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P R O C E E D I N G S

MR. WITTES: Welcome to the latest in the Judicial Issues Forums here at Brookings. My name is Ben Wittes, I'm a fellow here, and I can't imagine that there's a more interesting set of things to talk about than the term just ended. So two years ago at this time of the year, we were all sort of sitting around talking about wondering whether a new era of peace had broken out at the Supreme Court.

The first term of the Roberts court had just seen this great sweep of unanimous cases and a whole bunch of divisive ones not proving quite as divisive as people expected.

This time last year, that sense of, you know, a new era had been utterly disrupted by one of the most divisive cases of the term. There had been more 5/4 splits along kind of conventional ideological lines, a great deal of vituperative rhetoric on the part of the justices, both in majority and dissent, and a real sense that for the first time after, you know, many decades of trying, that the sort of – a new kind of conservative majority had really sort of seized control of the court, and you know, had the agenda in hand. This year, things look a bit more confused again. And so I thought we would spend some time today trying to sort through, both on the individual level of a lot of the cases, but also on the sort of more gestalt level what this year things really look like now. Maybe today we'll figure it out.

The biggest blockbuster cases of the term, which I think most people would regard as *Boumediene*, which dealt with detainees at Guantanamo, and *Heller*, which came down yesterday and struck down our local gun ban, handgun ban in the District, sort of look a great deal like last year.

They're both 5/4, they both divide the court in a sort of conventional ideological manner with Justice Kennedy as the key swing vote. They both involve some pretty strong rhetoric. So in *Boumediene*, Justice Scalia writing in dissent talks about how Americans will die as a consequence of the decision. And there is no shortage of similar rhetoric with respect to *Heller* yesterday from the liberal dissenters. So yesterday this prompted Stuart to write me an email posing the following question; if nine smart, more-principal-than-average people with all the time in the world and brilliant staffs of clerks split along predictable liberal-conservative lines, not only on the bottom line of this and almost every other big case, but also on every component of the analysis, doesn't it drive one toward the conclusion that the justices are simply politicians on the bench, and all the reasoning and the opinions are subconscious sophistry, driven by preconceived conclusions? More broadly, is there any hope that any – that reasonable people of diverse ideologies will ever be able to come to empirically-driven consensus about anything important? So those are at sort of the top altitudes that review cases.

However, one step beneath that, I think the term looks quite complicated actually. So for one thing, the court is a lot less divided this term than last. Last term, we had 33 percent of the court's aggregate case load decided by a 5/4 margin; this year it's more like 20 percent. So that's a pretty significant difference.

For another thing, several of the big ideologically divisive cases that everybody expected to really, you know, come out in this very kind of conventional left/right split ended up not doing so. So, for example, the court did not split the way people expected over the voter ID case out of Indiana, the lethal injection case, both of which Randy will talk about shortly. Interestingly, the biggest presidential powers case of the term, *Medellín*, and a whole bunch of employment discrimination cases, which, you know, particularly after last term, one might have expected would have divided the court very predictably, sort of didn't.

Moreover, and I think this – probably today in conservative circles, there's a fair bit of clucking about how well, or from the conservative point of view, how badly they have done in a number of cases, and in liberal circles, how well they have done in a number of cases, both relative to last term and relative to expectation.

I think – speaking personally – I was rather surprised by the outcome in the child rape death penalty case, which I think does constitute a major sort of new constriction of the applicability of the death penalty.

And, you know, there is in several areas a sort of significant, I don't quite know if you'd call it an expansion, but questions on the scope of anti-discrimination laws coverage have generally this term been resolved in favor of a broader rather than a narrower construction. What's more, the court has really quite aggressively continued its war on behalf of, again, in a pretty non-ideological fashion, the sentencing discretion of district judges around the country. And so there's a fair bit that looks very different this term from last. And certainly, if you take the last three terms in sequence, it's actually pretty hard to discern an aggregate pattern.

So we're in kind of a weird state of equipoise that I'm confident our extremely illustrious panel is going to walk us through.

Stuart Taylor will start us off. Stuart needs no introduction at Brookings. But he is a *National Journal* columnist and a Brookings Non-Resident Senior Fellow. He's also been, over the years, something of my mentor in the sort of world of legal journalism, dating back from when we worked together at *Legal Times* a number of years ago. He will start us off with a discussion of the courts cases in *Heller* and *Boumediene*. Then we'll discuss those briefly as a panel, and then Randy will talk to us about the lethal injection cases, a group of cases that we can think of as sort of the political cases of the term, that is, the cases that deal with the political system in some direct sense. And *Medellín*, which those of you who were here the other day for Justice Breyer's talk, have already gotten something

of a primer on. Randy was the head of the Office of Legal Counsel in the latter years of the Clinton Administration. He is now a partner at WilmerHale, the name of which firm I still have not entirely gotten used to.

And at that point, Miguel Estrada will give us a background on this term's rather extensive cases in the area of business law; those of you who have read Jeff Rosen's piece in the *New York Times* magazine from earlier this year have a sense that there's been some sort of significant developments in that arena in recent years. And Miguel will also talk to us about the criminal law cases of the term.

Miguel is a partner at Gibson, Dunn and Crutcher, and has argued 18 cases before the Supreme Court as one of the leading advocates today before the court. Stuart, take it away.

MR. TAYLOR: Thanks very much, Ben. My first two cases, and I have a little one to add, the gun control case and the Guantanamo case, are both historic firsts in ways I'll detail. Fortunately, since the combined total is seven opinions in the two decisions, spanning only 280 pages between them, they shouldn't be hard to summarize, so I'll give it a shot. The first in the D.C. case, the D.C. gun case, was that this was the first time in history that the Supreme Court had definitively interpreted the 217-year-old Second Amendment on the right to keep and bear arms, and the first time it had held that there is an individual right to keep and bear arms apart from service and the militia.

And on that basis, the court struck down the District of Columbia gun control law, or to keep provisions of it. It's the strictest gun control law in the country, or was, and those provisions ban, with minor exceptions, possession of a handgun anywhere in the District, even in the home for purposes of self-defense, and require that any rifles kept in the District, in the home, be disarmed and trigger-locked in a way that the court said makes them pretty useless for self-defense.

And the core of the court's holding was that there is a right to have a pistol or another gun, presumably in the home, for purposes of self-defense.

Now, the whole argument in the 154 pages of opinions here went to the 27 words of the Second Amendment, which I might as well read: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed", with commas scattered here and there in ways that look a little odd to the modern eye. You know, I think you all know that for decades, for generations, the argument between pro-gun and anti-gun people has been whether that militia part, the prefatory clause, as Justice Scalia calls it, basically takes away the right, or negates any right, to keep and bear arms in the second part, the idea being the traditional view, which most courts had taken, that there really is no individual right to keep and bear arms now because there are no militias, state militias like there were at the time

of the founding or anything closely analogous to them, and basically the amendment is a dead letter.

That until recently has been almost a consensus view. In the '90's, some scholars, some liberal scholars, interestingly, given the politics of this issue, began to say, well, gee -- maybe one of them wrote an article called The Embarrassing Second Amendment, and part of the argument by Sanford Levinson was, well, maybe we should take seriously the idea that this amendment means something; after all, we liberals take all the other provisions of the Bill of Rights seriously. In a 5/4 conservative liberal split with Justice Kennedy, the perennial sometime-liberal, sometime-conservative swing vote creating the majority, the court held for the individual rights view, held that the prefatory clause about the militia states a general purpose, but does not limit the scope of the right created by the second clause, to keep and bear arms.

Now, there also were bitter jibes exchanged between the two sides in this case, and I'll read a few of them to give the flavor. Justice John Paul Stevens, who's an 88-year old dean of the court's liberal block and a gentleman of the old school, was pretty tough in reading the sentence from the bench yesterday.

