THE BROOKINGS INSTITUTION

ARE JUDGES POLITICAL?

Washington, D.C.

Tuesday, June 20, 2006

Anderson Court Reporting
706 Duke Street, Suite 100
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190

MODERATOR

Stuart Taylor, Jr.

Nonresident Senior Fellow, The Brookings Institution;

Columnist, *National Journal*; Contributor, *Newsweek*

PANELISTS

DAVID SCHKADE

Co-author of *Are Judges Political?*;

Jerome Katzin Professor,

University of California, San Diego

CASS SUNSTEIN

Co-author of *Are Judges Political?*;

Senior Fellow, The Brookings Institution;

Karl N. Llewellyn Distinguished Service Professor of

Jurisprudence, University of Chicago Law School

RUSSELL WHEELER

Guest Scholar, The Brookings Institution

BENJAMIN WITTES

Editorial Writer, *The Washington Post*

* * * * *

P R O C E E D I N G S

MR. TAYLOR: Good morning. Our equipment seems to be operating randomly, so hold on to your seatbelts, and we're about to start.

We're here today, as I think probably all of you know, to discuss this book and related subjects, and when we get to the audience question period, the subject of what's related could be — you can stretch it as far as you want the way Justice Stevens stretches the definition of wetlands in his recent decision.

The book is *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. The authors, Cass Sunstein and David Schkade, are here today, and so are the other authors. Lisa Ellman and Andres Sawicki are in the audience. My name is Stuart Taylor.

First, we're going to have — the format's going to be like this. David Schkade is going to talk for 10 minutes about some aspects of the book, then Cass Sunstein will talk for 10 minutes about other aspects of the book, then Russell Wheeler will talk for 5 minutes or so, then Ben Wittes for 5 minutes or so, and then we'll have a period of questioning by me and then a period of questioning by the audience.

First, let me briefly introduce the — why don't I just introduce each panelist before his turn.

David Schkade — and I apologize, I'm working on the pronunciation — holds the Jerome Katzin chair in the Rady School of Management — I've got to work on that pronunciation, too. Is it Rady? Rady School of Management at the University of California, San Diego. He previously served on the faculties of the University of Texas at Austin; Princeton University; Duke; and the University of Chicago. BA in mathematics; MBA from the University of Texas at Austin; and an MS and PhD in organizational psychology from Carnegie Mellon University. His scholarly work includes four books and over 50 papers with

the primary focus on how people form and express their preferences and how their decision making can be improved, and he will begin by telling us something of what this book shows.

Thank you.

Oh, I should say feel free — all the speakers should feel free either to come up here or to speak from their seats, as they prefer.

(Laughter)

MR. SCHKADE: No one ever accuses me of not being able to be heard.

First of all — oh, very good — am I on? Now I'm tethered to my seat anyway.

First of all, Andres and Lisa, please stand so we can all see.

This book would never have happened without their considerable support and help.

So, we would like to present today a different perspective on the question of what difference it makes which party appoints federal judges. And, in particular, we want to take the perspective that we're going to test empirically the presumption which imbues all debates that you hear about this, that in fact the party of the appointing president does influence how judges are going to behave, meaning that the Democratic presidents will appoint judges that vote differently than Republican presidents.

It sounds obvious, doesn't it? But it's important to take the perspective of saying well, does it actually matter — a consequentialist view. And so what we discovered in thinking of this question is that we have an exceptionally fortunate procedure that the federal courts of appeals use — the circuit courts — and that is they randomly assign judges to cases. Why is this important? Well, from a methodological point of view, it enables us to separate out the influence of different characteristics of judges on their voting patterns, and so — and to separate that from the types of cases they have. So, this gives us, from a social science research

point of view, a natural experiment in the world that is conducted with the actual decision-makers doing what they normally do.

So, what we took advantage of this fortunate feature in the world to examine the influence of ideology. As many of you know, the Supreme Court gets a lot of press, but, in fact, the court of last resort, the final decision-making court, is more often by a factor of 100 to 1 or more — the courts of appeals. Very few cases actually make it to the Supreme Court, and so these courts play a much larger role in practice, in resolving cases, than is often considered. And so we're going to examine the circuit courts for those two reasons.

Secondly, we're going to examine cases that have ideological differences, the idea being that if it's really true that judges do have an ideological influence on their decision-making, it ought to show up on issues that have ideological differences in the public, in society. And so we're sort of taking that question and saying can we find evidence that in fact this distinction of which president appoints a judge does seem to have a downstream effect on the votes that they make. So, we studied about 20,000 votes of federal appellate court judges on a series of controversial issues, like abortion and death penalty and others that will not surprise you if you look at the list in the book. So, does it matter?

Let's begin. There's a handout that has some graphs on it. If you'll go to the last page — they got a little bit out of order — a page that looks like this, black and white, and let's examine the basic question.

The first question that of course you would want to know is does it matter which party the appointing president is a member of? So, we have bars that are white in this graph that represent Democratic appointees and — or appointees of Democratic presidents. Let's be very clear, we're making no statement about the individual politics of the judges. We're only examining the politics of the appointing executive. And then the darker bars refer to judges

appointed by Republican presidents. And so you see a difference. The vertical axis here is the frequency, the percentage of the time with which they vote for the liberal position on a given issue.

So, for example, with abortion you would be voting to uphold abortion rights, okay? On death penalty you'd be voting for the defendant, not against the defendant. Okay, that sort of a thing. So, each case category was scored in an ideological direction and so — to standardize things across all the case categories. The liberal is one, and conservative is zero. We would have gotten the same results if we reversed things. It's just an arbitrary choice to do it in that fashion. So, higher bars here mean a higher rate of liberal voting.

Okay. Now, let's look at the graph more carefully. The first thing you notice is that the white bars are higher than the dark bars. This is the party effect. There is in fact a systematic difference between Republican and Democratic appointees in the rate at which they vote for the liberal position on the controversial issues. But it's a surprisingly small difference, I guess you might say. It's not — if you take abortion, for example, Republican appointees vote in favor of abortion rights about 50 percent of the time. That's not on this particular graph but on that particular case category. Now, Democratic appointees vote for abortion rights at a much higher rate, okay, about 80 percent. But it's not true that Republic appointees vote in favor of abortion rights 10 percent of the time and Democrats are 95, okay? And abortion is one of the most polarized issues we have here, so most of the differences are somewhat smaller than that. It's kind of an interesting fact that turns up here.

Cass will talk about this a little bit later, but we characterize this as reflecting the fact that the legal system and the case law constrain the decisions that judges can make. They can't do anything they damn well please. They have to do it within the context of established law and based on the case facts that they have and, also in our view, because they're

professionals who are trying not to advance a personal agenda but primarily are trying to serve an important function in the legal system, okay?

So, the second important thing, and perhaps the most surprising finding of our study, is the fact that the bars rise from left to right. Well, what's on the left and what's on the right? On the left in this case are the Republicans — I know that's a confusing thing, right? — and on the right are the Democrats. But what we have done here, because of that wonderful fact of random assignment, is we have separated out the individual judges appointing president from those of the other two people on the panel. So, another important fact about the appellate courts is that there are three-judge panels that make decisions. No single judge makes a decision. Only the majority vote of a three-judge panel, and those three-judge panels are randomly drawn from the roster of the circuit in which the case is appealed.

So, we can also examine the question of does it matter who you're sitting with when you're making the decision? So, the first question was does it matter which party you were appointed by? And the answer is yes, about 13 percent is the difference in the rate of liberal voting for the liberal and — I mean, for the Democratic and Republican appointees.

