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P R O C E E D I N G S

MR. WITTES: All right, I think we're going to get started.

For those of you who don't know me, my name is Benjamin Wittes. I'm a Senior Fellow in Governance Studies. And in case you hadn't noticed, this is actually not the first Monday -- or even the first Wednesday -- in October, perhaps for which reason we have a relatively small group today.

And so I'd like to do this a little bit differently than we normally do Judicial Issues Forums, which is to say a little bit less formally and, you know, create more of a discussion or as much of a discussion as we can.

So I'm going to, you know, start this as though we were doing a normal Judicial Issues Forum, but lets -- you know, as you guys have questions, have things to add, just signal me and I will try to go to audience questions early and often. So feel free to be as involved as possible. And if I don't see you, you know, wave and stamp aggressively until I do.

As I say, it's not the first Monday in October, but it is the beginning of the Supreme Court term. And we have a great group to discuss what's really shaping up to be quite a remarkable term -- or at

least potentially remarkable. There's always the chance in these things that they kind of fizzle out as they go.

To my left is Orin Kerr, Professor of Law at GW Law School. And to my right in sequence is Randy Moss, of the law firm of Wilmer Hale, and formerly the Office of Legal Counsel at the Justice Department, an Stuart Taylor of National Journal and a Nonresident Senior Fellow in Governance Studies at Brookings.

So I guess what I'd like to do is start off with a case that is, I guess, unusual in many ways, not the least of which is that it was argued before the term started -- which is the Citizens United, Hillary, you know, movie case, which really -- at least if you imagine a maximalist outcome of, it really stands to reshape the fund-raising and campaign finance landscape that we've all kind of thought was heading towards some kind of a stasis -- or I think a lot of people, did, anyway, some sort of an equilibrium.

So let me start with you, Orin. Is this going to be as big a deal as it seems to be? And what is it? What do you think it's going to end up being?

MR. KERR: Yes, this is a campaign finance case. I suspect this will be a major case. The biggest sign we have here is the fact that the case was re-argued.

Usually, when the Supreme Court asks the parties to brief the case again and consider whether to overrule one of its prior precedents, that means that five of the Justices want to overrule one of the prior precedents, and they're jumping through the hoops of getting argument on the issue, but it's probably already a done deal.

So I'm expecting this to be a pretty major decision.

In the area of campaign finance law it's very difficult First Amendment issues that the Court has never really satisfactorily resolved. I think this will be an important case because the fact of re-argument really does suggest that there may be a very broad decision in the works.

MR. WITTES: So walk us through, a little bit, what the case is and how it relates to, you know, the last 10 and the last 100 years of law in this area.

MR. KERR: And I'll defer to others who may be more expert on this. I'll give you my sort of amateurish understanding of the case.

It involves the constitutionality of Section 203 of the BICRA -- the 2002 McCain-Feingold Campaign Finance Law. And the question is the constitutionality of restrictions on expenditures by corporations. And the question is whether corporations get treated any differently. Is the fact that a corporation has made a campaign expenditure, does that require different treatment or not?

In an earlier case, the *Austin* case, the Supreme Court had suggested, or had held, that there is different treatment. And the question is whether that still stands today.

So it's a, practically, very important case, given all the corporations that want to give to campaigns. And it could really restructure a lot of the assumptions of campaign finance law, if this earlier case is overturned.

And at this point I'll defer to others who may —

MR. WITTES: Yes, so in the spirit of, you know, Woody Allen pulling out Marshall McLuhan and saying, "Well, I happen to have Marshall McLuhan right here," I happen to have Randy Moss right here.

And Randy actually wrote a lot of the briefs -- not just in this case but in a bunch of cases related to this. And so I'm curious for your sense of -- with the proviso that this is -- you know, that Randy would not present himself as a neutral presenter on the subject, how do you see the importance of the case?

MR. MOSS: Well, you know, the importance of the case -- you know, I'll switch back to a point in time a lot earlier than any of my involvement, or any of our involvement in campaign finance law. And while the Court in the case started off addressing a fairly narrow question of whether "Hillary, the Movie" was the functional equivalent of express

advocacy -- was the movie really a campaign speech or was it -- not a campaign speech.

MR. WITTES: And just for background, what is “Hillary, the Movie?”

MR. MOSS: It was an on-demand movie that was, you know, a substantial attack on Hillary Clinton. And, you know, you would actually to have to sit in your home and click. You didn’t have to pay for it, but you’d actually have to choose on-demand to watch the movie.

And so the question was, did the law, which was intended to get at broadcast advertising, did it in fact reach this “on-demand” programming? And was this movie, in fact, really the equivalent of a campaign ad?

But the case, when the Court decided to order re-argument, became substantially broader. And the issues that the Court framed go well beyond the question even of the constitutionality of the McCain Feingold law, which has a provision in it that says that if you are a corporation and you run an advertisement shortly before a Federal election, that you have to pay for that advertisements out of funds that are in your political action committee, rather than paying for it with funds that come from your general treasury.

The potential here could go way, way beyond that. Because the Court asked for re-argument not only on whether to overrule the *McConnell* decision, which sustained just a few years back the constitutionality of precisely that provision, but also whether the Court should overrule a case called *Austin*, which dealt with not the Federal rule but a State restriction on the use of corporate general treasure funds for purposes of engaging in campaign finance -- or campaign activity.

And in doing that, the Court raises the question of whether its decision could call into question not just the McCain-Feingold law but, frankly, the constitutionality of the Taft-Hartley law which was enacted in 1947, which itself was a clarification of the Tillman Act, which was enacted decades earlier.

So, for decades and decades and decades in this country it's been the case that corporations are note allowed to use their general treasury funds for purposes of engaging in campaign speech, and they have to use political action committee funds -- funds that are actually put into an account by individuals who raise their hand and say, "Yes, I would like this money to be used for political activity," instead of the average shareholder.

If the Court were to take that step, it would be, you know, one of the most dramatic developments in campaign finance law in history.

MR. WITTES: And do you share Orin's and others' sense -- either gleeful or ominous, depending on their underlying views of the issue -- that the Court seems poised to do something very dramatic here? Or do you think it's likely to be one of those situations that kind of fizzles out, sort of like the -- you know, the voting rights act case last year, which everybody expected to be very dramatic, and turned out to be something less than very dramatic?

MR. MOSS: I think it's hard to answer that question, because I think that at the end of the day the question of whether it is dramatic or narrow may come down to the views of one or two of the Justices on the Court. And the Court has been fairly divided on this issues -- on these types of issues.

And the question is, with the Justices who perhaps are towards the middle on these questions, whether they, in fact, are going to go to one camp or the other, or whether they're going to try to find some resolution. So I think unless you can predict how one or two Justices are going to come out, I don't think you know what's going to happen with the case.

MR. WITTES: So to focus on just one of them -- I notice, you know, this seems to me one of those cases where John Roberts' interview with *The Atlantic* shortly after becoming Chief Justice seems like it could have a lot of bearing.

The Chief Justice, in an interview with Jeff Rosen -- this was after his confirmation, not before -- talked about the importance of deciding cases on the narrowest possible grounds in order to preserve and enhance the institutional legitimacy of the Court, and talks about how, if it is not necessary to decide something, it is necessary not to decide something.

When I look at this case, I say: There seems like there's about eight or 10 ways to decide this case on very narrow grounds that would not do something very dramatic, that would resolve this case. And part of me says: Why do you give an interview like that, in which you state a sort of broad conception of how the Court preserves a legitimacy, and then go do precisely the opposite?

And so I guess the question -- a long-winded way of saying: For Justices who wanted a narrow way out, what are the narrow ways out?

MR. MOSS: There are, I think, a number of narrow ways to address it, and one is the way the case was originally presented, is just whether the law actually extends to on-demand programming.

Another way is that the plaintiffs in the case said, in their briefing, Citizens United, the group that wanted to run the "Hillary, the Movie," said they only received I believe it was a couple thousand dollars in money from corporations.

And the rule is -- there's a case called *Massachusetts Citizens for Life*, that says that these rules restraining the ability of corporations to engage in political speech do not apply to advocacy groups that don't receive any money from for-profit corporations. And the D.C. Circuit -- as well as, I believe some other courts -- have held that there's also a de minimis rule. If it's just, you know, a couple thousand dollars, if there's not a real risk of actual or apparent corruption -- and I should say, I mean, the underlying, one of the underlying rationales for the rule here, and which may be obvious but I'll state it anyway, is that if you have corporations that are amassing huge quantities of money, and then can use that money for purposes of helping individuals get elected, that those individuals are going to then feel indebted. And there is at least a risk of, at a minimum, appearance of corruption in the system, an appearance that those politicians, when they make decisions, are going to do so based on the interests of those who helped them get into office by spending all this money.

