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Welcome and Introduction:

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P R O C E E D I N G S

MR. WITTES: I'm usually pretty lax about timing things, but I'm not going to be today. I'm going to get things started by starting right on time. For those of you who don't know me, I'm Ben Wittes, a Fellow here, and Research Director in Legal Affairs and Public Law. Welcome to the discussion about the future of the federal judiciary in the next administration.

Every 4 years we have this discussion that comes up in the context of the presidential campaign which is characterized by sort of apocalyptic rhetoric about the future of the courts from all ends of the political spectrum. You'll frequently hear dire predictions about the fate of values that we all, meaning our particular political whichever it is, holds dear. Anxieties about overweaning judicial power, anxieties about overweaning power by branches of government the executive is meant to check. And there is always the sense that we are kind of at the edge of the cliff and staring down into the abyss, and not just at the edge of the cliff, but in a truck kind of racing toward the edge of that cliff and about to plunge into the abyss. I think I once did a sort of informal study of the last I guess since 1980, the political rhetoric in the elections, and it really is something that happens every 4 years and the rhetoric is almost interchangeable every 4 years. And every 4 years it turns out to be in

some sense correct which is to say that a president gets elected, makes appointments, those appointees are different if that president is a Republican than if he's a Democrat, and both collectively at the lower court level and individually at the Supreme Court level, those nominees do incrementally and sometimes quite dramatically affect the direction of the law.

In some larger sense, however, I think every 4 years that rhetoric and particularly that sense of being right at the edge of a cliff in a truck careening over the edge of it turns out to be wrong which is to say that we never actually plunge into this abyss in which we lose all our values and the federal judiciary has a great deal more continuity than sudden change, and so we see that continuity across administrations in a way that that rhetoric would never lead you to predict. Which brings us to this year. Once again we see this sort of sense that the fate of the courts are at stake, and there is some reason this year actually to wonder if that may be truer than it's been in prior years in prior quadrennial cycles of anxiety.

At the Supreme Court level, we always talk about the Supreme Court at a tripping point and in a very visible sense this year I think that's probably actually true. You have two blocs of four justices on a delicate seesaw over the fulcrum of Anthony Kennedy who is the decider

in an incredible number of cases. Because of the age of some of the justices particularly on the liberal flank, the next president, presumably if he's John McCain, has a genuine opportunity to create a decisive majority on the conservative side. And similarly, a Barack Obama administration would have the opportunity at a minimum I think so substantially reinforce the liberal flank with much younger justices and you could imagine in the course of particularly an 8-year Obama administration an opportunity to pick off or replace one of the five members of the conservative majority. So you could really imagine a very different Supreme Court after 4 or 8 years of an Obama administration than after a McCain administration. And as Russell will illustrate in the first presentation which I don't want to preempt, you can imagine at the lower court levels a pretty dramatic set of shifts as well depending on which president we have.

I don't want to go on at length, so I'm going to with that open this discussion by introducing our panelists. Russell Wheeler will speak first. He is a Visiting Fellow here at Brookings. That's a little bit of a misnomer because he's as permanent as you can be as a Visiting Fellow. And he's also the President of the Governance Institute which is a small nonpartisan think tank which deals with interbranch relations and their policy implications. He was the Deputy Director of the Federal Judicial Center and has written very widely on the judiciary and its relations with

other branches. He's going to give us a talk on the composition of the lower courts over the last several administrations and how we can expect that composition to change depending on which presidential administration we have come January.

Following that we're going to hear from my two absolute favorite combatants in the wars over the courts, and I mean that warmly in both cases. Doug Kendall is the founder and President of the Constitutional Accountability Center which is a think tank, law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history, and he's also the founder of the predecessor group to the Constitutional Accountability Center which is the Community Rights Council. He is an expert on the law of land use and takings and environmental law more generally. His commentary has run frequently in the "New Republic," "Slate," and dozens of papers around the country including my alma mater at the "Washington Post," "USA Today," and the "Los Angeles Times," and he blogs as well for Huffington Post.

Ed Whelan who coincidentally is sitting to Doug's right -- coincidentally but conveniently -- is the President of the Ethics and Public Policy Center where he directs the Program on the Constitution, the Courts, and Culture. His areas of expertise include constitutional law, and

conveniently for our purposes today, the judicial confirmation process. He is a contributor to the "National Review's" Bench Memos blog. He clerked for Justice Scalia and served as Principal Deputy Assistant Attorney General in the Office of Legal Counsel at a particularly fateful period of that office's existence. And he was also during the 1990s or earlish-1990s, the mid-1990s, the General Counsel of the Senate Judiciary Committee where he also worked on judicial nominations.

With that I'm going to turn matters over to Russell and we'll go from there.

MR. WHEELER: Good morning. Thanks, Ben. As Ben said, it doesn't take too brave a person to look at the Supreme Court and say what will it look like in 4 years, how might it change, just given the actuarial tables, although by no means do we know for sure what's going to happen to any one of the nine justices. But it's even more difficult to get a handle on the courts of appeals and the district courts for that matter, although my focus will be on the courts of appeals, but it's important to realize how the courts of appeals in one sense are really the federal courts of last resort for all but about 60 cases and they make law and enforce law along with the Supreme Court. So the question becomes how might a McCain administration or an Obama administration change the face of the courts of appeals, currently 179 judgeships, in 13 circuits around the

country? There are various ways we can ask that question, how might the demography change and other things, but my focus today will be how might the courts of appeals change in terms of the proportion of judges appointed by Republican and Democratic presidents.

The party of the appointing president is often taken as a surrogate measure of the ideological posture and the views of judges and is probably the best measure we have, but it's really not very good. So I preface this by saying just because we're talking about Republican and Democratic appointees, take care to realize that that doesn't necessarily mean we're talking about rigid divisional differences among judges of the courts of appeals. It's partly just because the judicial role is a very strong governor and it's partly because the case load of the court of appeals is in many ways fairly mundane with cases in which the law is pretty clear and it's just a matter of finding it and announcing it.

One other thing bears mention. As I said, there are 179 circuit judgeships. Most of them are filled today. There are also 99 senior judges who function in a semiretired status, some deciding cases just the way full-time judges do, others doing no judging, but they're there as well. So a panel decision of any particular court of appeals can consist of a judge on the court of appeals, a visiting judge from the district court, and perhaps a senior judge from that court or another court. So any way you

look at it we're getting at this question of potential changes in a rather loose way.

You were handed five tables. We decided not to use overheads just because this room doesn't suit overheads very well. So if you turn those tables and walk through them with me, what the first table shows is the composition of the court of appeals at the end of the last two administrations and today. What you see for example is at the end of the term of the first President Bush, 64 percent of the judges on the court of appeals have been appointed by Republican presidents. The interesting thing in anticipating what might change is to see that you'll notice that President Clinton in 8 years was able to reduce the percentage of Republican appointees by 23 percent and increase the percentage of Democratic appointees by a like number by 23 percent. President Bush in 8 years has not had that same success. He's managed to increase the number of Republican appointees on the court of appeals by 15 percent, and he's managed to reduce the number of Democratic appointees by 8 percent. I should also say that the vacancy rate down there of 8 percent is surely going to go up before the new administration takes office although we don't know by how much.

