THE BROOKINGS INSTITUTION

A BROOKINGS JUDICIAL ISSUES FORUM

RESHAPING THE SUPREME COURT

MODERATOR: STUART TAYLOR, JR.

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A G E N D A

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Moderator:

Panelists:

P R O C E E D I N G S

MR. NIVOLA: Good morning, everyone, and welcome to the first of this fall's Judicial Issues Forums.

I'm Pietro Nivola, and the Director of the Governance Studies Program here, which sponsors these forums. And this is the first of a series, so stay tuned; there will be other sessions throughout the year, and we hope you'll follow them. You can check our website periodically.

Today's seminar is loosely titled "Reshaping the Supreme Court." And I say loosely because it's meant to be a really wide-ranging and free-wheeling discussion about what's happening to the high court these days and what might lay in store for it.

Among the kinds of questions our panel may want to take up this morning are the following:

How come the confirmation process for Judge John Roberts, the nominee for Chief Justice, is so grueling compared to, say, Justice Ruth Bader Ginsberg's confirmation, which, if I recall as correctly, sailed through the Senate on a 96 to 3 vote. Today, by contrast, it's conceivable that all eight Democrats on the Judiciary Committee may actually turn thumbs down.

Another question: How come the Roberts confirmation proceedings are so retrospective instead of prospective; that is, concerned with how he might handle past precedents rather than how he might

decide interesting questions of the future, including complex issues involving the limits of genetic engineering, for example, or friction between new technologies and civil liberties, new concerns about free speech in business regulation and so on.

Third, what are the chances, if any, that the Court may really some day overrule its most controversial decision, Roe v. Wade?

And finally, a fourth possibility: How should one ultimately characterize the current Court? Is this majority really "conservative?" and I put that in quotes, or is it just conservative on sort of Mondays, Wednesdays, and Fridays, but basically pretty liberal on Tuesdays, Thursdays, and Saturdays.

Well, these are just a few provocative options.

We have a very distinguished panel of guests here this morning to talk about them or actually whatever else you deem worthwhile.

Our panelists this morning include, at the far end, my colleague Sarah Binder, who's a Professor of Political Science at George Washington University, as well as a Senior Fellow in my program, and who's writing a really fascinating book on the whole process of judicial selection.

Next to me--on this end, here, is Chuck Lane, Charles Lane, a national staff who covers the Supreme Court for the Washington Post.

Next to Sarah, at the other end, is Dr. Russell Wheeler, who's the former Deputy Director of the Federal Judicial Center, and who will be joining us at Brookings--actually, in my program--as a Guest Scholar, and President of the Governance Institute.

And finally, Neal Katyal, a Professor of Law at Georgetown University.

And, of course, finally, our moderator, Stuart Taylor, who really needs no introduction, except to stress that he also is affiliated with Brookings as a Non-Resident Senior Fellow.

Thank you, all, very much for taking the time out of your busy schedules to join us this morning. This is the busiest court watching week you can imagine, so we're delighted to have you here.

And, Stuart, the floor is yours.

MR. TAYLOR: Good. We're going to begin with brief opening statements by each panelist, and first, Chuck Lane, I'm going to ask for a dispassionate and comprehensive and thorough five-minute summation of what's going on down at the battle front with the Roberts confirmation hearing.

But I can't resist beginning with a little editorial commentary of my own, speaking as journalist covering the hearings.

We journalists are very, very disappointed in these hearings. The Chairman, Arlen Specter, has been impeccably fair, and seems to even understand Constitutional Law pretty well.

His relations with Pat Leahy, the Senior Democrat, are disgustingly amicable. I mean Senator Sessions says welcome to the pit, when he greeted John Roberts as an allusion. In fact, he was quoting Senator Allan Simpson as an allusion to some of the mud wrestling and brawling that typically goes on at these things.

And yet, the Democratic Senators seemed so disarmed by Roberts' charm and savvy that they were almost meek in their questioning of him, including Senators who one expects may vote against him.

Senator Kennedy was almost deferential in his questioning of Roberts, and outside the hearing room folks like Ralph Neas of the People for the American Way, a leader of the opposition to Bork, and Chuck Cooper, one of the conservatives who's been on the other side of these battles for 20 years or so, greet each other like old friends.

In short, we hated it.

But Chuck will give you a more dispassionate account of what went on and what it means, and then we'll move to the other panelists.

MR. LANE: Thank you very much, Stu, and I will give you a more dispassionate account, because I differ with you actually, Stu, in your assessment slightly.

MR. TAYLOR: I hate it when you do that.

MR. LANE: I wasn't disappointed in the hearing, neither as a journalist nor as a citizen. And I'll tell you why.

There was a lot of pressure on the Senate Judiciary Committee. Of course, there was a lot of pressure on John Roberts, but I think a lot of members of the Committee, especially the Chairman, felt that, you know, in past hearings, the Committee did not look so hot.

I can think of the Thomas hearings in particular, where Saturday Night Live did a memorable send up of the members of that Committee, and how buffoonish they seemed.

And so I think the Judiciary Committee was--members of both parties were really on their best behavior. And I think they behaved well. I thought their questions were pertinent, and, for the most part, as penetrating as they could be, given their limitations on time and format.

I agree with you, Stu, that I think Specter has done a superb job of chairing the hearing in a fair and knowledgeable way, and I think redeeming himself, perhaps consciously, for the memorable flat-out perjury moment in the Anita Hill trial--or hearing--where he took a lot of heat for that.

And so I think it's been a very good exercise. And I also disagree with those who say that John Roberts hasn't said anything of interest or substance.

I agree that he has not declared a position on any number of issues that he says might come before the Court. But I think if you take a cumulative look at everything that's been said, which I admit takes some doing, he has declared I think a very forceful and interesting view of

what he regards as the judicial process and his view of what constitutes judicial restraint, and his view of precedent.

We can get into more I suppose of the substance of that later, but let me just talk for a moment about the horse race aspect of this confirmation.

One reason I was little bit late today is I was caught in traffic, but the other reason is I bumped into one of my sources and was sort of pumping that source on the way in for information about the votes.

And I can tell you that in the last 24 hours I've talked to one Republican and one Democrat, both of whom are deeply involved in this business. And the Republicans are very nervous that Roberts won't get more than 64 votes on the floor. And the Democrat was extremely nervous that he won't get fewer than 80.

So while everyone agrees that he's going to be confirmed, there's a lot of play apparently about the margin. And my understanding is that there are several Democrats on the Committee who are seriously considering voting for Roberts. And, of course, they had the option of voting present in the Committee as well.

I think part of the reason for that is that Roberts made an important concession in this hearing--it's not an unprecedented one for Republican nominees, but it seemed to work especially well for him--

when he, in effect, said I recognize that there is a right to privacy in the Constitution.

And I think that took a lot of the potential energy out of the Democratic attack.

He never really walked away from this famous remark in that memo eons ago about a so-called right to privacy. In fact, I don't think he walked away or repudiated any position he took in those memos, but he I think succeeded in at least creating enough ambiguity about his views on how he would decide Roe or a case bringing Roe that he disarmed the Democrats and made it a little trickier for them to vote against him.

The other thing I think he accomplished was to come out there and be youngish, vigorous, very smart, and very articulate and durable under a long, long couple of days under the hot lights.

And I think by the end of the hearing, you had all the Senators, from across the board, practically, you know, genuflecting about to Roberts with respect to his abilities. And, you know, this is a televised hearing. Those Americans who are paying attention to it are viewing it on television.

And I thought John Roberts was a good TV performer.

