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Featured Panelists

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P R O C E E D I N G S

MR. TAYLOR: Good morning. I think we'll start, the better to have some time for questions at the end. I'm Stuart Taylor, I'm Resident Brookings Fellow here. We have to great panelists who I'll introduce in a moment but first I'll give a quick overview of some of the things we'll talk about.

Adam Liptak of the *New York Times*, who is a great reporter, rained on our parade a bit yesterday when he wrote that the coming Supreme Court term is a "buffet with no entrees". That may be true in the sense that the Court hasn't yet agreed this year to hear any of the blockbuster cases on abortion, affirmative action preferences, gay rights, religion, presidential power, campaign finance, those sorts of things that have been the staples of liberal-conservative brawling in recent years.

But when our two panelists and I were deciding which of the dozens of cases the Court has agreed to decide this year, to discuss, we found an embarrassment of riches in terms of fascinating clashes that will probably prompt a reasonable amount of liberal-conservative brawling on issues such as the following: whether the Attorney General and the FBI Director can be held personally liable for mistreatment of hundreds of innocent Muslims who were rounded up and imprisoned on immigration and other charges in the months after 9/11; whether the Federal

Communications Commission can penalize broadcasting of so-called fleeting expletives, dirty words, which I will leave it to our panelists to tell you about. (Inaudible) conflicts between state and federal regulatory power in cases involving horrible personal injuries caused by pharmaceuticals and cigarettes; a clash between the navy's need to use sonar in training exercises and environmentalists worries that the sonar is harming whales and other marine mammals; whether the Environmental Protection Agency can weigh costs against benefits in enforcing the Clean Water Act; and a variety of contentious issues involving campaign spending, speech, and voting rights.

Perhaps the biggest of them is whether states in the Old South and other communities with a history of racial discrimination in voting have reformed it to a point that they can no longer be required, constitutionally required to clear all changes in voting rules with the Justice Department.

We have two panelists who are as well qualified as any I can imagine to brief you on these issues. Alan B. Morrison, to my far right, your left, has been a lawyer in public service for more than 40 years and has argued 20 cases in the Supreme Court. He's currently a Visiting Professor at American University's Washington College of Law. A graduate of Yale College and Harvard Law School. He served for four years as a U.S. Navy Officer, followed by stints with a private law firm and

the U.S. Attorneys Office in Manhattan. He came to Washington in 1972 to found Public Citizen Litigation group with Ralph Nader. As far as I know that's the first public interest law firm of many in the country.

Alan headed public Citizen Litigation Group for more than 25 of the 32 years he was there. More recently he has been teaching law at Harvard, NYU, Stanford, and the University of Hawaii, and now, of course, American University.

Thomas G. Hungar, to my immediate right, was deputy Solicitor General in the Justice Department from 2003 until this July supervising the government's Supreme Court and Appellate Litigation on a wide range of issues. He has argued 24 cases in the Supreme Court. A graduate of Willamette University and Yale Law School. He served as a law clerk to Judge Alex Kozinski and Justice Anthony Kennedy, and later as an Assistant to the Solicitor General and as a partner in the Washington, D.C. office of Gibson, Dunn, and Crutcher.

Tom Hungar will give something of an overview of the Supreme Court's docket and then Alan will make a couple of observations and then we'll go to the cases.

Thank you.

MR. HUNGAR: Thank you Stuart. It is typical, and it has been typical in recent years around the first Monday in October to hear people bemoaning the ever diminishing Supreme Court docket. Of

course, that's usually Supreme Court reporters and Supreme Court lawyers who have a vested interest in an increasing docket. But in any event, this year you haven't heard any of that because there's been quite a change. The Court, even before the most recent round of grants in September had 43 cases on its docket for this term, which is a 60 percent increase over the number of cases they had at that point last year.

I thought it would be interesting to just spend a couple moments talking about what types of cases seemed to be leading to that increase and whether that trend is likely to continue and what lies behind it.

The biggest area of increase over the previous term in that 43 cases is criminal cases and principally what we call state on top petitions, that is Cert Petitions filed by a state where either the State Supreme Court or the Federal Court of Appeals has set aside a conviction, invalidated a sentence, somehow ruled against the prosecution in a criminal case.

There have been some interesting studies done of the relative propensity of Justices to grant, to vote to grant certiorari to grant review of Cert Petitions and obviously we don't know who votes how among the current members of the Court, but the Justice Marshall papers and Justice Blackmun papers have shed some light on the propensity of justices on the Court at that time. And interestingly, both Chief Justice

Rehnquist and Justice O'Connor tended to be among the most likely to vote, to grant state on top Cert Petitions in criminal cases. Their replacements Alito and Roberts may have been less likely to do that in recent years, which it could explain part of the drop in the docket, but if that's the case maybe they have been growing into the shoes of their predecessors in that regard which could explain the increase.

