Day

**Respondents’ Counsel of Record:**

C. Mark Holt, Kirby & Holt LLP

**J. McIntyre Machinery, Ltd. v. Nicastro** (09-1343)

**Question Presented:**

Does a "new reality" of "a contemporary international economy" permit a state to exercise, consonant with due process under the United States Constitution, in personam jurisdiction over a foreign manufacturer pursuant to the stream-of-commerce theory solely because the manufacturer targets the United States market for the sale of its product and the product is purchased by a forum state consumer?

**Summary:**

In *Asahi Metal Ind. Co. v. Superior Court of California*, 480 U.S. 102 (1987), the Court divided on the standard for determining when a state may exercise personal jurisdiction over a defendant who has put products in the stream of commerce that end up in the forum state. Justice O’Connor’s plurality opinion concluded that the plaintiff must demonstrate that the defendant actually intended that the products reach the forum, while Justice Brennan’s four-justice concurrence concluded that a plaintiff need only show that the defendant was aware that its products were being marketed in the forum state. This case raises the question of the permissible scope of the stream of commerce theory in establishing personal jurisdiction when the product injected into the stream of commerce causes injury in the forum state.

Respondent was injured in New Jersey by a machine built by petitioner, a United Kingdom corporation. Petitioner shipped the machine to its U.S. distributor in Ohio, which shipped it to respondent’s employer in New Jersey. Respondent sued petitioner in New Jersey alleging that the machine was defective. Petitioner objected to the court’s assertion of personal jurisdiction over it, but the New Jersey Supreme Court rejected that claim.

The court held that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subjected to jurisdiction in New Jersey in a product-liability action. Under that test, the foreign manufacturer can avoid being subjected to nationwide jurisdiction only if it takes reasonable steps to prevent distribution of its products to the forum state.

Petitioner argues that the Supreme Court of New Jersey’s stream of commerce theory impermissibly permits a state to exercise jurisdiction whenever a foreign defendant deposits a product into the stream of commerce and the product unpredictably ends up in any state in the United States. For personal jurisdiction to attach, petitioner
argues, there must be some purposeful availment by the defendant toward the forum state.

This case will be argued in tandem with Goodyear Luxembourg Tires v. Brown (10-76), which raises the question whether the stream of commerce theory may be used as a basis for establishing jurisdiction when the claim does not arise from the contacts between the defendant and the forum state.

**Decision Below:**
201 N.J. 48 (2010)

**Petitioner's Counsel of Record:**
Arthur F. Fergenson, Ansa Assuncao, LLP

**Respondents' Counsel of Record:**
Alexander W. Ross Jr., Rakoski & Ross, P.C.

**False Claims Act – Qui Tam**

*Schindler Elevator Corp. v. United States ex rel. Kirk* (10-188)

**Question Presented:**
Whether a federal agency's response to a Freedom of Information Act request is a "report... or investigation" within the meaning of the False Claims Act public disclosure bar, 31 U.S.C. § 3730(e)(4).

**Summary:**
The False Claims Act (FCA) imposes civil penalties and treble damages on any person who submits a fraudulent claim to the government. 31 U.S.C. § 3729(a)(1). The FCA allows private plaintiffs to bring suit *qui tam*, but it bars actions based upon publicly disclosed “administrative... reports... or investigations.” § 3730(e)(4)(A). The question in this case is whether a federal agency’s response to a FOIA request is an “administrative report or investigation” within the meaning of the FCA’s disclosure bar.

Respondent Daniel Kirk’s wife filed a FOIA request with the Department of Labor concerning whether petitioner, Schindler Elevator Corporation, filed reports on the number of qualified veterans it employed in compliance with the Veterans Readjustment Assistance Act. The Department of Labor’s response showed that petitioner had either failed to file the necessary reports or filed inaccurate reports over a number of years. Based on that information, respondent filed suit under the FCA against petitioner. The district court dismissed the suit based on the disclosure bar, but the Second Circuit reversed.

The Second Circuit held that FOIA documents are administrative “reports” or “investigations” only when they are the result of the government’s efforts to compile or synthesize information to serve its own investigative or analytic ends. The Second Circuit based that interpretation on neighboring words that apply the disclosure bar to government “hearings” and government “audits,” both of which are processes by which information is compiled to serve a specific government purpose.