But on the other hand, if it's just a very small amount, the Court could say, look, if it's just a very small amount, we don't think that risk exists. So that's one narrow way.

MR. WITTES: We had a question over here?

SPEAKER: (Off mike.) Mr. Moss, you mentioned that there were several judges in the middle that would be swing judges. Could you (inaudible) they are?

MR. MOSS: You know, I'd rather not. But Stuart can.

MR. TAYLOR: I can. Being the journalist here, I can be reckless.

I think the -- usually, the key Justice in the middle, when you think of liberal-conservative splits is Justice Anthony Kennedy. Maybe not this time, because Justice Kennedy, if there's one thing he's kind of absolutist on, it's First Amendment rights. And in the campaign finance field, he's already written opinions that seem to say -- I think he dissented in the *Austin* case which said corporations can be banned from spending money on campaigns. And in other cases since then, including on McCain-Feingold, he's been pretty solid with the conservative critics of campaign finance reform.

I think Justices Roberts and Alito are the unknown quantity here, particularly Justice Roberts -- in part, for the reasons that Ben gave,

Justice Roberts having positioned himself as the mild-mannered incrementalist, judicial modesty, don't overrule precedents, don't strike down laws too readily guy, has now come on in the oral argument in this case ferociously -- in terms of the way he presented himself in the oral argument -- as someone who wants to strike down this big provision of the McCain-Feingold law, strike down a 1947 provision of the Taft-Hartley Act, overrule the *Austin* case, overrule a big chunk of the McCain-Feingold case. And, as liberals might put it, unleash corporate wealth and power to overwhelm democracy forever.

Now, I don't put it that way. In fact, a lot of States have had open corporate spending on elections for a long time, and things don't seem -- democracy doesn't seem to suffer there any more than it does in other places.

But I do think it's going to be extremely interesting to watch Chief Justice Roberts and Justice Alito who, in prior campaign finance cases have nibbled away -- they've been on the conservative side, but they've been nibbling away at things rather than striking things down and making sweeping pronouncements.

It sounded in the oral argument in this case as though Chief Justice Roberts might be preparing a sweeping pronouncement that for the first time in history would declare that corporations, including big

business corporations, as well as small ideological corporations, can spend unlimited amounts advocating the election or defeat of candidates. Not contributing -- they couldn't contribute. That's not up for grabs. But they could -- you know, Microsoft could take out a billion dollars worth of ads in the next election saying, "Defeat Obama," for example, if they wanted to, under one approach to this case.

MR. WITTES: Then, Stuart, how seriously -- I've got you, Bruce -- how seriously do you take Roberts' ferocity at oral argument on this?

I mean, back last year, in the Voting Rights Act case, he was similarly ferocious on Section 5 of the Voting Rights Act, and then wrote this very statesmanlike opinion for -- I think it was unanimous, wasn't it? —

MR. TAYLOR: Not quite.

MR. WITTES: -- you know, bringing almost everybody together -- right? -- in which, you know, kick it, at least kick it down the road and fight another day on it.

Do you think the argument in this reflected where he's going, or reflected something else?

MR. TAYLOR: I can't tell. You're right, in the Voting Rights Act case, after the oral argument, the general conventional wisdom among journalists and lawyers was, "Well, they're going to strike down Section 5

of the Voting Rights Act. It's going to be a gigantic headline. It's going to be a new culture war that captivates the country." And then they drew back and wrote a very narrow opinion, kind of ducking the issue in the case.

MR. WITTES: But it was largely people's reaction to the argument was largely a function of Roberts' —

MR. TAYLOR: Exactly. And so he comes on again, even more ferociously in this case.

Rather than predict, I will say what I'd like to see happen. I have a dog in this fight, too.

Justice Stevens, the 89-year-old sort of dean of the liberal wing of the Court, proposed what I thought was a very elegant way of compromising this case at the oral argument. He said, "Well, what about the National Rifle Association brief?" Now, we don't usually think of Justice Stevens and the National Rifle Association as allies, but their brief had argued that business -- that even if the Court wanted to leave campaign finance restrictions on business corporations, big money, intact, they should strike the restrictions down as applied to non-profit ideological corporations like the NRA, like the Sierra Club, which are really aggregations of citizens spending money on joint causes. It's not like shareholders, who really didn't have any idea that they were investing in a

political campaign when they bought Microsoft. It's ideological group members who certainly intended to advocate their causes.

So Justice Stevens floated, as a possible resolution to this case: Strike it down as to the small, non-profit ideological corporations -- and, by the way, the legislative history shows quite clearly that when they passed McCain-Feingold, the members of the Senate included a special provision to make it apply to non-profit ideological corporations. And the reason they did that was that they were tired of being attacked by those corporations.

You know, they said things on the floor that would easily translate to, "We need to stop these people from criticizing me." And that's a very inviting thing to strike down.

I'd love to see the Stevens view prevail, and I'd love to see Chief Justice Roberts adopt it.

MR. WITTES: Orin?

MR. KERR: Yes, I want to just comment a little bit on the question of John Roberts as a judicial minimalist. There are two different ways of looking at his comments that he favors judicial minimalism.

One is as a heartfelt commitment that he may be quite consistent on over the course of his career.

The other is as a tactical move that a Chief Justice might take with a swing vote being Justice Kennedy. The reason why you might do that is that in a sharply ideologically divided Court, with Justice Kennedy as the fifth vote for either side, Justice Kennedy generally won't sign onto particularly ideological opinions on either side. And, in fact, a particularly strong sort of maximalist opinion might cause him to defect to the other side.

So a minimalist approach means not only just incrementalism in sort of a case-by-case approach, it also means that justice Kennedy's vote is unlikely to be the swing vote in any of those cases.

Now, in an area like campaign finance, Justice Kennedy's vote is not the center vote. So the interesting question will be whether Chief Justice Roberts has a different approach in areas of law where Justice Kennedy is not sort of right in the center than he does in the more common case where Justice Kennedy is in the center.

MR. WITTES: And you know, there actually is an example from just two terms ago, I think it is, now, where just this happened, where the Court was divided in the campaign finance case dealing with just the same provision, a case called *Wisconsin Right to Life*.

And the Court in three parts. There was one group that would have declared this provision of the McCain-Feingold law unconstitutional. There was another group that thought it was both -- that the provision was constitutional, and that as applied there was not a problem.

And Justices Roberts and Alito wrote what ended up being the controlling opinion in the case saying that -- not challenging the law or questioning the law categorically, but saying as applied in that particular context, that it was not sufficiently clear, it was not unambiguously clear in that case, that the speech at issue was electioneering speech. And I don't know that (inaudible) the Court held, based on the opinion of those two Justices. But at least as applied in that particular context it was unconstitutional.

Bruce, you had a question?

SPEAKER: Maybe Stuart's comment met my point, but I just wondered if there was an SEC dimension on this -- I wondered if there's an SEC dimension because, you know, I don't want my company spending $700 Dennis Kaslofsky shower curtains, or excessive bonuses. And why are they spending shareholder money on political campaigns. Maybe there's a governance issue that you've got to go to your

shareholders and ask for permission or something to get into the political business.

But there's a kind of footnote on Stuart's comment. A lot of these big companies have foundations. Now, if they slip some money to the foundation, would that have the same rules, or be governed -- would a corporate foundation be an advocacy group? Because they're semi-political anyway. They spend money in the areas where they do business and sort of, you know, do good. So I just wanted —

MR. WITTES: Randy, do you want —

MR. MOSS: A few minutes ago I described what was one of the principal rationales for defending the constitutionality of the requirement that corporations use their political action committee funds instead of their general treasury funds, and it was this concern about actual or apparent corruption.

You've identified the other rationale that the courts have identified and that was briefed in the case which is what people refer to as "shareholder protection." And, you know, do you as a shareholder in a large company, you know, how do you feel about your money being spent to influence elections in ways in which you may vehemently disagree?

And the comeback that people frequently make to that is they say, yeah, but, you know, you're free to just take your money and go elsewhere.