I think where he was weakest was in any situation in which one of the Democrats tried to get him to declare a kind of a personal and emotional view of a problem in life as opposed to a legal matter.

For example, Diane Feinstein at one point asked him, you know, as a man, tell me how you would feel about such and such a family member having to make an end-of-life decision. What would you counsel them?

And to be sure, it's a, you know, sort of a multiple hypothetical that he was presented with there. It's not an entirely fair question.

But I was struck that Roberts couldn't muster a kind of--an emotive response to that. He couldn't--I think he is such a legal technician, he is so used to expressing himself in those terms, that it was hard for him on the spot to rise to that moment, which could have been a good television moment for him. And instead, it became kind of a blah moment for him.

And so I think the net effect of this hearing--somebody I think called it a victory for Roberts yesterday--and I think that's probably accurate. He thinks he clearly avoided any egregious misstep or outrageous statement. He stuck to his talking points like glue, and he did not get flustered when some of the Democrats did try to pin him down or get aggressive with him. And at the end of the day, he substantively distinguished himself as a conservative, but not a conservative in the mold of Thomas or Scalia, which, of course, was the menace that Democrats had, you know, raised about this appointment.

So I think when you put it all together, he accomplished what he set out to do. But I don't think the Democrats in any respect failed. I think they did their job, too, and so I actually take away this a fairly upbeat perspective on the confirmation process. There's a lot of discussion about how it's broken down; how it's failed; how it's dysfunctional, et cetera. And I'm certainly not suggesting that it won't return to that in another situation.

But when you really look at the big picture, this process, as of today, appears to be going fairly properly and fairly smoothly.

MR. TAYLOR: Thank you, Chuck. I'm going to mark that down as a concurring opinion.

Sarah, do you have something to add, and in particular a little historical context, if you will?

MS. BINDER: Sure. I had the great fortune to be visited this week by a group of legislators from the Kenyan Parliament, who, for those of you who are not following Kenyan constitutional history, are the verge of getting the right as a parliament to vote up or down on judicial appointees made by the president.

So they came to the United States wondering not necessarily trying to emulate what we are doing here, but at least to avoid the pitfalls and the problems of what we have achieved in our confirmation process.

And they went to the hearings on Wednesday and came to me with two observations, among others, that I think two of them are worth

raising here, because they bring us I think some perspective about how to think about what we witnessed on the Hill this week.

They had two observations. First, one the inordinate focus on policy issues and trying, at least from the Democratic perspective, trying to pull out of his Roberts his views on past decisions, future decisions, decisions and policy issues more generally.

And second, they commented on the pattern of partisan questioning of the nominee, noting even from an outsider's perspective they could clearly see that Republicans were lobbing softballs, not entirely, but by and large, and Democrats were asking a little bit of the tougher questions, trying to ferret out Roberts' views.

I think those two observations deserve a little more thinking about, because I think they're going to tell us a bit more about what's going on this week.

In terms of the almost exclusive focus on policy views or policy issues or legal issues in this questioning and whether or not that's appropriate or not--and there's been a lot of debate about that--I think to answer that question, we need to think about the judiciary in the broader political system, which is briefly to say we have a system of an independent judiciary, and lifetime appointments, a norm of hands off the courts. We don't attack or try to remove judges for what they do or say in office, at least related to legal issues or policy issues.

That raises the question for Senators, as a Democratic representative institution, how do you hold the courts accountable. And it seems to me the confirmation process we should think about it and think about the policy questions being asked in terms of prospective up front accountability.

This is the one chance for Senators to really exercise any type of accountability. It has to come during the selection process.

And I think if you think about the confirmation process in that light, one might be more readily amenable to having this type of policy focus and legal focus of the questions.

On the second observation they had about the partisan pattern of questioning, I really believe this gets discussed in the United States in terms of the polarization of the confirmation process or sometimes we refer to it as the politicization of the confirmation process.

I'm not so sure that it's such a bad thing. I think there's something potentially healthy about having a vigorous Senate role in the confirmation process.

To give you some perspective, in the 19th century, roughly a third of Supreme Court nominees were rejected by the Senate. Compare that to the 20th century, where we've roughly had basically 90 percent of nominees have been confirmed--so one in 10 roughly rejected.

I don't think it's simply because the quality of the nominee. I can't--I don't think we should say, well, the 19th century had worse

nominees; the 20th century had better ones, and so the Senate simply rubber stamped them.

I think there's something going on here about the degree of deference played by the Senate to the President and to the Executive over the selection of judges and justices for the federal bench.

What we saw in the 19th century I think it's fair to say we saw institutional partisanship. We saw Senators essentially standing up for what their role was as Senators, remembering they weren't pulled by national political parties that we have today.

I think if you look at most of the history of the 20th century, perhaps up to the 1960s or so in the Nixon appointments, we saw a good deal of Senate deference to the President over judicial appointments.

And what I'd like to think is that we're seeing the Senate, at least from the opposition party, depending on who's the President, trying to assert a little more institutional power here and exercising its constitutional rights in the advice and consent process.

Unfortunately--the unfortunate part I suppose today is that Senators aren't first and foremost responsive to their institutional obligations; right? They're pulled by both institutional obligations as well as partisan attachments to their parties. And I think that helps to explain why Republicans are lobbing largely, not entirely, but largely softballs to the nominee, while Democrats seeming were playing a more institutional role here.

Again, these are tough questions. I'm sure we'll come back to them. It's not clear to me that the partisan character of the questioning is bad. It's not clear to me that the policy focus is bad. I think it suggests an effort by Senators to exercise this up front prospective accountability on the courts.

And finally--I will come back to this I assume as we go along here--the issue of the vote counting. My sense without any good sources is it's not quite clear what these Democratic Senators are going to do. And I think the interesting part from the political science perspective is this is not an isolated vote. I think Senators are thinking not only about the Roberts nomination, but also the potential next nomination that clearly is going to be made to the O'Connor seat. And I think they are thinking twice about what position they want to take here, lest they be accused of obstructionism in a sense by voting against Roberts and thinking carefully that they need improve or sustain their ability to be critical of the next nominee and it may cause them to say okay, and we're going to go ahead and vote for Roberts, not ignoring their views about Roberts, but taking both vacancies into account.

And I'll stop there.

MR. TAYLOR: Thanks. Neal, one hears a lot of worrying about the Court's balance. What's that all about?

MR. KATYAL: Well, let me start by saying two months ago I was blessed. My wife and I were blessed to have our third son, and we

named him Harlan. And a lot of people have said which one, the younger or the older one? We don't actually have law names in our family normally. We named our first after an architect; the second after a sculptor.

But by the third boy, we had run out of names. And so we came up with Harlan.

And it can't be the older one, from my perspective, because the older is someone--he's justly famous for his dissent in Plessey v. Ferguson--separate can't be equal. But that dissent goes on to talk about the evils of the Chinamen invading our shores and so on. Not someone I particularly want to celebrate.

But you think about the younger Justice Harlan, the younger Justice Harlan, who left the Court in 1971 to be replaced by then Justice Rehnquist, and now we're seeing Chief Justice Rehnquist being replaced by all accounts by Chief Justice Roberts.

Well, what did the younger Harlan stand for? The younger Harlan stood for it seems to me two central things: one is respect for tradition--the country's traditions, the legal traditions, precedents; and also respect for legislatures.

And I think when you think about the Roberts nomination and the next nomination that's forthcoming, the key question is do you want justices that are evolutionary in the mold of Harlan or revolutionary in the mold of certain justices that are currently on the Supreme Court.

So I think if you look at the current matrix of the Court, you could think of it in kind of along two axes. One is their approach to judicial philosophy, and judicial--the process of judging; the other is kind of their political inclinations.