Petitioner argues that the plain meaning of administrative reports and investigations encompasses FOIA documents. Petitioner also argues that rather than allowing *qui tam* actions only by genuine insiders with firsthand knowledge of fraud, the court of appeals’ interpretation would allow opportunistic lawsuits based on public information.
Decision Below:
601 F.3d 94 (2d Cir. 2010)

Petitioner’s Counsel of Record:
Steven Alan Reiss, Weil, Gotshal & Manges LLP

Respondent’s Counsel of Record:
Jonathan A. Willens, Jonathan A. Willens LLC

Federal Practice and Procedure – Class Action

Smith v. Bayer Corp. (09-1205)

Questions Presented:
1. Can the district court's injunction [under the relitigation exception of the Anti-Injunction Act] be affirmed when neither the parties sought to be estopped nor the issues presented are identical?
2. Does a district court have personal jurisdiction over absent members of a class for purposes of enjoining them from seeking class certification in state court when a properly conducted class action had never existed before the district court because it had denied class certification and due-process protections had never been afforded the absent members?

Summary:
The Anti-Injunction Act generally bars a federal district court from enjoining a party from pursuing a claim in state court. An exception to that general bar, known as the relitigation exception, authorizes a federal court to issue an injunction to “protect or effectuate its judgments.” This case concerns whether the relitigation exception authorizes a federal court to enjoin parties from pursuing a class action in state court when the federal court has determined in a case brought by different class representatives that the requirements for a federal class action have not been satisfied.

Baycol, a cholesterol medication, was withdrawn from the market after it was linked to 31 deaths. A class action lawsuit was filed in West Virginia state court against the makers of Baycol, under a theory of economic loss. After the case was removed to federal district court, a multidistrict federal court denied class certification. Petitioners, absent class members in the first case, filed a second class action in West Virginia state court under an economic loss theory, but that case was not removed. Applying the relitigation exception, the district court enjoined petitioners from seeking class certification in West Virginia state court, and the Eighth Circuit affirmed.

The Eighth Circuit held that the relitigation exception is applicable because the question of class certification that petitioners seek to litigate in the state court proceeding was resolved in the federal court proceeding. The court rejected petitioners’ argument that the difference in state and federal certification requirements makes the certification issues different on the ground that there is no substantial difference between the two sets of requirements. The court also rejected petitioners’ argument that the federal court did not have jurisdiction over them because they did not receive notice and an opportunity to opt out. The court reasoned that notice and an opportunity to opt out are essential only when the judgment precludes a class member from pursuing an individual claim, and the district court’s injunction still gives petitioners the opportunity to pursue an individual claim.
Petitioners argue that the issues in the two proceedings are not the same because state courts have discretion to apply their class certification requirements differently from the way federal courts apply Rule 23 even when the requirements are substantially the same. Petitioners also challenge the court of appeals’ reliance on their ability to pursue an individual claim on the ground that a class action is the only effective way for them to pursue their claim.

**Decision Below:**
593 F.3d 716 (8th Cir. 2010)

**Petitioners’ Counsel of Record:**
Richard A. Monahan, The Masters Law Firm

**Respondents’ Counsel of Record:**
Peter W. Sipkins, Dorsey & Whitney LLP

**Criminal Law**

**Standing – 10th Amendment**

**Bond v. United States** (09-1227)

**Question Presented:**
Whether a criminal defendant convicted under a federal statute has standing to challenge her conviction on the ground that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment.

**Summary:**
To implement a 1993 treaty that addresses the proliferation of chemical and biological weapons, Congress enacted a statute that makes it unlawful for any person to knowingly use a chemical weapon. The question in this case is whether a criminal defendant has standing to challenge her conviction under the chemical weapons statute on the ground that, as applied to her, the statute exceeds Congress’s powers and violates the Tenth Amendment.

Petitioner tried to injure her husband's paramour by spreading toxic chemicals on the woman's car and mailbox. When petitioner was prosecuted for violating the chemical weapons statute, she challenged the statute as exceeding the federal government's enumerated powers and impermissible under the Tenth Amendment. The district court rejected petitioner’s constitutional challenge.

The Third Circuit never reached the merits of petitioner’s constitutional claim. Instead, relying on *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 108 (1939), the Third Circuit held that a private party lacks standing to challenge a federal law on the ground that it violates the Tenth Amendment unless the State or one of its officers is a party to the suit. By resting its decision on standing, the Third Circuit avoided having to address the scope and persuasiveness of *Missouri v. Holland*, 252 U.S. 416 (1920). *Holland* held that Congress has at least some authority to enact laws to implement treaties that it could not enact under its enumerated powers.