He assailed the decision as a betrayal of the conservatives long-professed devotion to "judicial restraint", and to the Constitution's "original intent." He accused them of setting aside settled law, wandering

into the political thicket, and by referring to Felix Frankfurter as a “true judicial conservative”, Steven’s implied that Chief Justice John Roberts, Scalia, and their allies are conservatives of the crasser political sort.

Scalia fired back in kind. He accuses the liberals most specifically of wanting to pronounce the Second Amendment extinct. On both sides, there’s a little whiff of each accusing the other of hypocrisy and of going back on the kind of constitutional interpretive techniques that they prefer when the shoe is on the other foot and it’s something like abortion rights.

The general rationale of Justice Scalia was, first, that the militia clause was a prefatory statement of purpose, and he went through a lot of history for the purpose of showing that traditionally, in all kinds of context, when you say, because we want X, therefore, we create a right to Y, the right to Y is not limited by whatever X is, and he said that logic holds here.

He parsed the language almost word by word of the amendment. He went at great length through the relevant English and United States history, United States history both before and during and after the drafting of the Second Amendment. He touched on, for example, the fact that after the Civil War, the right to keep and bear arms was relied on by freed slaves trying to protect themselves against the KKK.

There was also a big argument about the meaning of the court's major previous precedent in 1939 on guns, the *United States v. Miller*, in which the court held that there is no constitutional right to have a sawed-off shotgun. It's a brief five-page, somewhat opaque opinion. And most courts have in the past overwhelmingly read it as adopting the militia clause view of the Second Amendment.

Justice Stevens emphasized that Justice Scalia kind of batted it aside with a footnote, why all these other judges could have been so wrong, in his view.

As for political reactions…John McCain was celebratory, Barack Obama, interestingly, was not exactly celebratory, but he said, yeah, that's a good thing, I'm for the Second Amendment, which I think reflects some difficulties politically Democrats have had with gun control.

For all the symbolic importance, this probably will have a limited impact. Not many other laws are likely, in my view, to be struck down as a result of this decision, in part because there aren't that many really, really tough gun control laws. There are tough laws, restrictions on handguns in Chicago, New York, Philadelphia, and Detroit. The Second Amendment Foundation has already filed a lawsuit yesterday against the Chicago law, there will be others. Those laws may go down. But Scalia stressed that laws against concealed guns, licensing laws, reasonable licensing laws, restrictions on guns in schools, government buildings and

the like, bans on possession by felons and the mentally ill and also on particularly dangerous weapons, like machine guns, the kinds of gun control laws that are common and that the federal government has passed are probably going to be okay.

Justice Stevens, in his dissent, and Justice Breyer, in a separate dissent, did warn that the self-defense logic, self-defense in the home in this case, used by the majority could be viewed expansively. What about self-defense when you're walking through a dangerous part of town? We'll see how that plays out.

The second decision, a major decision and an historic decision, *Boumediene v. Bush*, which is only 126 pages of opinions, is the first decision in Anglo-American history, as the descanters emphasize, that non-Americans held outside the United States, or non-English people outside the sovereignty of England, can invoke the support of the courts when they say they're unlawfully imprisoned by the Executive Branch. It's also the first decision in which the court has ever overturned, unless somebody can cite me something I missed, a law enacted by the President and Congress during what they deemed to be wartime about matters of war. And it's the third stunning rebuff in four years by the court to President Bush's policy of detaining hundreds of suspected enemy combatants, as he calls them, at Guantanamo Bay, without the procedural protections against error, since they weren't wearing uniforms when they

were captured, that five justices have now held are constitutionally required.

A little background might help frame these issues. Why Guantanamo? The reason the Executive chose Guantanamo was that under Supreme Court case law, particularly a 1950 decision called *Johnson v. Eisentrager*, Guantanamo had the unique virtue of being totally controlled by the United States under a perpetual lease with Cuba, and being outside the technical sovereignty of the United States, under the same lease, which under the president, suggested the judicial power can't reach there, that it would be a place basically in which the Executive Branch would have total power without any interference by the judiciary. And they sent people there, and they initially had no hearings at all, even the cursory hearings required by the Geneva Conventions, to determine whether they actually had the right people or whether these were innocent people seized by a mistake. President Bush, in early 2002, declared that the Geneva Conventions did not apply to the people on Guantanamo because they were stateless terrorists.

The first rebuff to this policy came in June 2004. *Rasul v. Bush* held that the habeas corpus statute, and let me define habeas corpus—it's the main protection for freedom from unlawful restraint by the Executive, it's a petition where a prisoner goes to a court and says they

don't have a legal basis for holding me or they have no evidence to hold me and gets a judicial ruling on that.

Bush had contended that there is no right of habeas corpus at Guantanamo, with some support and a history in the precedence. The court said otherwise; it said that under the statute enacted by Congress for habeas corpus, and there's also a constitutional right which I'll get to, the people on Guantanamo had a right to petition the courts for habeas corpus, didn't really say what happens when they petition them, but they had a right. The Executive after that set up something called Combatant Status Review Tribunals, which were military hearings, not before judges, and not with defense lawyers, to determine, well, is this guy, whatever his name is, let's say Boumediene, is he really an enemy combatant or is he some other kind of guy that we have to let go? And Congress adopted the Detainee Treatment Act of 2005, which was designed to overrule *Rasul* by saying, no, they don't have a right to judicial review, to habeas corpus petitions on Guantanamo but they didn't say it clearly enough to convince the court. In June 2006 in *Hamdan v. Rumsfeld*, the Court held that some of the military commissions for Guantanamo detainees were legally insufficient, under the Geneva Conventions, which the court felt did apply to Al Qaeda, thereby rebuffing Bush on a very important issue, which also has relevance to interrogation. Because Geneva restricts interrogations.

Hamdan said that and also said that while Congress may

have wanted -- may have been trying to overrule our decision on the statutory right to habeas corpus, they didn't say it clearly enough, so we're still going to let these people file.

The administration goes back to Congress and gets the Military Commissions Act of 2006. The Congress and President tried to overrule as much of *Hamdan* as they could. And in particular they said, no habeas corpus at Guantanamo. We meant it the first time; we'll say it more clearly this time.

But come forward to this case. Lakhdar Boumediene was snatched in Bosnia by the way, not in Afghanistan. And some other detainees challenged the CSRT's, the military hearings on detention by filing habeas corpus petitions. They contended that the Military Commissions Act operated as an unconstitutional suspension of the writ of habeas corpus.

The Constitution says it may be suspended only in cases of a rebellion or invasion. Neither the President nor Congress had claimed that was applicable.

Seventy page opinion. Justice Kennedy for the liberal majority, he's with the liberal majority or the conservative majority from case to case. He held that the CSRT's were error-prone, no lawyers, no access to classified evidence, hearsay can be used and also the cursory review that the Military Commissions Act had provided and the US Court

of Appeals for the DC Circuit, of the CSRT decisions, was inadequate.

Almost done. Justice Scalia and Justice Roberts wrote separate dissents; Scalia's was the more passionate one. He said the writ of habeas corpus does not and never has run in favor of aliens abroad. He stressed the disastrous consequences in his view of the decision, which he said "will almost certainly cause more Americans to be killed."

Chief Justice Roberts and all the conservatives on both dissents were less alarmist about the consequences of the decision.

But Roberts did see it as an unwarranted judicial power grab, saying "the majority nearly replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date." And he went on at considerable length about how unhelpful the decision was to the lower courts, who are going to have to make up the rules from now on.