But in today's world I actually don't think that is a practical response. I mean, many folks have their money in large mutual funds, we don't even know which particular corporations the mutual fund is investing in on any given day, and it's changing on a given day. People have funds in retirement plans where they don't have control over where the investment is.

And it's imposing a pretty substantial burden on the public, and the public's interest in democracy and how their money is spent with respect to influencing elections to say, "Look, if you really, really care about this and don't want your money to be used for purposes of influencing elections, you know, you need to log onto the internet every morning, you know figure out which companies in the mutual fund where you're holding your money, where they're investing and then move to a different mutual fund if you don't like that." Or don't invest in mutual funds.

And that's a pretty substantial burden on people to say that they have to do that in order to avoid the consequences that you're talking about, I think.

On the other hand, it's not so hard to say the corporation has to have a political action committee. And when you have a political action committee, you actually -- or periodically. There are limits on how often you can do it -- periodically you can go out to the shareholders and say to the shareholders, "Do you want to make a contribution that goes into the political action committee that would be used then for political speech."

MR. WITTES: Well, as you can see, we could spend the whole session just on this case and not run out of things to talk about, but I'm going to force us to move on a little bit and talk about the other potential -- or one of the other potential real blockbuster cases of the term, which is the question of whether the Second Amendment does or does not apply to the States, and to the City of Chicago, in particular.

AS you probably know, a couple years ago, or last year, the Supreme Court decided that, after all, the Second Amendment does have an individual right in it to own guns -- the contours of which are as yet still a little bit fuzzy. But one of the questions this begs is a question that had been somewhat latent for, you know, the better part of a hundred years, which is the question of whether that right operates only against the Federal government, or whether it also operates against the States.

This case, this question is now solidly before the Court, and stands to not just revolutionize the law of guns, but also the law of

incorporation -- that is the application of the Federal Bill of Rights against the States.

Stuart, give us a sense of it.

MR. TAYLOR: Well, it's a case that excites at least two different groups of people: one, gun lovers, and, two, constitutional scholars -- particularly an odd alliance of liberal constitutional scholars who both see the gun case as a way to do things that have -- to pursue objectives they have that are unrelated to guns.

The easiest way to try and put that together is probably start with the adoption of the Fourteenth Amendment in 1868. I promise not to stop every year along the way.

You know, that was designed mainly to create new rights for freed slaves, and among the key phrases are the due process clause, "no person shall be deprived of life, liberty or property without due process of law," and the so-called "privileges or immunities" clause -- or is it "and" -- get it mixed up -- "and immunities" -- which is "no citizen shall be deprived by a State of the privileges and immunities of citizens of the United States."

There's a lot of evidence that the privileges-and-immunities clause was designed by the framers of the Fourteenth Amendment to be a large vehicle for incorporation to get -- you know, for application to the

States of all the original provisions of the Bill of Rights -- Fourth Amendment, searches and seizures, First Amendment, free speech, all the way down the list. As against the State governments, which had not originally been bound by those provisions -- and also, perhaps, other rights created under the Ninth Amendment. The brand-new rights -- maybe abortion rights, for example.

But five years after the Fourteenth Amendment was adopted, the Supreme Court essentially gutted the privileges-and-immunities clause in a case called the *Slaughterhouse Cases*, and put them in the dustbin of history until now. And therefore, over the past century, when the Supreme Court has applied various provisions of the Bill of Rights against the States, it has done so through the due process clause. And it was also the due process clause that was the basis for *Roe v. Wade* on abortion was, to a large extent, along with the equal protection clause, the basis for the Court's gay rights rulings. And a whole bunch of other unenumerated rights rulings, you might say.

That has never been a good fit. Because due process of law, to Justice Scalia and a lot of other people, means "the process," not "the right." You know, it doesn't have much to do with abortion rights, you might think.

Privileges-and-immunities a lot of liberal scholars see as a wonderful vehicle for incorporating all these rights if they could just get the *Slaughterhouse Cases* overruled. And it's seen by a lot of conservatives -- same clause, privileges and immunities, as a wonderful vehicle for economic rights, for striking down all kinds of local laws that give little monopolies in hairdressing to certain people, or minimum wage laws, the whole -- or the New Deal, or State provisions like the New Deal.

So along comes this gun case. And the issue is whether, for the first time in history, should the Court interpret the Fourteenth Amendment as applying the Second Amendment right to keep and bear arms against State governments. In this case it's Chicago -- or local governments.

And, frankly, if they say yes, it applies against State and local governments, which is widely expected, it won't be a cataclysm in terms of gun control. The Court has made it clear that they're not likely to strike down very many gun-control laws. Chicago's, along with D.C.'s and New York's are the most restrictive in the country. But if they use the privileges and immunities clause as a basis for applying the second amendment to the states, if they say, you know, we're going to overrule the *Slaughterhouse Cases*, then they open this broad potential vista, with a lot of historical justification, for judges and the Supreme Court in

particular, to fortify various -- abortion rights, for example, make up new rights, and all under the guise of enforcing the privileges and immunities clause.

MR. WITTES: So when you -- if you imagine a ruling here based on the privileges and immunities clause, is that -- part of me says, well that's a really interesting thing as a matter of constitutional history, to kind of sweep away substantive due process and basically say everything we've ever done under the rubric of substantive due process was really just because privileges-and-immunities wasn't available. So scratch all those -- you know, erase all of those passages and write in "privileges and immunities" instead, it has this wonderful kind of hygienic quality to constitutional history, and basically no practical implications at all. Because it's not like the Court didn't do all those incorporation things anyway.

So the question I have to any of the three of you who want to address it is: Is it more than a sort of dental-hygiene exercise for the constitution? Does it have practical implications if you say, "Okay, just kidding about substantive due process. We were really talking about privileges and immunities, even when we weren't."

What is it -- you know, to those people who aren't interested in sort of the purity of constitutional history, what does it matter what you call the vehicle for incorporation?

SPEAKER: I actually think there's at least one significant practical implication, which is there are two provisions in the Bill of Rights that have not been incorporated to date: the right to a jury trial -- civil jury is not incorporated for purposes of the State system, nor is the grand jury right incorporated. And if the Court were to say that it the privileges and immunities clause just categorically incorporates at least he first eight amendments of the Bill of Rights, that would raise pretty serious havoc, I think, with respect to those issues.

I mean, you can imagine, you know, then all of the habeas corpus litigation about all the folks who were not indicted by grand juries in States, coming in then and saying, "Well, wait a second. You know, this is, you know, a fundamental constitutional right that should have been applied. You know, my conviction has to be set aside."

I mean, it would have pretty significant ramifications.

MR. WITTES: What do you think, Orin, is it —

MR. KERR: I think it's important in the doors it might open up.

So over the last few decades, the discussion about what our constitutional rights are has become relatively fixed and predictable. There are a lot of holdings that are there that people don't want to overturn.

If we have a new basis for some of these rights, on one hand you have just the transfer -- okay, we used to say it was under that ground, now it's under another?

At the same time, I think that shift would also create a lot of open questions, and you never quite know where the Court would go. So I think it would lead to a bunch of new questions being asked, and potentially some new answers.

So I think it could have a big impact.

MR. WITTES: Yes, you had a question, sir?

SPEAKER: (Off mike)

MR. WITTES: Wait for the mike for just a second.

SPEAKER: I thought that the better way to handle it probably was the way that Mr. Justice Frankfurter had it -- namely, that some of them apply and some of them don't, and I think them exempt.

But secondly, on the whole gun-control thing, I hope somebody would point out that when that was adopted, when the country was formed, there were less than 4 million Americans living in this country.

You had Indians here, you had slaves. Now you've got over 300 million people living here. And therefore it might make sense to have some restrictions on the use of guns.

SPEAKER: It certainly seems correct to me and I think, you know, saying some restrictions on the uses of guns.

My understanding is -- and we'll have to see how this law develops over time, but I don't think there are any members of the Court that would take the position that there cannot be fairly substantial restrictions on use of guns. The question is, you know, how categorical those can be with respect to the Court.

But I do think that, you know, in wrestling with the issue that's presented in this case, and if the Court takes the approach of due process and asks is this a right that is fundamental to an ordered liberty, I think it is one of those -- there are a lot of contextual issues, like the ones that you raised, the Court will have to consider in that context.

SPEAKER: Just one thing to add. I think as Mr. Colman says, do you prefer the Justice Frankfurter approach, which is what's called "selective incorporation," I think, of rights, as against the States -- "Well, the First Amendment applies, but not the grand-jury clause, because that would be impractical."