It also turns out to matter a lot who you're sitting with. So, let's look at the Republican appointees for a second. The dark bar on the left with the 31 percent number on it? That means that if you're a Republican appointee and the other two members of the panel are Republican appointees also, you only vote for the liberal position 31 percent of the time. But if — now go to the middle bar — if you're sitting with, instead, just one Democrat and a Republican, so that panel is two Republicans and one Democrat, you're rate of liberal voting rises to 37 percent, and if you're sitting as the sole Republican on a three-judge panel with two Democrats, you're rate of liberal voting rises to 46 percent. So, who you sit with turns out to have as much, or in some cases slightly more, effect on the rate at which you vote for an

ideological position on an issue than who appointed you. Very interesting. So, there is this social effect that was very surprising.

Now, finally, let's go to this draft, because individual judges, as I said, do not make decisions, and that first graph was all about how individual judges vote and who they're voting with, but this is about individual judges. This shows that — it actually magnifies a little bit when you actually look at the panel vote, the actual vote that matters, which is the majority vote of the three-judge panel. And, so, with an all-Republican panel you get, 31 percent of the time, votes for the liberal position and with an all-Democrat panel 66 percent of the time. So, it's about a third of the time you win if you are a plaintiff in an affirmative-action case, let's say, with an all-Republican panel, and about two-thirds of the time you win with an all-Democrat panel. So, it does matter quite a bit more if you're an individual looking at will my case succeed or not when you look at the votes of the panel. So, it's amplified a little bit there.

Finally, with my 10 minutes drawing to a close, let me give you one little more tidbit that we have now on this last panel, and that is, is the federal judiciary becoming more conservative is the question people have been very interested in, and in this book we have a bit of evidence on this point, and so here on this last bar chart we've grouped judges, just to make it easier to see what's going on, into different eras of presidents. So, Kennedy, Johnson, Carter — these are Democratic presidents from a little bit further in the century — back in the century — and then Clinton judges, which were — and then we have Eisenhower, Nixon — four judges — and Reagan, Bush —one, Bush two judges. Just to group that way to make it easier to look at.

So, there are two facts about this graph that are kind of interesting to think about. One is, of course, that the bars decrease within a given time period, so in cases decided from 1993 to 1996 the blue bars, which are the Democratic appointees, vote for the liberal position more than the Republicans, so that's not surprising and just replicates the part effect we

saw before. But what's more interesting is each bar declines over time, so take the top one. This is Kennedy, Johnson, and Carter appointees. In 1993-'96, 54 percent; then, in '97-2000, 53 percent; and in 2001-2004, 48 percent. Each individual group of judges is getting slightly more conservative over time. So, it's not just that we've had more conservative presidents in recent years; there's also something else going on that needs to be thought about and explained. It has to do with the general trend in the future.

MR. TAYLOR: Thank you.

Let me introduce Cass Sunstein, who will speak next. He is a co-author. He's a Karl Llewelyn Distinguished Service Professor of Jurisprudence at the University of Chicago Law School, and he clerked for Justice Benjamin Platt, of the Massachusetts Supreme Judicial Court, and Justice Thurgood Marshall of the U.S. Supreme Court, among many things.

MR. SUNSTEIN: How's the volume? The volume okay? I recently took my daughter to a Sheryl Crow concert, so I really want to make sure the volume is high and — do you know Jack Ingram, who he is? He was — no, you don't. You will. He opened for her, and he was louder.

(Laughter)

MR. SUNSTEIN: Okay, I have five points to make, I guess, and they're — some of them have subcategories, but let me just make the five.

Okay, point number one. We have three major findings. First, and the least surprising, there is ideological voting on the federal branch in the sense that there is a statistically significant difference in numerous important areas between how Republican appointees vote and how Democratic appointees vote.

Second of our three findings is that there is ideological dampening in the sense that when a Republican judge sits with two Democratic judges, the Republican shows pretty

liberal voting patterns, and a Democratic judge sitting with two Republican judges shows pretty conservative voting patterns. In fact, they look about the same — a Republican with two Democrats and a Democrat with two Republicans.

Third and final finding, to me the most dramatic, is ideological amplification. That means when a Republican sits with two Republicans, his or her conservatism leaps compared to when there's one or two Democrats on the panel, and when a Democratic judge sits with two Democratic judges their liberalism leaps. So three D's will show very liberal voting outcomes; three R's will show very conservative voting outcomes. End of point one.

Point two. This set of findings kind of runs like a very powerful truck over two pretty widespread views in the culture. One widespread view is on the courts of appeals judges essentially follow the law, so the political party of the appointing president doesn't matter. Jeff Rosen, among others, said that during the recent debates over the lower court judges. That is a wildly inaccurate oversimplification. It's not false to say judges follow the law — they do — but where the law is unclear, as it is in a number of our cases, there is a significant difference.

A second implication, as part of my second point, is that we can show, and David summarized it, that the conventional division that the Democrats and the Republicans both like between Democratic and Republican appointees just doesn't capture it. The notion that some are activists and others aren't or some want to strike down acts of Congress and others don't — that doesn't capture what we're getting at. A much more accurate way of capturing it is to say the judges, to a greater or lesser extent — lesser but to some extent — just mirror political divisions between the parties. That's the best first cut at what the divisions look like in terms of our findings.

Okay, the third of my five points — second point is now done, I'll have you know — the third is there are two areas in which we find ideological voting, but it doesn't

matter what the composition of the panel is. That is, of our two dozen or so areas, there are only two in which Democratic appointees differ from Republican appointees, to be sure, but it doesn't matter who else is on the panel. Democrats are liberal in these two areas, even if they're sitting with two Republicans, and they're not more liberal if they're sitting with two Democrats, and it's perfectly symmetrical for Republicans. So, there are two areas where we don't see the dampening and the amplification. They are not environmental law. They are not affirmative action. They are not disability discrimination. I won't bore you with areas they're not. They are abortion and capital punishment. Those are the only two where we can show imperviousness to panel effects. Done with point three.

Point four has to do with what's going on in what seemed to me the most interesting findings, that is, ideological dampening and ideological amplification. Why is it the Republican appointees, when sitting with two Democratic appointees, look pretty liberal and Democrats look pretty conservative when sitting with Republican appointees? We call this the collegial concurrence, and we think it's a clue not only to judicial behavior but also to human behavior generally.

In some famous old experiments in social psychology, it was shown that normal people — and now this has been shown cross-culturally — normal people will yield to the unanimous views of others, even to the point of apparently ignoring the evidence of their own senses.

If you — that is, you individually, you in particular, and I'm talking to you as an individual, you 75 or so — are asked which line — I'm holding up a line here — is matched by one of three lines that's being projected here, and if everyone else in the room makes a mismatch, there's a very good chance that you'll make a mismatch, too, even though your eyes show you that everyone else in the room is wrong. That is to say that human beings are

particularly prone to go along with the unanimous views of others so much so that they will yield on sensory perception and political views, too. These are social psychology experiments I've just referred to, not the real world.

We have a pretty controlled experiment involving the real world in which Republican judges and Democratic judges both yield to unanimous others on the most contested issues of the day except for abortion and capital punishment. The exception is important. It's less important in terms of the general run of American law than the standard finding — affirmative action, environmental protection, labor law, much more. Democrats and Republicans, if isolated, tend to yield.

The other finding we have is amplification. Judges appointed by Democratic appointees get very liberal when they're sitting with other judges appointed with Republican appointees. We think we have a case study here in an important phenomenon called group polarization by which like-minded people sitting or deliberating with one another typically end up going to extremes. If you get a group of people who think the Iraq war was a good idea, after they've talked to one another they'll think it's a very good idea. If you've got a group of people who think global warming is a terrible problem, after they talk with one another they're likely to think that global warming is an extremely terrible problem. Groups typically end up in more extreme positions in line with their predeliberation tendency, and we think that's exactly what we've got in terms of ideological amplification —- the greater politicization of federal judiciary — when they're sitting with like-minded others.