Petitioner argues that the Third Circuit erred in holding that she lacks standing and that the error is based on a misreading of *Tennessee Electric Power Co.* Specifically, petitioner argues that the *Tennessee* decision, while relevant when private parties seek to air a generalized grievance, does not apply to deny standing to private
parties who have suffered concrete, particularized injury because they are being prosecuted under an allegedly unconstitutional statute. Disavowing the position that the government took in the court of appeals, the Solicitor General agrees with petitioner that the court of appeals erred in denying standing to petitioner. The Court has appointed counsel to defend the Third Circuit’s ruling.

Decision Below:
581 F.3d 128 (3d Cir. 2010)

Petitioner’s Counsel of Record:
Paul D. Clement, King & Spalding LLP

Respondent’s Counsel of Record:
Neal Kumar Katyal, Acting U.S. Solicitor General

Court-appointed Amicus Curiae in Support of the Judgment Below:
Stephen R. McAllister, Solicitor General, Kansas

Sixth Amendment – Confrontation Clause

Bullcoming v. New Mexico (09-10876)

Question Presented:
Whether the Confrontation Clause permits the prosecution to introduce testimonial statements of a non-testifying forensic analyst through the in-court testimony of a supervisor or other person who did not perform or observe the laboratory analysis described in the statements.

Summary:
In Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), the Court held that the Confrontation Clause is violated when the government introduces a forensic laboratory report as evidence without allowing the defendant to be confronted with the analyst at trial. This case presents the question whether that holding precludes the introduction of a forensic report through a forensic analyst who did not perform or observe the analysis.

Petitioner was charged with driving while intoxicated. At trial, the government introduced a blood alcohol report, but did not call as a witness the analyst who wrote the report. Instead, the government introduced the report through that analyst’s supervisor. Petitioner objected to the admission of the report as a violation of the Confrontation Clause, but the trial court allowed its introduction, and the New Mexico Supreme Court affirmed.

The New Mexico Supreme Court held that introduction of a blood alcohol report is consistent with the Confrontation Clause, as interpreted in Melendez-Diaz, as long as an analyst is present in court to defend or explain the report. The court concluded that the analyst present at trial need not be the one who prepared the report because that analyst is a mere scrivener who transcribes the results generated by the gas chromatography machine without exercising independent judgment. In those circumstances, the court held, the real witness is the gas chromatography machine, and Melendez-Diaz is satisfied as long as the results are presented by a forensic witness who is qualified to testify about the machine, the laboratory’s procedures, and the results of the report.

Petitioner argues that the Confrontation Clause’s description of the right as a right to be confronted by “the” witness against him requires an opportunity to cross-examine the author of a report, not some other witness. Petitioner further argues that the New
Mexico Supreme Court’s rule fails to fulfill the purposes of the Confrontation Clause because it precludes defendants from testing through cross-examination the honesty, proficiency, and methodology of the author of the report.

**Decision Below:**
226 P.3d 1 (N.M. 2010)

**Petitioner’s Counsel of Record:**
Jeffrey L. Fisher, Stanford Law School

**Respondent’s Counsel of Record:**
Ann Marie Harvey, New Mexico Assistant Attorney General

**Drug Laws**

_Depierre v. United States_ (09-1533)

**Questions Presented:**

Whether the term "cocaine base" encompasses every form of cocaine that is classified chemically as a base - which would mean that the ten-year mandatory minimum applies to an offense involving 50 grams or more of raw coca leaves or of the paste derived from coca leaves, but that 5000 grams of cocaine powder would be required to trigger the same ten-year minimum – or whether the term "cocaine base" is limited to "crack" cocaine.

**Summary:**

The federal drug laws subject to a ten-year mandatory minimum sentence any person who engages in a drug-related offense involving 50 grams of “cocaine base.” In contrast, a person would have to engage in an offense involving 50,000 grams of powder cocaine or coca leaves to trigger the same 10-year minimum. The question in this case is whether the term "cocaine base" refers only to crack cocaine or also encompasses any cocaine that is chemically classified as a base.

