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Supreme Court of the United States, October Term 2007 Preview

Georgetown University Law Center, Supreme Court Institute

Rupal Doshi
Georgetown University Law Center

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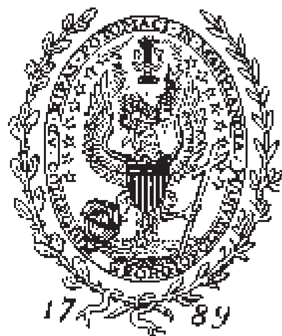

GEORGETOWN UNIVERSITY LAW CENTER
SUPREME COURT INSTITUTE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2007 PREVIEW

Compiled by:
Rupal Doshi
Research Assistant
Supreme Court Institute

July 11, 2007

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A GLANCE AHEAD AT OCTOBER TERM 2007

This report provides an overview of the Supreme Court's plenary docket for the October Term 2007. Section I includes general observations about the upcoming Term as well as a discussion of noteworthy issues to be decided by the Court this Term. Section II highlights "high-profile" cases organized by subject matter. This report concludes with a preview of all other cases granted certiorari so far this Term by area of law.

SECTION I: TERM OVERVIEW

Introduction

As in past Terms, the Court appears to be maintaining its low level of cases granted plenary review in October Term 2007. Of the 26 argument hours filled so far this Term (including consolidated cases), the Court will hear 16 civil cases, six criminal cases, and four habeas petitions. Also similar to past Terms, the Court will hear cases of interest to businesses, including a potentially significant securities fraud suit filed by investors. Likely to be the most significant and closely-watched cases of the Term are the Guantanamo Bay detainees' appeals, consolidated for one-hour oral argument, and granted cert on a rehearing petition the final day of the October Term 2006.

Cert Grants

The Court completed its October Term 2006 – the first full Term of the Court with both the new Chief Justice, John Roberts, and Associate Justice, Samuel Alito, on the Bench – on June 29, 2007. Before recessing for the summer, the Court granted 28 cert petitions for the October Term 2007 to fill 26 hours of oral argument. To fill all the potential argument days through the December argument session, the Court needed to grant review in cases that would require 34 hours of argument. In recent years, the Court has filled the docket through the December argument calendar by its summer recess. For instance, at the close of October Terms 2003 and 2004, the Court had granted plenary review in 39 and 37 cases, respectively. At the end of June 2006, the Court had granted plenary review in 29 cases, but had 32 hours of argument to fill through the December 2006 session. The Court does not appear to be reversing its longer term trend of the past few decades of reducing the number of argued cases. Given the slow pace of cert grants for this Term, it is unlikely that the number of argued cases reviewed will rise above that of recent years.

Noteworthy Cases

In October Term 2006, the most recently-appointed Justices, joined with the traditionally conservative members of the Court to shape several areas of law in significant ways, particularly under the First and Fourteenth Amendments. The Court has not shied away from confronting significant legal issues this Term either, which begins October 1, 2007. The Court has already granted cert in several areas that are expected to generate significant interest, including cases concerning the rights of enemy combatants, limits to the executive power, and the reach of the Commerce Clause.

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Most notable of the high-profile cases to be argued next Term are the Guantanamo Bay detainee cases, *Boumediane v. Bush* (06-1195) and *Al-Odah v. Bush* (06-1196). In an extremely rare move by the Court, the detainees' petitions for rehearing were granted in the Court's final list of orders before the summer recess. After initially denying review of the Petitioners' appeals in April 2007, the Court subsequently vacated its previous order, and agreed to hear the cases in a consolidated hour of argument. The cases question whether aliens detained as enemy combatants at the Guantanamo Bay Naval Base have a right to challenge their imprisonment in district courts by petitioning for writs of habeas corpus. The lower court decision under review, issued by the Court of Appeals for the D.C. Circuit, held that the Military Commissions Act of 2006 lawfully deprived courts jurisdiction over the detainees' habeas petitions. The Court's decision may have far-reaching implications, particularly for the more than 300 prisoners remaining at the Naval Base apparently without legal recourse in U.S. courts and possibly for the fate of the detainee camp.

Also this Term, the Court will review a decision by the Court of Criminal Appeals in Texas that raises a significant issue of both international and domestic interest. In *Medellin v. Texas* (06-984), the lower court ruled that President Bush exceeded his presidential authority when he instructed state courts to comply with a judgment issued by the International Court of Justice with respect to the rights of convicted Mexican nationals. A Court decision on this issue may have a major impact on the limits to executive power as well as the United States' international treaty obligations.

The Court is apparently continuing its most recent trend of granting business cases review – more than half of the civil cases to be argued concern the civil or tax liability of a business. For instance, *Stoneridge Investment v. Scientific-Atlanta, Inc.* (06-43), another closely-watched case and likely the Court's main business case this Term, examines the secondary liability of companies involved in securities fraud. The Court will also review *Klein & Co. Futures, Inc. v. Bd. of Trade of The City of NY* (06-1265), involving the commodities futures trading market and raising the issue of whether futures commission merchants have standing to file an action against a board of trade for failing to enforce its rules. In *LaRue v. DeWolff, Boberg & Assoc., Inc.* (06-856), the Court will decide whether the owner of an individual investment account is entitled to "make-whole" relief under the Employee Retirement Income Security Act for losses suffered due to an account administrator's failure to follow the participant's instructions. *Riegel v. Medtronic, Inc.* (06-170) concerns a medical device manufacturer's liability for injuries caused by a defective product that received premarket approval from the Food and Drug Administration.