And on the first, you have a fairly stable matrix of people who believe the Court is a super legislature and can interfere in the political process. This isn't just Justices Scalia and Thomas who are the ones who are traditionally identified with us. I think Justice Stevens is fairly characterized as being in this group.

Chief Justice Rehnquist was a notch below that. He was someone who you might think of as kind of a precedentual federalist; certainly, willing to overturn legislative enactments, but at the same time someone who did have some respect for precedent in the process.

And then you have a group of four people on the Court who I think really do follow this tradition of Justice Harlan--moderate deferentialists, led by Justice Breyer, but including Justice Kennedy, Justice Souter, and Justice Ginsburg. And then you have the last person currently on the Court who defies all of these categories, which is Justice O'Connor, who I think is best thought of as a common law judge, someone who approaches each case at a time, and doesn't articulate broad principles.

When you take that matrix and compare it to the political matrix, what you've seen over the past several years with the Rehnquist

Court is a fairly stable group, but not always, of five justices on one side of an issue and four on another. Justice O'Connor has been, you know, often the swing vote on certain things, and she's kept the process from looking like a legislative one, where it's just politics and you always have four on one and four on the--five on one side and four on the other. And it does seem to me as we think about the next appointment, someone who can keep the Court from just degenerating into that same five to four pattern is essential, not just because that avoids this kind of partisan--making the Court look like a partisan [inaudible], but also because we're viewing this against the backdrop of an incredibly activist court.

We're talking about a court--it took two centuries for the Supreme Court to strike down 128 federal laws. The Rehnquist Court in five years struck down 21. You can look at the Violence against Women Act, which the Court struck down as--part--portions of it as unconstitutional, as exceeding Congress' power; the Guns out of Schools Act in 1995 that struck down as unconstitutional a violation of Congress' bounds. You know, any number of examples: the Religious Freedom Restoration Act; the Americans with Disabilities Act--you can use that to sue states--and invalidating piece of legislation after piece of legislation.

And it seems to me that's the central question. And the hearings I think have done a somewhat good job at posing the question, but not a great one. And one reason--and I'll just leave it with this--is it seems to me we actually have a coalition on both the Democrats and

Republicans who are sold on the idea of judicial activism. The Democrats are the party of Brown v. Board of Education and Roe v. Wade; and the Republicans are the party of these new federalism decisions. And so there isn't a very strong voice right now saying "wait a minute." What are we doing? Should we really be ceding this much authority to the courts?

MR. TAYLOR: Thank you. Dr. Wheeler?

MR. WHEELER: Yeah. I'd like to step away from the focus so much on doctrine and speculate briefly about looking towards 30 years of the Chief Justice if it's John Roberts of developments--institutional developments--that might occur affecting the Court, shaping the Court, and the larger federal judiciary in the short term and in the long term.

And these thoughts are fairly random. I'll try to give some coherence to them, though.

One thing that everybody notices, indeed, one of the forums dealt with this chasm that's developed between the Congress and the federal courts. A lot of people have been around for quite a while saying they've never seen things quite this bad.

And I think the Court itself--and obviously, some--one root of that is what you saw from Senator Specter and this indignation about the Court's disrespect for the congressional fact finding process, both as to the Commerce Clause and as to the abrogation of sovereign immunity.

But another part of this hostility seems to me is just a more basic populist distrust of an un-democratic institution, which the federal courts, of course, are in some sense.

And the Court can't do much about the first one, except to make different decisions. And who knows whether that's going to happen?

But in just trying to heal this breach, the Court has stepped in. I don't know--it can't do an awful lot, but it seems to me it may be on its agenda. There was last spring, for example, a no staff justices and legislative leadership lunch at the Court, which reflects it seems to me a realization that it's not just the Chief Justices job. It's perhaps the role for all the members of the Court to do what they can to the degree possible break down some of these misperceptions or barriers that seem to be fueling this hostility.

Likewise, the Chief Justice, the last Chief Justice, responded to an attack by the Chairman of the House Judiciary Committee, Congressman Sensenbrenner, who said that he thought the judicial branch's administration of the 1980 Judicial Conduct and Disability Act was so inadequate that Congress may have to consider taking that authority away from the Courts. So Rehnquist appointed a committee within the judicial branch--two district, two circuit judges, and his administrative assistant--chaired by Justice Breyer for the purpose of responding to this statement of concern by Sensenbrenner.

I don't know, but I think we might see more of that--the Court taking on to a degree part of this role of seeing what it can do to ease these tensions.

Now, in the longer term, let me suggest five things that might be worth watching, and I want to preface this by saying I'm not advocating--I'm not predicting any of this is going to happen, and I'm certainly not advocating that. I'm just offering them as sort of observations about developments that could occur.

One has to do with the point Sarah made in the life tenure that, not all, but most federal judges enjoy, and especially whether or not that's going to come under consideration. For a long time, you could expect every Congress and a member of Congress would introduce a resolution to have the judges elected. It never went anywhere. But we've seen in the last year or so rather thoughtful proposals by a variety of people that ask the question is the accountability that the federal courts get through the confirmation process enough. And you look at the specter of individuals appointed like John Roberts, who's going to be on the bench for 30 years, and you ask yourself well, should George W. Bush be having that much influence 30 years or whatever--it will be 28--after he leaves the White House.

We've always said that the accountability of the federal courts has to--occurs when Presidents make appointments to vacancies.

But those appointments last a long time, perhaps longer than people anticipated, given the longer lifespan.

So I think there's going to be continued interest--it's not going to happen overnight, and as I say, I'm certainly not advocating it. And whether or not there ought to be some cap on the length of service of especially federal appellate judges.

Also, we heard talk this week during the confirmation hearings, references anyway, to how the Court just runs itself, and the fact that it is now hearing about 80 cases a year; 25 years ago, it was hearing 150 cases a year.

And a lot of that stems from the fact that the Congress has given the Supreme Court a great deal of discretion about how it runs itself; how it picks the cases it's going to decide or doesn't pick the cases it's going to decide; when it convenes, how many cases it hears. Every once in a while, Congress will direct that a certain act be litigated in a certain way, like the Campaign Finance Act. You know, you're going to file the case in the three-judge district court here in town; and then you're going to have an immediate appeal to the Supreme Court. It doesn't do that very often.

I just wonder whether or not there might be more attempts by Congress to impose some sort of--some sort of regulation on how the Court does its business--just a possibility.

It's conceivable--I think third it's conceivable that Congress, depending on how things develop might take more of a look at the ethical regulations that affect Supreme Court Justices. They are, of course, bound by the disqualification statute and Justice Scalia, two terms ago, recused himself in one case, as we recall, but did not recuse himself in another case involving the Vice President and his Energy Task Force.

It's a difficult matter, because while you can have an appeal of decisions, recusal decisions, for example, by Court of Appeals judges and district judges, where do you take an appeal in the case of the Supreme Court? I don't know. I offer that as a third possibility that perhaps if we had this discussion 15 years from now the landscape will look a little bit different.

And it might look a little bit different also in deference to the television cameras here whether the Court is going open up. I don't know whether that's going to happen or not, and I'm not suggesting it should. But I see those are aspects of the Court's operation that may, over the course of the next 10, 15 years, take on more interest.

And the final thing I'd mention is this: There's various references to the fact that John Roberts, assuming and I think we all assume he will be confirmed, will assume not just the role of first among equals on the Court, but he will take over the leadership of the federal judiciary.