Petitioner was convicted of distributing more than 50 grams of cocaine base. At trial, petitioner sought an instruction that required the jury to find that he distributed more than 50 grams of crack cocaine, but the court instead instructed the jury that it was required to find that he distributed more than 50 grams of cocaine base. The First Circuit affirmed, holding that the term cocaine base encompasses all forms of cocaine that are scientifically a base, and not just crack cocaine. The court reasoned that while crack cocaine was the main focus of Congress’s concern, the term “cocaine base” sweeps more broadly.

Petitioner argues that construing “cocaine base” to reach cocaine that is scientifically a base is inconsistent with the structure of the drug laws. In particular, petitioner argues that because coca leaves are scientifically classified as a base, the court of appeals’ interpretation would permit offenses involving 50 grams of coca leaves to trigger the statutory minimum, even though Congress specified that only offenses involving 5000 grams of coca leaves trigger the statutory minimum. Petitioner also argues that the legislative history shows that Congress used the term “cocaine base” to refer to crack cocaine.

**Decision Below:**
599 F.3d 25 (1st Cir. 2010)

**Petitioner’s Counsel of Record:**
Andrew J. Pincus, Mayer Brown LLP
Respondent’s Counsel of Record:
Neal Kumar Katyal, Acting Solicitor General

Sentencing

Freeman v. United States (09-10245)

Question Presented:
Whether a defendant is ineligible for a sentence reduction under 18 U.S.C. §3582(c)(2) solely because the district court accepted a Rule 11(c)(1)(C) plea agreement.

Summary:
Under Federal Rule of Criminal Procedure 11(c)(1)(C), the government and the defendant may enter into a plea agreement in which they agree on a sentence that binds the court if it accepts the plea agreement. The question in this case is whether a defendant who has been sentenced based on such an agreement is eligible for a sentencing reduction under 18 U.S.C. § 3582(c)(2), which authorizes a reduced sentence when a defendant has been sentenced based on a sentencing range that has subsequently been lowered by the Sentencing Commission.

Petitioner William Freeman entered a plea agreement with the government on the appropriate sentence for his offenses, which included a crack cocaine offense. The district court accepted the plea agreement and sentenced petitioner to the agreed-upon sentence. Subsequently, the Sentencing Commission lowered the sentencing range for a crack cocaine conviction, and petitioner applied for a reduction in his sentence. The district court refused to reduce petitioner’s sentence on the ground that he had entered into a binding plea agreement, and the Sixth Circuit affirmed.

The Sixth Circuit applied prior precedent that focused on the requirement that a sentence must be “based on” the applicable Guidelines range in order for a defendant to be eligible for a reduction. A defendant who agrees to a binding sentence does not satisfy the “based on” requirement, the court held, because his sentence is “based on” the agreement, not on the applicable Guidelines range.

Petitioner argues that because his plea agreement did not address the possibility that the applicable sentencing range would subsequently be lowered, he retained the right to seek a reduction. Petitioner further argues that the Sixth Circuit’s “based on” analysis is in error, because it fails to recognize that a sentence pursuant to a binding agreement is based on an applicable Guidelines range because the court considers that range in deciding whether to accept the agreement.

Decision Below:
355 Fed. App’x 1 (6th Cir. 2009)

Petitioner’s Counsel of Record:
Frank W. Heft, Jr., Office of the Federal Defender

Respondent’s Counsel of Record:
Neal Kumar Katyal, Acting U.S. Solicitor General

Fourth Amendment – Searches & Seizures

Kentucky v. King (09-1272)
Questions Presented:
When does lawful police action impermissibly "create" exigent circumstances which preclude warrantless entry; and which of the five tests currently being used by the United States Courts of Appeals is proper to determine when impermissibly created exigent circumstances exist?

Summary:
The Supreme Court has held that probable cause combined with "exigent circumstances" can justify a warrantless entry into a dwelling. The question in this case is whether police officials may rely on the exigent circumstances exception when they create the exigency.

Police followed a suspect who bought drugs from a confidential informant to an apartment building, but lost track of him. After smelling marijuana emanating from an apartment, the police knocked on the door and announced their presence. When they heard movements they associated with the destruction of evidence, they entered the apartment. Police seized large quantities of drugs and arrested the occupants, one of whom was respondent. After being charged with drug trafficking, respondent moved to suppress the drugs. The state circuit court denied the motion, but the Kentucky Supreme Court reversed.

The Kentucky Supreme Court held that the exigent circumstances exception does not apply when the exigent circumstances are a reasonably foreseeable result of the tactics employed by the police. Applying that standard, the court concluded that the exigent circumstances exception could not justify a warrantless entry in this case because the destruction of evidence was a reasonably foreseeable result of the police knocking on the door and announcing their presence.