There's one other factor that we can't completely nail but we have some evidence to suggest is accounting for our findings, and that has to do with whistle-blowing. I won't give you the details that support this conclusion, but I will give you the conclusion, which is that when three Democratic appointees are sitting together or three Republicans are sitting together,

they don't have a whistle-blower. The whistle-blower is someone appointed by a president of another party who's likely to bring up countervailing considerations that have a moderating effect.

With the data I've told you about so far, we can't establish that, because we don't know what the right answer is. Hence, we don't know when the whistle-blowing occurs. But consider just this fact as a clue. When the Bush National Labor Relations Board is doing something conservative, the Clinton judges, if there are three of them, are likely to be very concerned. If the Clinton EPA is doing something liberal, the Bush judges, if there are three of them together, are likely to be very disturbed and upset. We don't see this kind of political shift on mixed panels, which is a clue to the whistle-blower effect.

So, to the summarize this fourth and most complicated of my points, the panel effects we observe show ideological dampening because of a conformity effect; they show ideological amplification because of a polarization effect; and they probably show a whistle-blower effect, which means that the mixed panel is more moderate than the three R's and the three D's.

Okay, the last of the fifth point is the briefest which has to do with the upshot for how we should think of the composition of the federal judiciary.

As a first cut, our findings don't tell us a lot. You need to know what you think to know whether the amplified panels or the dampening panels are good. If you think that Republicans are good, they're just too weak of will, then you'll be very excited to hear that they amplify one another once the three get together. If you like the Democrats but think they're too timid, then you'd like the judicially appointed Democrats when there are three of them on a panel; then they are less timid.

Okay, so as first cut, the only way to make a purchase on this is to — and

"purchase" doesn't mean you should buy the book.

(Laughter)

MR. SUNSTEIN: The only way to make a purchase, an analytical purchase on the implications, is to try to figure out what we believe to be right. But I think that first cut really is too simple, and it's possible at least, without too much of a lead, to make a plea for diversity.

We have a kind of clue for the purposes of the rule of law of correctness. If it's the case the judges appointed by presidents of different parties are willing to go along, we have a kind of clue that the deliberative process is, other things being equal, assisted if the two Democratic appointees have a Republican appointee there who's willing to call them to account. So, there's reason to believe, at least, that the amplification effects we observe are, some of the time, disturbing and that it's healthy to try to moderate that by getting more diversity on the federal bench than we might if we otherwise aren't attentive to that fact.

One additional point. I've now talked about these findings to a number of federal judges. Some of them are embarrassed. Not one of them has been stunned. They say it fits with their experience. And, with respect both to ideological dampening as ordinary people and participants in legal and political discussions and amplification, knowledge might provide at least a degree of inoculation, so if ordinary people know their tendency to get more extreme or to conform, depending on what group they find themselves in, maybe there's at least a check on those processes occurring when they ought not to, and this might also be true for federal judges as well.

Thanks.

MR. TAYLOR: Thank you, Cass.

The next speaker will be Russell Wheeler. He's a Brooking Institution guest

scholar in governance studies. He's a former deputy director of the Federal Judicial Center, and he's also — he has another title, here it is — president of the Governance Institute.

Excuse me, Russell.

And he will comment on what we've just heard and on what he's read.

MR. WHEELER: Thanks very much.

Can you hear me?

Obviously we have here I think a very compelling book that's going to reshape our analysis of the federal judiciary, and I think the authors established the party effect and the panel effect and all the implications really quite well. I would say that — I would agree that the party effect, while it's undoubtedly present, is not terribly strong. As I count the cases here, and that's always a risk with my arithmetic, I think there's about 6500 cases. As I see it in about half of those cases, the difference between the liberal/conservative score is less than 10 percent, and about 41 percent is between 10 and 20 percent, so it's undoubtedly there but it's easy to overestimate it, overstate it I guess you should say, especially with all the groups up on the Hill who do give the impression that Democrats vote liberal 80 percent of the time and Republicans just the opposite.

One confirmation of the party effect comes not from data on courts of appeals but from data on district courts. Robert Carp at the University of Houston has assembled a really — a very extensive database of district court-reported decisions from the 1930s and reports the results periodically as we get more decisions.

If you have the book, you can look on page 114, and if you don't, I can tell you what's there. It is for Presidents Eisenhower through Bush II, the percent of liberal decisions made by their court of appeals appointees, and let me give you Carp's data for the district court decisions, and it's striking how similar they are. They're not exactly the same, but they're quite

similar. For example, we learned that Johnson's appellate appointees made liberal decisions, as they defined it, 59 percent of the time; the district appointees 52 percent of the time; Nixon's appellate appointees, liberal 46 percent of the time, district 38; Ford appellate appointees 44 percent liberal decisions, district appointees 43; Carter 44 percent decisions liberal by his appellate appointees, 51 district; Reagan 39 percent appellate, district 36 percent; Bush 136 percent appellate, 37 percent district; Clinton 48 percent appellate, 44 percent district; and Bush 238 percent appellate decision, appointees appellate decisions are liberal, 33 percent of the district appointees' decision. So, anybody that wants to argue that the party and the appointing president don't have an influence on how judges decide cases has got a real uphill battle.

A second — on page 16 of the book, the authors issue some invitations for further research. This book is the graduate student and assistant professor of the Full Employment Act of 2006.

(Laughter)

MR. WHEELER: There are just a lot of things to tease out of here to analyze further. I'd like to suggest two areas, one having to do with workload and the other having to do with collegiality. The — and this goes to the collegial consent, and the point that one reason a judge might not file a dissent in an opinion in a case is because it just takes a lot of time to write a dissent. You don't want to write a dissent if it's not going to affect the law or if it's not an important case given the time demands.

In that regard, it's important to know that the filings per appellate judgeship keep on going up in this country. There were 376 in 2004; there were 300 in 1995; there were 214 in 1985. And they varied by circuit. In 2004 there were 116 filings per appellate judgeship in the District of Columbia; almost 600 in 11th Circuit. Now, that obviously speaks, among other

things, to the different kinds of caseloads.

In the District of Columbia, there's an awful lot of administrative cases, which are much tougher than a lot of the criminal cases in the Eleventh Circuit, so there's a big mix operating there, and it would be interesting to know the effect it has on the so-called collegial concurrence. And it speaks — from a policy standpoint, it speaks to the federal judiciaries' — especially the appellate judges' — resistance in increasing the number of appellate judges. Appellate judges by and large don't want more colleagues, because they like the appellate courts to be small. They say they function better that way. That may be, but these data may suggest that that has to be revisited.

Second, I don't know how you treated visiting judges. Did you treat visiting judges sitting temporarily?

SPEAKER: Um-hmm.

MR. WHEELER: It would be interesting to know more about what those findings are, especially because it's district judges. District judges participated in about a quarter of the merits terminations in 2004 after oral argument, which I assume would include a good number of the cases in the your dataset.

Well, you can ask yourself a question. If a court of appeals judge is reluctant to dissent when two colleagues are firmly committed to a position, how much more reluctant will a district judge who's up there temporarily? I don't know, but I'd like to see that played out.

Third, by studying only published opinions, given the fact that again because of workload pressures published opinions are decreasing as a proportion of merits terminations, you may be crowding into that dataset more contentious cases, and that could have an effect also.

Final point. The authors note that the party effect is very strong in the Sixth

Circuit Court of Appeal; the panel effect is very weak. They attribute that to the well-known divisiveness on the Court of Appeals for Sixth Circuit, which came into public view when the arguments over some procedural matters got aired in a dissent and then in the pages of *The Wall Street Journal* and the House Judiciary Committee.

So, collegiality — this sort of can't-define-it-but-know-it-when-I-see-it quality of appellate courts where judges don't necessarily agree with each other but they get to understand each other and to appreciate each other's strengths and weaknesses — if it could be measured by some sort of collegiality index, it would be interesting to tie back to the presence of the collegial concurrence and all the phenomenon the authors are talking about, and that speaks, it seems to me, to the role of the chief judge of the Court of Appeals. Now, judges — I think of Harry Edwards here in the District of Columbia — have written rather persuasively on what a chief judge can to do to improve the collegiality on a court. That might help to take advantage of the greater diversity that the authors call for.