So you ask yourself why is it that Bush had less success than Clinton in changing the face of the court of appeals and you might

say it's because of Democratic obstructionism in the Senate, but if you look at chart two you'll see that the confirmation rate for court of appeals judges for both Bush and Clinton is exactly the same, 73 percent. You might say that's too close for government work. I don't think that was planned, but it does suggest that all the noise we've heard about resistance to Clinton appointees and resistance to Bush appointees at the very last has been evenhanded.

So if that's not the reason, if Clinton got 66 judges confirmed and Bush got 60 judges confirmed, 73 percent of nominees, what then explains the lower rate for Bush and what might explain challenges facing the next president? There are a variety of reasons to explain why Bush couldn't replace as many Democratic appointees. There are some Democratic appointees on the bench who would quite literally rather die than have Bush appoint their successor, and that's a phenomenon in every administration. But I think it's more likely that it's just the work of the actuarial tables. That long slew of Reagan and Bush I appointees started to retire when Clinton was president and Clinton got to replace them with Democratic appointees. Those Democratic appointees, Carter appointees had retired long before Bush took office, and the Clinton appointees by and large just aren't eligible status yet which is governed by a statutory formula.

So that brings us to table 3 over here. This shows that Clinton's appointees replaced Democratic appointees 39 percent of the time, but over half his appointees replaced Republican appointees. That explains that more sizable shift that he was able to achieve. Furthermore, Clinton was able to fill six new seats, seats created by legislation in 1990. George Bush I filled five of them, he couldn't fill the other six and Clinton got those. You'll see that Reagan and Bush I both filled a minority of their replaced Democratic appointees but they had new seats that helped them shift the focus of the appellate courts. Only 25 percent of Bush's appointees replaced Democratic appointees, 75 percent replaced Republican appointees, and he had no new seats to fill. There has been no judgeship legislation. What that suggests is that just as there are structural factors working in any election, there are structural factors working in the federal judiciary that influence how much of an impact a president may have changing the face of the court of appeals.

We go over to tables 4 and 5, I emphasize it now and I'll emphasize it at the end of my comment, this is largely speculation. This is based on a few assumptions none of which I think are really true, but they're a way to work. We ask ourselves what might face a President Obama or a President McCain? There are three factors really. One is that judges are going to take senior status. Judges are going to step

down. By my calculations, there are 24 Republican appointees and 19 Democratic appointees who are now eligible to retire and by 2011 when the nominations will slow down, that figure rises to 66 total. Let's assume half the number of judges eligible to retire to do which is a reasonable estimate based on past performance. We'll assume 33 will take senior status and that's going to be more Republicans, 16 Republicans, and 14 Democrats. Let's just assume that to start with. Second, Congress is likely to enact a Judgeship bill. There's a judgeship bill before Congress now to create 14 new seats on the court of appeals. It's not going to pass, but there hasn't been a judgeship bill since 1990 and I think the pressure is going to be pretty strong even if the Democrats keep the Senate and McCain wins the White House to pass a judgeship bill partly because the current judgeship bill says none of the seats it would have created could be filled until January 2009, and it would be tough, not impossible, but tough for Senate Democrats to turn around and say now that we know who's the president we're not going to pass the bill. So let's assume those 14 judgeships get created. And third, this is the assumption we know won't be true, let's assume that the president manages to fill all the vacancies that come his way. If those three things were to happen, and I say they're assumptions for the sake of analysis, you see that overall McCain would be able to increase the number of Republican appointees in

the court of appeals up to 74 percent, a very strong majority. If Obama wins and those same assumptions hold, he could reduce the number of Republican appointees from 56 percent where it is now down to 42 percent and create 58 percent Democratic appointees. So a big shift there depending on who wins the election. Then on table 5 on the individual court of appeals, now in defining a solid majority on any court of appeals as at least twice as many appointees of one party as the other, now there's a solid Democratic majority on one court of appeals, the 9th Circuit, two are even, and then 10 court of appeals have Republican majorities either slight or strong. If McCain wins given the assumptions I just laid out, all 13 court of appeals would have Republican majorities, a majority of judges appointed by a Republican president, that's the way I ought to say it, and 11 of those would be quite strong. So again you see the potential for a rather dramatic shift on the court of appeals. On the other hand, if Obama wins given our assumptions, you're going to have eight court of appeals with a majority of judges appointed by Democratic presidents, two would be even, the 6th Circuit would have 17 judges so that can't be even but I just kept it there, and we'd have only three court of appeals with a majority of judges appointed by Republican presidents. So again aside from the Supreme Court, you can say this election could have a difference in terms of the composition of the court of appeals measured

by judges appointed by presidents of the two different parties. We can talk over if you want about whether that would have any practical effect. I think the practical effect would be much less than the effect demonstrated on these tables.

MR. WITTES: Thank you very much, Russell. Before I set Doug on all of you which I will do momentarily, there is a lot of seating up front for those of you standing in back. If you want to move forward don't be shy. Doug?

MR. KENDALL: Thanks, Ben. Thanks, Russell. I'll just start by picking up on a point that Russell just summarized. If you look at table 1 in Russell's presentation, you see that the ideological or presidential appointment ratio has shifted pretty dramatically in election years over the last couple decades but that the highest percentage of judges appointed by a president of either party during this period has been 64 percent. In the first year of President Clinton's presidency, 64 percent of the sitting federal appellate judges had been appointed by a Republican president. If you look at table 4, you see that according to Russell's projections, at the end of the first term of a McCain presidency, 74 percent of the then sitting court of appeals judges would have been appointed by a Republican president and that figure is well outside the range that we've seen any time in the last several decades. On the other hand, Russell projects that

at the end of the first term of an Obama administration, the court would be about 58 percent Democratic appointees, a ratio that is well within the range of the historical shifts here.

I have an ideological-based concern with the courts so dominated by conservative judges, and I'll get to some of those concerns in a minute, but I wanted to make one nonideological point about this first. The point concerns what is known as the panel effect. There has been a ton of great empirical research done by a number of scholars over the last several decades into the judicial decision-making process. One of the consistent findings by scholars has been that judges on the court of appeals tend to be much more ideological when they are sitting with a panel that is ideologically consistent. Again this is not a liberal-conservative thing. We find that on a panel of three liberal judges -- tend to be more ideological than a mixed panel -- a panel of three conservative justices similarly tend to be much ideological when they're sitting among their friends if you will.

So if we want judges to act as umpires neutrally applying the law, empirical research suggests that we should favor rough equipoise in the ideological makeup of the court of appeals. Those opinions tend to be more narrow, more neutral applications of the law than do the panels dominated by one side or the other. Russell's charts indicate that

President Obama would move the court generally toward equipoise, President McCain would move the court in the other direction.

The same roughly could be said about the Supreme Court. While the court is already dominated by Republican appointees, it is much more common to describe the court's current status as Ben did as roughly divided between a liberal or moderate camp, a conservative camp with Justice Kennedy sitting in the middle. The court's more liberal justices are on average 15 years older than their conservative counterparts. That means that President McCain would likely have the opportunity to replace one of the court's more liberal justices and thus dramatically move the center of balance on the court. A first-term President Obama, on the other hand, would probably maintain the court's current ideological balance by replacing one or more of the court's more liberal justices with like-minded justices.