SPEAKER: (Off mike)

SPEAKER: Pardon?

SPEAKER: (Off mike.) At least part of it.

SPEAKER: At least part of it -- I stand corrected.

Anyone who feels that way would want to leave the privileges and immunities clause dead and buried, where it's been since 1873. Because if they revive the privileges and immunities clause, then it opens all kinds of potential conceptual doors towards incorporating provisions of the Bill of Rights that have not yet been incorporated against the States.

MR. WITTES: Well, one other thing before we move on, on the privileges and immunities clause. Is it clear, as a matter of Federal constitutional law, that the privileges and immunities -- to whatever extent it exists -- refers only to constitutional privileges and immunities, as opposed to statutory privileges and immunities?

Because, I mean, one of the doors you could imagine it opening up is the understanding that if the Federal government grants a right, that that right applies ipso facto against the States. After all, it's a Federal "privilege" or a Federal "immunity" conferred by Congress. And the Constitution says right there, you know, the States can't abridge any Federal —

I mean, is it simply that we haven't, we've spent a hundred years not talking about what the privileges and immunities means, and therefore we don't know the answer to those questions? Or is there an answer to that question.

SPEAKER: Well, I think the answer would depend on a lot of historical scholarship, some of which has been done. But I know that some of the -- like Doug Kendall of the Constitutional Accountability Center, one of the liberal scholars in Washington, sees it as a way of opening up, perhaps through the door of the Ninth Amendment, which seems to suggest that there are rights that are not enumerated that apply against the Federal government -- well, would that apply against the States, too?

I think he and his allies seem to see it as a way of shoring up and perhaps expanding unenumerated privacy rights, such as abortion rights and gay rights. And their conservative counterparts see it as a way of creating and expanding the kinds of economic rights that the Court protected in the early 20th century under the so-called Lochner Doctrine, striking down wage and hours laws and the like.

So I think there would be an awful lot of room for argument about once you open up the privileges and immunities clause, as to whether it's just a free-wheeling grant of power to the courts to figure out

what rights they want to protect, or whether it's tightly tied to some historical intent of the frames of the Fourteenth Amendment.

SPEAKER: Then just one further thought I would have on this, which is there is a Federal statute that was enacted at roughly the same period of time, which is 1983 -- Section 1983 -- which does take the sort of broader view that you're talking about, of both providing constitutional protections as well as statutory protections of the people as against State power. And so -- and that has certainly been held to preempt and limit State authority.

And so I guess I'd have to think through the practical implications of how constitutionalizing that principle, versus having it in a statute, what the different implications could be.

MR. WITTES: So what I'd like to do now is start, go from left to right, and have each of you flag whatever the other big cases this term that are on your mind looks like.

And, again, to the audience, jump in at any time. Signal me if you have questions about the individual cases. I anticipate we're going to cover a fair bit of ground relatively quickly here. So, you know, don't be shy about jumping in if you have something to say about individual cases.

SPEAKER: I'd like to flag two cases: *United States v. Comstock*, and *Briscoe v. Virginia*.

United States v. Comstock deals with whether Congress has the power to set up a regime for civil commitment of sexual offenders in Federal custody after their Federal prison terms have elapsed. So, basically, somebody who's in Federal prison, serving a sentence, and the government believes, based on their prior offenses and other information, that they are continuing sexual offenders, are sexually dangerous -- can they be, continue to be detained outside of the scope of their prison term?

And the question raised by the case is a narrow one -- narrow piece of this puzzle -- which is does Congress have the power to do that under the Federal Commerce Clause power?

Interesting dynamic about the case is that this is one in which the lower court opinion was written by a relatively liberal panel, and authored by a relatively liberal judge. Typically, the way the ideology question works out in Commerce Clause powers is that the conservatives see more limitations in the scope of Federal power, the liberals generally don't -- obviously a huge generalization, but often accurate.

And in this case it's interestingly switched. The question is going to be whether the U.S. Supreme Court will see this case as really a Commerce Clause power case -- limits of Federal power -- or not.

I suspect the Supreme Court will reverse the lower court and say Congress does have this power, on the theory that if Congress had

the power to detain the person in the first place -- for example, through the punishment, through the creation of the Federal crime and the following punishment, the detention in Federal prison -- that that comes along with it a certain power to continue to detain the person following when their prison term is elapsed.

It doesn't mean there aren't some other legal questions, difficult constitutional questions about the legality of that law. But I don't think the Supreme Court would say that it's outside the scope of the Commerce Clause power.

SPEAKER: Just a quick point on that.

The Court has confronted the question of the due process implications of these post-conviction sexual predation laws, detention laws, in the past -- right? And they've upheld them on fairly narrow ideological grounds opposite the ones you're anticipating here.

It would be a little bit odd to have, imagine, a five-four conservative majority saying it doesn't offend due process, and a five-four liberal majority saying it doesn't offend the Commerce Clause, either -- right?

SPEAKER: That's right. I think this case will probably be pretty lopsided. I think it will be 9-0, maybe 8-1.

The more liberal Justices generally have not seen Commerce Clause limitations in Congress's power, construed the Commerce Clause power very broadly. And I think you see in cases -- the *Gonzales v. Raich* from 2006, the case on medical marijuana, also sort of creating, not a 5-4 case. I guess in that case it was 6-3, in favor of the broad Federal power.

So I'm not thinking this case will be very close.

MR. WITTES: Okay.

SPEAKER: The one other case I wanted to talk a little bit about is *Briscoe v. Virginia*, a case involving how criminal trials have to be conducted under the Constitution and, in particular, in light of the confrontation clause, which says that if you're a criminal defendant, you have a right to confront witnesses against you.

A very important question that comes up in a lot of Federal -- or State or Federal -- criminal cases is what that means when the government is trying to prove some fact through a forensic report. Most often this arises in narcotics cases, where the government is trying to show the existence of an amount of narcotics through a report prepared by a lab expert who -- the person who actually conducted the forensic test says, "Yes, this did, in fact, contain cocaine," or "Yes, this substance was, in fact, marijuana in the following quantity."

And the question is whether the government needs to put on as a witness the person that prepared the report, or whether just the document is enough.

Earlier courts have said that just the document as enough. The actual person who prepared the report did not have to be put forward. At the same time, the Supreme Court in a 2004 case called *Twyford* re-analyzed the confrontation clause and really bolstered this confrontation clause, saying that, you know, it means what it says. If you're a criminal defendant, you have a right to confront the witnesses against you. And in a case just last term, *Melendez-Diaz v. Massachusetts*, the Supreme Court held that in one of these cases involving a forensic report, that that means you have a right to question the person who prepared the forensic report.

What makes the *Briscoe* case so interesting is that the Supreme Court agreed to hear this case just the next term, instead of basically sending this back to the lower courts and saying, "Figure out what to do in light of our new decision," which was a 5-4 decision with a very vigorous dissent by Justice Kennedy.

The speculation is that perhaps the Court took this case again because it might significantly narrow -- or potentially even overturn -- the case from last term, restoring the law to what it had been before last

term, rather than requiring the government to put forward the witness in every case.

So this is an interesting case where Justice Kennedy is not the key vote everybody's looking at. Instead, everybody's going to watching Justice Sotomayor, the new member of the Court. Because it was a 5-4 decision in Melendez-Diaz last term. Justice Souter was the fifth vote in favor of striking down the Massachusetts law in Melendez-Diaz. Justice Kennedy wrote the dissent in Melendez-Diaz.

The question is where Justice Sotomayor is going to fit into that now 4-4 division on what to do with this problem.

MR. WITTES: Randy, what's on your mind?

MR. MOSS: A couple of cases.

One case which I think goes to Ben's point at the beginning about whether -- you don't know at the beginning of the term whether it's going to be, you know, a really huge term, with very significant developments in the law, or whether it's going to be more of the average term.

There's a separation of powers case called *Free Enterprise Fund v. The Public Company Accounting Oversight Board*. And I think depending on how the case comes out, it could just be, you know, your average case where the Court is applying established precedents. Or it

could end up being a landmark case where the Court articulates significant new doctrine.

The case deals with an entity that was created by Congress in the Sarbanes-Oxley Act following the Enron and WorldCom accounting scandals. And it's an entity which Congress actually called a private entity. It said it wasn't part of the government. But the courts and everyone in the case agreed that it is, for constitutional purposes at least, part of the government.