MR. TAYLOR: Thank you.

Our last speaker is Benjamin Wittes. He's been editorial writer on legal affairs and other matters since 1997 for *The Washington Post*. He's the author of *Star Reassessment* published in 2002, and a forthcoming book highly relevant to our topic today, which is going to be entitled *Confirmation Wars: Preserving Independent Courts in Angry Times*.

Ben?

MR. WITTES: I'm in a slightly awkward position here, because I was actually a I hope polite but rather harsh critic of Cass's earlier discussions of this data in a prior book, and my basic criticism was that the chapter of the book that dealt with these data painted the judiciary as sort of writhen bipartisan politics that were tempered only by the conformity or the tendency of conformity of judges.

I have an anxiety about this kind of discussion, because I operate in my daily life in the kind of vortex of political discussions of the courts and particularly of judicial confirmations where this kind of data is very apt to be mischaracterized and, shall we say, taken to extremes by like-minded people.

And so I'm very sensitive to and troubled by what I see as over time a sort of effort crudely to characterize the judiciaries' work numerically rather than qualitatively, which tends to lose a certain amount of nuance in the quality of judging and the way judging actually happens in real life. I think these are dangers in the current political climate that we need to be sensitive to, so I was quite delighted when I picked up the book that has now emerged at how in fact textured and sensitive its portrayal of the operation of the judiciary numerically actually proves to be. And, in fact, I saw the title with a fair bit of dismay, "Are Judges Political?" and I figured the answer was going to be why, yes, you know.

(Laughter)

MR. WITTES: And, in fact, I think, if I can just change the title for a minute to "How Political are Judges?" the answer that the book describes is not quite as political as you would probably think, based on watching the political discussion of the courts by people who are very invested in the answer being political.

So, let me talk — amplify briefly on Mr. Wheeler's comments concerning the degree of ideological effect, which is actually quite contained when you identify it precisely.

The authors examine a group of cases that — and I say this not as a criticism but as an observation — that are preselected for a propensity, or a hypothesized propensity — to display ideological division. It is not an assessment of the aggregate work product of the federal courts of appeals. Among those two dozen or so — I don't remember the exact number — case areas, which very enormously — in terms of the sample size with which they deal, they

found an ideological effect in most but not all of them, and some of them — in fact, the one area that accounts for a very substantial percentage of the aggregate caseload of the federal judiciary, which is to say criminal appeals, they found to their admitted surprise in the book no ideological effect at all. Some of the areas in which they did find an ideological effect involved very small numbers of cases.

The federal courts don't actually spend a lot of time thinking about abortion, contrary to, you know, common imagination, and so to find an aggregate — to find an ideological effect in a specified group of case areas, some quite small, and not to find one in criminal law, you could really make the argument that this is not a demonstration of the sort of pervasively ideological federal judiciary, which is in fact the point the authors make on page 82 where they say, "It would be possible to see our data as a real tribute to the rule of law, suggesting that most of the time the law is what matters, not party or ideology. Even when party effects are significant, they are not overwhelmingly large. Recall that Republican appointees cast stereotypically votes 40 percent of the time, whereas Democratic appointees do so 52 percent of the time." In other words, we have an ideological effect in a range of cases where you would expect to find one that is substantial but not especially dramatic.

To me, the most interesting feature of these data is not the ideological effects but the panel effects, which strike me as an interesting window into the effect that judges have on each other, and I think we can imagine — if you imagine effects that are probably more pronounced than the straight ideological effects, these are sort of methodological divisions — for example, you know, originalism versus a more free-wheeling constitutional adjudication which sort of tracks liberal/conservative divides but doesn't do so precisely — the role of economics in judicial decision-making for example.

The presence of panel effects has much wider implications, it seems to me, than

simply how political is the judiciary, and consequently I would, in the spirit of sort of suggesting an area of further research that the data begs to me — I wonder how much of the aggregate ideological effect is the result of individual outlying judges. That is to say, there is a certain category of judge — and let's in the crude reductionist way call it the Reinhardt Leutig effect — who is very, very confident of their ideological position, I suspect probably pretty immune to panel effects in the sense that they really know where they're coming from and pretty strongly ideological, and most federal appeals courts have a few of these people.

I would hypothesize — and I can't support this at this point, but it seems to me the data begs the question — I would hypothesize that if you identify those people on all the federal courts around the country, and they're pretty easy to identify, just sort of atmospherically, and you remove from the datasets all of their opinions and all of their votes and then you ran these numbers again, I would hypothesize that a fair degree of the ideological effect would vanish and the panel effects would actually go up in the sense that these are the judges who are least likely to be influenced by being on a panel with two of their colleagues — two colleagues from the other party, and I think that actually has — if that hypothesis is right, that has a very — a sort of further layer of texture, that you wonder how much of the ideological finding here is the result of individuals who are really sure they know what they're doing, and in fact the panel effects are the opposite of the ideological effects, the tendency of judges across party lines, across ideological divides to kind of come to understandings with one another, to be influenced by one another.

So, what I would suggest is that we should not be troubled by panel effects, and in fact they may be the opposite of ideological effects. We should be troubled by dramatic ideological effects. Unfortunately, in a large area of what the judiciary does, they're not really that pronounced.

MR. TAYLOR: Thanks, Ben. My first question for David — and I'll probably ask about 15 minutes worth of questions, and then we'll open it to the floor. The panelists I urge to err on the side of brevity so we can do more questions.

If I could caricature the conversation that seems to go on during confirmation battles between Democrats and Republicans — Republicans say judges should just follow the law, and, as Chief Justice put it in his confirmation hearing, judges should be umpires just calling the ball and strikes not players, and the Democratic response to that is along the lines of yeah, sure, or at least — and the implication being that it's all political and there's no point pretending otherwise, or at least that that's what the Republican judges are up to. What do your findings — do your findings help us interpret that argument?

MR. SCHKADE: I believe so. I think that what our findings would suggest is that most judges follow the law regardless of who they're appointed by. This is really this question of why the ideological difference of the party effect is not bigger, and there are fewer judges of the type that were just mentioned that would be uninfluencable by other people, and instead they're professional decision-makers whose first allegiance is to justice and trying to do, you know, right by people in society. I would say that topic probably has more to do with who's doing the appointing and who's doing the objecting, and I bet the same objections were voiced by Republicans for Clinton appointees as now by Democrats for Bush appointees. Perhaps not in exactly the same words but the same essential kind of position. You want them to follow the law if you like the law, and you want them to change the law if you don't like the law. So, I think that part of it is really a political debate. I think if you look at the actual votes it doesn't seem to me that there's that much difference in how professional in following the law — that the appointees — the people who get to be a serious candidate for appointment to the federal bench, you know, are not people who came from nowhere, Harriet Myers aside.

(Laughter)

MR. SCHKADE: And so they actually, you know, have a certain temperament and way of looking at the world that includes a very large component to me that was reflected in our data of really doing your job correctly in that sense.

MR. TAYLOR: Thanks.

Cass, the book discusses implications of your findings for the Senate confirmation process. Could you summarize that and address, in that context, the views of many Republicans these days that the Senate should just make sure that the person is qualified and not worry about ideology?

MR. SUNSTEIN: Yes. It's a great question, and what we have to say is indirect, so I'll describe a few views that seem to me plausible and some that are less so.

An implausible view — let's start out with one — is that the Senate should just back off — the Democrats should just back off, because judges are judges, they have nothing to do with politics. Although this is, in a way, a tribute to the rule of law. The 13 percent difference is quite significant, and the difference between an all-Republic and all-Democratic panel is huge. So, the notion that the law is the law, back off, that's not a plausible one.