There's also been, there was something of a further increase in the business cases which, of course, has been a growth area for this Court. In any event, and that trend is likely to continue particularly given the Chief Justice's extensive experience with an interest in the business docket and the fact that the Chief sets the agenda for the Cert Grant Conferences, where they decide which cases to set for oral argument in which to grant review. The Chief Justice starts that process by identifying the cases that he would like to discuss and that arguably gives him slightly greater voice in that process.

I think also that something else is going on though. I think the Court has in effect reduced the standards that it applies in deciding what cases meet its criteria for review. I think they have slightly lessened, lowered the bar if you will. And I say that for a number of reasons, but I'll just highlight a couple of cases from this term that I think maybe show that most clearly. And the background is that two years ago in a case called *New York vs. EPA*, the Court of Appeals for the D.C. Circuit invalidated an

important, a very important Federal Clean Air Act, EPA regulatory program. The government decided this was a very important environmental case, filed a Cert Petition, the court denied review. There was no Circuit conflict, no dispute among the Courts of Appeals, and the Court denied review so we concluded that just because it's an important environmental case that's not enough to get the Court's interest if there isn't something else, a Circuit conflict, some other additional reason for review.

So this past term there were two environmental cases that the government lost in the Courts of Appeals, they happened to be Clean Water Act rather than Clean Air Act cases. Neither of them, we thought, could be viewed as more important then the *New York vs. EPA* case and there was no Circuit conflict so the government did not file a Cert Petition because the Solicitor General's office tries to mimic the standards that the Supreme Court itself implies at the certiorari stage, so the government tries not to file a petition that it doesn't think meets the Court's standards as evidenced by what the Court is granting and denying.

But in both of those two Clean Water Act cases, even though the government did not petition, private parties did and the Court granted review. Now you could say the government was just wrong in its assessment, or I suppose you could say the Court is more interested in Clean Water than in Clean Air. But I think that the burden for getting

review effectively is being reduced a little bit, which from the standpoint of practitioners is a good thing.

MR. MORRISON: Good morning. I think the difficulty in trying to determine trends from the Court is the numbers are very small. Until about 15 years ago when Chief Justice Rehnquist took over and transition had been made from the old Court to the new one, the Court was hearing around 140 cases a year. It went on a crash diet and reduced itself to about 80, and then last year it was down the 70.

This year they took more cases in the spring and last winter that carried over. And so they started with more cases and the question is are they going to finish with more cases than 70 at the end of the year? One of the things that leads me to think that they're not is that they're hearing arguments in the afternoon for the first time, for how long Tom would you say?

MR. HUNGAR: Years.

MR. MORRISON: Years.

MR. HUNGAR: Many years.

MR. MORRISON: The only argument that they heard in the afternoon was the big campaign finance case *McCain-Feingold* and they heard that in September and they heard in the morning and the afternoon, so that doesn't prove anything except that it was a big case and had to go into the afternoon and there were lots of parties and people who wanted to

be heard.

The second as far as exciting cases are concerned, I suppose that if we had been doing this in 2000 nobody would have said we expect a big election case this year and so maybe we'll have a big election case this year, although I think most people are hoping we don't. The second is, in every year that there have been these big Guantanamo cases you couldn't predict them at the beginning of the year with the exception of last year perhaps where there was a late grant in June of the case, no. that was until the fall was it actually Tom?

In any event, the Guantanamo cases tend to come up and tend to come up on an expedited basis. And there are two things, there are some cases coming out of the D.C. Circuit. There are challenges to the delays that are going on in the District Court on habeas. And of course, we never know what's going to happen with the new administration and what they're going to do about changing the whole process around and that will give people more grounds to challenge or at least different grounds. So it's hard to know what we're going to see, but we will certainly see some cases an addition to the ones that have already been granted. We'll talk at the end about a few cases that seem interesting if not necessarily likely to be heard. Tom do you want to begin?

MR. HUNGAR: Yeah, the first case that I wanted to talk

about is *FCC vs. FOX*, which Stuart referred to briefly. That's the so-called fleeting expletives case. In the interest of full disclosure I worked on the Cert Petition for the government in that case before leaving the SG's office.

The background is that Congress and the FCC have long banned indecent speech over the broadcast airwaves, radio and TV and in the *Pacifica* case, about 30 years ago involving George Carlin and the famous seven filthy words. The Supreme Court upheld the FCC's authority to ban indecent speech on the ground of potential injury to children and the fact that broadcast media is so pervasive and intrusive into the home and is so readily accessible to children. Of course, this was 30 years ago and they didn't have things like cable TV and satellite TV that are, and for that matter the Internet, that are probably equally pervasive. So arguably times have changed which is part of the issue in the case.

As a matter of regulatory policy the FCC for many years did not applied or enforce it's indecency prohibition against fleeting expletives, that is the isolated use of a single expletive but obviously repetitive uses would bring down the regulatory hammer on the networks or radio stations. But in 2004 in a case involving one fleeting expletive by the singer Bono at the Golden Globe Awards, the FCC announced that it was changing its policy and had concluded that even a single use of an

expletive could impose harm on children that should be avoided and at least one such use was gratuitous and didn't have any artistic or newsworthy component to it that they would apply the ban on indecency. And in particular, the fleeting expletive used in that case and that they applied the ban to is what the New York Times Style Manual apparently calls "a four-letter word connoting sex" and what a genteel law school classmate of mine referred to as the naughty F word.