Two other business-related cases involve employment discrimination claims under the Age Discrimination in Employment Act (*Sprint/United Management Co. v. Mendelsohn* (06-1221) and *Federal Express Corp. v. Holowecki* (06-1322)). Also related to individual business interests are the Court's three grants regarding taxing schemes: *Dept. of Revenue of KY v. Davis* (06-666) (state tax structure exempting in-state bonds, but taxing out-of-state bonds), *Knight v. CIR* (06-1286) (permissible tax deductible expenses for trusts and estates) and *CSX Transportation, Inc. v. GA Bd. Of Equalization* (06-1287) (valuation of public property for ad valorem tax purposes). Unlike last Term, when the Court's plenary docket witnessed a jump in antitrust and patent cases for review, areas the Court traditionally avoided, the Court has not granted cert in any such cases so far in October Term 2007.

This Term, the Court has already granted cert in three election law cases, scheduled for two individual hours of argument. The consolidated cases of *Washington State Grange v. WA. Republican Party* (06-713) and *Washington v. WA. Republican Party* (06-730), originating in the Ninth Circuit,

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consider the constitutionality of Washington State's blanket primary system, which allows the top two candidates to advance to the general election, regardless of party affiliation, under the First Amendment. The other election-related case on the Court's docket, *NY Board of Elections v. Torres,* examines New York's judicial convention system for selecting state trial judges.

Of the six criminal cases currently slated for oral argument next Term, five concern criminal sentencing. The remaining case involves discriminatory intent in peremptory challenges to jury selection.

Kimbrough v. U.S. (06-6330), the Term's major sentencing case, considers the disparity in the mandatory minimum sentence for crack cocaine to powder cocaine ("100:1 crack/powder ratio"). The Court will consider the case in light of its 2005 decision in *United States v. Booker,* which held that the mandatory application of the U.S. Sentencing Guidelines to criminal defendants violates their Sixth Amendment rights. Because Kimbrough's sentence fell below the applicable sentencing guideline range, the Court of Appeals vacated and remanded the case to the district court for resentencing. This decision will be reviewed by the Court this Fall.

Dubbed the "O.J. Simpson" case because the prosecutor referenced O.J. Simpson's acquittal to an all-white jury in the murder trial of a black man, *Snyder v. Louisiana* (06-10119) raises the issue of proving discriminatory intent in race-based peremptory challenges in jury selection. The Supreme Court barred the discriminatory use of peremptory strikes in 1986 in *Batson v. Kentucky.*

Court of Origin

So far, the Court has granted review in more cases from the Court of Appeals for the Second Circuit than any other court. The Court will hear six cases from the Second Circuit, which exceeds the total number of cases the Court reviewed from the Second Circuit in the entirety of the October Term 2006 (five). The Court has only granted review in three cases from the Ninth Circuit,[1] compared with 21 total cases argued last Term. The Court will hear at least four cases originating in state courts, three of which are sure to be closely-watched[2] Eight of the cases granted plenary review in October Term 2006 originated in state courts.

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[1] *Washington State Grange v. WA Republican Party* and *Washington v. WA. Republican Party* are counted as two cases for purposes of comparison, although they are consolidated for one-hour oral argument.
[2] *Dept. of Revenue of KY v. Davis* (06-666), *Snyder v. Louisiana* (06-10119), and *Medellin v. Texas* (06-984).

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SECTION II: SUMMARIES OF HIGH-PROFILE CASES

- **HABEAS CORPUS**

Boumediene v. Bush **(06-1195) /** ***Al Odah v. United States*** **(06-1196)**

Questions Presented:

Boumediene

1. Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat.2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay.
2. Whether Petitioners' habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits.

Al Odah

1. Did the D.C. Circuit err in relying again on *Johnson v. Eisentrager* 339 U.S. 763 (1950), to dismiss these petitions and to hold that Petitioners have no common law right to habeas protected by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush,* 542 U.S. 466 (2004), that these Petitioners are in a fundamentally different position from those in Eisentrager, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States?
2. Given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that Petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law
3. Are Petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Conventions?
4. Should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over Petitioners' pending habeas cases, thereby creating serious constitutional issues?

Summary:

Guantanamo Bay Naval Base detainees petitioned for a writ of habeas corpus to challenge their imprisonment. In *Boumediene*, the District Court for the District of Columbia granted in part and denied in part the government's motion to dismiss, ruling that the detainees had no constitutional rights because they are neither U.S. citizens nor aliens residing within sovereign United States territory. In *Al Odah*, the district court dismissed the case for lack of jurisdiction. The Court of Appeals for the D.C. Circuit held the Military Commissions Act of 2006 lawfully deprived courts jurisdiction over the detainees' habeas petitions.

Case Citation Below: 476 F.3d 981 (D.C. Cir. 2007)

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Petitioner's Counsel of Record:

Seth P. Waxman, Wilmer Cutler Pickering Hale and Dorr LLP (Boumediene)
Thomas B. Wilner, Shearman & Sterling LLP (Khalid A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al.)

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Amicus Briefs:

In Support of Petitioners

1. United States Senator Arlen Specter
   Arlen Specter, Ranking Member, Senate Judiciary Committee
2. Former Federal Judges, et al.
   Phillip Allen Lacovara, Mayer Brown Rowe & Maw LLP

- **SECURITIES LAW**

Stoneridge Investment v. Scientific-Atlanta, Inc. **(06-43)**

Questions Presented:

Whether this Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.,* 511 U.S. 164 (1994), forecloses claims for deceptive conduct under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c), 17 C.F.R. 240.l0b-5(a) and (c), where Respondents engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements, but where Respondents themselves made no public statements concerning those transactions.

Summary:

This case examines the secondary liability of companies in securities fraud cases. Petitioners bring this class action suit against Scientific-Atlanta, Inc. and Motorola, Inc. for assisting Charter Communications, Inc. in falsifying its publicly reported financial results, a violation of § 10(b) of the Securities Exchange Act and SEC Rule 10b-5. The claim was dismissed by the district court because Respondents were not "primary violators" of the statute and Rule; the Court of Appeals for the Eighth Circuit affirmed the dismissal. Petitioners argue the acts of the third parties in this case were intentionally deceptive and directly connected to the fraudulent conduct, and therefore, a primary violation.