And it is a board that is created for purposes of overseeing public accounting firms. And it has investigative authority, it can promulgate rules.

And this board was challenged on a number of grounds. And two issues that are before the Court are whether the way Congress established this board violates the Appointments Clause of the Constitution, or general principles of separation of powers.

Now, under the appointments clause -- well, the Appointments Clause says if you are an officer of the United States, you need to be appointed in one of two ways. If you're a principal officer, the only way you can be appointed is by the President with the advice and consent of the Senate. If you're an inferior officer, there are additional ways you can be appointed. But one of the additional ways you can be

appointed is by the head of a Department, and the advice and consent of the Senate is not required for inferior officers.

The members of this board -- the PCAOB -- are appointed by members of the SEC, the Securities and Exchange Commission. And so the plaintiffs first argued that this violates the Appointments Clause because in their view the members of the PCAOB are principal officers and should have been appointed by the President with the advice and consent of the Senate. And they say they're principal officers because they're not subject to adequate oversight by some other officer in the government.

The Court of Appeals in what was a 2-1 decision disagreed with that argument and said, no, there is actually quite substantial oversight by the Securities and Exchange Commission, it's comprehensive, and for that reason they're inferior officers. And because they're inferior officers, they don't have to be appointed by the President.

The plaintiffs then argued and said, well, but the SEC is not the "head of a Department." And the Court of Appeals correctly, in my view, said, one, that you can have -- the "head of a Department" does not mean a Department in the sense, you know, that we now denominate the departments within the government and say, you know, "the Department

of Homeland Security," but was instead intended to refer to an independent establishment within the Executive Branch.

And there was also authority for the proposition that you can have a collective head of a Department. The fact that the SEC is made up of a number of individuals, a number of commissioners, doesn't mean that when they vote together they still can't act as the head of a Department.

So the Court rejected those arguments.

In additional, there was a general separation-of-powers argument that was raised that said, look, the President needs to be able to control people who are part of the Executive Branch. I mean, you folks have heard discussion of "the unitary Executive," and frequently sort of misuse of the phrase "the unitary Executive."

This actually is -- I think when scholars talk about "the unitary Executive, this is what they're really talking about. They're talking about the fact that you have one head of the Executive Branch. It's the President. And the President has to have authority to control those who are in the Executive Branch.

The Supreme Court, decades ago, in a case called *Humphrey's Executor*, held that even where you have individuals in the Executive Branch -- there it was the Federal Trade Commission -- who are insulated somewhat from removal, and they can only be removed by the

President for cause and have some independence, that doesn't violate this principle.

There are some members of the Court, I think, who have doubts about *Humphrey's Executor*, but the Court has reaffirmed *Humphrey's Executor*, most notably in *Morrison v. Olson* a number of years ago. It was on the constitutionality of the Independent Counsel statute.

But the plaintiffs in this case argued that this is worse than the Federal Trade Commission, where the members of the Federal Trade Commission are subject to only for-cause removal, because they said here there's double for-cause removal here, because the member of the SEC have some tenure protection, and they can only be removed for cause. And then they are appointing members of this board that has protection and can only be removed for cause. So that there's this double level of insulation. And so even if you're bound by *Humphrey's Executor*, and even if you thought it was right, this is a step further and it's problematic for that reason.

The Court, again -- the Court of Appeals rejected that argument on two grounds. One, it said that there's not this two-step argument, and it doesn't really make sense that it would make a difference as to whether it's a one-step or a two-step.

And two, they said, you know -- and the importance of the removal power is overstated, where you have an entity like the PCAOB which is subject to pervasive oversight by the SEC. So if the SEC is okay, and the SEC can second-guess everything the PCAOB is doing, it should be okay.

Judge Cavanaugh dissented, and he first of all said that he thought that *Humphrey's Executor* is a dubious decision, but then said, but this isn't simply *Humphrey's Executor* redux. This is *Humphrey's Executor* squared. And so he accepted this argument that it was more problematic because there was this double layer of insulation.

And he also disagreed with the majority with respect to whether the members of the PCAOB were principal or inferior officers.

The Supreme Court doesn't hear separation of powers cases and Appointments Clause cases very often -- maybe once a decade. Judge Cavanaugh, in his dissenting opinion, said he thought this was the most important separation of powers case since *Morrison v. Olson* was decided 20 years ago.

I think the question of whether he's right about that will turn on whether, in fact, he's right about his analysis, or whether the majority opinion is right about its analysis.

The other case I wanted to mention briefly is a business case, and sort of comes from an entirely different world -- a case called *Bilski v. Kappos*. And if the number of amicae you see filing briefs in a case is some measure of the importance of this case, this may be the most important case ever decided in the history of the Court.

There are at least 50 amicus briefs -- and I'm not sure they've all been posted at this point, but at least 50 amicus briefs have been filed in the case. And it is a very important case.

And the case addresses the question of when is a process patent-eligible. And it's not that hard to kind of figure out when a machine is patent-eligible, or when a product is patent-eligible. But the notion of when a process is patent-eligible is a really tricky question -- which the lower courts have wrestled with for a long time.

These cases, at least in recent years, have been decided exclusively by the Federal Circuit, which has exclusive appellate jurisdiction in patent cases. And there was a period of time in which the Federal Circuit held that methods of doing business were not patent eligible.

And then in a case decided in 1998 called *State Street*, the court set that aside and said, no we don't mean to suggest that categorically, that methods of doing business are not patent eligible. And

following that decision, the number of patent applications for business methods skyrocketed.

MR. WITTES: What sort of business methods are we talking about. I mean, are we talking about human resources management types of things, or —

MR. MOSS: It could be. It's, you know, accounting methods, tax mitigation techniques, financial instruments. You know, one of the judges from the Federal Circuit years ago gave the example, said, "You know, the idea of a diaper service ought not be patentable."

I think the question is, what is patentable.

The patent that was at issue in the Bilski case itself was an idea for how to hedge against the risk of the weather with respect to energy pricing. So it was a hedging methodology. And the question of whether that methodology and that idea for how you hedge is patent eligible -- which gives you some sense, though, of why the business community sees this as such an important case.

There's been a huge amount of litigation over these sorts of -- you know, financial instruments and other methods of business and whether they're patent eligible or not. Companies have started going out and getting defensive patents for how they, you know, do their accounting,

or whatever financial instruments they create to make sure that someone doesn't come along after the fact and hit them with a patent claim.

And if that doesn't make this case important enough to start with, it also raises -- conceivably raises the question of the extent to which computer software is patentable. Because many of these business methods are implemented through software. And although it's not the case with respect to the particular patent that's at issue in this case with the method of hedging energy, one could easily take the formula that they came up with for hedging against the weather and just put it in a computer program and say, "Okay, I get you that we weren't patent eligible. Now are we patent eligible now that we've now put it into software?"

And a lot of the briefs in the case touch on this question of whether, and the extent to which, software itself is patent eligible.

The Federal Circuit articulated a test that was based on Supreme Court precedents that said for a process to be patent eligible you need one of two things. You either need it to be physically transformative -- you need to be vulcanizing rubber, or refining flour, doing something like that, where you're ending up with some change in the physical world. Or you need to be using an existing apparatus or equipment in a new way, so the invention of the telephone or the telegraph, even though the equipment that was used for constructing the telephone and telegraph

existed, you're using that apparatus in a new way -- but that a process just standing by itself is not patent eligible.

Others on the case argue the other side and they say, look, the statute says "process." It doesn't delimit it in any way. And if it's any sort of process, any series of steps, it ought to be patent eligible. And, you know, to the extent you think that's too broad, there ought to be other provisions in the Patent Act that then catch the overbreadth of this and —

MR. WITTES: And so they would patent the diaper service?

MR. MOSS: Umm -- well —

MR. WITTES: Assuming it was a new kind of diaper service?

SPEAKER: (Off mike) -- the algorithm.

MR. MOSS: Yes, the algorithm. Exactly.

Possibly. I mean, I guess they might say as long as they were the first one to come up with the idea of doing a diaper service, and it wasn't obvious -- you know, conceivably it would be.

And you know, in some of the methods, I mean, you know, they're more refined -- or I should -- they're more complex, perhaps, than just the idea of doing a diaper service. But, you know, ideas for, you know, tax mitigation or accounting methods, they're not really different in kind from that sort of situation.

MR. WITTES: Stuart, what's on your mind?