The best thing, I think, for the Republicans to say in terms of backing off is let the natural election cycles work this out, and if we have a kind of arms control agreement by which the Democrats back off when there's a Republican president and the Republicans back off when there's a Democratic president, then you'll have a good mix over time. Now, that's a respectable position. And an alternative position, which is also respectable, I tend to think that in the end is the right one, is for the Senate to have a strong role under both Democratic and Republican presidents in checking against the appointment of outliers. And I'll give one name, Janice Rogers Brown, who now sits on the D.C. circuit. She's a person of, so far as I can tell,

full competence, superb character. Her views, as expressed in multiple speeches, are just too extreme and peculiar to warrant confirmation to the D.C. circuit. She shouldn't be sitting there. And opposition to her was completely responsible, even though it was ideologically focused.

MR. TAYLOR: Thank you.

Russell Wheeler, let me read you one of the more provocative findings of the book from page 25, provocative in the sense of those who think that courts are too political might be able to do something with it. "It follows," says the book, "that an institution defending an affirmative action program has a one-in-three chance of success before an all-Republican panel but more than a four-in-five chance before an all-Democratic panel."

MR. WHEELER: Exclamation point.

MR. TAYLOR: You don't want to be — exclamation point, yes. What do you make of that? How can we read numbers like that and not conclude these people are voting their politics not the law?

MR. WHEELER: Well, it seems to me it goes back to the question are they voting their politics? Are their politics being influenced by the panel effect and the decrease in the impact of collegiality, the kind of collegiality you were describing before, that would lead to the so-called whistle-blower effect, and the tendency of a more diverse panel, diverse in terms of the party of the appointed presidents to rein in what must be some fairly, in this case, far-to-the-right opinions? I mean, in that sense it really goes back to what Cass Sunstein was talking about before, and that is — and I don't think his answer is a particularly satisfactory one but I don't have a better one — is what can we do to make sure that we don't have these cycles of no-holds-barred appointees by Republican presidents and likely to get, depending on what happens in 2008, the same thing from a — if one is elected — Democratic president? I mean, that's the ultimate answer here. It seems to me that, along with whatever self-discipline you can

impose on it, but the data speak for themselves.

MR. TAYLOR: Thank you.

Ben, I think Cass just said that Judge Janice Rogers Brown, now sitting on the D.C. circuit, shouldn't be sitting on the D.C. circuit, and that the confirmation process, if it worked properly, would stop people like that from getting through. Do you agree with either or both of those, and — depart from the book a little bit — what implications would your view have for the use of the filibuster to try and block nominees like her?

MR. WITTES: Well, let me just disclose, first of all, that my page opposed the nomination of Janice Rogers Brown and opposed her confirmation and did so on the basis precisely of the speeches to which Cass refers. So, I don't have any particular anxiety about the proposition that the Senate should have rejected her. I do think it is a different proposition to suggest that the Senate controlled by the Republican party, which professes some interest in the philosophy that she was articulating in the speech, ought to have rejected her or that a minority group within the Senate ought to have driven the Senate's position, and I'm not a friend of the judicial filibuster as a general matter.

I guess my larger — the point I make in my forthcoming book about judicial nominations — I don't really have a deep-seated problem with the idea of the Senate acting on an ideological instinct or basis about people. It seems to me that there's enough evidence that ideology matters both to the appointing presidents to the senators, and there are ideological divisions on this — on courts, as you can see with your naked eye. You don't actually have to — you know, we knew that there were ideological divisions before they were quantified.

I think given all of that, it is a little bit unreasonable to expect the Senate to consider nominations devoid of politics, and Charles Black, Yale Constitutional scholar, once wrote in, I guess, 1970 or something, that if the tradition, the mythical tradition that

conservatives love to cite of non-ideological consideration of Supreme Court nominees — he wrote if it exists, it exists somewhere other than in recorded history.

(Laughter)

MR. WITTES: And I think that's basically true, that the history of nominations is actually a history of ideological consideration of nominations.

I think there's two points on which the Senate's engagement in that ideological examination is very unfortunate and also unfair. One is that — the almost total failure on the part of senators of both parties to distinguish between ideological examination of a nominee's record and character assassination. Janice Rogers Brown made some speeches that were, you know, sort of Ayn Rand-ian in their libertarianism, but, you know, she was accused in the Senate discussion of those speeches of supporting — I think the word "cannibalism" came up, you know. I'm exaggerating only a little.

The second thing is that I am very troubled by the requirement that nominees participate in their ideological — their own ideological examination, that is, in the form of live testimony before the Judiciary Committee. It seems to me that if you want to examine a nominee's record and make a judgment based on it, that's a perfectly legitimate thing. If you want to force the nominee to bare his soul or her soul, as a condition of confirmation, on a series of issues that may never have taken a public position on and they might not have thought through completely, I do find that very troubling.

MR. TAYLOR: Thank you.

David, a question about the dampening effect, the idea that mixed panels of Democrats and Republicans tend to be — tend to moderate the views of everybody involved. I think your book indicates part of that could be just persuasion. One pictures Judge Reinhart, who's thought of as very liberal, saying to himself hmm, Kazinsky has a point on affirmative

action being a terrible idea, speaking of Judge Kazinsky, who's considered fairly conservative.

And then your book suggests another possible view on page 66. I'll read it to you. "According to informal law, a kind of implicit bargain is struck within many courts of appeals in the form of I won't dissent from your opinions if you won't dissent from mine, at least not unless the agreement is very great." That could be called the laziness effect, I suppose.

(Laughter)

MR. TAYLOR: And how do you sort those out, and I think there's another one, the corroboration effect was it? How do you see the mix? Maybe your data don't tell you the answer to that, but what do they tell you and do you have any hunches?

MR. SCHKADE: Thank you. A couple of points about that. Number one, there's only 7 percent of the cases in which there's a dissent. So, when we're thinking about how much this goes on, we want to be constrained by the fact that it's, you know, just 1 in 14 or something like that that it actually happens.

We did talk to a number of sitting justices whose names will go unmentioned, but I think that what was mentioned earlier about there being a cost to dissenting — I've forgotten who made the point earlier — I think it's really there, because you have to write an opinion, and you have to sort of, you know, justify that your opinion is really distinct enough to merit such an additional bit of effort not only on your part but on the part of the writer of the majority opinion. And so I think that that part is a disciplining element in and of itself that they mentioned and not just the part that you need to get along with people because these people have lifetime tenure and they're basically in bed with the same, you know, 15, 20 people for a very, very long time, and so the idea that you should learn how to treat each other's views with respect and not trivially attack them just because you can I think is also a reasonable kind of a

thing in terms of maintaining a sort of overall social viability of the court.

MR. TAYLOR: Thanks.

Cass, *The New York Times* reports some decisions today, all of which are kind of interesting in light of our discussion. Now, it's not about the Supreme Court, our discussion, but one of them prompts this question: One of the decisions was about whether the government in a domestic violence case should be able to use the statement that the victim, alleged victim, gave to the police, not — the 911 call they said yes, you can use that, but the statement after the police get there — "now, ma'am, what happened" — they can't use that. She's got to testify herself. Now, that seemed to be unanimous with the exception of Justice Thomas. So, here we have the man who's by common consensus the most conservative member of the court being the one most favorable to victims of domestic violence, and the question that raises is who's liberal; who's conservative; and does this confusion, is it sort of a sport in this case, or do you — does it come up in a lot of cases?

MR. SUNSTEIN: Well, it's an interesting case, because as you were describing it it's hard to know what the liberal or conservative position is, isn't it, with respect to domestic violence and criminal defendants, which — what do liberals and conservatives think? So, I'm not sure how to analyze that one. There are a number of cases — in fact, we tried to do this in some areas where coding in terms of liberal or conservative proved extremely difficult. The cases we did, it was pretty easy, and those were the more standard ones in the Supreme Court, and those were the ones where ideology matters. Where ideology matters by definition, ideology isn't going to matter.