And we recall that he wrote a memorandum I think in the early '80s disparaging an idea, then in legislation, of the creation of a chancellor of the federal judiciary. This was a pet project of Warren Burger. And because Burger thought the Chief Justice--too many duties had accreted to the Chief Justice, administrative duties, so the Chief Justice needed help with them.

We're seeing now a different analysis of the situation, asking whether or not these duties that have accreted to the Chief Justice ought to be the province of one single individual, or whether there ought to be some sort of manipulation of the governance scheme to avoid that. And people, Professor Resnick's most obvious one, who point to the Chief Justice's authority to appoint all the committees of the Judicial Conference, especially the rules committees, because rules amendments can have consequences. You can that perhaps the Chief Justice has too much power in this regard. When you try to figure out a way to do it differently, it doesn't become quite so obvious. But again, as I say, if we're here in 15 or 20 years, we may be looking back on developments in this area as well. But as I say, I'm not predicting it; I'm not endorsing it. I'm just commenting on it.

MR. TAYLOR: Thank you. Back to confirmation politics for the moment. Chuck, Pietro at the beginning mentioned the fact that Justice Ruth Bader Ginsburg was confirmed in 1993 by 96 to 3. And I

think even the most optimistic Roberts projection you gave earlier was he might get 80 votes?

MR. LANE: Yeah.

MR. TAYLOR: And it might be 64.

MR. LANE: That was actually pessimistic because it came from a Democrat.

MR. TAYLOR: Right. Whatever it is, it ain't going to be 96 to 3; right?

MR. LANE: Yeah.

MR. TAYLOR: What, in your view, explains the difference?

MR. LANE: Well, I thought about that, Stu, because you quite nicely gave us that as a possible question for this panel, and I spent some time thinking about it. It is tough to account for, because I would say that if you look at then Judge Ginsburg as a prospective nominee for the Supreme Court, she had a lot going against her from a conservative point of view--basically, her whole career as general counsel of the ACLU, advocating a whole bunch of positions on pornography and free speech--you know, free speech for everybody that a lot of conservatives would have objected to.

At the same time, she was replacing Byron White, who had voted against Roe v. Wade. He was one of the dissenters in Roe v. Wade. So her declared support for Roe at her hearings, another thing she did

differently from John Roberts, raised the prospect of flipping the Court a little bit in favor of abortion rights.

So the conservatives and Republicans really had a lot to lose from her nomination. So it is remarkable how little opposition there was.

I think I would account for it in two ways. One, she was appointed, if I'm remembering correctly, at a time fairly early in the Clinton Administration--first Clinton Administration--so the new President had a relative strong political position, and I think he had a majority in both houses of the Congress at that time. So the Democrats could control the process in the Senate. That's one factor.

Another is that she was a woman joining the Court, and I think there was some sense that the Court should be diversified a little bit more in that respect.

I think also that she was a very able candidate in pure legal talent. It was hard to find something, some sort of glaring flaw that would give the Republicans a kind of a neutral basis to oppose her as opposed to an ideological basis.

And, you know, perhaps most importantly, I think the Senate has changed a lot as an institution since 1993. I think the Senate is now a lot more like the House, because of the way the parties themselves are polarizing. There are fewer moderates on either side of the aisle in the Senate; more people from the ideological poles of the respective parties

and the environment in the Senate now is more like the House, and, therefore, more conflictual than it was in '93.

I--one of the problems I can't quite explain is that, as I think your question suggests, if you have somebody like Ginsburg, who is every bit as liberal as John Roberts is conservative, why the seeming disparity in treatment as between the parties? But I think that's, in part, explained by the fact that today the Democrats feel a lot more strongly about the Court, and they have a lot more constituencies who are kind of attached to particular issues that involve the Court, particularly the women's groups and the civil rights groups; that they are really being driven by constituencies to fight as hard as they possibly can, even on somebody like Roberts, who is a highly qualified candidate.

And again, I don't know the history intimately from '93, but I don't think that there were similar organizations as well as organized and as highly motivated and well funded on the conservative side focusing on the Court back in '93. So those would be my best guesses at that.

MR. TAYLOR: Thank you very much. Sarah, as you know, Judge Roberts was very reluctant to answer questions about anything that might touch on an issue that might ever come before the Court while he's there.

Was he too reluctant? Is this--is it--I mean here we're picking someone to head the third branch of government, a branch that makes national policy these days on a huge range of important issues for

maybe 30 years or maybe 40 years. And not only does he never face the electorate--we're used to that--but as he goes through the Senate, he won't tell us what he thinks. And nobody is ever going to have another shot at him in terms of, you know, saying we better not put this guy on because now that we know what he thinks, we don't like it.

Is this any way to run a railroad?

MS. BINDER: I would think about that in this way. First, we actually do know at least one specific view of his is I think it's North by Northwest was his favorite movie, which I thought was a brilliant move.

MR. TAYLOR: Don't forget Dr. Zhivago.

MS. BINDER: And Dr. Zhivago, which I thought--

MR. TAYLOR: It had some racy scenes in there. I think some of the Republicans were a little unhappy there.

MS. BINDER: I think of it this way. But if you listen to the Senators talking about this issue this past week, they kept referring to the Ginsburg principle, the Ginsburg precedent; that is, that nominees have--we respect their authority really and their discretion not to say all that much on the grounds that they don't want to be prejudging themselves or committing themselves before specific issues come before the Court.

And it was convenient for Republicans to say, look, this is actually a principle set by a Democratic President nominee, and, thus, we should respect it here.

As I best understand it, that precedent of limiting what you're going to say reaches back to Frankfurter in the 1930s in his hearing. It was unusual to have hearings in those days, and Frankfurter really set out that there are limits on what he can say.

I'm not a great fan of that precedent, and what I guess--and I may be on the outlier here--but it seems to me we don't really challenge that view. And I'm not sure why Senators give the nominees a pass on that. There was a little bit of back and forth--I think it was from Senator Feingold--listening to my car on the way home one day, and I think he was pushing the nominee saying, look, we all know roughly the views of the Justices, who already sit on the bench when cases are going to come before them. Why can't we have a little better sense of what you think on these issues?

And again, there was a little more legal mumbo jumbo, from my view, about the protecting and not for judging and so forth.

I'd like to see a little more debate about that principle. And it may be that it's a very sound one, but I don't think we've really tested it in any way, and at least, given the intellectual debate about the pros and cons and the benefits and the harmful, or but the adverse consequences of not hearing more from the nominees.

Again, and I guess people's views differ on how much Roberts did say. I guess I would be in the camp of being a little surprised of him coming initially with his essentially respect for the right

to privacy. So there was more said potentially than you might have expected.

I'm just going to throw in two more things on the question about the Ginsburg comparison and the vote and why she had such an overwhelming vote in '93.

Just to add on to what Chuck has said. Two more small forces perhaps--again, these are just sort of--to give a small end. There's no big comparison here.

But my understanding from what Senator Hatch wrote in his autobiography is that Hatch himself had a conversation with Clinton, 'cause Clinton was reaching out in this advice portion of advise and consent, and Hatch--Clinton said, well, I'm thinking of Bruce--nominating Bruce Babbitt. And Hatch said, uh, how about Ginsburg? How about Breyer?

Now, I don't know if that's Hatch's view of the world versus Clinton's view of the world, but it seems to me that there was some recognition of some consultation with the Senate and not an endorsement by Hatch, but a recommendation on that hand. And I think that may reflect currents within the Republican conference at that time.

The second is if you look at Ginsburg's behavior and her votes and opinions she's crafted and participated in on the Court, my sense is we would--Supreme Court scholars would say she is not a very, very to the left. She really is somewhat in the moderate middle of the

spectrum. And my sense or my hunch is from reading backwards in time is that came out in her testimony before the Senate, as well as all those opinions she had crafted while on the D.C. Appellate Circuit.