MR. TAYLOR: I'll begin, I'll talk about three cases, really raising two main issues.

The first, I'll confess, I had a knee-jerk reaction to when I first heard about it. It involves a man who is claiming his First Amendment rights were violated when he was convicted and sentenced to Federal prison under a law that made it a crime to use commercial -- to sell commercial depictions of animal cruelty, dog-fighting, in his case. And my first reaction was: dog-fighting. First Amendment. Give me a break.

However, then I began thinking like a lawyers, and we lawyers worry about slippery slopes -- and like a journalist, and we journalists feel proprietary about the First Amendment and think that any exception to it is ultimately aimed at us.

And I began to see some of the complexities that unfolded at the Supreme Court oral argument yesterday in this case, which you may have read about.

This man was convicted of dogfighting. Justice Scalia says, "Well, what about bullfighting? What if I'm an aficionado of bullfighting? Can somebody be sent to prison for a bullfighting video?"

Justice Ginsburg, "What about cockfights?" "Hunting videos," someone else said. "Human sacrifice channel," Justice Alito said.

I think Scalia came back with, “What about depictions of a new Hitler advocating hate speech and extermination.”

And so it was just crackling yesterday. All these hypotheticals were being rained down on the head of poor Deputy Solicitor Neal Katyal who, I suspect might have preferred to be on the other side of the case, because it looks like he’s going to get his head handed to him.

MR. WITTES: As long as nobody does a videotape of that and sells it.

MR. TAYLOR: Exactly. But it involves serious issues.

It began with Congress in 1999 -- well, it began with, apparently there’s a market in so-called “crush videos,” disgusting videos in which scantily clad women wearing high-heels or barefoot stomp on little animals, and you hear them and see them screaming. And apparently there are sexual fetishists who get a charge out of this.

And Congress decided we’re going to put a stop to that, and that was the genesis of this law: “Let’s have a law against crush videos.”

But they worded it somewhat more broadly, and it’s a law against any commercial use, sale, making, et cetera, of videos, audios, pictures of animal cruelty. And that’s what opens up all these hypothetical examples.

Because even if the animal cruelty was legal where done -- for example, dog-fighting is legal in Japan, and a lot of the videos that this man, Robert Stevens, was promoting were from Japan. Even if it's legal where it was made -- or bullfighting in Spain -- if it's illegal where the person is distributing it -- and all 50 states have laws against dogfighting -- then you can be prosecuted for commercial production of it.

And the rationale is not -- at least not when you get down to constitutional argument -- not that we can't bear to have people watching this, not that the message is so terrible, it's that we've got to dry up the market for the underlying activity. We do not want people to having dog-fights in this country, therefore -- and we can't catch them all in the act, so if we can prevent there from being a market for dog-fights, maybe we can reduce the number.

MR. WITTES: Just a quick clarifying question. Could you fix the issue and make it much clearer simply by having an element of the offense be the cruelty in question is illegal under local law?

MR. TAYLOR: Ahh, that —

MR. WITTES: Local law in the place that the thing was filmed, rather than the place the thing was marketed.

MR. TAYLOR: Well, that would probably make it more defensible, but it also reduces coverage very dramatically.

MR. WITTES: Right.

MR. TAYLOR: Now, Congress did do one thing to try and make it more defensible. They made an exception for works of significant artistic, literary, political, educational, et cetera, et cetera, value. But that's a very vague exception, as the members of the Court emphasized yesterday.

And what the Government is essentially asking the Court to do -- and this isn't really an Obama Administration thing. The Justice Department has an obligation to defend acts of Congress, unless they're clearly unconstitutional. What they're asking the Court to do is to create a new exception to First Amendment protection. Obscenity is completely unprotected. The last -- there are a couple other categories, so-called "fighting words," threats, et cetera.

But the last categorical exception to free speech protection that the Court created was in 1982 for child pornography. And the rationale of that decision was, unlike, say, adult pornography, this involves exploitation of children and we need to dry up the -- we need to prevent it from being done by drying up the market for it.

And the Government's lawyer, Mr. Katyal was leaning heavily on this precedent yesterday, saying: Same thing. We need to stop people from being cruel to animals.

But it looks like, from all the questions they were getting peppered by, that they're probably going -- the law is probably going to be struck down, and Congress will have to try and figure out whether they want to draw something much more narrow.

Probably the most challenging single hypothetical of all the ones flying around yesterday, Justice Scalia asked the Government's lawyer, "What about David Roma's dog-fighting videos." I didn't know who that was but I looked it up. These are dog-fighting videos that are made by friends of animals, in order to show how horrible it is, and in order to try and mobilize people against it. So the purpose of those dogfighting videos -- which are bloodier than the ones involved in this case -- is a supposedly benign purpose. But as Justice Scalia said, we're not supposed to differentiate among categories of speech based on whether they're benign or not.

So I think that law is probably doomed. That was one of those cases that's easier to read than most. And then the question is how narrowly or broadly they'll write the opinion, and what will be left for Congress to try and recover.

Incidentally, it does appear -- or there's some evidence -- that this law has done what was originally intended. There have been no prosecutions for crush videos, because there haven't been many crush

videos detected. And that, it was suggested, the argument yesterday made, may mean that actually the creation of crush videos has been deterred by this law, and that it's done some good.

MR. WITTES: Before you go on, Stuart, Gary has a question.

SPEAKER: (Off mike.) What's the name of the case?

MR. TAYLOR: That's *United States v. Stevens*.

SPEAKER: Thanks.

MR. TAYLOR: And the other two —

MR. WITTES: And we have one more question over here.

SPEAKER: If child pornography -- if it's so easy to draw a line for child pornography, why isn't it easy to draw a line for animal cruelty? I mean, I don't get it.

MR. TAYLOR: Very good question.

Justice Ginsburg identified one difference, in her question yesterday. She said usually when people are prosecuted for child pornography videos, the child pornography was done for the purpose of creating the video, and therefore the idea that you're really going to dry up the market for doing this stuff if you ban the videos has special force.

In this case, for example, Mr. Stevens, he's using old videos from Japan where it was legal, and other videos. He didn't create any of

those videos, didn't have any role in creating them. So the argument that by putting him in prison you're going to prevent dogfights is much more attenuated.

And I think the other distinction -- although it wasn't heavily leaned on that's in the back of everybody's mind is -- well, we take exploitation of children more seriously as an evil to be prevented than we take cruelty to animals. Now, not everybody thinks that way, but I think there's a wide view of that.

But while we're on children, the other two cases I'm going to briefly touch on, *Terrence Graham v. Florida* and *Joseph Sullivan v. Florida*, the issue in both cases is can a juvenile, someone under 18, be sentenced to life in prison without parole for a crime other than homicide?

And in this case, for example, Terrence Graham had been, done a lot of offenses, and he finally got arrested one more time for burglary with a gun while he was on parole. He was 16 years old. And the judge, in sentencing him, said, you know, you've had chance, after chance, after chance. You've thrown your life away. You're unsalvageable. At this point, we can't help you. Our job is to protect society against you. Therefore you're going into a cell and you're never coming out.

The other case involved a brutal rape of an elderly woman in her home by a 13-year-old -- similar sentence.

Interestingly, the Court scheduled two separate arguments rather than one combined argument, suggesting that they don't just see these as two interchangeable cases. I think there are differences, but the difference between 13 years old and 17 years old -- Mr. Sullivan was 13, Graham was 17. It's possible the Court will say, well, 13 is really too young to give up on someone, but 17's a different category.

But his comes against a background of death penalty cases in which the Court has been gradually biting off chunks of the death penalty and saying they're unconstitutional based, in part, on the Court's perception that there's a growing consensus -- particularly an international consensus -- against executing juveniles. And in 2005, the Court held you can't have the death penalty for an offense committed as a juvenile. And they've done the same for offenses by retarded people and some other categories.

And so now the question is, well, does the same logic apply to life without parole? And, in a sense —

MR. WITTES: Although, Stuart, one of the arguments for restricting the death penalty that has always had the most salience to a lot of people is the availability of life without parole.

And so does this have a little bit of the quality of a bait-and-switch? You know, sort of, you hold out life without parole as an available alternative that reduces the need for the death penalty, and then you kind of take away the life without parole, too.

MR. TAYLOR: I think it does have that quality, particularly if you think, well, what are they trying -- what is the societal goal of doing either death penalty or life without parole for any particular category? It's this person, if released, is going to go out and harm more people.