A second related point that I want to make is that I expect that what Ben has called the judicial wars would greatly increase under a President McCain and would likely recede a little bit under a President Obama. I say that for a couple reasons. John McCain will make judicial appointments between a rock and a hard place. The rock is his conservative base. The Supreme Court is an issue that rallies the conservative base in a way that is much more powerful than the issue

rallies the liberal base. A recent Rasmussen poll asks Americans to rank the relative importance of the war in Iraq, the Supreme Court, and the economy. Thirty percent of Republicans voters ranked the Supreme Court as the number-one issue among those. Seven percent of Democrats in the same survey picked that as the number-one issue. For Republican voters, the Supreme Court was more important than the Iraq war. That it is obviously not the case with Democratic voters.

It's not just that the conservative base cares more about the Supreme Court, they also know much more clearly what they want in a justice and I think that is documented quite plainly by the conservative reaction to the Harriett Miers nomination. I think this is an area where like the V.P. selection, any moderating impulses that John McCain may have will be overwhelmed by the demands of his base.

Which brings me to the McCain hard place, the U.S. Senate. A President McCain will likely face a senate with 55 or more Democrats and with liberal justices retiring, and the possibility of a sharp ideological shift in the makeup of the Supreme Court, a Democratic controlled senate will almost certainly demand a consensus nominee. The skirmishes we saw over John Roberts and Sam Alito will look like child's play in comparison to the battles likely to accompany McCain's Supreme Court nominees.

Barack Obama on the other hand will face a base that has a less-clear vision about what they want in a Supreme Court nominee and therefore a little more leeway in terms of what types of nominees he can pick. He will also I think probably greatly benefit from a Democratically controlled senate. We saw in the Roberts and Alito battles that no matter how energized the opposing party is, it is incredibly difficult to successfully oppose Supreme Court nominations without a senate majority.

The final point I'll make goes to the heart of what this panel is about and that is how changes in the composition and ideology of the Supreme Court are likely to play out in the context of rulings by the Supreme Court and the federal court of appeals. There are clearly some areas where both Supreme Court opinions and the same empirical research that I cited before document a fundamental divide between conservative and progressive judges in terms of how they approach the law. One of these areas is environmental law. If you look at opinions written by Justice Scalia in "Massachusetts v. EPA," and "Rapanos v. United States," two critical environmental cases over the last two terms, you see a fundamental difference between the justices in terms of the validity and reach of critical federal environmental statutes such as the Clean Water Act and the Clean Air Act. The court is also deeply split along ideological lines concerning the meaning of the constitution's

guarantee of equal protection. In the "Seattle Schools" case, the court's conservative bloc sought to redefine the meaning of "Brown v. Board of Education" and fully equate race-conscious measures designed to segregate schools with race-efforts to integrate schools. The court's opinion in "Hamdan v. Rumsfeld" illustrates a significant divide in the court in terms of how much deference the president should get when it is alleged that the president is violating laws passed or treaties ratified by the U.S. Congress.

The final area I want to highlight, and I think in some ways this is the most-important area, is a panoply of issues that fall under the rubric of access to courts. In the "Mass v. EPA" case, the court's conservative bloc would have ruled that because the problem of global warming is so big and affects so many people that no state or environmental group or individual has standing to challenge EPA's refusal to follow the Clean Air Act in addressing the problem. In a case called "Bowles v. Russell," the Supreme Court's conservatives threw out an appeal of the district court's ruling the appeal was filed 2 days late even though the untimely filing was caused by the erroneous instructions given to Bowles in an order by a federal district judge. In "Ledbetter v. Goodyear," the court's conservatives voted to throw out an equal-pay suit on statute-of-limitations grounds even though the pay discrimination was

hidden from the victim of the discrimination. The effect was to make it impossible for Ms. Ledbetter to hold her employer fully liable for a blatant violation of her right to equal pay. This dispute over access to courts reflects an honest disagreement about the role of the judiciary but it has huge impacts and consequences on the lives of ordinary Americans. I think that's why both Ed and I agree and everybody on this panel would agree that the future of the Supreme Court should be a top priority and key issue for Americans across the political spectrum.

MR. WITTES: Thanks, Doug. Ed?

MR. WHELAN: Thanks very much, Ben. Thank you Russell and Doug, and thanks to all of you for being here.

I'm going to focus my opening remarks on what Supreme Court nominations by a President McCain or a President Obama would mean and I hope to use the discussion session to discuss where the confirmation process is and how it got there as well as perhaps to discuss some of the points that Doug and Russell have raised.

I want to begin by addressing Ben's comment that every 4 years it seems like we're going to plunge into the abyss. In my view we plunged into the abyss long ago and every 4 years we wake up to remind ourselves of that. The current court is markedly to the left if we have to use crude political labels, sometimes they're convenient and unavoidable,

of the American public. Clear evidence of that comes from Barack Obama's rush to criticize the court's ruling in "Kennedy v. Louisiana" involving the ban of the death penalty for the rape of a child, Obama's flip-flop on Second Amendment rights, the public's overwhelming disapproval of the court's ruling on constitutional habeas rights for Guantanamo detainees in "Boumediene." It is also quite possible that the court as currently composed when it sees fit will invent a constitutional right to same-sex marriage. So there's no reason to think that an informed public would want to preserve the supposed equipoise on this court.

I also want to emphasize, and I agree with the comments others have made on this, that even though it's most likely that the first replacement or two would be liberal justices, there is no guarantee of that. And as Ben pointed out, over the course of 8 years a President Obama would have the ability to transform the court and you'd have six or more votes for all sorts of constitutional mayhem.

I have used political labels, and we've had a lot of them in this panel discussion. I want to emphasize though that political labels shouldn't obscure the underlying battle between judicial restraint and representative government on the one hand, and judicial activism and government by judiciary on the other. Judicial activism can be in the service of any political stripe. It's equally condemnable no matter how it's

used. But I think the clear history of the last few decades is the dominance of liberal judicial activism. Let me be clear what I mean by that term because it's fashionable to pooh-pooh it and pretend that it means nothing or to misuse it simply to mean any opinion one disagrees with. When I'm talking about constitutional cases I use the term judicial activism to refer to cases that wrongly override democratic enactments, and liberal judicial activism obviously refers to such rulings that do that in the service of the agenda of the left. Judicial activism is not the exclusive category of judicial error. There are many different categories, one of which is judicial passivism, that is, failing to enforce constitutional rights when the courts ought to, but again I think it's clear that the temptation for the courts to engage in judicial power grabs, that the temptation to engage in judicial activism, is the gravest threat.

I want to focus on issues at stake in the future. I'm not going to present my own list of what I see at stake. Instead I'm going to rely on the list that the remarkably evenhanded and knowledgeable Supreme Court reporter Stuart Taylor compiled. He presents both what he calls a liberal nightmare version/conservative dream, and a conservative nightmare/liberal dream. I'm not going to run through all these, but I'm going to highlight some of them because what's striking is that most of the issues on the liberal nightmare list involve the courts deferring to

democratic enactments, letting American citizens govern themselves through their legislators, where virtually all the items on the conservative nightmare list involve liberal justices inventing constitutional rights in pursuit of the left's agenda. Let me give you some examples.