Case Citation Below: 443 F.3d 987 (8th Cir. 2006)

Petitioner's Counsel of Record:

Mr. Stanley M. Grossman, Pomerantz Haudeck

Respondent's Counsel of Record:

Oscar N. Persons, Alson & Bird LLP (Scientific-Atlanta, Inc.)
Stephen M Sacks, Arnold & Porter LLP (Motorola)

Amicus Briefs:

In Support of Petitioners

1. Charles W. Adams, and William Von Glahn
   Charles W. Adams, Professor of Law, University of Tulsa College of Law
2. American Council of Institutional Investors
   Priya R. Aiyar, Kellog Huber Hanson Todd Evans & Figel PLLC

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3. New York State Teachers' Retirement System, et al.
   Max W. Berger, Bernstein Litowicz Berger & Grossman LLP
4. Arkansas, et al.
   Stanley D. Bernstein, Bernstein Liebhard & Lifshitz LLP
5. American Association for Justice
   Louis M. Bograd, Center for Constitutional Litigation, P.C
6. James D. Cox, et al.
   Jill E. Fisch, Professor of Business Law, Fordham Law School
7. Los Angeles County Employees Retirement Association, et al.
   Stuart M. Grant, Grant & Eisenhofer
8. William S. Lerach, Lerach Coughlin Stoia Geller Rudman & Robbins LLP
   Regents of University of California, et al.
9. Ohio, Texas, and 30 other States and Commonwealths
   Elise W. Porter, Acting Solicitor General, Office of the Attorney General (Ohio)
10. North American Securities Administrators Association
    Alfred E. T. Rusch Senior Counsel, District of Columbia Securities
11. Change to Win, and CTW Investment Group
    Alfred E. T. Rusch Senior, Counsel, District of Columbia Securities Bureau
12. AARP, et al.
    Matthew Wiener, Cuneo Gilbert & Laduca LLP
13. California State Teachers' Retirement System
    Steven N. Williams (located in Burlington, CA)
14. Regents of University of California, et al.
    William S Lerach, Lerach Coughlin Stoia Geller Rudman & Robbins

- **ELECTION LAW**

Washington State Grange v. Wa. Republican Party **(06-713)** ***/ Washington v. Wa. Republican Party*** **(06-730)**

Questions Presented:

Washington State Grange

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court specified how States could structure a top-two primary system that does not violate the associational rights of a political party. Pursuant to the Initiative power which the People of the State of Washington reserved to themselves in their State Constitution, the voters of the State of Washington enacted a top-two primary law that the Washington State Grange had drafted to comply with Jones. That law makes the State primary a contest to select the two most popular candidates for the November ballot - regardless of party nominations or party selection. That law also allows candidates for certain offices to disclose on the ballot the name of the party (if any) which that candidate personally prefers.

The Ninth Circuit invalidated this top-two primary system in its entirety, holding that the First Amendment (applied to the States through the 14th Amendment) prohibits a State from so allowing a candidate to disclose the name of the party he or she personally prefers on the ballot.

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Does the First Amendment prohibit top-two election systems that allow a candidate to disclose on the ballot the name of the party he or she personally prefers?

Washington

In *California Democratic Party v. Jones*, this Court recognized that, consistent with the First Amendment rights of political parties, a state may adopt a primary election system in which all voters may participate and the top vote recipients advance to the general election, so long as "primary voters are not choosing a party's nominee." *California Democratic Party v. Jones* 530 U.S. 567, 585-86 (2000). Washington voters adopted a primary election system in which all qualified voters are allowed to vote for any candidate, and the two candidates receiving the most votes for a given office qualify for the general election ballot, without regard to party affiliation.
Does Washington's primary election system in which all voters are allowed to vote for any candidate, and in which the top two candidates advance to the general election regardless of party affiliation, violate the associational rights of political parties because candidates are permitted to identify their political party preference on the ballot?

Summary:

The State of Washington's Republican Party challenged the constitutionality of the state's modified blanket primary system, which allows selection of the two most popular candidates. For "partisan offices," the system allows each candidate to tell voters the name of the party, if any, which that candidate personally prefers. Other political parties intervened. The top-two system was adopted through the passage of an initiative in the general election. The district court granted political parties' motion for summary judgment and issued an injunction barring enforcement of the initiative. The Ninth Circuit Court of Appeals affirmed.

Case Citation Below: 460 F.3d 1108 (9th Cir. 2006)

Petitioners' Counsel of Record:

Thomas Fitzgerald Ahearne, 1111 Third Avenue, Suite 3400, Seattle, WA 98101 (Washington State Grange)
James K. Pharris, Assistant Attorney General (Washington)

Respondent's Counsel of Record:

Thomas Fitzerald Ahearne, 111 Third Avenue, Suite 3400, WA 98101 (Washington State Grange)
David T. McDonald, Kirkpatrick & Lockhart Preston Gates Ellis LLP (Washington State Democratic Central Committee)
Richard D. Shepard, Shepard Law Office, PLLC (Libertarian Party of Washington)
John J. White Jr., Livengood Fitzerald & Askog, PLLC (Washington State Republican Party)

Amicus Brief:

<u>In Support of Petitioners</u>

1. Louisiana
   William P. Bryan III, Louisiana Department of Justice

***NY Bd. Of Elections v. Torres* (06-766)**

Questions Presented:

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1. In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that it is "too plain for argument" that a State may require intraparty competition to be resolved either by convention or primary. Did the Second Circuit run afoul of White by mandating a primary in lieu of a party convention for the nomination of candidates for New York State trial judge?

2. What is the appropriate scope of First Amendment rights of voters and candidates within the arena of intraparty competition, and particularly where the State has chosen a party convention instead of a primary as the nominating process?

(a) Did the Second Circuit err, as a threshold matter, in applying this Court's decision in *Storer v. Brown* 415 U.S. 724 (1974) and related ballot access cases, which were concerned with the dangers of "freezing out" minor party and non-party candidates, to internal party contests?