This was the biggest unresolved issue. There are lots of unresolved issues. Who's an enemy combatant? What's the proper definition of an enemy combatant? How much evidence do you need to detain? Who has the burden of proof? What about classified evidence? What about hearsay?

The biggest one is – Is this just about Guantanamo? And the 270 or so people who are still there? Or does this reach worldwide? What about people in our prison in Afghanistan? Can they now go to the court

too? This will prove to be a gigantically important decision if it reaches beyond Guantanamo; it will in the eyes of history be perhaps a much less important decision if in the end it's held to be applicable only at Guantanamo.

And just a word about another decision the same day, *Munaf v. Geren*, which may encourage the executive to take the people from Guantanamo and send them to their home countries.

Two U.S. citizens were held by the U.S. military in Iraq for supposedly committing terrorist-type crimes against Iraq. They petitioned for habeas corpus to say, don't hand us over to the Iraqi government for prosecution. They will torture us. And the court in a unanimous opinion by Chief Justice Roberts says, "Well the good news is, you do have a right to a writ of habeas corpus." This was not controversial since they were American citizens, even though they were abroad. "The bad news is you lose."

And the court had some deferential language about the role of the political branches in such matters, noting that the Judiciary is not suited to second-guess the Executive on things like the risk of torture. Which points in a somewhat different direction than does the *Boumediene* case and the tensions between the two mindsets will have to be worked out over time. Thanks.

MR. WITTES: Thanks, Stuart. So I think what we should do

is just plow on, get all three presentations and then I'll just open it up to the floor for questions at that point. So Randy, take it from here.

MR. MOSS: Okay that'll be great. Let me do that -- let me just ask Stuart one question if I could about the *Heller* case. Which is --

MR. TAYLOR: I've already told you everything I know. But I'll give it a whack or a shot.

MR. MOSS: Well the question is whether *Heller* addressed the question of whether the Second Amendment applies to the states. When you are dealing with the District of Columbia, obviously you're not dealing with the state per se. And, there's a question, I would take it, with respect to whether the Bill of Rights, which were originally adopted for purposes of constraining the new federal government, whether that provision of the Bill of Rights would be incorporated and applied with respect to the states given the prefatory language that you read which the court concluded was not sort of a sufficient basis for narrowing the context of the right itself, but indicates that the purpose of the framers was to protect the security of the free states.

Is there a question that remains then about whether that protection would then apply and bind the states themselves, or only apply to the federal government?

MR. TAYLOR: Very good question. Justice Scalia said in a footnote, specifically, we're not resolving that here. He cited some old 19th

century precedence that said, no, it does not apply to the states. But he also noted that in the 20th century the court had applied amendment after amendment after amendment from the Bill of Rights to the states. If it's not applicable to the states here, it really will mean very little.

Because the federal government isn't passing the sort of gun control laws the court would strike down, so it's just about Washington D.C. Most of the commentary I've seen kind of charges right ahead to say well, Chicago's next, then New York, then Detroit, and seems to proceed on the assumption that the court will eventually apply *Heller* to the states. If I had to guess, I'd guess that's true, but I wouldn't bet too much on it.

MR. WITTES: But it's at least a great argument for Chicago to start with. That the entire decision doesn't apply to us.

MR. ESTRADA: Well, I don't know how great it is. I mean, you know it is an argument. I mean the point that Randy made is that this notion as to whether the Bill of Rights, which was intended to bind the federal government, ultimately ends up applying to the states is based on the intervening passage of the 14th amendment.

Right after the Civil War, and the question is that that was such a change in the federal/state balance, that many of these rights—those that are sort of implicit in ordered liberty, as the phrase goes—really now applied to the states. And I would make two points in response.

One; is that contrary to the implication from Randy's

question, in applying a part of the civil rights to the states, the Supreme Court hasn't been very punctilious about looking at the language of the particular constitutional right. The first one that was ever imposed on the states I think was the First Amendment which starts with the words "Congress shall make no law…"

And the second point is that if you read the discussion that Justice Scalia engaged in and part of the reasoning as to why this always has been implicit in a right to self-defense, you get a fair amount of fodder for the proposition that if something was incorporated as part of the war over slavery, certainly it was something that would be intended to give the recently-freed slaves this right.

MR. TAYLOR: I'd like to toss a related question back to you Ben. Since expansive interpretations of the Bill of Rights, including against the states, have traditionally been kind of a liberal thing and dragging feet on this has traditionally been kind of a conservative thing, what will the vote be? Who will vote which way on this issue when it comes up?

MR. WITTES: Well I don't -- I feel totally unqualified to answer that question. That said, I actually do agree with Miguel that this is not a winning argument for Chicago, and I think it's going to take several years to find that out. Because it's a good issue to litigate. But at the end of the day, I think it would be very hard for the liberal justices to say, we

incorporate all the provisions of the Bill of Rights against the states except for the few isolated ones that really don't make sense, and the Second Amendment, which we kind of don't like the substance of.

And I think that, for exactly the same reason, it would be an empty thing for the conservative justices to say, well, we announced this grand new right, only it doesn't apply against the only sovereigns that are likely to want to use it –- the only sovereigns that are really likely to want to restrict it, which is to say the state governments.

And so I think you probably have a pretty broad consensus for the idea that whatever the parameters of the individual right are, they probably apply against the states.

MR. MOSS: Well let me say one more thing about that, and then I'm going to turn to the other cases. In response to that point and to Miguel's point: the Second Amendment is the only provision in the Bill of Rights that actually specifies, in its text, its purpose. And in doing so, it says that its purpose is in order to secure a free state. And if one is a textualist, and is studying that language and then is applying a standard for application of those restrictions and liberties to the states, one then asks, did the framers think this is a provision, which is necessary towards its liberty? Is there something with respect to the liberty interest and the relationship between an individual and a state that says the individual should be able to bear arms? And based on the history and I'm no expert

on this, but one would think there is a substantial argument that the amendment is not about protecting individuals versus the state.

MR TAYLOR: We'll find out.

MR. MOSS: And I'm sure there will be plenty said about this.

MR.ESTRADA: And Randy, one could infer from the varied language of the First Amendment that the purpose was to not allow Congress to make laws that restrict speech. It actually didn't need to say, "And our purpose is" because you know the language itself tells us.

MR. MOSS: That's certainly true, and I'm not arguing that the language is binding. But what is binding for purposes of incorporations is the purpose that is served, and the purpose of the First Amendment is to guarantee freedom by allowing people to speak. And to dissent and so forth. It's less clear when it comes to the second -- but I agree, we'll just have to see. I offer no prediction as to how the courts will address the issue.

Let me talk for a minute about the Supreme Court's decision in *Baze*, which was the lethal injection case. This is a case which held up many executions throughout the country while the court was deciding whether the method of lethal injection was constitutionally appropriate under the Eighth Amendment. And this is a case where the court actually did split on particularly political grounds. The decision was seven to two. Although there was no majority opinion, the plurality written by the Chief

Justice held that there was an insufficient factual basis to strike down lethal injection.

And this is a theme actually that I'd like to touch on a little bit through all the cases that I address. If there's anybody here among the Brookings scholars or otherwise who's thinking about an interesting area to study or write about involving the Supreme Court, I actually think that looking at how the Supreme Court deals with facts in particular cases, and the extent to which the court at times is willing to rely on its own experience for making factual determinations, would certainly be interesting.

But what's at issue in the case is that, in most states, the way execution takes place is by the administration of three drugs. First sodium thiopental, which is a very strong sedative, is administered. It causes a coma-like unconsciousness.

Then there is a paralytic agent, which is administered, which stops the diaphragm from working, and thus stops respiration. And then finally potassium chloride is administered, which interferes with the electric impulses within the body and causes cardiac arrest.