Petitioner argues that the Kentucky Supreme Court’s test unduly limits lawful police action and rewards the illegal actions of a home’s occupants. Petitioner contends that as long as the police conduct that creates the exigency is lawful, the exigent circumstances exception should apply.

Decision Below:
302 S.W.3d 649 (Ky. 2010)

Petitioner’s Counsel of Record:
Joshua D. Farley, Assistant Attorney General, Kentucky

Respondent’s Counsel of Record:
Jamesa J. Drake, Kentucky Department of Advocacy

Violent Felony

Sykes v. United States (09-11311)

Question Presented:
Whether using a vehicle while knowingly or intentionally fleeing from a law enforcement officer after being ordered to stop constitutes a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Summary:
The Armed Career Criminal Act (ACCA) requires a sentence enhancement for persons who have previously been convicted of three violent felonies. A violent felony is defined as any crime that is "burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to
another.” 18 U.S.C. § 924(e). The question in this case is whether the crime of using a vehicle to flee from a law enforcement official is a violent felony within the meaning of ACCA.

Petitioner Marcus Sykes pleaded guilty to being a felon in possession of a firearm. The district court imposed a sentencing enhancement under ACCA, based in part on its determination that petitioner’s prior conviction for using a vehicle while fleeing from a law enforcement officer constituted a violent felony within the meaning of ACCA. The Seventh Circuit affirmed. It held that a felony is violent within the meaning of ACCA when it involves purposeful, violent and aggressive behavior that shows an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. And it concluded that the crime of using a vehicle to flee a law enforcement officer satisfies that standard.

Petitioner argues that the crime of using a vehicle to flee a law enforcement officer is not characterized by violent or aggressive behavior. For example, violators could include a coward or someone who is merely frightened. Petitioner also argues the crime does not satisfy the statutory standard because risk of bodily injury is not an element of the offense.

**Decision Below:**

598 F.3d 334 (7th Cir. 2010)

**Petitioner’s Counsel of Record:**

William E. Marsh, Indiana Federal Community Defenders

**Respondent’s Counsel of Record:**

Neal Kumar Katyal, Acting U.S. Solicitor General

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**Speedy Trial Act**

**United States v. Tinklenberg** (09-1498)

**Question Presented:**

Whether the time between the filing of a pretrial motion and its disposition is automatically excluded from the deadline for commencing trial under the Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(1)(D) (Supp. II 2008), or is instead excluded only if the motion actually causes a postponement, or the expectation of a postponement, of the trial.

**Summary:**

The Speedy Trial Act (STA) requires dismissal of the indictment of a federal criminal defendant if that defendant’s trial has not begun within 70 days of indictment or first appearance before a judicial officer, whichever occurs later. The STA excludes from this count any delays “resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.” The question is this case is whether the time between the filing of a motion and its disposition is automatically excluded from the count without regard to whether the motion actually causes a delay or the expectation of a delay in the trial.

Respondent Jason Tinklenberg was indicted for being a felon in possession of a firearm and possessing items used to manufacture methamphetamine. Prior to the start of trial, respondent moved to dismiss on the ground that the 70-day STA period had elapsed. The district court denied the motion, excluding from the 70-day count the nine days it
took to resolve certain pre-trial motions even though their resolution had not caused the court to delay the scheduled trial date. The Sixth Circuit reversed.

The court of appeals held that because the STA excludes only delay “resulting from” pretrial motions, the STA permits the exclusion of time in which pretrial motions are filed and pending only if their resolution could possibly cause a delay in the trial. Because resolution of the motions at issue did not cause any delay in the trial, the court concluded that the nine day period between the filing and disposition of the motions could not be excluded.

The government argues that the phrase “delay resulting from” does not refer to a delay in the trial date, but instead refers to the delay in the date on which the trial must start. That interpretation, the government argues, accords with the Court’s holding in Henderson v. U.S. 476 U.S. 321 (1986), that the time period for disposition of motions is automatically excludable, and with the need for a rule that gives clear notice to the court and parties concerning what days count toward the 70-day limit.

Decision Below:
579 F.3d 589 (6th Cir. 2010)

Petitioner’s Counsel of Record:
Neal Kumar Katyal, Acting U.S. Solicitor General

Respondent’s Counsel of Record:
Kevin M. Schad, Assistant Public Defender

Other Public Law

Indian Law

Madison County v. Oneida Indian Nation (10-72)

Questions Presented:
1. Whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes.
2. Whether the ancient Oneida reservation in New York was disestablished or diminished.