Let me give you another case, which is more typical, which was yesterday's big case, which involved the Clean Water Act and whether the Army Corps of Engineers could reach certain bodies of water which aren't adjacent to standard navigable waters of the United

States. So, a big environmental case basically. And if you would guess who would be the conservative four and write it down on a piece of paper and guess who would be the liberal four and write it down on a piece of paper and write down who would be the confusing one replacing O'Connor, I would guess that 85 percent minimum of you would get it right.

MR. TAYLOR: Thank you.

I just have two more questions for —

MR. WITTES: Can I respond very briefly to the?

MR. TAYLOR: Sure, yes.

MR. WITTES: I would just add the following addendum to that. There is one case area that is identified in this book that deserves note in regard to Stuart's question, which is the litigation under the contracts clause where the authors hypothesized an ideological effect in which Republican judges would be more sympathetic contract clause claims than Democratic judges on the basis of, you know, sort of, Republican — conservative interest in free contracts and, you know — and what they found was actually an ideological — a statistically significant effect in the opposite direction, that is, Democratic judges were more sympathetic to contract clause claims than Republican judges, and so I do think there are areas, and that's the one that sort of jumps out in the book, where hypothesized liberal conservative divisions don't always prove to be correct and in fact may prove the opposite of correct.

MR. TAYLOR: Russ Wheeler, I'd like to talk about why there are so few en banc reviews. For the benefit of non-lawyers in the audience, whenever a three-judge panel — and we're talking about three-judge panels, which is the typical way an appeals court decides a case — makes any decision, it's always possible to ask the full court, anywhere from 8 to 20-some judges, depending on which circuit you're in, to review it, and so a judge — assuming the party requests a judge who is unhappy with a decision can always say well, let's go to the full

court and overturn it, and yet this is very rarely done, and I think the rarity of it is one of the reasons the book gives for the reason there aren't more dissents. People figure why bother, we're not going to hear it en banc anyway. Why is — why are en banc re-hearings so rare, in your view?

MR. WHEELER: Yes, you're right. Last year after — just the figures — 9000 cases disposed of after oral argument, 48 went en banc.

MR. TAYLOR: Yeah.

MR. WHEELER: Obviously, you can take a case en banc without having a panel here to start with also. Well, one reason is, I mean, we're talking about people who read the rules. The rules disfavor it. The federal rules of appellate procedure say an en banc is disfavored unless there's a matter of great contention or a matter of — a matter that threatens to upset the law, the circuit, or a matter that is of great public importance. Beyond that, I can — I mean, maybe people study this. I can only surmise that an en banc again is a fair amount of work and you'd just as soon let it go rather than pursue it by getting the whole panel together. And, of course, it takes a majority of the active judges to vote to go en banc, and so if they agree with the decision of the panel, but it is inclined to take it en banc. That's all I can speculate.

MR. TAYLOR: Just one last question, and this is for Ben, and then we'll go to the audience.

To the extent that this book tentatively and not insistently suggests the moderation of mixed panels is a good thing, dampening effect and so forth, Chief Justice Roberts made a speech not long ago that's sort of in a similar spirit. He said we should decide our cases on the narrowest possible grounds; that way, we'll agree more. If we start talking about huge, broad propositions we'll disagree more. And an editorial in *The Washington Post*

page recently accused him of not practicing what he'd preached in a recent case. Could you describe that quickly?

MR. WITTES: Oh, well, the Supreme Court last week just —

XXX BEGIN SIDE 1B

— where they run into your house, and they decided that it did not — and this — there was a very narrow ground on which to decide that case and to reach that particular result, the opinion that Justice Scalia wrote and the Chief Justice signed, were — seemed to be on a much broader — based on a much broader theory that seemed to challenge the underlying basis of the exclusionary rule more generally, and I do think it is in some tension with the speech that the chief justice made at Georgetown a few weeks ago.

MR. TAYLOR: Good, thanks.

Let's have questions from the floor.

Sir, I think you had one.

SPEAKER: It's more a remark than a question. I'm cheating, because I got hold of a review copy of the book — I have to review it — and my first words are congratulations, it is stunningly good, and it will change how seriously we talk about our judges. Flat out.

Secondly, just for — I'm sorry — secondly, just for the dissents, among the little shreds of elegance floating around it, which wasn't put out here today, which may make people feel more optimistic about dissents, is you suggested perhaps one of the reasons we don't see more dissents is because the would-be dissenter exacts his or her price in the majority decision as the price of keeping quiet. So, if you have two judges of a particular ideological view who are going to carry the day, the third judge who's on the verge of dissenting will say well, if you write the decision narrowly I'll go along, and I think that's a very salvific and wonderful little

device. I suspect there's more of it than you people just used as a throw-away line, because it's something you can't prove.

MR. WHEELER: Thank you for that. Let me elaborate on that a little bit. I appreciate a lot, because it's maybe underemphasized in the book, and it involves judicial behavior and human behavior generally.

Okay, remember we have two findings. There's the collegial concurrence. Democrats look pretty conservative when they're sitting with two Republicans. The point is right, that that is probably overstated a little bit, the tendency of the Democrat to yield when isolated or the Republican to yield when isolated. The reason it's probably overstated is we're studying votes but not opinions, so often a Democratic judge will say I'll go along with you and vote to strike down the affirmative action program but make sure you don't say all affirmative action programs are unconstitutional; otherwise, I'm going to write separately. So, we think the collegial (off mike) finding is important, but in a way it can be overstated, suggesting the irrelevance of the isolated person when the person is relevant just not dissenting. And that has an implication for our amplification finding also. Remember, three R's get together and they get very, very conservative in their likelihood of a conservative vote. That's more likely than in any other circumstance. I actually think that our finding there is understated, that the opinions really go town. If three Democratic appointees are together in an affirmative action case, not only will the program be upheld but the opinion is likely to say affirmative programs are very generally okay. So, the concurrent finding probably understates the role of the isolated Republican appointee. The amplification problem — the finding probably understates its true extremity of the outcome.

MR. TAYLOR: Thanks.

Question back there? Harvey.

MR. HARVEY: I have this — and Russ sort of alluded to it — the percentage of cases where you have visiting judges or district court judges and senior judges who are asked to perform the work, and I think they — we can't actually do the appellate work without senior judges coming and visit, and I think the percentage of how often a senior judge will ever dissent is exceedingly low, and I'd like to hear you guys talk about that.

The second issue is the en banc issue. Under the most frap rules, the vote of the entire court is not public on the frap, and I'm sort of curious if — do you think if you made the votes on en banc public that you might see sort of another different dampening effect or enhancing effect on the cases?

MR. WHEELER: Well, okay, on the visiting senior and district judges, that's a great comment, that it would be very nice to see how senior judges — meaning old and kind of retired — and visiting judges who don't sit with this group a lot and district judges how they — whether they behave systematically differently. I'll give you a hunch in which I have fair bit of confidence, that any differences we observe would not be radically — they'd be pretty small, and a little data that supports that speculation was just suggested. The district court judge figures look pretty similar to the court of appeals figures in terms of ideological voting. My guess is that — Dorothy Parker said of one ethnic group, which shall go unmentioned, they're like everybody else except more so, and probably that's how senior judges and visiting judges and district court judges are. Even if I told you the group, it's not as offensive as you might be thinking. It's offensive not to mention the group, but it's not horrible, her comment.

Okay, so I think we picked up that finding and it wouldn't be — if there is a difference it wouldn't be large.