And the argument in the case was that this may not be the most humane way to put people to death. And that there is at minimum uncertainty regarding this and indeed that for veterinary purposes, there is a policy against using this approach because of the risk that it could be

inhumane. Even when putting animals to rest.

The court, the plurality, takes the view that it is possible to violate the Eighth Amendment, based on a risk of harm. And that you need to have—there has to be some substantial risk of harm and it has to be an objectively intolerable risk of harm.

But that turns on the facts. And when you look at the facts in this case there just was not evidence that there was an objectively intolerable risk of harm. In fact, there was no evidence in Kentucky that any of the executions had gone awry. There wasn't any reason to believe that – to conclude that people had gone through unnecessary pain.

And the petitioners in the case argued, that there were safer ways to administer lethal injection, and that in fact the way that would be most humane would be to simply administer a sufficiently large quantity of a sedative, and not to use this cocktail. And the court said—they set a major record on that—you have the burden of coming forward and showing us that not only is there an alternative method, but the alternative method is preferable. And it just wasn't in the record. And on that basis, at least the plurality rules against the claim.

Justice Stevens very interestingly agrees with that conclusion. He expresses some skepticism I think about the facts in the case. And in particular expresses a concern that the administration of the paralytic agent could mask signs of distress. And that you could actually

have somebody who was suffering enormous pain, and you just wouldn't know it because they were paralyzed.

And he does express concern about that. He then goes on and says, "I've been on the court for 30 years. I've seen a lot of death penalty cases. I was a member of the plurality in *Gregg*." And he comes to the conclusion that he actually thinks the death penalty is unconstitutional.

And he goes through and he provides his very personal analysis of why he's come based on his experience on the court to conclude that the death penalty is unconstitutional. He points to the fact that there's a risk of discriminatory application. He talks about there being a significant risk of error and perhaps a greater risk of error in death penalty cases, than in non-death penalty cases. Based on things like the process by which jurors who feel as though they can't bring themselves in any case to vote in favor of the death penalty are excluded from juries.

And the process by which victims and/or the families of victims are able to testify, regarding the impact on them. And that all this can skew things.

But interestingly, not withstanding that conclusion that he's come to, that the death penalty is unconstitutional, and not withstanding his concern even in this particular case, he votes to sustain, and says there's just not the record here.

The two dissenters in the case were Justices Ginsburg and

Souter. Rather than focusing on the paralytic agent as Justice Stevens did in expressing some concern, what they say has to do with the two final drugs in the process—the paralytic agent as well as the drug, which stops the heart from beating and causes cardiac arrest. In their view, it could potentially cause excruciating pain, and the state of Kentucky had simply done an insufficient amount to ensure that people were adequately sedated.

The way it actually worked is that the warden would take a look and see whether it appeared that the person was unconscious. After receiving the first of the drugs, they would then proceed to administer the later drugs. But there were other things that could be done to make sure that the person really was thoroughly unconscious and not experiencing serious pain.

But even those two Justices would have simply remanded the case for further fact finding.

I want to talk briefly about the three political cases that Ben mentioned. The first is the Indiana voter ID case. This is the case where the state required that individuals in order to vote show up with a state or government-issued ID to do so.

It was challenged on the grounds that it imposed a substantial burden on the right to vote. That the poor and the elderly were less likely to have IDs and might find it difficult to have the IDs and as a

result that some people would be disenfranchised.

And again, the case turned on a conclusion that there was a lack of evidence. The district court found that there was insufficient evidence that the law operated in a way that it imposed a substantial burden, and the Supreme Court again in a three-three-three split, sustained that judgment.

Justice Stevens in this case actually wrote the decision for the plurality and the controlling decision. And the court just says, requiring somebody to bring an ID is not unrelated to the voting process and to preventing fraud.

It goes directly to it—it's not like a poll tax in that regard. And there's just not sufficient evidence that people are not going to be able to vote. All it requires is a trip to the Bureau of Motor Vehicles in order to get your free ID, in order to do so.

The dissenters in the case take issue with this. They say, there's a real burden here. 43,000 people in this state are of voting age and without the type of ID that would be required. It's not so easy, for everyone. It's not so easy for the poor and the elderly to always get the ID that they need. You actually have to travel to the Bureau of Motor Vehicles in order to do so. There are many fewer locations that have a Bureau of Motor Vehicles than there are voting precincts. So it requires real travel to do it. 21 counties in the state actually have no public

transportation at all. If you don't have your own car, it may not be easy to get there.

And when you get there, there're some costs involved. You need a birth certificate, which can cost between $3.00 and $12.00 to get. Or to get a passport is going to cost you on average maybe $100.00 to do so.

So there can be a real cost in doing it, and the alternative of provisional voting, where you can go in and actually cast your vote without your ID, as long as within 10 days you go to the county seat and see the clerk and demonstrate that you properly voted is an insufficient check because that's even more traffic.

You have to go to one place in the county where the county seat is located in order to do so. And to the extent that there's any measure, there was one election held in 2007—a municipal election in which 34 provisional ballots were correctly cast—and only two made it to the clerk.

So that again is another case where it turns very much on the factual record, but the justices take different approaches to it.

In the *Grange* case, there is the challenge to a voting procedure in Washington State. Where the voting procedure was set up in such a way that, in the primary election, one would be listed on the ballot. And you as the candidate would decide how to designate your

political affiliation. It would appear that way in the ballot. And then the two highest vote-getters, whether they're the same party or different parties, would then run in the general election.

And the Republican Party in the state challenged this, saying that it violated the party's associational rights. Because all of a sudden, we may have a candidate who is appearing on the general election as the candidate for the Republican Party, for example, who's not the candidate that the party endorses or supports.

And the court again turns to the evidence there and says, this law hasn't even taken effect yet. How can you come in and challenge this because your ultimate argument is one of voter confusion? And that voters are going to think that that designation on the ballot that says Republican or Democrat or Independent next to the person's name is an endorsement from the political party.

When in fact it may well be that when the state implements this law, it's absolutely clear and says no mistakes here folks. This designation is just the individuals, and it doesn't mean that the party actually endorses them in any way. And until we know the facts and how it's going to work, we can't strike this law down. And the center's there, I believe led by Justice Scalia, saying we actually think you can know that pretty surely, and there's a pretty darn important document when you down to the ballot. It's the last thing that someone sees when someone

goes into vote, and I don't care what restrictions and qualifiers you may put on it, if it says Democrat, if it says Republican, there's going to some effect on associational rights.

And then the third of these cases is the *Davis* case, which struck down the so-called "Millionaires Amendment" to the Bipartisan Campaign Reform Act. And the Court there, again, takes a very different approach with respect to evidence.

What the provision it issued there did is it said that ordinarily there are federal campaign contribution limits, about $2,300 per election, for example, for an individual contribution. However, if you're running against somebody who is wealthy and is self-financing and they're able to put a lot of their own money into the campaign, you can raise the contribution limit, you can actually accept larger contributions subject to a complicated formula for a period of time, and then when the spending is balanced out again, then your figures drop back down and you're back down to the $2,300 contribution limit. And the court strikes it down, holding that this is a penalty, and it's a penalty that is being imposed on the wealthy, self-funding candidate based on that candidate's spending of money for purposes of speech, and, therefore, you're burdening the speech of that candidate by saying if you spend that extra dollar, that extra $100,000, the effect of that is going to be to help your opponent in the

election, and, therefore, there's a disincentive to spend that money, and that burdens speech.

The dissent in the case takes a very different approach and says, what are you talking about? This is increasing speech. What it's doing is there's no limit on how much anyone can spend, you can spend as much as you want on campaigns, and what it's saying is in one of these races where someone's spending a lot of money, we're going to actually let the opponent raise more money so they spend more money and we're going to have more speech.