Again the liberal nightmare is that "Roe v. Wade" might finally be overturned and abortion policy restored it to democratic processes where it belongs. Frankly, if I were a progressive strategist I would welcome that. You may well be on the verge of losing another election with this as a driver. I see the incredible embarrassment that Barack Obama has suffered through his vote against Born Alive Infant Protection Act in Illinois, a vote that he explained on the Illinois Senate floor was driven by his desire to guard against a highly speculative threat to "Roe." The second item on Stuart's list, throw gay rights into reverse. Again the political processes are fully capable including on the contentious issue of same-sex marriage of figuring out how we ought to address that issue. Bless virtually unrestricted government funding of religious schools and school choice including religious schools. Again, that's something that we work out through the political process. Stop shrinking and start expanding the death penalty. No court is ever going to say you need to impose the death penalty in this for this class of crime. What they're going to say is this law that the voters have enacted imposing the death penalty

for this class of crimes is not cruel and unusual punishment under any reasonable reading of the Eighth Amendment. And so forth.

By contrast, if you look at Stuart's list, the fears that we have if we have a court transformed by President Obama would be taxpayer funding of abortion through all 9 months of pregnancy, a federal constitutional right to same-sex marriage, prohibiting vouchers for religious schools, stripping "Under God" from the Pledge of Allegiance, banning the death penalty, expanding judicial oversight of military detentions, et cetera, constitutional rights to physician-assisted suicide, human cloning, and massive government welfare and medical care programs. Reasonable people can have a whole range of views on these matters. I'm not saying that there's a right substantive view that the court should impose, I'm saying exactly the opposite, that what we should want is a court that exercises judicial restraint and leaves these issues to us the citizens to work out through our legislators over time. And I would add that on I think every case that Doug Kendall mentioned, every one involved a statute, I believe, and Doug can correct me if I'm wrong, that if the court erred can be corrected by congress. That's no excuse for judicial error, the fact that it can be corrected, but it does show that the nature of the damage and its ease of reparability is so significantly

different from what we see when we have instances of liberal judicial activism.

Barack Obama has made quite clear his own criteria for selecting Supreme Court justices. He has basically said that in the most-difficult cases, and I'll try to get the exact quote here, that justices need to look to their own values in order to decide how to rule, not the meaning of the constitution, but their own values. Here's the exact quote: "We need somebody who's got the heart and the empathy to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African American or gay or disabled or old, and that's the criterion by which I'll be selecting my judges." We're all in favor of compassion. It's a virtue we should exercise in our personal lives and has a proper role to play obviously in the legislative arena. The traditional understanding of judges is that they should be dispassionate and not indulge their political and policy biases. Barack Obama clearly believes the opposite and intends to pursue that.

John McCain by contrast has said he wants judges with a proven record of judicial restraint. As Doug has pointed out, he's going to be constrained in his nominations by everyone believes a significant supermajority in the senate. I think you'll see that he'll have to make strong picks to get folks through and you're certainly not going to see

scaremongering about so-called constitution in exile and repeal the New Deal and maybe it's on the agenda of three law school professor somewhere, that is not what judicial conservatism is about. By contrast, and I think Doug and I are in agreement here, anyone Barack Obama wants to nominate to the Supreme Court is going to get confirmed. It's going to be a slam-dunk. The real question for senate Republicans is going to be whether they are going to stand up and make the case why they're voting against the nominee -- I oppose for reasons that I may explain later any effort to use the judicial filibuster -- but Barack Obama will have carte blanche to get anyone confirmed by the senate. With that I'll leave any further discussion for remarks. Thank you.

MR. WITTES: Thanks very much. I would like to leave as much time as possible for questions from the floor, but I'll start with a few questions of my own. The first is that I wanted to push all of our panelists on the question of what the stakes really are particularly in the lower courts. I think we all agree that at the Supreme Court level where precedent is not binding and where to the extent to which it is binding is itself a decision that the justices make themselves, the stakes are much more obviously very high. But until quite recently we did not have the same level of combat over lower-court nominations that we have over

Supreme Court nominees or even that we have over lower-court nominees today.

There's been over the last I would say 15 or 20 years a decision made collectively by the political culture that we're going to contest these nominations in a way that we never used to do and I think that raises the question of what is it that the lower courts are doing that we have become so anxious about that we are going to fight about them in the way that we used to reserve only for nine slots in a more than 800-person judiciary? So I guess I'll start with Ed. The stakes that you'd laid out at the Supreme Court level, you spend a lot of time on lower-court nominees too. First of all, why is it worth it? Secondly, does the work product of these courts justify the level of political and tense combat that we've chosen as a society to have and will those courts be so markedly different if John McCain or if Barack Obama wins as you cal the Supreme Court will be?

MR. WHELAN: That's a very good question. Let me offer a few thoughts on that. One is that I think that for the typical Democratic court of appeals nominee and typical Republican one there isn't a great deal of difference and I think that just talking with a number of folks who are judges, they find that they often get along well and agree more with colleagues on the other side of the aisle than with some appointees by the

same president. So I think there is a strong element in which this is hyped way too much.

One reason for that is the court of appeals for about 20 years have been viewed as the breeding ground for Supreme Court justices. That's obviously why Democrats went very hard after the superbly qualified Miguel Estrada and I think it explains a number of other battles, and it's rational in that respect, that is, I think this is a lesson that Democrats say they learned from letting Clarence Thomas be confirmed to the D.C. Circuit in 1989 or 1990.

Second, and I think we saw this especially last year once the Democrats took control of the senate, there are a lot of activists on both sides looking for scalps. Leslie Southwick, a 5th Circuit nominee who was rated unanimously well qualified by the ABA and had initially been approved unanimously by the Senate Judiciary Committee to a district judgeship, was regarded as a consensus nominee for the 5th Circuit slot to which a more controversial nominee Mike Wallace had originally been nominated. On the eve of the hearing the knives came out and folks who had previously privately committed that he would get through abandoned their commitments. Barack Obama was the first senator to wage the campaign of outright lies and distortions about Leslie Southwick's record and things went from there. I think it really was a sort blood lust, we're in

control now, let's get some scalps. I think that's happened on the Republican side. I'm guessing it happened as well, actually I left the Senate Judiciary Committee staff not long after Republicans took control in 1995, so I don't have a great deal of experience with that.

I will say that there are a number of judicial nominees, a small number, who are real outliers and who deserve to be fought. Rosemary Barkett and Lee Sarokin are two examples that jump to my mind from my time on the Judiciary Committee staff. We waged strong open battles against, spelled things out in memos and in the public record, and I just want to emphasize this point if I could take another minute, one of Senator Biden's staffers came to me after we had 60 single-spaced pages in the congressional record detailing Barkett's cases and he said, I couldn't find a single error in there. That doesn't mean he agreed with the commentary, but in terms of how the cases are described, the fair context and everything, I was pleased to do that and this is exactly what we wanted to do. We lost that battle but we made it, we waged it openly. With Lee Sarokin, we had a number of Democrats with us. Indeed, there were some Democrats who insisted on having a cloture vote so that they could be on record voting against cloture on this nominee who no one was trying to filibuster. Again on the senate floor, Senator Bradley, a good friend of Lee Sarokin, came up to me at the end and said, I just want to

thank you. I looked around, Senator, you don't need to thank me. I'm the one who's been fighting against your nominee. He said, I want to thank you for fighting fairly. There were groups on the outside who were making charges that we did not believe were accurate. We did not repeat those. We did not make them. We made the case on the record. Senator Bradley to his credit recognized what playing by the rules is like. I dare say that no one over the last 6 or 7 years, no Republican, has had occasion to thank Democratic senate staffers for the way they've conducted themselves on judicial nominations.