So I think we may have a different case here, comparing Ginsburg and the Roberts nomination.

MR. TAYLOR: Thank you. Neal, I'd love to hear your brief thoughts on whether you know commented too much, but what a lot of people really want to know--the three women in my family, for example, who think of the Supreme Court as an institution with a nice big building that the essential business of which is to decide what the law on abortion will be and doesn't really do anything else very important.

So are they going to overrule Roe v. Wade? When are they going to do it? Down to the month. And would it make any--what difference would it make? How would America change if they did that?

MR. KATYAL: No, I don't think there's a chance that the Court is going to overrule Roe v. Wade, and here's why: I think the story begins--Chuck alluded to the hearings for Justice Ginsburg, but really the story begins in 1989 with the hearings over Justice Souter, in which the Republicans and Democrats on the Judiciary Committee both said that Roe v. Wade is good law. And they signaled that not just to the nominee, but also to the other eight justices and that led to the Casey opinion by the Supreme Court in 1992, which said that the right to abortion after Roe v. Wade is settled. It's fundamental to our expectations.

I happen to think that Roe on its own terms is an indefensible opinion. But it is accreted into the traditions of our country in a way that I find very difficult to overrule without a significant change to the composition of the Court. And I do think that's why Supreme Court hearings should actually be structured to ask the question that your three--the three women in your family are asking. What's going to happen to Roe? And not just ask it of the nominee, which is Professor Binder's comment, but also to really inquire about the Senate itself, 'cause the Senate is our one chance to instruct the Court as to the views of the country on this issue--Supreme Court nomination hearing, in which all the eyes of the country are watching. And unless you have a real change in the Senate, I don't really think you're going to have a change in the way the Supreme Court handles this issue.

Now, as you get into the substantive issues about abortion--partial birth abortion--you really do have a different view in the Senate Judiciary Committee, perhaps a majority, probably a majority that say that that isn't something that should be protected and that the Supreme Court's decision a few years ago in the Stenberg case is probably wrong. And I do think that's where you will see the change as the Court, as these two nominations impact on the future dynamics.

MR. TAYLOR: Thanks very much. Dr. Wheeler, I think we heard Chief Justice Rehnquist called a great Chief Justice by some,

certainly at his funeral, and I suppose and I'm wondering whether you think history will draw that conclusion.

MR. WHEELER: Well, you know, it's an obvious question, and the obvious answer to it--and I don't mean to skirt the question--is it's just too early to tell.

I mean in terms of longevity, if that counts, he served longer than all Chief Justices but two--Marshall, who by any account was a great Chief Justice and Tawny, who by most accounts wasn't.

So you have to ask the question what are the criteria by which you judge a great Chief Justice, and it seems to me it has to be in the final analysis was this individual able, by virtue of his office and the authority and other powers that flow to him, able to make a lasting imprint on our constitutional law?

And so you ask the question 30 years from now we'll be looking back on Lopez as a blip in Commerce Clause jurisprudence or as a major change. Or we look back on the Seminole Tribe as a major federalism decision. I think it's just too early to tell that.

I think you can say he had a major impact in the area of church and state, but we have to remember obviously that he had help there. It wasn't just Rehnquist the Lone Ranger; it was the Chief Justice plus Justice Scalia, Justice O'Connor; in some of those areas Justice Thomas.

I would say in one other area he will be credited I think with having used his office effectively and that is--and many people have commented about this--that is his defense of the concept of an independent judiciary. I think that William Rehnquist had a fairly good tactical sense of how to engage Congress, and he picked his moments. But through a variety of methods he took, including his year-end report, he at least--well, I don't want to say at least--he certainly let it be known that an independent judiciary is not necessarily a party thing, because he's dealing with a Republican appointed President--Chief Justice dealing with a Republican-dominated Congress--who has really been quite vigorous in its attacks on the courts. And I think he will long be remembered for his willingness to stand up to that at least wave the flag of judicial independence and articulate the reasons for it fairly well.

MR. TAYLOR: Chuck, as you know, Chairman Specter, who is widely expected to vote for John Roberts, seemed very exercised in his questioning, not so much about what Roberts has done, but about what he called Congress being the court asking as task master to Congress attacking its method of reasoning. I think he's called it insulting, disrespectful. He seemed on a tear about this. And he says his colleagues are upset about it, too, although he sounded more upset than the others did.

And then, somehow, this connects in the minds of some and I think maybe Specter, too, to Judge Roberts' little opinion about a hapless

toad. What is this all about and why are they worried about the hapless toad so much?

MR. LANE: The hapless toad? Well, just to footnote to what you said: Specter wasn't the only one. Chuck Grassley, Senator Grassley, complained at some length to Judge Roberts about the fact that Judge Roberts, in Chuck Grassley's view, had misinterpreted a statute on the D.C. Circuit that Grassley had drafted and, in Grassley's view, had really weakened its provisions. It's a kind of anti-corruption law that Roberts interpreted to put certain higher burdens on people bringing the claims.

So Specter was not, by any means, the only person or even the only Republican on the Committee who was concerned about that.

Now, to the hapless toad. A sort of hot issue in the lower courts and I think it's on its way to the Supreme Court is the question about the Endangered Species Act and whether the federal government has the authority to protect species who seem to be not involved in anything inter-state. There is a toad in California that apparently it's a real small toad, and it's pretty rare, and it only lives in sort of one cave in one place in California. It never leaves there. It breeds there--all the rest. It doesn't migrate. And apparently, it's not trafficked in any way across state lines. And the D.C. Circuit, during Judge Roberts' two years there, upheld, as I understand it, federal regulation of development--oh, sorry--upheld federal regulation of the development that would have

affected the habitat of this toad. And there was a challenge in the case to Congress' authority under the Interstate Commerce--under the Commerce Clause to regulate a local developer and a, you know, who might affect a local toad.

Now, this is a big question because Supreme Court doctrine has offered various answers to the question of how much of an impact or reverberation into interstate commerce you have to have before Congress can legislate on it. And it was said by Judge Roberts in a--well, let me back up a step.

The losers in that case asked for a rehearing. And it was denied by the full Court of Appeals, but Judge Roberts dissented from that order, writing a brief opinion saying, you know, another federal circuit has interpreted this law differently. Perhaps we should take another look at it to see if we can uphold or not the Endangered Species Act in light of that argument.

Well, a lot of people have interpreted that as a sign that Roberts' real agenda is to say no, in a case like that, the Commerce Clause doesn't grant Congress the authority to make that kind of environmental regulation and they say that's a real concerning sign about where he would go on the Court. It does show that there is a lot of action at this frontier where the Court's power of judicial review meets Congress' power to regulate interstate commerce; and that the live areas

are precisely in these areas of environmental regulation, which people care a lot about.

You know, the argument would be I suppose that if you take seriously the idea, as I think this was one of the federalist five under Justice Rehnquist, one of their big themes, you have to be able to show that there's something--there has to be some content to the Commerce Clause. Interstate Commerce can't be defined so broadly that it, in effect, trumps all local authority and puts the federal government in the business of regulating, you know, every zoning board in the country. There has to be some content to it.

But the other side of that argument, of course, is well, if you put too much content into it, it's going to disable the federal government from acting where national interests are really at stake.