But what's interesting about the case is that there was very little, if any, factual evidence to support the conclusion that there is, in fact, a chill on spending by wealthy candidates, and, in fact, the candidate at issue in the case had spent a very substantial amount of his own money in doing so, and there wasn't evidence that he wasn't going to spend the money in doing so. But the Court, unlike in the Indiana case, where the Court held there wasn't sufficient evidence, was willing to take the leap either to assume that the chilling would take effect or deem it unnecessary to make that finding.

Then I don't know if you want me to -- I'm happy to go on and talk, but at any given time I wonder if you prefer to kind of talk about the business cases and --

MR. WITTES: Let's save those, and I'm sure they will come up in questions and we can go back to them at that point.

MR. ESTRADA: I don't want to keep taking issue with Randy.

MR. WITTES: Sure you do.

MR. ESTRADA: But I guess another way of characterizing the Millionaires Amendment Case is that there is a restriction being imposed on the ability of people to spend money to promote an idea, and that's fine so long as people are restricted equally, but it's relatively rare in the laws, just as Alito pointed out, to have one person say you have a restriction of number X and you do not, and, ultimately, I'm not sure how much really is at issue because any person who really can fund his own candidacy for office, that is he can be a billionaire that can spend oodles of money on his own candidacy, usually has tons of friends who can write him lots of checks for $2,300, and this was more of an attempt, just to be perfectly crass, for people who are incompetent in Congress who get reelected all the time just to make sure they seldom had any credible challenge because, as incumbents, they don't have any problems raising lot of $2,300 from the industries they regulate, and there was some fear that somebody could credibly challenge them. But that's just --

MR. MOSS: You're absolutely right, Miguel, that Justice Alito starts the opinion off by saying hey, if the cap went up for both, the

challenger as well the self-funding candidate, this would be fine. This is not a challenge, the soft money ban at all.

MR. ESTRADA: Right.

MR. MOSS: That is not a problem, and if they were treated equally, it would be fine here, but I do think your comment is sort of interesting again from this question that I raise about the extent to which the Court is willing to sort of infer facts about the world because in the Indiana case with the voter identification, there were suggestions that what was really going on in that case was --

MR. ESTRADA: Keep Democrats from voting.

MR. MOSS: Right, to keep Democrats from voting, and to tilt the scales in favor of the Republicans in the election.

MR. ESTRADA: Right.

MR. MOSS: And the Court said, you know what, we're putting blinders on to that because there is a legitimate purpose to be served by the legislation here, and the legitimate purpose to be served here is preventing voter fraud, not withstanding the fact there has not been a single case ever documented in the State of Indiana in which a person showed up at the voting place and lied about who they were for purposes of voting, which is not at all surprising, given the fact that it's a felony to do so, and the only benefit you get from it is one additional vote, which is hardly likely to swing an election. And if you actually created a conspiracy

where you went in with all your friends, your chances of being caught would be extremely high. But the Court says look, we're going to rely on it, we're going to take it for granted that that's what the rationale is here.

Yet, when you get to the *Davis* case, there certainly is a flavor of, yes, that maybe what's going on here is incumbency protection, and that concerns us.

MR. ESTRADA: Well, one of the interesting aspects about the voter ID case is that the judge who dissented in the Seventh Circuit Court of Appeals is an enormously well-respected judge, Terry Evans, who said look, let's not beat around the bush. What's going on is that Republicans in the Indiana legislature want to keep people who vote for the Democrats from voting, and that was not really a theme that got a lot of attraction in the Supreme Court.

Anyway, I have a grab-bag of cases that I think roughly fall in the categories of business interest cases and some criminal cases. For those of you in the audience who think that those are two different categories.

(Laughter)

MR. ESTRADA: You may have seen, as was mentioned earlier, there was a lead article in the *Sunday Times* some weeks ago that reported on the efforts that the business community makes to put its point of view in front of the Supreme Court of the United States. There's

something in the First Amendment that sort of says that you have a right to do that, and lots of people from the death penalty lobby the Second Amendment Foundation, and everybody actually does it.

I think it is true that there is an effort on the part of the business community to understand, I think, that there are cases that reach the Supreme Court, primarily involving statutory law rather than constitutional law, with the exception of punitive damages, that have a great effect on the business community. And these tend to be a grab-bag of laws that Congress has passed, and at a very simple level, when Congress passes a law, it is usually open to a state of the union to have a law that supplements, but does not conflict with the federal law, and the issue of whether it'll actually conflict goes under the label of preemption. I mean, whether Congress has effectively ousted the state authority to sort of do something in the same field, and there are many theories as to what that is, but, ultimately, we have one national government, and if Congress says this is going to be the national rule, we are to have one national rule.

Over the years, the issue of whether a federal law actually is being undermined by a particular state effort has given rise to a lot of controversial dispute, and the various tests for the Court to sort of look at those questions.

One of the background rules that the Court has used is the notion that this is a federal system, and we will go out of our way

essentially not to find that a state law has been ousted or preempted unless it's absolutely clear.

In some years in the past, the Court has gone -- it might be a little overboard because there are many federal laws where Congress says we do not want any state law in this area, and even in that context in the past, the Supreme Court has gone out of its way to say well, maybe they didn't mean it quite that strongly. And there has been a little bit of a division between people on the Supreme Court who really buy into the state rights' issues and other people on the Court.

Interestingly, the Court had a few cases dealing with this dynamic. A couple of them came up in the context of consumer rights. One of them was called *Riegel v. Medtronic*, involving a catheter that was being implanted in open heart surgery and exploded.

Now, as you can imagine and hope, whether a catheter can be implanted in somebody's body is usually something that goes to the FDA and it goes through a process of being vetted for various safety issues and ultimately there's a permit issue as to whether you can sell it and under what conditions. In the federal statute, the Medical Amendments Act then says that a state may not impose any additional requirements.

One of the issues over time has been, does a state impose an additional requirement that is forbidden by this type of expressed

preemption clause when it applies a general law or general applicability dealing with tort law?

If I run you down on the street and you sue me because I ran you over, that's not usually viewed as imposing an additional requirement on the make of my car. And the argument goes, well, gee, if I sue somebody because the thing will blow up in my heart, I'm not really imposing a requirement that is in addition to the FDA argument, and the Supreme Court, in the narrow context of these heavily regulated areas, would, in effect, say it was good enough for the Feds, but we want a higher standard of safety.

The Court has now said no, that's a requirement. And you can claim it's a tort lawsuit under a law of general applicability, but, essentially, you are saying it was good enough for the Feds, but you want more—that is out.

Somewhat as a change from previous years dealing with these issues, the vote in that case was eight to one. It was a surprisingly nearly unanimous opinion that as far as I can see, never even mentioned this notion that there is a presumption against ousting state law, and, in my view, probably right or rightly so, because Congress and the statute says this is it and no more.

There are a couple other cases of the same ilk. There was one dealing with whether the states may impose additional duties or

obligations on motor carriers. Maine, I believe, attempted to say if you are actually using the motor carrier to deliver cigarettes, you have to take strict steps to make sure that only a adult signs for the carton and you have to make sure that there are no children involved and things of that nature, and the Court, again, by a vote of 9-0, said Maine can't do that. I mean, the federal law says you cannot impose anything else that is related to the price, the route of the service, and that's it.

This type of issue tends to be enormously important to the business community. If you have a national industry that sells goods all over the country, it is almost better to have a fairly firm understanding of what the rule is from the Feds rather than having to have a rule from the Feds and 50 other rules that may conflict or supplement it that you just have to know in each of the states in which your item is actually sold.