MR. WITTES: Doug, I'm going to ask you exactly the same question. You laid out a series of access to the court issues, a series of issues at the Supreme Court level, that are undoubtedly fateful. These issues aren't decided ultimately at the lower courts. Why are we fighting tooth and nail? We are we even talking about whether the lower courts will be 74 percent Republican or 44 percent Republican at the end of the next administration?

MR. KENDALL: I think a big part of the reason is just the facts of the Supreme Court docket which is that the Supreme Court only takes 70 or 80 cases a year, that's down from 150, while case load of the court of appeals has exploded. So you have in a situation like the 5th Circuit where Leslie Southwick was appointed a remarkably high African

American population in those circuits, a very sensitive civil rights set of issues, and a series of nominees that the civil rights community's views is hostile to their interests and the power of those judges to make what are well-nigh final decisions about civil rights cases, worker discrimination cases, a whole panoply of issues that are fundamentally important to those sets of issues. So I think the court of appeals matter a lot. I think the composition of those courts varies a little bit by circuit and by subject matter. So I think if you look at the battles in the 4th and the 5th Circuits, they are concentrated on issues about civil rights, if you look at a battle over at the 9th Circuit, for example, on Bill Meyers, it was over environmental protection because so many important environmental cases come out of those areas.

So I think Ed is generally right that most nominees to the court of appeals are not and shouldn't be controversial and shouldn't be fought in a particularly aggressive way and I think Russell's statistics indicate that by and large that's the case, that there are nominees both in the Clinton administration that Republicans have fought, some of those battles you could point to I think are Judge Fletcher where they tried to throw his mother off the bench before he could get a set on the court of appeals who is enormously well qualified and what turns out to be a great circuit court judge was fought tooth and nail by people like Alan Schneider,

like Elaina Kagan were top-notch appointees who never go through the process in the Clinton years. We could each cite our examples of egregious conduct by the other side. I think in general you're right that the stakes are less high at the court of appeals than at the Supreme Court and in general the fight should be over big issues there and not little ones.

MR. WITTES: Russell, what data can we bring to bear on this? When you look crudely at court of appeals gestalt data, unlike the Supreme Court, an enormous percentage of the caseload is resolved unanimously, often without any level of disagreement let alone partisan disagreement.

MR. WHEELER: Often without oral argument even because the cases are easy to resolve because their standard is -- deferential. Doug referred to the studies of the so-called panel effect, but before we get there, I think the most recent bit of scholarly work that he had in mind was this Brookings book by Cass Sunstein and three others, "Are Judges Political," in which the authors state that you can pretty well predict the decision of a judge by the party who appointed the judge. But their data doesn't bear that out really. They found that the difference between Democratic appointed judges and Republican appointed judges voting liberal, and we can go into what they meant by that but you can pretty well guess, was in the range I think of 42 to 52 or something like that. If you

listen to talk radio you'd think it would be 20-80. As I recall, judges make liberal decisions 40 percent of the time, make conservative decisions 48 percent of the time. So Doug is certainly right and Ed is right, there are some really big cases in the courts, the 5th Circuit is one place that's had them, but in the day-to-day work, I think Ed is right, it's very hard to tell the difference and it raises the question of how much time and energy do we want to put into battles over judges whose decisions are really fairly homogeneous.

MR. WHELAN: I'm sorry. I may have overstated the extent to which I think there's this consensus on the courts. I do think that on certain issues there can be real disagreement and I also think that the agreement is more going to be maybe about half the Republican appointees and half the Democrats. I'm not saying by the way that those folks have it right and I also would dispute this panel-effect question that the issue becomes, does the panel effect operate to produce more correct decisions or not? To say they're less ideological begs the question of what ideological means and what the correct ruling ought to be.

MR. WITTES: If I can distill perhaps a little bit more agreement here than there is, I think not, but what I hear everybody saying is that a very large percentage of the work product of the lower courts is not a matter of partisan contest, be that most or some significant portion of

lower-court appointments are not going to be contested or shouldn't be contested as a matter of party politics, and three that there are some outliers who once side or the other is going to contest. This brings us to the question of what tactics are in and what tactics are out in the course of that presumably still small number but I would say empirically growing number of cases that one side or the other is going to argue about.

It seems to me a lot of that is still in dispute, that is, we're still arguing about whether it's okay to filibuster nominees, we're still arguing about whether it's okay to use various procedural devices at the committee level and at the individual senator level to hold up lower-court nominees and for that matter Supreme Court nominees. So I guess my question to Doug and Ed is if you lose the presidential election and your side loses the presidential election and your side in Ed's case a little bit improbably controls the senate from January, what is in bounds, what's legitimate, and what is illegitimate to do? I'll start with you, Doug. In the outlier case.

MR. KENDALL: Right. There are historical things that the senate has done to have a role up front in the judicial nomination and confirmation process. There's this blue slip policy whereby if a senator and there's been inconsistencies in the way the senate has applied that policy whereby if the home state senator for the court of appeals doesn't

sign off on the nominee, the senate typically won't move that nominee through the Senate Judiciary Committee. I don't know in a perfect world whether I think that is a good thing or a bad thing. I think it's a well-established tradition. I don't think the senate is going to abandon that tradition and I don't think it's a bad or a good thing.

I think I feel similarly about the use of the filibuster. I don't think it is something that should be used on judicial nominations generally, I don't think it is something that will be used in the next presidency almost regardless of this election just because of the way the politics are going to fall out. But I think the arguments against applying the filibuster specifically in the context of judicial nominations don't make much sense. I don't think that there's an intellectually coherent argument if you have a senate filibuster against categorically using it the judicial confirmation process, it's not something -- again I don't think it's going to be -- because of the way the politics are playing out is going to be an issue that we face over the next 4 or 8 years.

MR. WITTES: I just want to push you on the question of the likelihood of the use of the filibuster. You don't see a Democratic senate with 55 -- to use your numbers, 55 member majority that has no fear of the nuclear option, 41 of those senators getting together and stopping a McCain nominee for the Supreme Court who is a reflection of, and I forget

whether it's the rock or the hard place that you described McCain -- but is a reflection of the base politics to which McCain needs to keep in mind, you don't see 41 of those senators with no fear of Bill Frist or the Republican leadership holding the nuclear option, you don't see them using that option?

MR. KENDALL: If you look at the Alito vote, 42 votes against confirmation and 24 votes for a filibuster, I think that there is -- I don't know that there are more -- I think it is more likely that a Democratic majority would a nominee down in an up or down vote than a minority of that majority would stop a nominee based on a filibuster. I don't think it's any easier for opponents of a nominee to get to 51 no votes than it is to get the 41 filibuster votes.

MR. WITTES: What do you think, Ed? Do you think there's -- what do you think about Doug's comments and what would you advise Republicans to do if as seems likely they're in the minority and they're facing -- and they happen to be facing an Obama making nominations to which they very vigorously disagree?