And as a footnote to that, I would say that we're now engaged in a reconstruction effort down in Louisiana where already the debate is very--has been joined about who ought to have responsibility for it. Who ought to pay for it? Who ought to make the decisions about what kind of a city to rebuild in New Orleans? I can assure you there's going to be a million environmental issues associated with that. And that's going to be a couple hundred billion dollars worth of taxpayers' money over years and years. And so what the Court says on this issue is going to be very consequential indeed.

MR. TAYLOR: Thank you. I might add that in the hundreds, I think maybe thousands of pages of commentary and analysis about Judge Roberts put out by various groups, especially liberal groups that are worried about him, I think I saw and also in an editorial cartoon, well, why did he call it a hapless toad? And why not a "precious" toad or an "irreplaceable" toad? An "endangered" toad? A "nice" toad? You know, what agenda does this word "hapless" mean?

Unfortunately, none of the Senators asked that as far I know.

MR. LANE: But John Roberts is a little bit of a wise guy, you know, and we saw that in his memos, way back when, and I think he sublimated it pretty well, but it crept out a little bit in that opinion.

MR. TAYLOR: Yeah. Sarah, could we return a little bit to this--to your sense that the Senators haven't challenged nominees, including John Roberts enough on the refusal to comment.

Now, quite a few of them, including Chairman Specter and almost all the Democrats, did complain a lot about it. And I don't think--and some may vote against him giving that reason.

Now, as I recall, the essence of his answer, when they said why can't you tell us what you think of this or that past decision. We're not asking you to promise what you'll do on some future case. We just want to get--we want to know what you think. And Roberts' answer essentially was--part of it was I wouldn't want litigants in future cases to sort of think well, he's already made up his mind. He said he thinks Roe

v. Wade was right or wrong; therefore, I'm going to win or lose. But I think the more interesting part was if I start down that road of saying here's what I think about this, this, this, and the other thing at least tentatively, Senator, it's going to be a bargaining process.

Senators are going to try and extract concessions. Well, wouldn't you say that this value that I respect should be protected or that that case that I hate should be overruled? Wouldn't you say this? Wouldn't you say that? And it would come from the left and it would come from the right. And, in his view, there would be a lot of pressure on nominees to say well, sure, Senator, I guess I'd say that; and that it would degrade the integrity and independence of the Court. What do you make of all that?

MS. BINDER: I have no doubt that were nominees to say okay, I'm going to be a little more forthcoming on these issues that lines would have to be drawn, and this is really what the debates are about. Where do you draw the line?

And again, maybe where we've all been thinking about the onus on the nominee to be more forthcoming, I guess the corollary is we'd need some behavior from Senators that would respect the line that the nominee wants to draw. And that we might be skeptical on Senators' ability to restrain themselves from this bargaining situation.

I think, though, that there is probably still room for a little more discussion on what legal scholars call settled areas of law. The

extreme I suppose is what Thomas or Scalia who said that he couldn't comment on Marbury v. Madison from the early 1800s.

Clearly, Roberts was not that reticent to talk; right? He was a little bit more forthcoming than that. But again the confirmation process is something that evolves over time, both institutionally and in a political sense, and we don't quite know how it would be structured. But I think it's worth Senators and nominees thinking a little bit more about whether or not there's more to be said.

MR. TAYLOR: Thank you. Neal, if as and when the second President Clinton or on the second Bush--someday, we may be on the second President Clinton nominates you to sit on the Supreme Court--I don't want to hex you--but if that were to happen, would you draw the line in your questioning about in terms of I won't comment or I will comment about where Roberts did or somewhere else? Do you think his line is different than--and, if so, why? And if the way I asked the question is too uncomfortable, why don't you just say, oh, well, forget the question, but here's what I think about how he did.

MR. KATYAL: It's not uncomfortable in that it's never going to happen. So but I'm happy to--

MR. TAYLOR: You heard it here first, folks.

MR. KATYAL: --to discuss it that way or any other. I mean it seems to me it's a very odd thing that we have right now. We're ceding so much authority to the Supreme Court, and yet we can't ask them about

how they would rule on--their views on current issues of the day. It seems very strange when the standard answer is always, well, judges have already written their opinions. When I go and argue a case in the Court, I'm arguing to judges who've already published certain opinions. So I already have a sense of what they're going to say and how they're likely to think. Why should a nominee be different?

Well, Judge Roberts--the answer given by the nominee here as well as past nominees is, well, those judges heard cases on the basis of an oral argument, on the basis of a record, trial record and the like. I don't have that here.

And that just strikes me as a thoroughly bizarre answer, because if that' so that's precisely why you should be able to answer the question and say, Senator, my view right now on Roe v. Wade is X or Y or Z. Of course, I haven't read the trial transcript of some future case that would pose the question of whether Roe is good law or not. But if one arises, I'll review it and decide that issue as appropriate, and my views might change, and the views of all good judges I think change over time.

But to not give your kind of current inclination on a matter like Roe, which frankly I don't think needs you to look at some trial record or to hear oral argument to understand your views on, I find bizarre. And I understand there's a past tradition in this country in which you don't ask nominees questions. We didn't even have confirmation

hearings, as Professor Binder said, public ones for many years. But that was also at a time when the Supreme Court wasn't wanting so much of the democratic process. And now they are.

And if they are going to act like legislators, I do think it's appropriate that they have questions that are put to them in that capacity, and I understand it may degrade the process a bit, as Stu Taylor suggested, but at the same time, it will create at least some accountability--

[End of Tape 1, side A; flip to Side B.]

MR. KATYAL: [In progress.]--sense of control over what nominee we're likely to get instead of creating guessing game in which people are reading tea leaves on various sides.

MR. TAYLOR: Chuck, did you have something?

MR. LANE: Yeah. I would just like to add something to that. You know, I think whether one approves of the line that Judge Roberts drew or not, I think as a political reality it's the only line that nominees can plausibly live with. The minute they bend or engage--and I'm talking in political terms, not in terms of what would happen to their independence on the bench--it's a very slippery slope, and they will quickly be drawn into all kinds of arguments in public with the Committee that can easily slip out of their control and cause them trouble.

And with particular reference to Roe, it's very noteworthy that Justice Ginsburg, when she was being confirmed, she did speak out on Roe.

Now, why the difference? Judge Roberts pointed out well, she had written about that. But it's important what she had written as a liberal and a woman--I repeat liberal or a Democrat and a woman--she had written critically of Roe and had said that it was decided on the wrong basis. It should have been decided on a more sustainable basis, and she had written quite sharp things about it. She had, for the sake of the Democratic support she needed, reassured people on that of the aisle that she would vote to uphold Roe on the basis that Roe had been decided, and she went ahead and did that at the hearing.

Why could she politically. I believe--you know, there's a lot of kind of mystification actually about the underlying dynamics here, but the bottom line fact is Roe is popular. Opinion polls show that most Americans don't want it fully overturned, whatever fully means.

So when Ruth Bader Ginsburg stands before the Senate and declares her support for Roe, she has the wind at her back. And she's declaring support for an existing precedent. It's much easier to do it.

If John Roberts or any other nominee were to come up and say, well, it's got to be revealed. Well, we saw what happened to Bork. It was just too dangerous.

And so I think what we're really seeing is one of the--again, without expressing a view on Roe--one of the unfortunate consequences of Roe, because by injecting such an emotional issue into the judicial realm, it does, all by itself, disable the Senate and nominees from discussing a whole bunch of other issues that they might want to talk about in terms of pre-existing precedents.

You know, if but for the need to avoid discussing Roe, I'll bet Roberts would have discussed Wickert against Filburn on the Commerce Clause. But since he's got to hold that line on Roe, he can't talk about a whole bunch of other things.