There were other issues. Again, part of the grab-bag of federal statute that ends up in the Supreme Court. There was a question about whether, under the securities laws, somebody who is said to have aided somebody who engaged in fraud, in selling stock, for example, but did not himself make any representations to the public and did not induce anybody to rely on him, could be made liable under the securities laws, in particular, a section that is an anti-fraud section called Section 10b and a rule called 10b-5.

This case is called *Stoneridge*. And it got a fair amount of

press because people thought that it might be one of the tools that could be used in the post-Enron world to go after people who did not themselves commit fraud, but could be gone after to make whole some of the losses that were suffered by the victims.

But the Court said that this case was a piece with another case from the early '90's called *Central Bank*. The Court had already said by a vote of 5-4 in 1994 that under this particular statute, there is no aiding and abetting liability.

And, in response to that, the Congress had passed a law saying that the Securities Exchange Commission could go after people for aiding and abetting, but had said nothing else, and the Court drew from that, that the Congress had, in effect, given the okay to the Central Bank ruling, and by a vote of 5-3, it essentially said that this is another way of trying to get aiding and abetting liability. We've already held that that's not available. Congress changed part of it, but not all of it, and that's basically the end of the day.

For those of you who are interested, there was a cable company called Charter who engaged in a fraud, it was said, trying to keep its books up and trying to meet objectives and all of that other stuff, and the allegation was that several of the vendors that had dealt with Charter had agreed with Charter to engage in schemes about how the goods were going to be paid for and helped Charter try to fool the public, though these

people, in fact, had not, themselves, taken part in the fraud, other than by having an arm's length contract with Charter. The Court ultimately said that these so-called secondary actors cannot be sued under Section 10b-5. It's a fairly large issue for the business community.

There were some cases involving employment law. They were seen in the press widely as extremely bad for the business community. By and large, they involved issues that had been settled under similar statutes in favor of the employee, and the main question was whether in this statute that is literally next door and deals with the same issue, we should have the same rule that we already have.

Just to give you an example, one of the cases involved the Age Discrimination in Employment Act. It says that one of things that is unlawful is to retaliate against someone who makes a complaint of age discrimination. There are many civil right statutes that have that sort of a proviso.

There is a part of the ADEA that applies to public entities, like the postmaster general, parts of the federal government, and the wording is slightly different, and the issue is, do we imply from the general provision of discrimination a prohibition on retaliation, as well, even though Congress did not specifically say so in this part of the statute, and the answer that the Court gave was yes. There is a statute that was passed right after the Civil War, the so-called Section 1982, and it deals with

discrimination against people in the sale of property. And back in 1969, the Court had said that that also had a prohibition, even though it didn't say against retaliation.

Now, the issue in another case this term was whether Section 1981, which was passed at the same time by the same Congress in 1870 or whenever, also should be read in the same way, and the Court said gee, as a matter of so-called *stare decisis,* it means we've sort of already ruled on this. We're going to apply the same rule to Section 1981 as we did in 1969 to Section 1982. All of those are victories for the employee who was making the claim. It was not exactly a watershed moment in the development of the law.

There is even the argument that if you are an HR person in a large company, you may get some benefit of having consistent rules and not really having to think of which of a patchwork of rules and discrimination acts may apply to a particular instance if the background rule is "Do not retaliate." That's easier to deal with and you don't really have to worry about all of the details.

I think those are the ones I should highlight.

I should say something about a couple of the criminal cases in particular.

MR. WITTES: Actually, Miguel, having urged you to do that, I'm now going to do a *Boumediene*-like bait and switch because I want to

save time to open it up for questions and we'll get to the criminal cases in that context if that's okay by you.

MR. ESTRADA: Okay. Yes, the only one I think we should really mention is *Kennedy v. Louisiana*.

MR. WITTES: Right.

MR. ESTRADA: Which is the child rape case.

MR. WITTES: Well, we will make a point of that. I'd like to open it up now, and there's a lot on the table. Please wait for the mic before you ask a question.

All right, yes? Don't be shy.

SPEAKER: I had a question about this idea of facts -- and you sort of invited future research on this issue --

What would you hypothesize --

MR. MOSS: On facts?

SPEAKER: The issue of the use of facts and reliance on facts or non-reliance on facts. If you're to hypothesize the pattern here, is it ideological, is it issue-based, does it change over time? What would be your hypothesis on that issue?

MR. MOSS: I really don't have a clear hypothesis on it. I don't believe that it's theological, at least not that I've identified in any way, or based on a particular judicial philosophy, but there are times in which

the Court will rely on its own experience and the members of the Court rely on its own experience in making important factual determinations.

For example, in cases dealing with the Fourth Amendment and whether there's an expectation of privacy, the Court will decide based on its own experience, how to think about having a plane or a helicopter hovering in the backyard 100 feet up in the air. Do I have an expectation of privacy that no one's going to be 100 feet up looking down, or what if it's 1,000 feet up? Do I have an expectation of privacy if someone's going to go and look in my garbage, or do I think that no one's going to go look in my garbage?

And typically in cases like that, the Court doesn't go off and say, well, we're going to remand and actually have a hearing and someone's got to go off and do a study.

Other times though, like in the Indiana case or in the case dealing with lethal injection, the Court will say we have some studies that are cited to us, and maybe the *amici* come in in these amicus briefs and they tell us something or they recite to us various Web sites and various materials out there that suggest particular answers, but we're not the ones to look at that and sort of wrestle through that. There actually ought to be a trial court that looks at that and tries to resolve it, and I guess my point is I'm not sure that the Court has sort of a consistent jurisprudence on those issues, but I --

MR. ESTRADA: Can I -- I mean, there was an article from the early 60s by a very distinguished scholar called Karst, K-a-r-s-t, and he drew a distinction between what he called adjudicative facts, that is, facts that are mostly of relevance to the instance of controversy and so-called legislative facts, which are basically facts about how the world works.

And, generally, the problem that Randy is citing is confined to the latter category, which is not that he punched you in the nose and that's what the fight is about, but is Washington, D.C on the eastern seaboard or the western seaboard. Obviously you can posit a continuum of things that are indisputable and so indisputable that any judge basically will take it into account and agree that this is how the world works.

The problem that Randy cites is that the justices do not have a very well-established methodology for resolving what the world looks like when they're trying to announce legislative facts to bind other people and other controversies, and essentially make law. And the problem is actually a little bit worse than that in that we have had over the years several statutes where Congress purported to find what the state of facts was that caused the passage of the legislation, and, in some cases, the Court has gone as far as to say we don't believe you. In the *Lopez* case, for example, when they threw out a gun control law back in 1995 under the Congress clause, Congress had engaged in detail in the fact-finding

as to what the basis for the problem was that it was trying to deal with, and the Court essentially has a spotty reputation in dealing with where the worldwide, larger, legislative facts come from.

MR. WITTES: And that's actually a good entrée back into the child rape case where Justice Kennedy for the majority writes this extensive discussion of all the various statutes that purport to limit the applicability of the death penalty in the context, but ultimately says, you know, the facts are what the facts are, but we're going to resort to our own sense of independent judgment about the propriety of the use of the death penalty in these cases. And so there's even this other level of fact evaluation, which most commonly shows up in the context of the Eighth Amendment where the Court says, you know, here are the facts and ultimately we don't really care, which is sort of still another level of sort of confusion in the way they treat factual questions.

MR. MOSS: And in that case in particular, turning back to the *Kennedy* case, the child rape case, there's a debate between the majority and the dissent over whether the fact that there are only a handful of jurisdictions in which it is permissible, or was permissible, to execute someone for a rape or of raping a child -- there's a dispute as to whether that is a result of the fact that it represents some view of common standards throughout the country, or whether it was based on a

misperception by state legislatures as to whether it was constitutionally permissible to do so.