Summary:
In City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 214 (2005) the Court held that Oneida Indian Nation of New York (OIN), could not assert sovereign authority over land it purchased on the open market, and that the land was therefore subject to state taxation. This case presents the question whether tribal sovereign immunity precludes taxing authorities from foreclosing on the property to collect the taxes that are due on it.

OIN purchased land in central New York on the open market that was once part of its 6,000,000 acre ancestral home. Petitioners, Madison County and Oneida County, seek foreclosure of OIN land due to its failure to pay property tax. OIN filed suit in federal district court to enjoin foreclosure, and the district court issued such an injunction. The Second Circuit affirmed, holding that OIN’s sovereign immunity bars a state tax foreclosure proceeding. The court reasoned that while City of Sherrill held that OIN is
subject to state taxation on the property at issue, the distinct doctrine of tribal sovereign immunity precludes any suit against the Tribe to collect the taxes.

Petitioners argue that Sherrill not only held that the lands at issue are subject to taxation, but also that sovereign immunity does not bar a foreclosure action to collect the taxes due on the land. Petitioners also argue that, independent of Sherrill, the doctrine of tribal sovereign immunity does not apply to in rem actions to collect taxes on property. To hold otherwise, petitioners argue, would lead to the illogical conclusion that states have the authority to impose a tax, but lack the means to collect it.

Decision Below:
   605 F.3d 149 (2d Cir. 2010)

Petitioners’ Counsel of Record:
   David M. Schraver, Nixon Peabody LLP

Respondent’s Counsel of Record:
   Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Bankruptcy

Stern v. Marshall (10-179)

Questions Presented:
2. Whether Congress may, under Articles I and III, constitutionally authorize core jurisdiction over debtors' compulsory counterclaims to proofs of claim.
3. Whether the Ninth Circuit misapplied Marathon and Katchen and contravened this Court’s post-Marathon precedent, creating a circuit split in the process, by holding that Congress cannot constitutionally authorize non-Article III bankruptcy judges to enter final judgment on all compulsory counterclaims to proofs of claim.

Summary:
The 1984 Bankruptcy Act allows bankruptcy courts to issue final decisions in “core proceedings” arising under the bankruptcy laws or arising in or related to a case under the bankruptcy laws. With respect to other proceedings, a bankruptcy court may issue only proposed findings of fact and conclusions of law. Core proceedings include “counterclaims by the estate against persons filing claims against the estate.” 28 U.S.C. §157(b)(2)(c). This case concerns the circumstances in which a counterclaim constitutes a core proceeding.

Anna Nicole Smith, wife of Howard Marshall, filed for bankruptcy following Howard’s death. Pierce Marshall, son of Howard, filed a defamation claim in the bankruptcy proceeding arising from Smith’s assertion that he interfered with an inter vivos gift Howard planned to give her. Smith filed a counterclaim for tortious interference with the gift. The bankruptcy court resolved Pierce’s libel claim against him, and awarded compensatory and punitive damages to Smith on her counterclaim, but the Ninth Circuit reversed.

The Ninth Circuit held that a compulsory counterclaim can constitute a “core” proceeding, but only when the counterclaim is so closely related to the proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself. The court viewed that narrow construction as necessary to comply
with the Article III limitations on bankruptcy announced in *Pipeline Construction Co. v. Marathon Pipe Line Co.*, 548 U.S. 50 (1982). Because resolution of Smith’s counterclaim was not necessary to dispose of Pierce’s claim, the Ninth Circuit concluded that it was not core.

Petitioner argues that the Ninth Circuit’s limitation on when a counterclaim constitutes a core proceeding renders it superfluous, because the bankruptcy laws separately identify as a core proceeding the allowance or disallowance of claims against the estate. Petitioner further argues that *Marathon* provides no support for the Ninth Circuit’s interpretation because that case involved a claim against a party that had not voluntarily filed a proof of claim in the bankruptcy court.

**Decision Below:**
600 F.3d 1037 (9th Cir. 2010)

**Petitioners’ Counsel of Record:**
Kent L. Richland, Greines Martin Stein & Richland LLP

**Respondents’ Counsel of Record:**
G. Eric Brunstad, Jr., Dechert LLP