MR. WHELAN: One dirty secret about senators on both sides of the aisle is that they have concocted a series of procedures and practices that serve their own narrow self-interest and help protect them from accountability, enable them to do quiet obstruction, and to go back to

your question of what should the process be like, we should have transparency, we should have people making their arguments openly and honestly, we should have votes, losers make their case, lose and move on. Instead, Doug mentioned the blue-slip policy, the details of the blue-slip policy have changed in seemingly minor but dramatic ways over the years. It used to be that a failure to receive a positive blue slip wouldn't prevent a hearing, now actually Senator Specter developed this as chairman, it blocks a hearing at all so that you can't even develop a case for the nominee. It used to be that a negative blue slip was given, I forget the adjective, but something like substantial consideration, a fuzzy adjective that didn't necessarily mean much. More recently it's become a block. It used to be that the blue slip didn't apply at all to court of appeals nominees who incidentally have no particular connection to the home state other than the fact that they have chambers there. The caseload of their court does not reflect more cases from that state. What you have are senatorial power grabs that enhance the power of the senator, make it easier for them to get reelected, give them cheap, quiet ways to obstruct nominees, and all of that is to the detriment of the process. So generally I would say look for transparency and openness.

On the question of filibusters, I certainly agree with Doug that there is not an intellectually coherent argument against the

constitutionality of the filibuster. I will say that the very arguments for the constitutionality of the filibuster also dictate the constitutionality of cloture reform to get rid of the filibuster at any time. Basically the senate has plenary rule-making authority. It can change its rules at any time. Obviously that's not going to be happening soon.

I suspect that Democrats will if needed resort to a filibuster of a McCain nominee and I think you could have the sort of extended fight that Doug referred to before. I think that's a good thing. I think you'll see a President McCain fighting hard for his nominee and if a nominee is filibustered, keep fighting. So what? That doesn't mean that nominee is dead. Make a political case out of it. Elevate it. One big difference between Supreme Court nominations and lower-court nominations is lower-court nominations are easy to obstruct. No one cares. Not one person in 100 around the country knows who Leslie Southwick is. Supreme Court nominations are higher visibility and a White House that's adept can make a real battle out of that and win it.

MR. WITTES: Russell? Is there any prospect do you think of having reform of the various rules by which this stuff gets obstructed? Is this just the lay of the land that we live in or is there some -- is there anything you can think of that would be helpful?

MR. WHEELER: Let me answer that by asking a question to Ed, and that is whether in your roster of values, transparency and others, where would you place prenomination consultation? Let me say, I'm like Doug, and I say this as someone whose enthusiasm for the McCain campaign is totally under control. I got to say that. I'm not sure that you might not see a President McCain with the thought of serving one term even though -- not announce it, being willing to engage in some reaching across the aisle, and frankly, I think Obama might also, but we're looking at McCain right now.

MR. WHELAN: Russell, in answer to your question, consultation is one of those political tools that a president can choose to use to his benefit. I will highlight because there's been a lot of talk about how President Clinton consulted with Senator Hatch on the Breyer and Ginsburg nominations, that's true, but it misses the big point that Senator Hatch was working with President Clinton to help him avoid a fight. Senator Hatch made clear from the outset that he was not drawing an ideological line in the sand, that he was eager to defer to quality picks, and what he was helping President Clinton do is avoid nominees who would cause political fights, folks like Bruce Babbitt who is unpopular with western senators, like Mario Cuomo who is just too radioactive not to oppose. Pat Leahy, Chuck Schumer, Teddy Kennedy, there is no one

President Bush could have gotten their approval of who was ideologically similar to the sort of nominees that President Bush wanted. So consultation is fine when you have people who are willing to consult and have some sort of common goal and it may be politically astute to do it, but when you have folks who are going to oppose your nominee no matter what, and look at Teddy Kennedy's -- do you remember his vigorous rhetoric against David Souter of all folks, I'm not sure politically it's astute to engage in. Lower courts, you know there's been a great deal of consultation and at some point what do you do when the Maryland senators basically knock one qualified nominee after another, even claiming that current U.S. Attorney Rod Rosenstein is just too good a U.S. attorney to go on the 4th Circuit? You can't negotiate with these folks and at some point you just have to move on.

MR. WITTES: One comment in response to that. As I recall and understand it, there actually was consultation between President Bush and Harry Reid that led in part to the Harriet Miers nomination.

MR. WHELAN: Proves my point.

MR. WITTES: Which proves perhaps -- that's why I said it also proves -- the reaction to that then was that nominee came out and was absolutely eviscerated by conservative opponents who weren't sure that she would be the type of justice that they want. So it was an effort by

President Bush and I think Harry Reid in very good faith that came with a list of plausible Republican nominees to the court of appeals that would have avoided a fight. Harriet Miers was one of the people that he didn't object to -- if you had a nominee that came out of that process, not the greatest nominee on objective criteria, but a nominee that came out of the process that was just flat out rejected by the conservative base.

MR. WHELAN: Just one note on that. Harry Reid does not speak for senate Democrats and there was vigorous opposition to Harriet Miers from the get-go by a member of a leading senate Democrat. So he's a very weak leader and insofar as the White House took his word as being meaningful it made a serious mistake.

MR. WITTES: I want to back to the tactical question with respect to are you -- you said in your opening remarks that you would not support filibusters by Republicans. In your judgment I just want to push you on this. If the most outrageous Obama nominee that you could imagine, I can't attach a name to that person off the top of my head --

MR. WHELAN: Bill Ayers maybe.

MR. WITTES: Bill Ayers. I think that's fair. Nominee Bill Ayers and you can count 41 votes to stop that person, you're content to make a factual record of principled opposition to the person he has been

and the type of justice you expect him to be and then let him take a lifetime appointment?

MR. WHELAN: Absolutely, and I'm especially willing to see that the moderates on the Democratic side take the heat for any votes for that person. No Democratic president is going to nominate anyone whose record is so radioactive that Republicans would dare to filibuster. It's really that simple. But beyond that, I think that the process by which people openly debate nominations and express their view and vote against it is a healthy one. There are three options that Republican senators can take to Obama nominees. One, the one to which so many will be inclined is roll over and play dead. That's what we saw with Ginsburg and Breyer. The opposite one that maybe some of the newer Republican senators will be inspired to take is to fight to the death, resorting to a filibuster. There's a middle ground which is what I want which is make your case. Learn how to talk about the court. Explain to the public why this matters, vote and lose, and make the case at the next election. We have so many Republican senators who can't begin to talk about the court in ways that are intelligible and understandable and coherent. They need to start practicing.

MR. WITTES: Let's take questions from the floor. We have a microphone coming around so please wait it before you start speaking.

MR. SUGAMELI: My name is Glenn Sugameli. I've headed the Earthjustice Project on judging the environment for the last 7 years, our website and other materials, and from the environmental perspective I wanted to hear reactions particularly from Mr. Whelan on a couple of points. First of all, contrary to Stuart Taylor's list, environmentalists don't want judges who will rewrite the constitution. What we are in favor of are judges who will uphold and make sure that laws are enforced when the administration violates statutes. The constitutional challenge to environmental regulations and laws has almost always been from the right, under the Commerce Clause, takings, et cetera. One thing that you said particularly, the cases Doug listed, they were all cases where congress could change the situation, that's not true as to the John Roberts opinion joined by three other justices in the "Massachusetts v. EPA" case on the access to courts issue which Doug stressed where what he was saying was as a constitutional issue congress cannot allow even a state that's already lost land to bring a case challenging the violation of the Clean Air Act by failure to look at global warming issues. It's important to note that the result of that is not to take that off the agenda for the courts, it's to say that only the industries which want to complain that a regulation is too tough can challenge it and nobody on the other side could ever challenge the opposite. The industry can always say it's costing us a little

money, we want to challenge it, whereas people who are saying we're losing -- the states that are saying we've already lost coastline -- people could not do that.