(b) If *Storer* does apply, did the Second Circuit run afoul of *Storer* in holding that voters and candidates are entitled to a "realistic opportunity to participate" in the party's nomination process as measured by whether a "challenger candidate" could compete effectively against the party-backed candidate?

Summary:

Judicial candidates, voters, and non-profit organization brought this action against the New York State Board of Elections and others for declaratory and injunctive relief, alleging that New York's judicial convention system for nominating and electing Supreme Court judges violated their political association rights. Under the convention system, locally-elected delegates gather at party conventions for each of the twelve Judicial Districts to nominate the party's candidate who will appear on the general election ballot in November. The district court found the convention system unconstitutional and the Second Circuit affirmed.

Case Citation Below: 462 F.3d 161 (2d. Cir. 2006)

Petitioners' Counsel of Record:

Theodore Olson, Gibson Dunn & Crutcher LLP (NYS Board of Elections, et al)

Carter G. Phillips, Sidley Austin Brown & Wood LLP (NY Republican State Committee)

Andrew J. Rossman, Akin Gump Strauss Hauer & Feld LLP (NY County Democratic Committee)

Barbara Underwood, Solicitor General, Office of the NY State Attorney General (Attorney General of the State of NY as Statutory Intervenor)

Respondent's Counsel of Record:

Deborah Goldberg, Brennan Center for Justice, NYU School of Law

Amicus Briefs:

In Support of Petitioners

1. Republican National Committee
   H. Christopher Bartolomucci, Hogan & Hartson LLP
2. Mid-Manhattan Branch of the NAACP, et al.
   Gene C. Schaerr, Winston & Strawn LLP

In Support of Neither Party

1. The Cato Institute, et al.
   Erik S. Jaffe, Erik S. Jaffe PC

In Support of Writ of Certiorari

1. Asian American Bar Association of New York

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Steven B. Shapiro, 340 West 57th Street, New York, NY 10019-3732

- **EXECUTIVE POWER**

Medellin v. Texas **(06-984)**

Questions Presented:

In the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), I.C.J. No. 128 (judgment of Mar. 31, 2004), the International Court of Justice determined that 51 named Mexican nationals, including Petitioner, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration in the state courts. However, the Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the Avena judgment or the President's determination.

This case presents the following questions:

1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

Summary:

Petitioner Medellin, a Mexican national, was convicted of capital murder and sentenced to death for his participation in the gang rape and murder of two teenage girls in Houston. Medellin claims his right to consular notification – his right to speak with a consular official after he was detained – under Article 36 of the Vienna Convention on Consular Relations, was violated. He seeks review and reconsideration of his conviction and sentence to determine whether the violation "caused actual prejudice to the defendant in the process of administration of criminal justice" in accordance with the *Avena* judgment of the International Court of Justice. President Bush ordered state courts to give effect to the *Avena* judgment, but the Texas Court of Criminal appeals refused, holding that the President's determination exceeded his powers.

Case Citation Below: 2006 WL 3302639 (Tex. Crim. App. Nov. 15, 2006)

Petitioner's Counsel of Record:

Donald Francis Donovan, Debevoise & Plimpton, LLP

Respondent's Counsel of Record:

R. Ted Cruz, Solicitor General, Office of the Attorney General (TX)

Amicus Briefs:

In Support of Petitioners

1. Government of the United Mexican States
   Sandra L. Babcock, Bluhm Legal Clinic, Northwestern Law School

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2. Argentina, et al.
   Asim M. Bhansali, Kekar & Van Nest LLP
3. EarthRights International in support of neither party
   Judith Brown Chomsky, Law Offices of Judith Brown Chomsky
4. United States
   Paul D. Clement, Solicitor General, US DOJ
5. International Court of Justice Experts
   Lori Fisler Damrosch, 435 West 116th Street, New York, NY 10027
6. Former United States Diplomats
   Harold Hongju Koh, Lowenstein International Human Rights Clinic, National Litigation Project, Yale Law School
7. Ambassador L. Bruce Laingen, et al.
   Daniel C. Malone, Dechert LLP
8. American Bar Association
   Karen J. Mathis, American Bar Association
9. European Union and Members of International Community
   S. Adele Shank, Law Office of S. Adele Shank

- **SIXTH AMENDMENT**

Kimbrough v. United States **(06-6330)**

Questions Presented:

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines are to be applied as advisory only, and as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. §3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented

(1) In carrying out the mandate of §3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant, may a district court consider either the impact of the so-called "100:1 crack/powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of §3553(a) to impose a sentence that is "sufficient but not greater than necessary" upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

Summary:

Defendant-Petitioner Kimbrough plead guilty to four counts of charges, including distributing 50 grams or more of crack cocaine and possessing a firearm in a drug trafficking crime. The district court sentenced Kimbrough without following

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sentencing guidelines prescribed for crack cocaine offenses because of the alleged unfairness in the disproportionate crack to power cocaine sentencing ratio. Because the district court sentenced Kimbrough below the applicable sentencing guideline range, the Court of Appeals vacated and remanded the case for resentencing in an unpublished Per Curiam opinion.

Case Citation Below: 174 Fed. Appx. 798 (4th Cir. 2006)

Petitioner's Counsel of Record:

Michael S. Nachmanoff, Assistant Federal Public Defender (VA)

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

- **JURY SELECTION**

Snyder v. Louisiana **(06-10119)**

Questions Presented:

Petitioner Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury in Jefferson Parish, Louisiana, for the fatal stabbing of his wife's male companion. Prior to trial, the prosecutor reported to the media that this was his "O.J. Simpson case." At trial, the prosecutor peremptorily struck all five African Americans who had survived cause challenges and then, over objection, urged the resulting all-white jury to impose death because this case was like the O.J. Simpson case, where the defendant "got away with it." On initial review, a majority of the Louisiana Supreme Court ignored probative evidence of discriminatory intent, including the prosecutor's O.J. Simpson remarks and argument, and denied Mr. Snyder's Batson claims by a 5-2 vote. This Court directed the court below to reconsider Mr. Snyder's Batson claims in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). See *Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand, a bare majority adhered to its prior holding, once again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O.J. Simpson case, the totality of strikes against African-American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Mr. Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable factfinder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes. Three justices, including the author of the original opinion, dissented, finding the prosecutor's reference to the O.J. Simpson case in argument to an all-white jury, made "against a backdrop of the issues of race and prejudice," supported the conclusion that the State improperly exercised peremptory strikes in a racially discriminatory fashion. The Louisiana Supreme Court's consideration of Mr. Snyder's Batson claims on remand from this Court raises the following important questions:

1. Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and

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documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries?

2. Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case?

3. Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect —- i.e., that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984) — a holding directly conflicting with decisions from inter alia the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?

Summary: See Questions Presented above.

Case Citation Below: 942 So.2d 484 (La. 2006)

Petitioner's Counsel of Record:

Marcia A. Widder, The Capital Appeals Project

Respondent's Counsel of Record:

Terry M. Boudreaux, Jefferson Parish District Attorney's Office

Amicus Briefs:

In Support of Petitioner

1. Cornell Deaths Penalty Project
   Sheri Lynn Johnson, Professor of Law, Cornell Law School
2. Louisiana Association of Criminal Defense Lawyers
   Timothy A. Meche, 700 Camp Street, New Orleans, LA 70130

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SECTION III: CASES BY AREA OF LAW

Arbitration

***Hall Street Assoc. V. Mattel, Inc.* (06-989)**

Questions Presented:

Did the Ninth Circuit Court of Appeals err when it held, in conflict with several other federal Courts of Appeals, that the Federal Arbitration Act ("FAA") precludes a federal court from enforcing the parties' clearly expressed agreement providing for more expansive judicial review of an arbitration award than the narrow standard of review otherwise provided for in the FAA?

Summary:

Respondent Mattel, Inc., the tenant, brought this action against Petitioner Hall Street Associates, the landlord, arising from a property lease between the parties. The parties entered into an arbitration agreement that provided for the District Court to retain authority to review the arbitrator's factual findings and legal conclusions for legal error. The District Court refused to enforce the arbitration award. The Ninth Circuit reversed and remanded the case.

Petitioner's Counsel of Record:

Michael T. Garone, Schwabe, Williamson & Wyatt, P.C.

Respondent's Counsel of Record:

Shirley M. Hufstedler, Morrison & Foerster, LLP

Commodities Exchange Act

***Klein & Co. Futures, Inc. v. Bd. of Trade of The City of NY* (06-1265)**

Questions Presented:

The Commodity Exchange Act provides an express private right of action for actual losses to a person who "engaged in any transaction on" or "subject to the rules of" a commodity board of trade against that board of trade if the board, in bad faith, engaged in illegal conduct that caused the person to suffer the actual losses, 7 U.S.C. § 25(b)(1).

The question presented is:

Whether the court of appeals erred in concluding that futures commission merchants lack statutory standing to invoke that right of action because, in the court's view, they do not engage in such transactions, despite the statutory requirement that the merchants enter into and execute their transactions on, and subject to the rules of, a board of trade and the fact of the merchants' financial liability for the transactions.

Summary:

Petitioner Klein & Co. Futures, Inc. sought recovery of losses suffered as a result of its obligation to Respondent Board of Trade due to the manipulation of the daily settlement prices of P-Tech futures by Norman Eisler, the former chairman of the New York Futures Exchange, a division of Respondent. Despite complaints regarding the miscalculation of P-Tech

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futures settlement prices, the Board of Trade did not inquire into the complaints, in violation of the Commodities Exchange Act ("CEA") and various other rules and regulations. The district court dismissed the case, holding Petitioner lacked standing and failed to meet the requirement of § 25(b)(1) of the CEA requiring the claimant have engaged in a transaction or be subject to the rules of such contract markets or licensed boards of trade. Petitioner was not a seller or purchaser of P-Tech futures and did not suffer losses in the course of its transactions on a contract market. The Court of Appeals affirmed.

Petitioner's Counsel of Record:

Drew S. Days III, Morrison & Foerster LLP

Respondent's Counsel of Record:

Howard R. Hawkins Jr., Cadwalader, Wickersham & Taft LLP

Employment Discrimination:

***Sprint/United Management Co. V. Mendelsohn* (06-1221)**

Questions Presented:

This case presents a recurring question of proof in employment discrimination cases: whether a district court must admit "me, too" evidence - testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Tenth Circuit panel majority held that a court commits reversible error by excluding "me, too" evidence. This decision conflicts with those of other circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have held that "me, too" evidence may be excluded under Federal Rule of Evidence 403. Granting certiorari will resolve the conflict between the circuit courts of appeals on this important question of law.

Summary:

Petitioner Sprint employed Respondent Mendelsohn for more than ten years, until her release at age 51 as part of a downsize in personnel. Respondent alleged disparate treatment based on age under the Age Discrimination Employment Act. The district court granted Sprint's motion to exclude testimony from five witnesses ("me, too" witnesses), also former Sprint employees laid off before or after Mendelsohn, claiming they, too, had been victims of age discrimination. The court determined the witnesses were not persons "similarly situated" to the Petitioner because they were not laid off by the same supervisor and were not released at the same time as the Petitioner; therefore, they could not testify at trial. The jury returned a verdict in favor of the employer, Sprint, finding that Sprint did not engage in age discrimination against Mendelsohn. The Court of Appeals reversed and remanded the case for new trial, finding the testimony of other older employees also terminated by Respondent relevant.

Petitioner's Counsel of Record:

Paul W. Cane, Paul, Hastings, Janofsky

Respondent's Counsel of Record:

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Dennis E. Egan, The Popham Law Firm, P.C.