MR. TAYLOR: I'd add one thought I was puzzling with on this thing. Let's suppose that the nominee was open, and let's hypothesize the following set of questions.

Question 1. Do you think Roe v. Wade was correctly decided in 1973, not whether you would overrule it, but was it correct? And suppose the answer is no. Most constitutional scholars at the time, including liberals like Archibald Cox and John R. Healy, thought it was indefensible and I agree with them. There go forty some Democratic votes.

Second question. Do you think the Second Amendment creates an individual right to bear arms as opposed to the militia stuff? No. There go five or 10 or 20 Republican votes.

Do you--question three--do you think that news reporters should have a privilege to protect their confidential sources against subpoenas? No. There go all the editorial pages. So--and all of those are highly respectable positions, and they're kind of moderate in the sense that they lean left or right. But the interest group coalitions don't operate that way.

I'm going to ask one last question of Dr. Wheeler, and then invite questions from the audience and so please be thinking of some.

You mentioned the term limits proposals, and I think you said you didn't want to take a position on them. So let me--I've actually written, which I'll briefly summarize on that, and then ask you to maybe give you the--give me the argument for the other side--your understanding is not--I was advocating a scholarly proposal. Some 35 law professors, a rather eclectic, liberal and conservative and moderate group, have endorsed--basic and one of said I think life tenure for Supreme Court Justices is the dumbest thing in the entire Constitution. Now, it was put in there, of course, to ensure judicial independence, but its other aspects include sometimes we have justices who are--well, in the case of Justice Douglas virtually incapacitated for months before they go. Justice Marshall I think was far past his prime. Many others have been past their prime. Even if they retain their mental sharpness, you know, how likely is an 85-year-old man to be open-minded about issues he's already seen 50 times. And also is it healthy to have people deciding

what the law on abortion is, for example, in this country who are serving terms longer than the average medieval monarch. That wasn't as much a factor in the early years of the Republic. Some served very long. But the average term was much less than the 25-year average or so that it's become lately.

And also, if you had 18-year term limits protecting judicial independence, non-renewable so people don't worry about which is what the scholarly proposal is, you would then have a more even distribution of appointments. Over time, each President under this proposal would get two appointments in his term, and one appointment each congressional session. One new justice every 10 years--two years, excuse me.

So we won't have the situation where Jimmy Carter got zero in his four years, and Richard Nixon got four in his first four years.

What's wrong with that, understanding that you're not necessarily speaking your own view, but what would somebody who says, no, no, we should keep life tenure have to say about that?

MR. WHEELER: Well, I suppose that they'd say two things. One is that, you know, what you refer to as these old men, old people whatever it will, that's another person's accumulated wisdom. And you look at a person like John Paul Stevens, who is 85. He's been on the Court since Ford put him there in, I guess, 1975. And, you know, a lot of

people think it would be too bad if he had been forced off the Court, because of some mechanical operation of the proposal you recommend.

The other thing I guess that you have to at least be worried about is when you take a proposal like that and stick it into the legislative process, it's not going to come out the same way it went in. And so rather than tamper with something that's worked fairly well for something that nobody can expect, maybe the best thing is just to leave well enough alone.

Now, these additional problems you mentioned could--you know, the problem of the aging justice, the Douglas or Marshall situation, there may be a way to deal with that. That could tie back in a loose way to that ethics thing I was talking about before. There's just--you can certify as disabled a federal judge or a federal judge can certify themselves as disabled. I don't--am not sure that statute even applies to the Supreme Court. There might be some way to deal with that problem. But I think the main thing is just to, you know, be careful what you wish for, because you may get something a little different and a lot worse than what you want.

MR. TAYLOR: Well, I think I'm working on the Coalition. I'm going to--if you could poll the Democratic Senators today on whether John Roberts ought to be term limited, and then poll the Republican Senators tomorrow on whether John Paul Stevens ought to be term limited, I think you'd get a pretty good vote.

But if you ask them across the board, it may never go anywhere.

MR. WHEELER: But the interesting thing is for so long neither faction--I mean for 200 years--neither faction has really been willing to take this on. Part of it is the reason that was given earlier: this Court has not been as prominent earlier as it is today. But I think a lot of it is we don't want to mess around with their guys, because they're going to mess around with our guys. So let's just lay off.

MR. TAYLOR: Any other thoughts on term limits before we go to the--

MR. LANE: I just want to say the problem we face is there is no--once somebody is on the Court, there's no way to remove them except impeachment. And impeachment is not the appropriate remedy for all sorts of situations you can easily imagine that are short of misconduct but that should get somebody off the bench. And I'm thinking particularly about, you know, if there had been an unfortunate situation where somebody, you know, with life tenure slipped into a coma without having left their wishes about end of life decisions or something like that, you know, suddenly you have a terrible political rumpus over, you know, the unconscious body of a Supreme Court Justice that would be a terrible situation, but all too foreseeable in the real world.

And we have these provisions now in the Constitution after the Kennedy assassination procedures for what should be done if the

Cabinet decides that the President is physically unable to perform his duties temporarily and that sort of thing.

And if we're not going to go all the way to eliminating life tenure, it might be worth looking at some mechanism for dealing with the situation of a justice who simply can't physically or mentally perform.

MR. TAYLOR: Questions? Sir?

MR. : [Off mike.] [Inaudible.] Yesterday, I was hearing significant discussion about the current collegiality of the justices on the Supreme Court, and I'm wondering does anyone think that is possibly going to change even just with John Roberts coming on, if he does. And, of course, I mean there will be an unknown factor thrown in.

But it seems to me that, you know, particularly when you compare with other branches of government there really is, you know, not only in public forum but the reports of what goes on privately and socially with the justices. They really seem to get along quite well, and, you know, it seems to be, you know, a good example for the rest of the country.

But I'm wondering the fact that John Roberts is so young and even his experience as a judge is so limited and even, you know, talking about his intellectual ability or--when someone like Scalia or Thomas was seriously being considered for Chief Justice, I mean could there be any hidden resentment that, you know, might be there; that the fact that, you know, he will be in such a pivotal and important, prominent and

influencing position. I mean I don't know. Does anyone--has anyone thought about that?

MR. TAYLOR: Dr. Wheeler, you know these people; don't you?

MR. WHEELER: Well, not all of them and none of them on the basis [inaudible] employed by the question.

The Court has been, by all accounts, quite an amiable place for the last 18 years or so, and a lot of people attribute it to, among other things, the eminent fairness of the Chief Justice just in assigning opinions and in running the Court I mean as opposed to, as the stories have it, his predecessor.

If I were going to get in a worried state about the Supreme Court, it wouldn't be about John Roberts' ability to maintain that sense of collegiality. He strikes me as a very fair person--you know, I don't know him. He strikes me as very fair and smart enough to be able to deal with those things.

But obviously, this is going to be a jolt to the system, because these nine people--those nine people--were together since 1994 I guess it was, with no change--I think the longest period in the Court's history. So there's going to be some adjustment, but I don't think that's the main thing to worry about.

MR. KATYAL: I would say that if you look at what Justice Ginsburg said about the Chief Justice after he passed away, about being

the best boss ever, I mean that sentiment seems widely reflective at the Supreme Court. And I think the Bush Administration correctly calculated that there were just a handful of people who could carry on that type of respect for the other colleagues and bring great intellectual ability as well, and John Roberts is that type of person who can do it.

MR. TAYLOR: Sir, go ahead.

MR. : Judge Roberts seemed to have revealed only two things about himself: that he favors right to privacy and that he's not an ideologue. Now, if he turns out to be a level headed conservative rather than an ideological conservative, what does that do to President Bush's legacy?