In terms of the en banc, okay, the en banc votes are a little like Supreme Court votes, meaning there are a lot of justices, judges, a lot of people deciding whether to go

en banc, and on the Supreme Court it's very unusual — Justice Thomas the other day notwithstanding for a Supreme Court member ideologically contested a case — to find himself or herself thoroughly isolated — usually find some other people who agree with you, which suggests that a different dynamic from the courts of appeals where it's one isolated person. So, I say — and this is, again, speculative — that with respect to en banc, if you do it publicly or privately the liberals or conservatives will be with other liberals or conservatives, which suggests that we won't quite see them and the liberals will be with conservatives, and the conservatives will be with liberals. And I like that, as a diversity fan, because you — the people of one view aren't isolated and the people of the majority view aren't capturing the territory, but I think that's would suggest that whether it's a public or private vote — and this is speculative — won't make a huge amount of difference.

We tried to study panel effects of the Supreme Court. We worked on this, and my hope is in the fullness of time that someone will be able to make some progress on it. It's tricky, because you want to figure out whether O'Connor (off mike) differently, depending on whether she's got a lot of Republicans or a lot of democrats with her. Very hard to study. A kind of intuitive upshot is that it will matter for her who else she's surrounded by, but less so because whoever else she's surrounded by there are various people she's going to be surrounded by, not one type.

MR. TAYLOR: I might mention one fascinating new article that you remind me of, by David Cole, a professor at Georgetown Law School. The burden of his article is that Bush versus Gore, whatever you think of it, had a surprising after effect which was that at least some of the majority justices and particularly Justice O'Connor seemed to get more liberal afterwards, if you look at the voting patterns, and his theory is that they were taken aback by the vast amount of criticism they got suggesting they'd been acting politically and that they'd

reacted against it to some extent — we'll show them we're not just a bunch of conservatives legislating conservative views.

More questions?

Yes.

SPEAKER: Without having read the book yet (off mike) involve the extent of role of executive power, which seem at least by the press to be increasing, fit within those issues that you say that either are affected by amplification or dampening or will they ultimately fit within the adjoined death penalty and abortion as those for which those effects are not seen?

MR. SUNSTEIN: Okay, the question I've heard is about executive power, which got a lot of attention, especially in the Alito hearing. We don't have as terrific — we couldn't test that directly, and one reason is the number of cases in which presidential action involving the war on terror, say, is tested in the courts of appeals while it's increasing, it's still too small to get statistically significant results. But I'll tell you something that I find neat that is a follow-up study discussed a bit here, which involves judicial deference to executive interpretations of law under a judicial Supreme Court decision called Chevron, which says that if the law is ambiguous you ought to have judicial deference to executive interpretations of law. So, this is kind of the mundane of world of executive power, and there we do have a lot of data points. One kind of sound bite is Justice Scalia is the famous defender of judicial deference to executive interpretations of law. Justice Briar is the famous critic of the idea of judicial deference to executive interpretations of law. They both push their disagreement in law reviews as well as in opinions. Guess which justice is most deferential to executive opinion interpretation of law (off mike) — Briar, the critic of judicial deference to executive interpretations of law. Guess which justice is least deferential to executive interpretations of

law — Scalia, the great defender of judicial deference to executive interpretations of law. Okay, all that doesn't show anything particularly ideological; it just shows a kind of stunning reversal of their public opinions, but here's a little additional bit for you. Scalia is more deferential to Republican presidents in their interpretations of law than to Democratic presidents. Briar is more deferential to Democratic presidents than to Republican presidents, though he's pretty deferential to Republican presidents, too, and exactly the pattern just observed between Scalia and Briar, taking them as placeholders for Democratic and Republican appointees, we find on the courts of appeals, which suggests everything we find kicks in there with respect to executive power, which is to suggest an ideological skew in what I'm describing as the mundane world of executive power, and it's likely that we'd see a similar split with respect to the more public less mundane war on terror issues and a little, kind of anecdotal stuff, stuff that a real social scientist like David rightly won't trust but anecdotally if you have a Bush administration war on terror decision and it's challenged before an all-Republican panel unless the law is clear and the person who's challenging it is going to have a real uphill battle.

MR. TAYLOR: Thanks.

Yes.

SPEAKER: I wonder if there is any effort to (off mike) liberal or conservative but on some sort of multi-point scale, so instead of just having bars that reflect the percent liberal votes or percent conservative votes, you could actually have some sort of like more nuance score for a given court or judge, because it seems like that kind of a scoring would result in a lot more really interesting information. It might support the position you stressed before that the three-judge panels of the same party would really go to town. You could see that much more so than you would in a simple percent liberal and percent conservative kind of tally.

MR. SUNSTEIN: Yeah, this is a great suggestion, and one thing we're excited about here is we have a phenomenal dataset and we can learn a lot about judicial behavior in particular and human behavior in general. So, the ideological amplification we see on the judiciary, it also happens within the Democratic and Republican parties and in university campuses and basically every domain. That would be a terrific follow-up study, and if any one of you or anyone one of you knows wants to do it, great, and our data is freely available, and if you don't we might. What makes it more ambitions and demanding that what we did as our first cut is that you have to have people reading the opinions and coding the decisions along a scale that you trust, and you probably need to have a few people doing that because if you got, you know, a liberal person they might code the decision as quite conservative even though a moderate wouldn't. But there are ways of doing that, and it would be extremely interesting to find out.

MR. WITTES: Can I comment on that?

MR. TAYLOR: Yes.

MR. SCHKADE OR MR. SUNSTEIN: Although in our dataset we didn't do this that much, there's a wonderful dataset that's publicly available that was commissioned by an NSF study that goes back to the '20s and took a 10 percent random sample of all federal appellate court cases over that period of time, and they did have an intermediate category that they did the same type of coding that we did in ideological coding, but they had an intermediate category where it was mixed, which kind of goes in the direction that you're talking about. In my reanalysis of those data, it didn't matter whether we had them mixed in or not, because it wasn't a common enough category I think. But to give you an example in affirmative action cases, we coded it as a liberal decision if any relief was granted at all, okay, even though there could have been several other components to the decision that might have, you know, gone this

way. And so I think that there well might be some nuances in separating out decisions that had either conflicting on different issues, decisions, or multiple parts where you had a weaker decision and a stronger decision on the multiple parts. We certainly didn't get to that level of detail.

MR. TAYLOR: Now, Ben, I think you had something to say on this and Russell, if you do, please.

MR. WITTES: Yeah, I actually think that along the same lines rather than or in addition to, one question that I've had about this data is how does the ideological effect compare to effects that you might find in the same category of votes across other axes — for example, male/female by race or by, you know, if you wanted to get a sort of a little bit more, you know, analytical sort of methodologically oriented, you know, by sort of professed allegiance to one or another known methodological position, and then I would also — the thing that's always sort of lurked in the back of my mind as I've read this data is, you know, what if you used as a control something completely absurd, like astrological sign. You know, you have enough different case areas here that you would probably just by random chance show some spikes in — you know, and sort of how would it compare — you know, how would the ideological finding compare to — I mean, you'd want something absurd that had two rather than twelve possibilities, but to something that was a real, sort of genuine control, you know.

SPEAKER: Well, that's what the statistical tests do is exactly what you suggest — is they're comparing to a random alternative. That's the theory of the statistics that are being used to test for significance, so in effect what you suggest has already been done by the natural method of testing.

MR. TAYLOR: Yes.

MS. ROLAND: My name is Mary Roland. I was wondering about the staff in

these legal offices. I know that they make a lot of decisions, and I was wondering about the selection of what cases — for instance, the Supreme Court — what cases they would take. Is that political in any way? And those are the two questions.