And so when you're arguing against the death penalty for juveniles, the life without parole is an easy fallback.

MR. WITTES: But I was interested in the way you described it, at least this case. Maybe that's the next case. But as you described this case, it was for cases that did not involve homicide.

MR. WITTES: That's true. But, of course, for cases that do involve homicide, the Court has already said it's unconstitutional to execute a juvenile. And will the next thing be, well, what about an 18-year-old or a 19-year-old? You know, do we really have a categorical distinction between people the day before and the day after their 18th birthday? And there are all sorts of issues like that.

But the argument being made for the defendants in these cases is, the whole logic of the death penalty decision, *Roper v. Simmons*

in 2005, you can't execute people for crimes as juveniles, is they haven't emotionally matured. They don't have all their moral capacities. Therefore, you can't give up on them when they're 17. Earlier there was a decision that said 15, and then they spread it to 17.

And that logic does apply in these cases.

I think -- I'm not sure I'd predict the outcome, but I think, in part for the reason Ben gave, it would be a big leap for the Court to say it's unconstitutional to have life without parole, particularly because I think every State in the country, with maybe a few exceptions, allows life without parole for juveniles. It would be hard to argue that there was a trend inside the United States against allowing that, or a consensus.

MR. WITTES: Although on the other hand, I mean, I think it's a lot more plausible to imagine the Supreme Court saying: Wait a minute, 13 is a different story than saying it with respect to a 17-year-old.

MR. TAYLOR: And you're right. And there's a history there.

In 1988, *Thompson v. Oklahoma*, the question was can you have the death penalty for a crime committed as a 15-year-old? Answer: No. Unconstitutional.

The next year, in another case, the issue was: Well, what about a 16-year-old or a 17-year-old? And the Court said: Yeah, you can execute people for -- that's different than a 15-year-old.

Roll the clock forward another 19 years or so to 2005, *Roper v. Simmons*, they overruled that earlier case and said, well, now we think it's unconstitutional if it's a 16-year-old or a 17-year-old.

So they've been making those kinds of distinctions, based on how old the kid is. And they may well do it here.

MR. WITTES: So, I have two cases on my mind which I'm going to throw out on the table.

The first is a case I think hasn't gotten as much attention as it probably will deserve, or may deserve, which is a case involving a constitutional challenge to the Federal Material Support for Terrorists law -- which, for those of you who are not steeped in counterterrorism law is sort of the bread-and-butter tool that the Federal government uses now when it brings criminal prosecutions in the counterterrorism arena.

I think potentially this case has the capacity to narrow that tool's use fairly significantly, which would had a sort of a paradoxical effect, which is that it would make it a lot harder for President Obama to figure out how to close Guantanamo, part of which relies on the idea that you have this very powerful criminal just instrument that you can use.

I'm curious what your thoughts are on -- all of you, but starting here, what your thoughts are on the Material Support case and how it looks.

SPEAKER: Well, it's important to recognize that this is a case from the Ninth Circuit Court of Appeals out in California, written by a judge with the last name Pregerson. My general rule is whenever there's a case from the Ninth Circuit where the lower court judge was named Pregerson, that means the case is going to be reversed. Because that's what always happens.

And this is a case where the Ninth Circuit, the court below, said that the Material Support statute was unconstitutionally vague, looking at the various terms of actually what it means to provide this material support. And the court said: We don't know what these terms mean. It's really unclear what counts and what doesn't count.

And the difficult idea here is that Congress is going beyond the traditional notion of conspiracy law, of some sort of agreement, an agreement to commit a criminal act -- or something like accomplice liability, where the goal is intentionally to further somebody's criminal act with the idea of it being a specific criminal act.

The notion behind the Material Support statute is it's helping somebody along without showing that specific intent to further the criminal act of the other group or other person. So it's a new type of criminal liability.

And the Ninth Circuit said it's just too unclear to allow that statute to be on the books. And the doctrine that the courts were applying is one that the Supreme Court has rooted in the Due Process clause, the idea that a law can be void for vagueness. It's too unclear to have that law be on the books. Congress has to actually say what it is that they're prohibiting.

My guess is that the Supreme Court will say that the law is not void for vagueness -- but in so doing, will provide definitions for the terms which adopt a relatively narrow reading of the statute.

And there's a lot of wiggle room in how the courts go about this sort of a case, in terms of what interpretation they ultimately do give. So a court can say, "Well, that's not vague. Presumably this term means -- " -- and then they basically give the meaning that lower courts are then bound by. And something like that is what I would expect to happen.

MR. WITTES: And when you say the effect will be to give a relatively narrow construction to the statute -- I mean, when you look at the universe of people to which the Justice Department has sought to apply the statute, it ranges from something as specific as, you know, "He went and sold cigarettes illegally to use the proceeds to give to Hezbollah." So from very specific, very material in the literal sense of the word, to, you know, "He went out and trained in a training camp, hung out

with them, and thereby offered material support in the form of his services." Right?

And the power of the tool as a criminal justice instrument, and as a way of thinking about how to handle kind of overseas terrorist affiliations, really depends on how broadly you can apply it in that latter context.

And I'm wondering what you think the implications are for that?

SPEAKER: I don't know, in terms of how broadly the Court -- broadly or narrowly. My guess is that they will want to know what the facts are of these individual cases that have been brought, and will look at the cases, and those cases will very much be on the mind of the Justices when they're construing the statute.

But exactly where the lines will be drawn, we really don't know that.

And it's important to recognize, as well, this is a case that was just granted -- last week, I guess it was. So we don't yet have the briefs on the case. Usually the briefs will give you an idea as to what the specific arguments will be, and therefore what the Justices are likely to be focused on. And we don't know that yet.

SPEAKER: And the name of the case?

SPEAKER: *Holder v. Humanitarian Law Project*.

MR. WITTES: And this is a case that -- a law professor here in town, David Cole, has been working on this issue for -- I mean, since the Material Support law was passed in '96, David has been attacking it in court and has finally gotten it to the level of Supreme Court consideration.

SPEAKER: I think also there's a little bit of a First Amendment concern lurking in here, too. I'm not sure whether you covered it. Certainly David Cole would think so. Because one of these groups, for example, is a Kurdistan group that's classified as a terrorist organization by the State Department, but they also provide various humanitarian activities. Hamas is said to do the same. And there are people who want to give money to groups like that, supposedly in furtherance of their humanitarian activities, kind of a First Amendment-protected goal. And then the question gets to be, well, if the money might find its way indirectly or directly into support for terrorism, then what do you do?

And the broader the Material Support law is interpreted, the harder it would be for one of these -- you know, for somebody in this country to help out the humanitarian activities of such a group.

MR. WITTES: Finally, I'm just going to end with the case that a lot of people start with, which is this cross-in-the-desert case, which is

the latest in the increasingly absurd Supreme Court battles over when it is and when it is not okay to have a monument, either to or in the shape of the Ten Commandments, or a cross, or any other religious symbol.

In this case it is a relatively small cross that was originally build in the '30s as a war memorial, World War I memorial. It is on a cliff in the Mojave Desert on what used to be Federal government land. It was built by, I think, the VFW. And the Federal government, in a kind of effort to, sort of a ham-handed effort to get rid of the problem, decided simply to give the land that it was on, the one acre of land, to the VFW.

Which raises the question, first of all, whether there's something constitutionally deficient about the cross in the middle of the desert. And secondly, whether, if there is, you can cure that deficiency by having allowed a group to build a monument in the shape of a cross in the middle of the desert, to simply give the land away to that group.

This comes against a background of -- I don't think it's unfair to say -- increasingly incoherent Supreme Court approach to these questions in which some monuments to the Ten Commandments, depending on their size, shape, what they're surrounded by, purpose and kind of who put them there and when, are okay, and some are not okay.

And I guess the question is, is there any way to bring rhyme or reason to this? Is there any hope that this case will begin to do it? Or is this just the next step in a sort of increasingly ridiculous line of cases?

SPEAKER: I guess my own view on it is that, you know, unless the Court really were to fundamentally alter the doctrine, you're not going to walk away from this case with, you know, with clarity and say, "Oh, now we know how you'd resolve all these cases in the future." Because these cases are inherently fact intensive in a way, because the Court's Establishment Clause jurisprudence turns on the question of whether one, you know, would reasonably perceive an endorsement.