MR. TAYLOR: Anybody? Sarah?

MS. BINDER: Well, you raise an issue that I think is sort of the irony of judicial appointments perhaps is the word, which is this is the one point of control, and it isn't a lot of control. I mean witness the Souter nomination, the Earl Warren nomination is you don't actually know what's going to happen when nominees are confirmed and have been on the bench. All right, we all talk about O'Connor being the swing vote, and, with her disappearance, well, there won't be that type of swing vote anymore. Well, we don't know that. Once you have a new cohort of nine, it may be that Kennedy moves himself to the center a bit and becomes that type of swing vote. We don't even know where Roberts is going to situate himself. I don't think he wants to be seen as a clone of

Scalia and Thomas. I think he sees himself as fairly independent minded and might, in fact, think his influence on the Court is elevated by staking out a different position than the conservative group of three or four. So I think it's hard to tell.

MR. TAYLOR: Sarah, I'm sorry. Yes.

MR. : Thanks. Moving out of the Ivory Tower, and let's assume that the same ideological situation of the Senate is there, and there are 55 Democrats and 45 Republicans. I have two questions. Would Roberts be confirmed in your opinion? And then the second thing is other than the throwaway line or maybe heartfelt line about privacy, couldn't somebody in Hollywood have written every single word of every single thing that was said and there hasn't been a deviation of one word? In other words, isn't this just a purely political issue and other than the interesting discussions about collegiality and how to get together and should we ask questions? Isn't this my 51 percent says?

MR. LANE: Well, to the extent that you're correct and that what we're witnessing here is a kind of elaborate mystification of what is essentially a brute majoritarian exercise, it's worth asking whether that's entirely improper. Yeah. Because after all, George Bush won the election. It was 51 percent of the vote, and the Senate is controlled by the Republican Party, so you got to assume they're going to get their way on the Court.

I think that if there were 55 Democrats, Roberts probably would not have been nominated or might not have been nominated. You might have had somebody else.

But I actually disagree with you slightly and maybe with the previous questioner, too, that Roberts hasn't really said anything of substance. I think what emerged to me was, admittedly, nothing of substance on too many particular issues, but I think he is speaking his real view when he talks about the judicial process, and the notion that the judicial process is a kind of *sui generis* thing in our government, a mode of decision making with different norms and different rhythms to it that produces different kinds of decisions. And he's very--he's a real believer in that. He really believes that, when a judge goes in and reviews all these things in the company of his colleagues, that is doing something different from what a legislator does or from what a journalist or anybody else in the political arena is doing. And in his view, that in itself, the judicial process, self contained, can produce--he was very emphatic about that--can produce objective results that aren't political.

Big question mark. Is he right about that? But that I think is clearly something he believes, and that is in my view a significant, subtly, but significantly different view of judicial restraint than you would get from a Scalia or a Thomas.

MR. TAYLOR: Down in front.

MR. MITCHELL: Gary Mitchell, from the Mitchell Report. I want to come back to one of the questions that Pietro posed at the outset and that is--and I'm struck by the sort of metaphor I think of what we've been dealing with in the last couple of weeks. The homeland security mentality has essentially been a 9/11 mentality and then along came Katrina. The Roberts hearings were essentially a Roe mentality, a discussion that sort of danced around Roe, when, in fact, as Pietro suggests, some of the most interesting questions are the prospective ones, issues that the Court is going to have to be dealing with in the future that are presumably around technology and, you know, cloning and whatever else, and I would also add the New London case it seems to me holds a lot of interesting potential.

So I wonder if the panel would be willing to opine a little bit on what are the issues that prospectively that a Roberts court might be dealing with?

MR. TAYLOR: Anyone want to take that on?

MR. LANE: Everybody keeps looking at me.

MR. WHEELER: There was an interesting article in the Times Magazine a couple of weeks ago by Jeffrey Rosen--yeah--and, you know, making that very point, and I can't--no, I can't recite to you. I have it in my briefcase. I can't recite to you the issues he mentioned, but, as you said, it's hard not to anticipate that technological change is going to bring constitutional challenges no one really thought about, like

the case five or so years ago about heat sensing images as a--using it as a violation of the Fourth Amendment.

So beyond that, I don't really think you can say. I don't think the Kelo case is going to be--it's going to provoke some legislative reaction, but I don't see that as a long-term decisional tendency, partly because I didn't think it was so much out of the--went beyond the precedents the Court had already established.

MR. LANE: There is an inherently retrospective bias to this hearing, because what they have the most abundant record about are things that occurred in the past. Not only did they not talk about future issues, they rehashed a bunch of old arguments that are long gone, like the 1982 Voting Rights Act. So I think, in part, the hearing goes on the way it does because that, you know, inherently is what they have to work with.

With respect to the future, the only thing I would say generally about the impact Roberts would have on these cutting edge issues is that very often they are going to involve the question not just what the decision or the outcome ought to be, but who ought to make the decision within the political system. So the question becomes ought cloning to be banned or not. You will have presumably a legislative effort to do that or not to do that, which would be challenged perhaps or not.

And it will be very important to me at least to note that Roberts is big on deference, so he says, deference to the legislature. And so to the extent he can influence the question of who decides, I think that's where he would tend to go.

MR. TAYLOR: I might mention we're about out of time, but a couple of those--some of the issues Jeff Rosen raises in this good article, "Brain Fingerprinting," as he calls it, might they develop a reasonably reliable technical means of putting your brain in a scanner and your propensity for violence emerges--you know, a little bit like a polygraph on truthfulness but, say, more reliable and more--and the limits that should be put on that; designer babies. Does the right to privacy mean that you can sort of get your perfect baby by taking a few genes here, there, and the other place, and having them implanted? Do we end up with kind of a race of super people who happen to be the children of the rich? What should be done about that? Cloning. Affirmative action. DNA. You know, is it going to come down to the point where somebody can show one-sixteenth Mexican heritage; that you've got to pass a test to when you send your application into Harvard. And one of my favorites what is a person? The 14th Amendment applies to persons, among other things. How about a dolphin that has been implanted with enough human genes so that they're already prodigious intellectual abilities start to become like maybe a little better than ours? Does the dolphin get to vote?

There's--I asked Neal about this earlier, and he said he doesn't like to predict the future, but I imagine presidential power is going to be pretty big; don't you think, Neal?

MR. KATYAL: Certainly. I mean we talk about it with Katrina and obviously post 9/11 as well. It's an issue of increasing importance to the Court and one in which Congress is doing less and less post 9/11, which is, in my judgment, inexcusable.

Folks like Lindsay Graham and John McCain are in the lead trying to change that. But so far, we haven't seen a change. And if we don't, we're not going to--we're going to--all this is going to be forced upon the Court to decide.

MR. LANE: Stu, one quick comment. Jeffrey Rosen has discovered the solution to the confirmation problem: You put the brain scanner on the nominee, and it will figure out exactly, undeniably what they would do on all these cases.

MR. TAYLOR: And so maybe we'll have a dolphin--

MR. LANE: A dolphin sitting--

MR. TAYLOR: --for Chief Justice.

MR. LANE: --on the Court. Yeah.

MR. TAYLOR: With that thought, perhaps we should stop. Thank you all very much for coming. Thank you to the panelists for very engaging remarks and a brief editorial comment in case Justice Roberts, Judge Roberts, is watching. I have a little touch football game, and we

all think it would be real cool if the Chief Justice would play with us one of these times, and we were reassured when he said shortly after his nomination he characterized himself as having been a slow football player. That's just right for us. Please come join us.

[Applause.]

[END OF TAPED RECORDING.]

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