MR. WITTES: Well, they don't remand that.

MR. ESTRADA: Well, let me go into detail. Back in 1979 in a case called *Coker v. Georgia* the Supreme Court had ruled that it was unconstitutional to impose the death penalty for the rape of an adult woman. And the notion was that the opinion was widely -- it was sort of loosely-worded enough that the states had drawn from that that the only way that you could impose the death penalty was for a killing of another human being. And that the fact that only six states had basically gone in the face of *Coker v. Georgia* and said no, we really want to test that, didn't count one way or another in the theory that it's only six because you told them they couldn't do it. This is not a true consensus of what they would want to do if they had to make a moral judgment on their own.

MR. WITTES: Gary has a question in the front.

QUESTION: Thanks. Gary Mitchell from the Mitchell Report, and I want to ask a question that if you decide to defer until the end – that's fine. But as I sit and listen to this discussion, I'm intrigued by the notion of, you know, people are sort of asking the question well, what does the Roberts court look like or what is it beginning to look like? So the question that I'm interested in is, what value or validity is there in defining courts by the tenure of the Chief Justice -- the Rehnquist Court, the Berger

Court, etc.? And/or is it more appropriate -- or is it more accurate I guess I should say -- to say that there are some courts that are less defined by the Chief and more defined by an Associate Justice who has sort of undue influence -- a Brennan or may be even Sandra Day O'Connor or Frankfurter or whoever? I'm just interested in the extent to which that way of looking at courts is valid.

MR. WITTES: Stuart, do you want to take this?

Mr. Taylor: Yeah, I'll take a quick crack at that. You know, it sort of began in my experience with the Warren court. And that fit pretty well because Earl Warren usually won the cases he wanted to win, *Brown v. Board of Education*, *Miranda v. Arizona*, and on and on and on. Now people might say it was really the Brennan court because he was the one who was telling -- whispering in Warren's ear. It was really the Hugo Black court because he was the great intellectual leader, but Warren court fit pretty well. When you get to the Berger court, it doesn't fit so well, in part because he lost a lot and part because his colleagues didn't respect him much. When you get to the Rehnquist court, it doesn't fit as well because Justice Sandra Day O'Connor over time came to be the swing vote who determined who was the winner in every case or every big case almost. Sometimes Kennedy, but perhaps more often Justice O'Connor, and some were calling it the O'Connor Court, similarly some now call it the Roberts court. To us, it's really the Kennedy court. And then Roberts

earlier this year gets a couple of opinions, which he wins by more than 5-4, and people are writing articles and saying well, maybe it's not the Kennedy court anymore. Now Kennedy forms the majority in the late big cases. Yes, it is the Kennedy court. So I think as you point out, these labels, particularly based on the Chief Justice, are not good guides to who's winning and to where the Court is headed.

MR. WITTES: Yes? And when you're done, just pass the mic in back of you.

QUESTION: Sure. I guess the issue of the Rehnquist Court we always say is that the Rehnquist Court couldn't agree on many things, but it definitely could agree on asserting its jurisdiction, so one of the intriguing questions is whether or not the carryover to the Roberts court is, when you look at this particular term, that we used to call it the passive virtues, but the passive virtues seem to be of a different era. All of the justices now agree in their role in asserting the jurisdiction of the court and explaining to Congress what their role should be. So I'd be curious to see whether or not the panel sees that as a real historic trend -- that, regardless of who the new justices are, they really see the power of the Court getting involved.

The second issue is as opposed to the facts issue, when you look at the big, big cases of term, so many of the decisions turn on legal

history. This extra -- as a former legal historian -- this is this whole new concept of how powerful the originalists' views are in the 18th century.

MR. WITTES: Let's -- you've -- this is now a separate question. The first question is big enough. Is there any area of consequence in which either the liberal flank, the conservative flank, or a virtual consensus of the Court does not favor jurisdiction over no jurisdiction?

MR. ESTRADA: Well, no, I think, you know, for all of the stories about the Court being 5-4 and divided and political on all these questions, there is no doubt that this Court as compared to 60 years ago is unanimous on one point and one point only every day of the week, every month, every year, which is that they are the Supreme Court and they should be running the country. There is no issue that is too petty or too elevated, you know, whether it is the rules for golf and what they should include, or whether it's who's running the war, that is not suitable for judicial decision in this Court. I don't think it is really a byproduct of the particular individuals who serve on the Court at this time. I think it has been an accoutrement of the institutional role of the Court since the Warren Court. But by now it's fairly well-accepted by all of them.

MR. WITTES: Does anyone want to rise to the bait there?

MR. TAYLOR: There's a quick amendment to that, a corollary. I largely agree with that, but I think it's important to recognize

that the conservative and liberal blocks, which I insist on calling them, are very selective in when they want to assert jurisdiction. When it's Guantanamo, it's the liberals who want to reach out and say we're in charge here, and the conservatives say no, no, no, we should be restrained. When it's gun control, it's the conservatives who are reading the Constitution and saying we're in charge, and the liberals who are saying hey, aren't the elected branches supposed to run things? And that's one reason I felt I was in a dark moment writing Ben a despairing email about having any principle here that he read earlier.

MR. WITTES: Randy?

MR. MOSS: Well, I guess I'm perhaps a little less, feel a little less strongly about this, and I do think that the Court takes the cases on an individual basis and I think that, you know, justice -- it may depend on the particular split in particular cases, but you certainly still see the thread running through a lot of the decisions. And sometimes it's in the dissent and sometimes it's in the majority. That this is not a decision for us to make; this is a decision that should be left to the political branches and I think that a number of the cases came out this term certainly in the context in which the Court -- the majority of the Court reached the conclusion that it was appropriate for them to make the decisions. But if you go through the various dissents and then some of the majorities, it's not consistent, and I wouldn't want to predict on a going-forward basis that

the Court can consistently be of that view. And I think that one of the areas -- I'll use it as an opportunity to say a little bit about the *Medellín* case where the Court held that the Vienna Convention on consular relations which require that a state or the federal government when they detain a foreign national in the United States, tell that person that they have the right to consult with their embassy or their consulate, and then provide them the opportunity to do so if they want to, held that that rule was not self-executing as a matter of U.S. law, but only was a matter of international law. And the Court's reasoning is that it was ultimately a diplomatic question that ought to be left in the diplomatic realm. I think there are some counterarguments there, but that's one example of a case I think we go the other way on that point.

MR. WITTES: And we're not actually. In the case that Stuart talked about where the justices unanimously hold that they have jurisdiction over Guantanamo, they do also turn around and say, but if you want to repatriate people and just kind of get rid of them, we'll treat that as a political question.

SPEAKER: Diane Silber. I just am interested in knowing how you're viewing this particular Court and the justices individually. Are they using political points of view and then working backwards, or do -- you had mentioned this earlier in terms of how politicized decisions are

and whether it's working forward or backward. I don't know if I'm being clear.

MR. WITTES: Well, it's a great question. I mean, it's the perennial question: is this a court or is it a political institution functioning as a court?

MR. TAYLOR: I just wrote a paragraph on this that I'll quickly give as my response. "Across many years and a wide range of issues, both conservative and liberal blocks meander back and forth on such politically neutral jurisprudential questions as whether to favor individual rights over government power, whether to defer to the elected branches, whether to honor inconvenient precedence. But with occasional exceptions, they have been consistent in voting just the way liberal and conservative politicians would have voted on these same issues."