And, you know, the issues in this case are things like the fact that the United States maintained a reversionary interest in the property. And so if the cross is not maintained, the United States gets to come in and take the property back. The fact that the cross is surrounded by thousands of acres of Federal property, and then you've got this little donut in the middle of it, which they have now donated to a private group.

And so that is the approach the Court tends to take in the Establishment Clause, at least with respect to religious symbols of, you know, would one understand that menorah or that creche or that Christmas tree, you know, in this context to be a religious symbol or not? The Ten Commandments. If the Ten Commandments is, you know,

displayed in one spot is it viewed as a religious endorsement of the Ten Commands, or displayed elsewhere is it not?

MR. WITTES: One of the things that's always struck me as odd about this particular case, it's pretty clear that the cross in question was built as a war memorial by a non-religious organization, sort of along the idea that that was like one of the shapes that you build war memorials in in those days. If you did it today, it would very clearly be an endorsement. If you did it in 1930-whatever, or whenever that thing went up, you know, a lot less clear.

And I guess the question is, is there some implied grandfather clause in this doctrine that says basically, if you're the Chief Justice of Mississippi and you wheel a giant granite monument of the Ten Commandments in today, you know, we're going to draw the line. But if you're the VFW and you've had this thing in the Mojave desert, you know, for 70 years, we're going to treat it very differently.

SPEAKER: Yes. The best I can do is to look back on the last big monument case, the Ten Commandments case, where they -- I think it was 5-4 to uphold a big monument on the grounds of the State capitol in Texas on the ground that, well, it was old and nobody paid much attention to it; strike down plaques on a courthouse wall, where the county

government had made a big production of the religious content because, well, it was new, and they made a big production.

I think -- unless I'm mixing up my cases -- between the two cases, there were 10 different opinions written by Supreme Court Justices. And my favorite line of Chief Justice Rehnquist was -- after he kind of summarized this, and the 10 opinions -- he said, "I didn't know we had that many people on our Court."

SPEAKER: In the Pentagon Papers case I believe there were 10 opinions that were issued by the nine Justices of the Supreme Court.

MR. WITTES: Well, it's particularly appropriate when you have ten commands that each one gets a judge.

I think we have time for a couple questions from the floor.

Yes?

SPEAKER: Yes, my question is just of all the cases that we've talked about today, what individually would you single out as possible having the greatest effect on individual Americans in their everyday lives.

MR. WITTES: Why don't we just go down the -- start with Orin?

MR. KERR: Oh, that's hard. Umm -- can I pass, and —

MR. WITTES: Pass.

Randy.

MR. MOSS: Well, I can't say that I've studied the docket with that thought in mind, but I actually think that this campaign finance case really could have those implications. And if the Court were to issue a decision that set aside the 1947 act, Taft-Hartley Act, and corporations were to get into the business of spending massive fortunes of their treasury influencing elections, I think that would affect the public pretty substantially.

MR. TAYLOR: I think the dirty little secret of us Supreme Court mavens is that not many of these cases, not many of their cases, period, have a big impact that's traceable directly on ordinary people's lives. I mean, the campaign finance case, for example, is huge, but it might affect your life if it affects, you know, who's elected to some office and then they do something you don't like.

That's not to say they're not important. I think Supreme Court decisions, they're sort of like tectonic plates moving around under the Earth. You don't notice any difference in your life right away, but it may lead to an earthquake, or continents splitting apart and so forth. So I think that's why we pay so much attention to it.

MR. WITTES: Yes?

SPEAKER: I just had a question for Mr. Moss, specifically, about the patent case.

Just on a policy point of view, what's at stake for the businesses for trying to -- whether processes are patentable, or when they are patentable, rather than holding onto them as trade secrets so they won't be subject to kind of the parameters of the patent law?

MR. MOSS: Well, I think the big difference is that, you know, you can come up with your business idea and hold onto through a trade secret and, you know, you're hopefully successful in that and you can go about running your business.

If these things are subject to patent protection -- and I should say I did a brief in the case -- but, you know, the concern that the business community really has is it's very hard to do what they refer to as a "prior art" search. It's hard to kind of go out and find out, you know, "This idea that I have," or "The way we're running our business, is there someone out there who may be getting a patent -- " -- has a patent or may be getting a patent. It's hard to kind of figure that out.

And you run the risk, when you put some new product out on the market, you design your entire accounting system that, you know, someone's going to show up at your doorstop and say, "Guess what. You owe me a billion dollars because I patented that idea." And you're saying,

you know, “What are you talking about? This is just, you know, some new financial instrument we came up with.” And they say, “Yeah, but take a look. Here’s my patent.”

And I think it’s that fear that then results in litigation, and it drives companies to then engage in, “Well, we better go in and get a patent on everything we’re doing -- ” -- which, it creates an escalation.

MR. WITTES: Yes?

SPEAKER: Thank you. I’d be curious -- almost every one of you has talked about the possibility of a particular case being settled on narrow grounds, which suggests to me that the ideological composition of the Court maybe isn’t that important when it decides individual cases.

So I’d be curious to know how you feel about the ideological composition. Because if it is important, even if Mr. Obama serves two terms, he’s not likely to change it -- unless something overseen happens with one of the members of the conservative bloc.

I mean they’re all young and health, so far as we know.

MR. WITTES: This is a great question on which to close. Why don’t each of you address the question of the importance of the ideological composition of the Supreme Court?

MR. TAYLOR: I think it’s important. And, you know, sometimes we journalists get criticized for calling people “liberals” and

"conservatives." I know my friend Bill Coleman comes at me every time I do that, so I'll never do it again.

But I think it's important because I think, identifiably, four Justices take the position a political liberal would take in most ideologically-charged cases, and four conservatives take the position an ideological Republic politician would take. That's very common. Why, then, don't -- and then Justice Kennedy is often the middle.

I think the reason why you often have narrow decisions and the law doesn't change dramatically is twofold. One, the whole system has various continuity built into it: Long-serving Justices, respect for precedent -- except when there's a special reason not to.

And, number two, they've reached a certain -- I mean, we've had a closely split Court for a very long time. Even when Justice O'Connor was there, she and Justice Kennedy were sort of in the middle. And therefore, you're not going to see one side, or you're not likely to see one side or the other in the ideological splits suddenly hitting a grand slam and taking the field away from the other. Because there's always going to be somebody in the middle who's saying, "Well, I'll go this far and no farther."

MR. MOSS: Yes, I guess I would use the word "jurisprudential split" instead of "ideological," just because -- maybe this is

the reason, perhaps when Mr. Coleman reacts to "ideological." But it's to the extent it's seen, that's seen as meaning "political" in some sense. I don't think that's the right term to use in thinking about it.

But clearly the Justices have different jurisprudences, and sometimes there are jurisprudential positions that are well known publicly and, you know, people think of them in particular ways. Other ones are, you know, much more subtle but are as significant.

I mean, Justice Stevens and Justice Scalia have very, very different approaches to questions of statutory interpretation. I'm not sure I would call it "ideological," but it's a very different jurisprudence. And it does affect the decisions on the Court.

I have to say what I really value -- and I love it when I see the Court mixing it up that way, and when you see Justices, you know, crossing over and with alignments that are not the predicted alignments, and I personally always enjoy it when you see those cases. And I think it's a good thing for the Court as an institution, when you see that the alignments are not always the same, and that people are thinking, the Justices are thinking hard about each case and sometimes they're saying, "You know what? My jurisprudence is going to take me over here, and I'm not going to align the way everyone else thinks I'm going to on this one."

MR. WITTES: Orin, we'll give you the last word.

MR. KERR: I'll agree with Randy that I feel a certain amount of sadness whenever it's an ideological split, with sort of the predictable two camps. And you have to wonder how much real thinking is going on from the standpoint of constitutional interpretation, and how much the Justices are just sort of falling into predictable political slots -- which always is somewhat sad.

In terms of President Obama looking ahead, the potential new opening, maybe, at the end of this term, maybe Justice Stevens is going to retire. He's only hired one law clerk that we know of for the next term, which is what he would have if he retires, and takes the retired-Justice spot.

You're right that it's unlikely to impact the Court in the near term. But most of the people that are involved in these issues are looking down the road. Every position makes a difference. There are only nine of them.

And maybe the impact of a new Justice wouldn't be felt for another five years or 10 years, but within that window it would certainly make an enormous difference.

So every vote counts when there are only nine Justices.

MR. WITTES: Thank you all for coming.

(Applause)

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