And I think also on the point that Mr. Wheeler raised that I believe Sunstein's analysis shows that the result of partisanship is actually clearest in environmental issues. So basically that's the point. And one really brief point for Mr. Whelan, the previous extremely qualified nominee for the Maryland seat on the court of appeals was Claude Allen who was convicted of shoplifting. Is that the one you're saying who's extremely qualified previously --

MR. WHELAN: Let me avoid some of the rhetoric here and say that obviously I agree with you that courts should enforce environmental laws and I readily accept your amendment to my statement about one of the cases that Doug raised. Constitutional standing is an important restriction on the ability of folks to sidestep legislative processes and use the courts to get what they want. I'm not in a position to debate the particular Roberts opinion that you're talking about. But again I think I stated quite clearly that most of the items in Stuart's list were ones where liberals were looking for the courts to override political processes. I didn't say all so I'll leave it at that.

MR. MITCHELL: Thanks. Gary Mitchell from "The Mitchell Report." I think I want to pose this question to both Doug and Ed and it is about getting some definition of two terms that get used a lot here and elsewhere, judicial restraint and judicial activism. I want to start by naming three cases and would be interested in how you define are those cases of activism or restraint and if my list isn't any good, I'm interested in your list of where restraint or activism was utilized, and I'll take three easy ones, "Brown," "Miranda," and "Boumediene."

MR. KENDALL: I'm happy to address -- I think the question of what is judicial activism from my perspective is is the ruling consistent with constitutional -- that's from my perspective -- my organization's perspective that's what I look to. Can you look at the constitution's text and principles that are in that text and justify this ruling? I think certainly on "Brown" and "Boumediene" you can do that. "Miranda" -- getting the specific warning that the court applies in that case is -- I think is a more aggressive interpretation of the criminal procedural rules in the constitution and I tend to reserve judgment on that -- with what the court said in "Dickerson" 25 years later was that it had become part of our popular culture and therefore even very conservative judges -- Chief Justice Rehnquist in that case upheld those warnings as an appropriate interpretation of our constitution -- matter, I think it's open to debate.

MR. WHELAN: I agree with Doug that the first question to determining whether a ruling is or is not accurate is whether it's right decided. If it's rightly decided and overrides the democratic process then I would never apply the term activist to it. There's a long-standing debate on "Brown." I've written in defense of "Brown" on original public meaning grounds. A lot of that debate is going to turn ultimately on subsidiary issues of originalist methodology. It seems that the left now is so eager to discredit originalism that it maintains "Brown" can't possibly be justified, but there are serious arguments at the very least for "Brown" on originalist groups, I think "Boumediene" is clearly wrong, "Miranda" as well. The telltale cases of judicial activism, there are two that stand out in our history precisely because they so trampled the political process and both deprive the American people of their power to extend basic rights to a whole class of human beings; "Dred Scott" and "Roe v. Wade." And it's precisely the magnitude of those that the body politic cannot absorb that blow. We had the Civil War with "Dred Scott," we've had 30-plus years of distortion of American politics with "Roe" so that those are I think our archetypal example of judicial activism.

On judicial restraint I think the ruling in -- what you've seen in the last couple of years with the Roberts court is a reliance on the distinction between facial and as applied challenges to reject sweeping attacks on legislation. One that comes to mind particularly is the ruling in "Gonzales v. Carhart" upholding the Federal Partial-Birth Abortion Act. I think that's a classic and excellent example of judicial restraint.

MR. KENDALL: I think it can't go unremarked that it is I think deeply wrong to equate "Dred Scott" and "Roe." "Dred Scott" -- the Supreme Court was that African Americans because of their skin color are not and can never be citizens of the United States and protected by the laws of the United States, they are rendered property under that decision of the Supreme Court. To equate that with "Roe" which is -- John Roberts says (inaudible) that liberty is protected substantively under our constitution. If that is the case, then we can argue about that. Then the question of whether reproductive choice, whether (inaudible) is included within that liberty is at least an exceedingly difficult judgment call and you can say it's wrong but to equate it with what the Supreme Court did in "Dred Scott" -- wrong and offensive.

MR. WHELAN: I will I guess further offend Doug then. I think Doug has made an assertion without argument. The exact point he made about "Dred Scott" he made about "Roe." The Supreme Court has

said that there is a class of human beings that cannot be protected by law. Folks can agree or disagree on what policies there ought to be but that's precisely why the court's ruling was controversial and will continue to be controversial. So I think that again people can have -- I mean no one is going to defend "Dred Scott." "Dred Scott" was the first time that substantive due process was invoked to deprive American people of their ability to protect in this case slaves who had moved into the Northwest Territory. So I think there is a strikingly clear parallel and if it's offensive to folks I'd just would like you think more about it.

MR. WITTES: Mr. Coleman?

MR. COLEMAN: I'm Bill Coleman (inaudible) one I'm surprised that you never mentioned how little we pay these federal judges and there is pending in the House and the Senate a bill which would give them a substantial raise and I hope that before the Congress adjourns they will do that. Today a third-year associate in my law firm makes more money than the Chief Justice of the United States. I'd also ask you to look at most of the good law schools. The professors there make much more money than the Chief Justice of the United States and I think that something should be done whether the Republicans win or the Democrats because I think you have able people who would love to go on the bench but can't go because the pay is just not what it should be.

Secondly, I am somewhat surprised when you started your analysis by trying to identify the justices of the Supreme Court of the United States as liberal or conservative and somehow that had to do with who appointed them.

MR. WITTES: I'm sorry, is there somehow that has to do with --

MR. COLEMAN: Which president appointed them and I'd like to suggest to you that Souter and Stevens were both appointed by Republicans, and I also think that Brennan was appointed by a Republican. I think (inaudible) bench makes a difference. I have a greater problem and that is today I don't know what you mean by calling a judge liberal or conservative. I thought I had the answer by doing some research and I came across the fact that when Catherine the Great was the head of Russia she passed a law or had a law passed which said that if serfs (inaudible) without the land going with it. She said that was (inaudible) somehow that got to be in the British press as being liberal. I thought I had the answer but then several of my religious friends told me that the word liberal appears four or five times in the Bible, and frankly I haven't had time to read the Bible so I've dropped that. But I beg you to get a different analysis. I certainly disagreed with Mister Justice Thomas when he had the position as to whether you should not be able to move

kids from one school to another based upon their race if the schools would give them a better education. I also felt that Mister Justice Kennedy went only half the way when he said of course if something happened where they were segregated on the basis of race you could move them, but that (inaudible) 50 years in that particular state they were segregated for that reason. Thirdly, I really think that you have to say -- I disagree with Mister Justice Thomas, but on the other hand, if I were the father of a white child and he could go to a great school and because you try to desegregate the school you move him to a school not as great, I could see where (inaudible) was a liberal judge (inaudible) but I really think we got to change the whole discussion as to what it is that makes a judge liberal or conservative. I think today you have to describe them (inaudible)

MR. WITTES: You've put a lot of material onto the table. Let's try to take these in order. First of all, your point is certainly right, there are institutional issues, pay raise being the principal one affecting the judiciary in the next administration. Any reason to think that issue or these other sort of class of institutional issues are handled differently by an Obama administration versus a McCain administration? What do you think, Russ?