MR. ESTRADA: I would take issue with that a little bit. I think there is a fair amount of debate in the legal community about what the acceptable set of rules is for adjudicating and I think the seemingly bigger political outcomes are less a result of the justices' own political inclinations than of -- than a byproduct of underlying disagreements about what the proper methodology for judging is. And that there are people -- say for example, Justice Scalia, who has a very well-defined system of values as to what the rules are for the road, and I think by and large he's pretty true to those. There are those who have an equally intellectually

respectable broader set of rules, like Justice Ginsburg or Justice Breyer or Justice Souter, which are not quite as say technical and hidebound as Justice Scalia's set of rules. And there are justices, and there have been justices, who like to pick and choose. Justice Kennedy I don't believe has a clearly-articulated set of rules for the road that he has announced in advance and that he purports to follow. He finds particular arguments persuasive and they may be based on legislative history in one case or on technical statutes on the next, and so long as you have a spectrum of opinion in the Court as to what the rules for the road are, you will have outcomes that allow people who are not clearly announced in advance to drive on the left of the road as in England or on the right of the road as in the United States, or sometimes be on both sides of the road. But I don't think that that's really a byproduct of their ideological perspective. I think it's a question of methodology.

MR. WITTES: Yes?

QUESTION: Al Milliken, Washington Independent Writers. Do you think the average U.S. citizens may feel justifiably feel uncomfortable thinking that enemy combatants, child rapists, and gun abusers may have gotten a little more freedom and rights than they would prefer for their own safety and well-being?

MR. WITTES: Who wants to start?

MR. TAYLOR: I just made a comment on gun abusers. If you thought it was safe, that nobody had illegal guns in the District of Columbia before yesterday, I have about a thousand or fifty thousand counterexamples to give you. I think this is not relevant to the decision, but the DC law -- any local gun control law in this country is guaranteed to be ineffective because you can always just go across the state line and get the gun you want, or across the county line, and then bring it back in the trunk of your car.

MR. WITTES: Randy, do you want to address the question?

MR. MOSS: I think the bottom line is that what judges and justices on the courts need to do -- and this gets to the question that came beforehand I think -- is apply the law and apply the Constitution. And that there are policymakers in general who are involved in weighing more of the types of considerations that you're getting into and I'm not sure how a judge or justice would go about making a determination and finding what the sort of ramifications and broader ramifications of a decision are. You know, the same thing with respect to the guns decision. I think it's ultimately a question of the role the judge or the justice in making determinations, determining what they think the Constitution says about that issue.

MR. ESTRADA: I agree with Randy, by the way. But on the bright side, if you're really unhappy with the Court, you can always have

another silver lining. You know, you may have murderers/terrorists out on the street, but at least you have guns.

QUESTION: This is a question that probably goes to Mr. Estrada. Talking -- you talked about preemption cases and *Riegel* in particular and basically what you say the case comes out as saying is that, you know, if it's okay with the FDA, you shouldn't be able to bring a claim. But there's been pretty consistent coverage as of late that the FDA is blatantly failing in its job of protecting consumers, and these laws in part are protective as a means of protecting consumers, including the federal laws. And so doesn't that seem a little overprotective of business?

MR. ESTRADA: I am not really capable of assessing the accuracy of the premise of whether the FDA really is falling down on its job, but assuming for the sake of argument that that's true, it seems to me that then it comes down to a question of institutional competence. If Congress has passed a statute that tells the Courts no additional requirements other than those imposed by the FDA shall be imposed, and the FDA is falling down on its job, then it seems to me that the problem is fixing the FDA, not expanding the writ of the Court to do things that Congress has told them not to do.

MR. MOSS: Let me add a point about -- I mean, I think that you also need to consider -- and I'm also not in a position to judge how well the FDA is doing its job -- but if you consider the alternative in many

of these cases where it is a civil jury in a case that is making a determination relating to medical science, and not just a decision which will affect a particular case, but will affect the availability of particular medical devices, for example, in the future. You know, I think it's a matter of sort of public policy; you need to worry about that as well because, you know, do you really want a case, or cases, in which for example companies are discouraged from producing the next round of life-saving drugs or life-saving medical devices or whatever it might be because they're concerned that a jury somewhere has come back with a multi-million dollar judgment, when in fact if that device is out there, it might save thousands of lives. But they say, you know, we just can't run the risk for doing that. Do you want those decisions regarding the safety of a device like that to be made by juries in particular cases across the country and then scattered away or by the FDA? And if that's the case, then maybe you do need to do something more with the FDA. I don't know the answer to that question, but I think the policy issue is more complicated than simply whether the FDA is adequately policing medical device manufacturers.

MR. WITTES: We're going to take one more question and then we're going to wrap up. Yes, in the back?

QUESTION: Hi. I've found myself particularly frustrated by two of the cases. There's the voting case and the death penalty case in

which it seemed like the Court was sort of adopting a "good enough" standard and I felt like the issue called for something a little more stringent, so explain that. In the voting case for instance, you know, I think for the health of our nation, it makes sense to make voting as easy as possible so with no evidence of any fraud, I would think the Court would be pretty skeptical of new limitations on voting. And likewise in the death penalty case, I would assume that something as important as putting somebody to death, we'd be looking for the most foolproof process we can get so that the Court would take something even like a hypothetical problem like you explained like somebody could be in pain and we might not know it – they'd take that really seriously, too. And maybe that's just a problem of jurisdiction, you know, maybe it's the Legislature that should be looking for something a little more stringent, but I just wanted to throw that out there and see what you think.

MR. WITTES: It's an excellent question. I'm going to let each of our panelists, moving across the stage this way, address it and then we're going to close.

MR. TAYLOR: I think it's a great question. I think there's actually a neutral jurisprudential justification for what they did in both cases. In a word, it's deference to the political branches, when in doubt about whether judicial intervention is really necessary. In both cases, they left it open to come back with a fuller factual record and say okay, the

political branches really haven't done their jobs so we're going to have to jump in. But I think the idea was let's not jump in before we even see how it works.

MR. WITTES: Randy?

MR. MOSS: Yeah, you know, I've addressed this case before, and I think I agree with what Stuart said in that, you know, we may just have to see in some of these cases what round two looks like and whether there's further factual development. I think one of the things that was a little bit tricky in the voting case was ultimately to show that there are people -- individuals out there who are not voting because of the ID restriction. You can do one of two things. I guess you might be able to commission a very sophisticated study that would go out there and just, you know, across a population show what's going on, which presumably would take a fair amount of time, a fair amount of expense, and then would be subject to the type of attacks that expert analyses are always subjected to. Or you can bring individuals in, but by the time you actually go to the trouble and expense of bringing individuals in and say look, I can't vote because of the fact that I need an ID. Well wait a second, you mean you can actually bring a lawsuit and you can go through the expense of bringing a lawsuit but you can't go through the expense of going down to the Department of Motor Vehicles to get an ID? So it almost looks like a catch-22 in that case.

MR. ESTRADA: You know, my father-in-law takes delight in bringing these things to my attention. Today or two days after the election, he sent me this news report from his home town in South Bend where, you know, a gaggle of incredibly old Catholic nuns, who have not had an ID since the Truman Administration, were turned away from the polls because they had to have an ID. They don't live in the world, they don't travel, they don't need an ID, and the notion that these poor nuns were turned away from the polls especially galled my father-in-law. But the fact is you really cannot take either the anecdotes or the superstition as to what might happen to displace the judgment of elected representatives since ostensibly we do live in a democracy. To me what was worse about the *Boumediene* case was that Congress had passed a statute that allowed for courts to look at these issues, and the Supreme Court was willing to invalidate it preemptively without a single case ever having been considered by the D.C. Circuit under the statute. And to me, that was actually the singular defect of the decision in *Boumediene*.

MR. WITTES: On that note, we're going to close. Thanks to you all for coming.

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