Federal Express Corp. v. Holowecki **(06-1322)**

Questions Presented:

Whether the Second Circuit erred in concluding, contrary to the law of several other circuits and implicating an issue this Court has examined but not yet decided, that an "intake questionnaire" submitted to the Equal Employment Opportunity Commission ("EEOC") may suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge.

Summary:

In December 2001, Respondent Patricia Kennedy submitted to the EEOC an intake questionnaire in which she provided information about allegations of age discrimination by her employer, Petitioner Federal Express Corporation. In April 2002, Respondent Kennedy and thirteen other FedEx employees initiated this action against FedEx, alleging that FedEx had policies violating the ADEA. Respondent filed a formal charge of discrimination with the EEOC in May 2002, one month after she filed this suit. FedEx moved to dismiss the complaint because of the charge of discrimination filed with the EEOC was untimely. The ADEA requires that an employee wait to file suit until sixty days after filing an EEOC charge. The district court granted the motion to dismiss on grounds that no plaintiff had fulfilled the ADEA's charge-filing requirement. The Court of Appeals ruled that the intake questionnaire and accompanying affidavit constituted an EEOC "charge," fulfilling the ADEA requirement, and sufficient to permit fellow employees who never filed an EEOC charge to piggyback Kennedy.

Petitioner's Counsel of Record:

Robert Jeffrey Kelsey, 3620 Hacks Cross Road, 3rd Fl., Bldg. B, Memphis, TN 38125

Respondent's Counsel of Record:

David L. Rose, Rose & Rose, P.C.

Criminal Sentencing

Sentencing Guidelines

Gall v. United States **(06-7949)**

Questions Presented:

Whether, when determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

Summary:

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After Petitioner Gall plead guilty to his participation in an ecstasy distributing ring in Iowa, he subsequently ceased participation to pursue a college degree, ended his involvement with drugs, and set up his own business outside of the state. Two years after his guilty plea, Petitioner was approached by federal agents about his prior involvements in the distribution ring. He made arrangements to return to Iowa to face charges. Based on the federal Sentencing Guidelines and the drug quantity, Petitioner would have faced 30 to 37 months of imprisonment. Instead, the trial judge weighed additional factors to impose a sentence below the guidelines range. On appeal, the Eighth Circuit reversed and remanded for resentencing on grounds that the below-guidelines sentence was not sufficiently justifiable.

Petitioner's Counsel of Record:

Jeffrey T. Green, Sidley Austin LLP

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Watson v. United States **(06-571)**

Questions Presented:

18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that "use" of a firearm under § 924(c) means "active employment." Id. at 144.

The question presented in this case is: Whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(l)(A) and this Court's decision in Bailey.

Summary:

The district court convicted defendant-Petitioner Watson of exchanging an unloaded handgun for a quantity of drugs to an undercover agent, a violation of 18 U.S.C. § 924(c)(1)(A). The Fifth Circuit Court of Appeals held the exchange of a handgun for drugs in a drug trafficking crime is sufficient for a conviction.

Petitioner's Counsel of Record:

Mr. Mark T. Stancil, Robbins, Russell, Englert, Orseck & Untereiner, LLP

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Armed Career Criminal Act

Logan v. United States **(06-6911)**

Questions Presented:

Whether the "civil rights restored" provision of 18 U.S.C. §921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1)?

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Summary:

Petitioner-defendant Logan was convicted in the district court for being a felon in possession of a firearm. Pursuant to a plea agreement, Logan pleaded guilty to the one-count indictment for possession of a firearm. The plea agreement set forth the maximum penalty of imprisonment at ten years. The district court accepted Logan's plea of guilty conditioned upon the preparation of the presentence report ("PSR"). The PSR indicated that Logan may qualify as an armed career criminal and for enhanced penalties under 18 U.S.C. § 924(e)(1). Three prior convictions formed the basis for the PSR's suggestion and for the government's argument that Logan was an armed career criminal. At a sentencing hearing, the district court judge rejected the plea agreement and the district court found that Logan was an Armed Career Criminal, imposing the mandatory minimum penalty of 180 months as required by 18 U.S.C. § 924(e)(1). The Seventh Circuit affirmed the sentence.

Petitioner's Counsel of Record:

Richard A. Coad, Federal Defender Services of Wisconsin, Inc.

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Child Pornography

United States v. Williams (06-694)

Questions Presented:

Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits "knowingly * * *advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

Summary:

Respondent Williams was convicted in the district court of promotion and possession of child pornography in violation of a provision of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"). On review, the Eleventh Circuit Court of Appeals held the PROTECT Act's pandering provision was unconstitutionally overbroad and vague.

Petitioner's Counsel of Record:

Paul Clement, Solicitor General, US DOJ

Respondent's Counsel of Record:

Richard Diaz, 3127 Ponce de Leon Blvd., Coral Gables, FL 33134

Retroactivity

Danforth v. Minnesota (06-8273)

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Questions Presented:

1. Are state supreme courts required to use the standard announced in *Teague v. Lane* (1989), to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by Teague?
2. Did *Crawford v. Washington*, 541 U.S. 36 (2004), announce a "new rule of constitutional criminal procedure," as *Teague* defines that phrase and, if it did, was it a watershed rule of procedure subject to full retroactive application?

Summary:

Following his conviction for first-degree criminal sexual conduct, Petitioner Danforth filed a motion for post-conviction relief in light of the Supreme Court's decision in *Crawford v. Washington* (2004), barring the admission of certain testimonial statements. Believing that such evidence was improperly admitted during his trial, Petitioner motioned for post-conviction relief, arguing that new rules of constitutional criminal procedure should apply retroactively to his case. The district court denied the motion. The Court of Appeals and Minnesota Supreme Court affirmed the denial.

Petitioner's Counsel of Record:

Benjamin J. Butler, Assistant State Public Defender

Respondent's Counsel of Record:

Patrick C. Diamon, Hennepin County Attorney's Ofc.