MR. WHEELER: The pay situation which for a long time I thought was interesting but not particularly serious I think has taken on a

much more serious dimension because there's been such a long gap in any significant increase. I would guess just off the top of my head that the person who would have an interest in trying to push that legislation although I realize that some in his party don't would be Obama because of the kinds of people he might like to recruit for the bench especially the district bench are likely to be from the ranks of public-interest lawyers and others who don't make much that's obvious but want something out of the appointment rather than just the pleasure of serving. So I would think it's in the interests of either candidate to promote that although I don't think they're going to do it before the election because it's not a popular issue.

MR. WHELAN: I think there will be a pay raise bill. I do have a couple comments on this. First, I wish that there were some sort of locality pay component. I guess the judges just hate that idea, but if you're a judge in Amarillo versus a judge in New York City, there are tremendous differences in cost of living. That's reflected of course in the federal employee pay scale for Executive Branch employees and it seems to me that ought to also be something like that for judges. If judges want to move, fine -- difficulty of establishing exactly where their residence is.

I will say that Mr. Coleman you probably have a lot of third-year associates who'd be happy to become judges so obviously we're not looking for pay parity and you weren't arguing for that. I certainly don't

mean that. I do think that there are a lot of systemic reforms that might solve the problems on the other end, reducing the excessive pay of law professors and lawyers, but that's a daunting challenge.

MR. WITTES: Doug?

MR. KENDALL: I agree with both your points, what I take to be your main points. I think that the pay issue really has become at this point an obstacle to getting the best nominees to the federal bench throughout the system and I think that has to be rectified or it should be rectified. I also think, and this is a comment that kind of feeds into our conversation, that you're right that there are -- that the liberal-conservative labels are just almost so inaccurate or so loose as to be fitting into the same category of judicial restraint and judicial activism which I think we all kind of -- I think probably should be banned from the lexicon because they're so inaccurate. And one thing I'd just point to, I think Ed is a classic example of a judicial conservative. I think he is about 180 degrees philosophically different from conservative libertarians which are genuinely -- I was just 2 weeks ago over at the Cato Institute debating a book they have called "The Dirty Dozen" which lays out a remarkably activist or what I consider if we use that (inaudible) but a what I think Ed would categorize as remarkably activist vision of the federal bench and so there is --

between libertarian conservatives there's a range of views that don't really fit on that spectrum well at all.

SPEAKER: There's a difference though it seems to me in calling judges liberal and conservative and just as a categorical device to analyze decisions, liberal decision favors the labor unions, a liberal decision favors the environmental cause, so on and so forth. I agree that applying it to judges gets into all sorts of trouble, but it's just a typology that scholars use for convenience and in that way it doesn't really offend but can I say one other thing real quick?

MR. WITTES: Please.

SPEAKER: About the pay raise. It's not just a pay raise, it's -- I think you could say the next president is going to face a more serious problem in the federal judiciary, it's the pay raise along with the shift in the caseload, a lot of less-interesting cases perhaps due to decline in the trial rate, so you got a morale problem in the federal judiciary and the pay raise in some ways is just the icing on the cake and it does create recruitment problems, real serious.

MR. WITTES: Ed, you have one more?

MR. WHELAN: Just very briefly. As I indicated before, I certainly agree with criticism of crude political labels like liberal and conservative. For example, overturning "Roe" and restoring it to the

democratic process is substantively neutral on the question of abortion. The conservative view on abortion would be to take the position which no one on the court takes, that the constitution itself prevents enactment of permissive abortion laws. I do disagree with Doug though. Proper use of the terms judicial activism and judicial restraint precisely captures what we care about and the response to misuse of those terms is not to ban those terms but to use them properly.

MR. WITTES: Let's take one more question and then we can wrap it up.

MS. HOLT: My name is Diane Holt and I've done quite a lot of work in Europe, in the Czech Republic, in Italy, and former Yugoslavia, and other places like Mexico, and my question is a much more general question that I think sort of stands behind the discussion today which is about the overall credibility of the judicial system. We're talking about essentially tactical and ideological issues that impact what our popular feeling is of the judges themselves being impartial and having -- being in the right position to make decisions and the court decisions being decisions that we as a populace accept and believe in and believe that the Judicial Branch of government is in fact somehow trying to get at the truth or the right decision or something relatively lofty as opposed to representing some kind of further ideological division between -- the

Democrats are better represented and so we're getting more Democratic decisions versus the Republicans are better represented and so we're getting more Republican decisions and turning the judiciary into a more political branch of government.

So my question for you all is at what point are we beginning in the way that we look at the Judicial Branch including the Supreme Court doing things that cause us to look at it in a much more seriously negative way that's ideological as opposed to maintaining the view of the Judicial Branch as being somehow above all of this.

MR. WITTES: Who wants to start with that? That's a very big subject for 2 minutes left.

SPEAKER: The federal judiciary has always been seen as a dynamic and in some sense a political institution unlike the civil judiciaries in Europe and elsewhere so you're just going to have a difference there.

MR. WITTES: On the other hand, we do distinguish between the judiciary and the political branches. There's some sense in which it's always represented something more elevated than something you divide into party caucuses and count members. Right?

SPEAKER: No doubt. No doubt. And of course in the states also with judicial elections. And there is this notion that -- getting back to our topic, that a presidential election is a referendum on the

judiciary. I think that's a notion we should kick out the door. I think for the last -- how many elections back into -- Clinton was elected with a 43 percent vote, any mandate you can find to change the federal judiciary dramatically in presidential elections since then I just think is made up and I think it would do us well to get rid of that notion although that's a dream I realize.

MR. WITTES: Doug?

MR. KENDALL: One thing behind this conversation between Ed and I and led by Ben has been trying to talk individually and find a little more of a common language about how we argue about the courts and about judicial opinions. I think one of the thrusts of my new organization which is the Constitutional Accountability Center is to convince progressives but really everyone that the text and the history of the constitution are critical as a starting point for any judicial philosophy. And I think when you start there at least you have a common language. And so Ed and I can have sharp disagreements about what that text and history compels and what is activism and what is not, but at least we're talking along the same lines and I think that's a healthy way of pushing the dialogue back from is this all about results, is this all about liberals or conservatives. No, it's about what the constitution and the law says and means and we can disagree about that, but that at least we're having that

discussion and agreeing about the parameters and I think that's potentially a healthy development.

MR. WHELAN: And I certainly want to credit Doug for exploring the progressive implications of original-meaning jurisprudence. I think originalism has been so dismissed by so many folks because they see results that they don't like. There's a great article, a very long article, by law professor Larry -- who explains using the philosophy of language that original public meaning, originalism, is exactly how we use language when we communicate across generations and I think everyone would understand that but for the political fights over particular issues. So I think that the real problem is that there is a whole school of constitutional interpretation that rejects the notion that law is distinct from politics and indeed says that constitutional decision making is just dressing up your politics in the guise of law. And that's very debilitating and I think we need to do all we can on both sides of the political aisle to understand law as something separate and understand that judges have a sacred duty to say what the law means and not to indulge their own policy preferences.

MR. WITTES: On that exceptionally high-minded note I'm going to bring this to a close. Thanks to you all for coming.

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

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