MR. SUNSTEIN: Okay, the major staff I guess you're referring to are the law clerks of whom we have at least one in the room, and my guess is that the law clerk or clerks in the room will acknowledge that they very rarely make decisions. I clerked for Justice Marshall, who was famous at the time for listening to his clerk. Out of the 180 or so cases, there was maybe one where we changed his mind, maybe, so the staff — well, I should be careful about this. We want to something more systematic, but a hunch is that the staff plays actually relatively little role, certainly at the Supreme Court level with respect to voting behavior most of the time, and when the staff does play a significant role with respect to particular chambers, it's often because the clerk knows what the judge kind of likes, like a spouse, a little bit — this is what you would like to eat at this restaurant, and so it's not really that the clerk is making the decision; the clerk is tracking the anticipated judgments of the judge in a way that's fairly reliable. So, we don't have any tests for this, but a hunch is that if we did and we can't get the data very easily, the clerk — such clerk or staff effect as you'd find would be — wouldn't confound the ordinary predictions. Okay, you do have a great point about at the Supreme Court level there are these CERT memos in which the clerk — CERT memos they're called in which the clerks give the vast majority of the justices — at the same time the clerk's assessment of a case and whether a (off mike) should be granted, whether the court should hear it. And we just don't know what kind of independent effect the staff has at that level, and I — we — I don't just mean the four of us, I mean social scientists just haven't studied that.

SPEAKER: (off mike) question.

MR. TAYLOR: Yes.

MR. WITTES : It is interesting, though, you know, the one person who doesn't participate in the (off mike) pool is Justice Stevens, who has said he thinks that's one reason the caseload is going down in the Supreme Court, because the clerks are reluctant to put a dog before these — dog of a case — before the justices. Now, you have to test that also.

The question on the court of appeals, there's a different staff dynamic. There's a much bigger permanent staff in the court of appeals who supposedly make decisions about what cases get oral argument, what cases don't according to criteria established by the court. That's well worth testing, thought, and I think more than a few appellate judges are a little leery of the California 9th Circuit. There are 50 staff attorneys working there, and that's not a small group of people.

MR. TAYLOR: I'll add one observation based on this morning's paper again. There's lots — and the Supreme Court's pretty busy these days. The most controversial issue they're going to have next year is the so-called partial birth abortion, a law — should the federal law banning that procedure be struck down, and the court had agreed sometime ago to hear one case that presents that issue, and there's another case that came up that presents the same issue. The Bush administration said you don't need to hear that one, we like the one you've got already. The pro-choice group said no, we want you to hear both of them. Yesterday the Supreme Court decided to hear both of them. The pro-choice group celebrated. Does this — is this handwriting on the wall? Remember, it only takes four votes to grant (off mike). So, if I had to bet I think I could bet which four, in this case.

Any other questions? Yes.

SPEAKER: Yes, thank you. I just had a quick question about the issue of outliers, and it was discussed by a number of the panelists, this issue of appointees who are bordering on extremism, but I just had a question about appointees who, let's say, had or were

perceived to have a certain judicial record and ideological tilt, and then once having been nominated (off mike) and confirmed fundamentally altered their views almost over night and just systematically voted that way. I mean, you can make a number of suspicions either way. But would you treat those outliers in a similar as those who were perceived to be bordering on extremism, or would this be a separate case involving the research?

SPEAKER: Okay, great. Okay, we have a hypothesis that Ben has floated, which is that maybe some of our outcomes are driven by highly extreme court of appeals judges, and maybe — he didn't say this — but maybe — most judges you can't tell the difference between Republican and Democratic appointees, so let's start there. That's not ruled out by our data, but all of the data you have heard today suggests that would be a kind of stunning surprise if it were so. Remember that the district court judges show basically the same patterns as the court of appeals judges. We actually tried to test which are the 10 most conservative, which are 10 most liberal. We almost put that in the book. There were terrible coding patterns because, you know, the 10 most liberal oftener just hearing different cases from the 10 next most liberal, so it is true that we know that there are outliers, so Ben is completely right on that in the sense of judges who have very high percentages of liberal and conservative votes, but the numbers are just too small for any particular ones to drive our results. Remember, we have about 20,000 votes. So, even if you add more extremists than we probably have on the two federal judiciaries, you characterize a lot of people as extremists throughout all their numbers. Undoubtedly you've got a dampening of our effects but you've got basically the same direction of results. Okay, there's that.

In terms of judges —

SPEAKER: Could I just add to that? Are you talking about judges that are going to switch next?

SPEAKER: Yeah.

SPEAKER: Okay, I'll comment after (off mike).

MR. SUNSTEIN: Okay, judges who are going to switch don't believe it. It's like Haley's comment, and so the likelihood that a presidential appointee who's been axed is going to turn out to be why once appointed is very, very low. Justice Blackman is probably a good example. Even he's not a hundred percent clear in the area in which he was appointed. It was criminal law. He stayed conservative. Don't believe it with respect to at least a lot of others. Lee Epstein is the principle author of a recent book which goes through this very systematically, and the Supreme Court justices typically follow the appointing president. It's an excellent predictor. You want to ask, I guess, with respect to our data whether district court judges and flipping a hundred percent their ideology once they're on the court of appeals, everything we know suggests that that doesn't happen. I can't even think of an anecdote in which it's happened, so there isn't a Blackman analog. It's kind of a pleasing myth that both liberals and conservatives have an interest in emphasizing, but it hardly ever happens.

UNIDENTIFIED SPEAKER: Point made.

MR. WITTES: Can I just clarify one thing? I didn't mean to suggest that the entirety of the effect was due to individual outliers; rather, I wonder how much dampening of the effect you would have if you controlled for the outliers, the definition of which is necessarily hard. I mean, I think you could probably say — you could probably identify, say, the liberal and the conservative on each court who vote most consistently, you know, in an ideologically predictably — in an ideological, predictable fashion and remove them from the — you know, from the analyses and you would have some degree of dampening, and the question that I raise is simply how much dampening would you have.

SPEAKER: I would like to add one thing related to this. Just because

someone is "extreme" doesn't mean they're not persuadable. I think there's a — each judge has kind of a central tendency that somewhere on the liberal conservative scale — but they also move one way or the other. It's not true that any judge — there is no example of any judge who always is in the same place every time, and so I think that — you want to separate out incorrigible from extreme in terms of the starting point. And I think that's a very important fact to keep in mind, because when you're talking about diversity, it's not just R&D but it's how R and how D, you know, essentially that you're also looking for there to sort of cover the space of ideas that you would like to get incorporated into the law, and there is another function of the appellate courts that we haven't mentioned today that theorists talk about (off mike) institutional function, and that is to identify issues that the Supreme Court will then select among to settle, and one of the — an argument that has been made is that one good reason to keep all D and all R panels is they explore the extreme regions of the law to get the broadest possible set of ideas to make available to the Supreme Court to select. So, I don't — that's an institutional argument, not a justice argument, but I think we want to also consider the idea that people are not necessarily, because they hold strong views, unpersuadable.

MR. TAYLOR: I think we're out of time. I might just ask one last question of Russell that builds on what you just said. The book mentions that independent federal agencies, such as the Securities and Exchange Commission, their constitutive laws say there can only be no more than three members of a political party on this commission. The book does not say we ought to have similar requirements for the courts, nor does it say that we ought to have — instead of having random panels we ought to have mixed panels mandated — lock them in a room and don't let them out until they come out with a moderate decision. Why would that be a bad idea — if it would?

MR. WHEELER: Because it just opens the door to all sorts of manipulation, it

seems to me. If you're going to — if you have to have a liberal and a conservative — you know, about 4 or 5 percent of every president's nominees are members of the other party, so you hold those out. He's a Democrat nominated by — appointed by a Republican. This will be our go-to guy in the big cases. I mean, it would just get terribly complicated. It seems to me that the only way this is going to end is when the parties in the White House realize that this appointments fiasco is a losing game for everybody, and maybe moves towards some kind of simulation of a Missouri plan or something that would bring that diversity, but they've got to be persuaded first there's something in it for them and the groups don't let them do that.

MR. TAYLOR: I'd like to thank all the panelists, and I think one consensus about this book, from what I hear so far, is that it's performed a great service in bringing some kind of hard data free of ideological kind of skewing or manipulation to a question that's debated endlessly in this country.

Thank you.

* * * * *