Employee Retirement Income Security Act

LaRue v. DeWolff, Boberg & Assoc., Inc. **(06-856)**

Questions Presented:

1. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(2), provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title." 29 U.S.C. 1109 states that "a fiduciary with respect to a plan who breaches any * * * duties imposed upon fiduciaries * * * shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."
The First Question Presented is:
Does §502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?

2. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that a "civil action may be brought * * * by a participant * * * to obtain other appropriate equitable relief * * * to redress * * * violations" of the statute.
The Second Question Presented is:

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Does §502(a)(3) permit a participant to bring an action for monetary make-whole" relief to compensate for losses directly caused by fiduciary breach (known in premerger courts of equity as "surcharge")?

Summary:

Petitioner LaRue, who participated in a 401(k) plan, sued his employer/administrator – Respondents – under § 502(a) of the Employee Retirement Income Security Act (ERISA) for recovery of the losses he allegedly suffered in his individual account. LaRue alleged that his employer had failed to follow directions for making changes to investments in his retirement account, resulting in losses. The district court granted Respondents' motion for judgment on the pleadings, claiming that the relief sought by Petitioner was not available under ERISA. On appeal, the Fourth Circuit affirmed.

Petitioner's Counsel of Record:

Peter K. Stris, Whittier Law School

Respondent's Counsel of Record:

Thomas P. Gies, Crowell & Moring LLP

Individuals With Disability Act

Board of Education of City of New York v. Tom F. (06-637)

Questions Presented:

Does the holding of the United States Court of Appeals for the Second Circuit, stating that the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency, stand in direct contradiction to the plain language of 20 U.S.C. §1412(a)(10)(C)(ii) which authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency?"

Summary:

Petitioner Board of Education of New York filed an action under the Individuals with Disabilities Education Act ("IDEA"), which seeks to ensure a free appropriate public education to all students with disabilities. Petitioner seeks to overturn administrative determinations that Petitioner was required to reimburse Respondent Tom F. the cost of his son's private school tuition, even though Respondent didn't first try the public school special educational placement made available to his son. The district court granted summary judgment in favor of Petitioner. The Second Circuit vacated the judgment of the district court and remanded for further proceedings in light of its decision in *Frank G. v. Board of Education of Hyde Park,* 459 F.3d 356 (2d Cir. 2006), which held that IDEA did not preclude reimbursement when a student had not previously received special education and related services.

Petitioner's Counsel of Record:

Mr. Leonard Koerner, Corporation Counsel for the City of New York

Respondent's Counsel of Record:

Mr. Paul Gardephe, Patterson Belknap Webb & Tyler LLP

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Money Laundering

United States v. Santos **(06-1005)**

Questions Presented:

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether "proceeds" means the gross receipts from the unlawful activities or only the profits, i.e., gross receipts less expenses.

Summary:

Following affirmance on direct appeal of defendants' convictions for gambling, conspiracy, and money laundering, defendants moved to vacate. The district court granted the motion with respect to the money laundering convictions. The district court based its determination on an interpretation of "proceeds" under the federal money laundering statute to mean net income (gross proceeds less expenses). The Court of Appeals for the Seventh Circuit would not overrule a prior circuit decision in *United States v. Scialabba,* defining proceeds of illegal gambling business as net income, rather than gross income of business, for purposes of the money laundering statute. The United States challenges the vacatur of the convictions, contending that the word "proceeds" should be interpreted to mean gross income.

Petitioner's Counsel of Record:

Bruce A. Coane, Coane and Associates

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Preemption

Rowe, Att'y Gen. of ME v. NH Motor Transport Assn. **(06-457)**

Questions Presented:

1. Whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. §14501(c)(1) and 41713(b)(4)(A), preempts states from exercising their historic public health police powers to regulate carriers that deliver contraband such as tobacco and other dangerous substances to children.
2. Whether the FAAAA preempts states from exercising their historic public health police powers to require shippers of contraband such as tobacco and other dangerous substances to utilize a carrier that provides age verification and signature services to ensure that such substances are not delivered to children.

Summary:

Trade associations representing air and motor carriers of property brought this action against the Maine Attorney General, alleging that certain provisions of Maine's Tobacco Delivery Law, which regulates the sale of

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tobacco products by requiring the carrier to take specific steps to prevent the sale of cigarettes to minors, were preempted by the FAAAA, which bars states (with certain exceptions) from enacting laws related to prices, routes, or services of carriers of property. The district court determined that the FAAAA preempted the challenged law because it had a "forbidden significant effect" on United Parcel Service, a motor/air carrier of packages in Maine. The First Circuit affirmed in part, reversed in part, and remanded the case with instructions.

Petitioner's Counsel of Record:

Paul Stern, Deputy Attorney General, Office of the Attorney General (ME)

Respondent's Counsel of Record:

Beth S. Brinkmann, Morrison & Foerster LLP

Riegel v. Medtronic, Inc. **(06-179)**

Questions Presented:

Whether the express preemption provision of the Medical Device Amendments to the Food, Drug, and Cosmetic Act, 21 U.S.C. §360k(a), preempts state-law claims seeking damages for injuries caused by medical devices that received premarket approval from the Food and Drug Administration.

Summary:

Petitioner Reigel sued to recover damages for injuries suffered from a balloon catheter manufactured by Respondent Medtronic, Inc. The Court of Appeals held that the MDA preempts Riegel's claims.

Petitioner's Counsel of Record:

Allison M. Zieve, Public Citizen Litigation Group

Respondent's Counsel of Record:

Kenneth S. Geller, Mayer, Brown, Rowe & Maw LLP

Sovereign Immunity

Ali v. Fed. Bureau of Prisons **(06-9130)**

Questions Presented:

Under 28 U.S.C. 2680(c), the Federal Tort Claims Act's waiver of sovereign immunity does not extend to "[a]ny claim arising in respect of * * * the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." The question presented, over which ten circuits are divided six-of-four is:
Whether the term "other law enforcement officer" is limited to officers acting in a tax, excise, or customs capacity.

Summary:

Petitioner sued the Federal Bureau Of Prisons, its Director and a warden, asserting claims pursuant to, inter alia, the Federal Tort Claims Act in connection with the alleged mishandling of his belongings. The district court dismissed his claims with prejudice for lack of subject matter jurisdiction

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because it is barred by the doctrine of sovereign immunity. The Eleventh Circuit Court of Appeals affirmed the dismissal.

Petitioner's Counsel of Record:

Jean-Claude Andre, Ivey, Smith & Ramirez

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Takings Clause:

John R. Sand & Gravel Co. v. United States **(06-1164)**

Questions Presented:

The statute of limitations in the Tucker Act, 28 U.S.C. §2501, provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The questions presented are:

1. Whether the statute of limitations in the Tucker Act limits the subject matter jurisdiction of the Court of Federal Claims.
2. Whether a claim for a permanent physical taking of a portion of real property first accrues upon the government's temporary exclusion of the property holder from another portion of the property.

Summary:

John R. Sand & Gravel Co., which conducted sand and gravel mining operations on leased tract, brought suit against the United States, seeking compensation for the alleged physical taking of the leased property during environmental remediation of landfill operated on a portion of the property. The Court of Federal Claims held that the United States was not liable to Petitioner for the alleged taking of its leasehold interest. On appeal, although the government did not challenge the timeliness of Petitioner's claims, the Federal Circuit held that the Tucker Act's six-year statute of limitations is jurisdictional and cannot be waived. The Court found Petitioner's claim was time-barred and therefore, the Court of Federal Claims lacked jurisdiction to consider it.

Petitioner's Counsel of Record:

Jaffrey K. Haynes, Beier Howlett, P.C.

Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

Tax Law:

Dept. of Revenue of KY v. Davis **(06-666)**

Questions Presented:

Whether a state violates the dormant Commerce Clause by providing an exemption from its income tax for interest income derived from bonds issued by the state and its political subdivisions, while treating interest income realized from bonds issued by other states and their political subdivisions as taxable to the same extent, and in the same manner, as

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interest earned on bonds issued by commercial entities, whether domestic or foreign.

Summary:

Residents of Jefferson County, Kentucky, who paid Kentucky income tax on interest income earned from out-of-state bonds, filed a class action complaint seeking declaratory judgment. The taxpayers alleged that Kentucky's income tax laws, exempting interest on bonds issued by Kentucky or its subdivisions from income tax, but taxing interest income on bonds from other states and their subdivisions, violated the Commerce Clause. The Jefferson Circuit Court granted summary judgment in favor of Petitioner. The Kentucky Court of Appeals held the bond taxation system discriminated against interstate commerce in violation of the Commerce Clause.

Petitioner's Counsel of Record:

C. Christopher Trower (Atlanta, GA)

Respondent's Counsel of Record

G. Eric Brunstad Jr., Bingham McCutchen, LLP

Knight v. Commissioner of Internal Revenue **(06-1286)**

Questions Presented:

There is a deep, irreconcilable and widely noted conflict among the Second, Fourth, Sixth and Federal Circuits about the meaning of 26 U.S.C. § 67(e) — which permits trusts and estates to deduct on their income tax returns certain administrative expenses — and whether the statute permits fees for investment management and advisory services to be fully deducted on trust's and estate's income tax returns. This is an important and recurring question of federal tax law that involves deductions by trusts and estates that total in the billions of dollars annually.

The Question Presented is:

Whether 26 U.S.C. § 67(e) permits a full deduction for costs and fees for investment management and advisory services provided to trusts and estates.

Summary:

Petitioner Knight, Trustee of the Rudkin Trust, established under the will of the founder of Pepperidge Farm, petitioned for a redetermination of deficiencies in federal income tax. On the Trust's U.S. Income Tax Return for Estates and Trusts, the fiduciary income tax return, the Trustee included a deduction for the full amount of its SEC investment advisor's fees in calculating the Trust's taxable income. The IRS concluded that fees that the trust paid to the advisor to fulfill the trust's obligations were not fully deductible. Rather, pursuant to the Tax Reform Act of 1986, Respondent allowed only deduction of fees insofar as they exceeded two percent of the trust's adjusted gross income. Petitioner argues the fees are fully deductible because the Act provides for deductions for costs incurred in connection with the administration of the estate or trust which would not have been incurred but for the property being held in such a capacity. The Tax Court entered judgment for the IRS and the Second Circuit affirmed.

Petitioner's Counsel of Record:

Peter J. Rubin, Georgetown University Law Center

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Respondent's Counsel of Record:

Paul D. Clement, Solicitor General, US DOJ

***CSX Transportation, Inc. v. GA State Bd. of Equalization* (06-1287)**

Questions Presented:

Whether, under the federal statute prohibiting state tax discrimination against railroads, 49 U.S.C. § 11501(b)(1), a federal district court determining the "true market value" of railroad property must accept the valuation method chosen by the State.

Summary:

Petitioner CSX Transportation, Inc., a railroad, filed suit under the Railroad Revitalization and Regulatory Reform Act (4-R Act) against Respondent Georgia's State Board of Equalization, challenging the proposed valuation of its operating property for ad valorem tax purposes. In 2002, as in past years, the Property Tax Division calculated the market value of all public utilities, including railroads, using the unit rule. In 2002, the State replaced the previous calculation methods with a valuation method that raised Petitioner's property tax liability. Affirmed by the Eleventh Circuit, the district court entered judgment in favor of the Respondent, holding the 4-R Act barred the challenge to the state's methodology for valuation of the railroad's property.

Petitioner's Counsel of Record:

Carter Phillips, Sidley Austin Brown & Wood LLP

Respondent's Counsel of Record:

Warren R. Calvert, Senior Assistant Attorney General, Georgia Department of Law

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