The *FOX* case itself involves not the Golden Globe Awards, but the Billboard Music Awards. Given the propensity of Hollywood actors and pop music stars to use this kind of language, it's not particularly surprising that these cases always seem to come up in the awards show context. I suppose the FCC might solve its problem if it could just be and those shows outright, which to some might be a good thing for completely unrelated reasons but I suspect Alan, at least might think there's some First Amendment problem potentially with that sort of a ban.

MR. MORRISON: And with Red Lion, yes.

MR. HUNGAR: Yes, even with Red Lion. Anyway, at the Billboard Music Awards in 2002 and 2003, Cher and Nicole Ritchie respectively managed to use the naughty F word and Ritchie also threw in for good measure what the government's brief refers to as the S word, a shorthand for cow manure.

The FCC applied its new standard and found those fleeting

expletives to be indecent. The Court of Appeals for the Second Circuit up in New York set aside that ruling, not on First Amendment grounds but rather on Administrative Procedure Act grounds. They concluded that the agency had not adequately explained and justified and supported its decision to change its policy and ban fleeting expletives, but they also kind of went out of their way to say oh, and by the way, if we were to address the First Amendment issue we think there would be some serious problems, notwithstanding the Supreme Court's decision in *Pacifica*.

And that's how the case is teed up for the Supreme Court. It's first and foremost at least a procedural case, an Administrative Procedure Act case. And it's entirely possible, in fact, may be somewhat likely that all it will end up being which is why one colleague of mine at the SG's office has called this as the most over hyped case of the term.

It would certainly be easy for the court to resolve it on procedural grounds either way and thereby avoid getting into the somewhat messier First Amendment questions. If they do reach the First Amendment question for *FOX*, for the studios to win the Court would have to overrule *Pacifica* and indeed most of the networks; NBC, CBS, and ABC, unlike FOX surprisingly have specifically asked the court to essentially overrule *Pacifica*. To say it's a dead letter, things have changed, we've got the V-chip, we've got cable that isn't subject to these prohibitions so it makes no sense to subject broadcast media to these

probations.

So the government may well have an uphill fight, although one never knows. Justice Stevens wrote the original Pacifica decision and for all I know he continues to believe that it remains good law so it remains to be seen. But I think if I had to guess, I would say that the Court will probably a void the constitutional issue, which means that the most significant aspect of this case will be that it will end up sitting a record for the most uses of the naughty F word in the hallowed halls of the Supreme Court, at least on the record.

MR. TAYLOR: One quick question. If an entertainer spits out the naughty F word, does the broadcaster have the capability to bleep it out and make it decision that we'll let that one go by or not? Is that the theory?

MR. HUNGAR: Part of the government's theory is that they can do that relatively easily and they do have the technology to do that. Obviously it requires additional expense and effort and the delay, which they'd prefer not to do.

MR. MORRISON: Tom can I ask you a couple questions about that? Is one of the problems with this decision retroactivity? That is, did the FCC change its mind after the naughty words were spoken?

MR. HUNGAR: Well, yes and no. They did change their mind after the naughty words were spoken, but they said because the

networks weren't on notice of this policy at the time, we're not actually going to impose a fine. This is sort of declaratory, we're just putting the networks on notice that in the future they will be subject to fine if they don't essentially have a time delay and bleep out the naughty words. And the networks challenge that declaration of future intent.

MR. MORRISON: Right. Is there anything to the fact that the people who used the naughty words were not employees of the networks or weren't under contract with them, that they were in effect covering – the networks were covering news events and independent third parties spoke the words? Is anyone making anything of that? Or is there anything to that?

MR. HUNGAR: That's not really been the issue in this case. There was the Janis Joplin Super Bowl disrobing event involving –

AUDIENCE: Jackson.

MR. HUNGAR: Jackson, sorry.

(Laughter)

MR. HUNGAR: One of those famous people. Yes, Janet Jackson involved in that issue. That was a Third Circuit case where they also set aside the FCC ruling. But in this case The theory of the government's regulation is essentially is that because the networks have the ability to have the time delay and bleep out the expletives, it doesn't matter whether the actor or actress is their agent.

MR. MORRISON: Okay. We're now going to talk about a case called *Wyeth vs. Levine*. This is a real lawyer's case, but it has a major impact on everyone who takes pharmaceuticals, at least potentially does.

The plaintiff was a woman who was a professional violinist, lived in New Hampshire and took some drugs as part of a medical procedure and the problem was that the amount that she was given pursuant to her doctor's orders and pursuant to the amounts that were advises being not excessive turned out to be quite excessive and she suffered serious injuries and has been unable to play the violin, literally because of it. She was awarded, I think a sum of $12 million in the state court in Vermont. The Vermont Supreme Court upheld it. The defendants, among the reasons claimed that they were not responsible but the only issue now before the Supreme Court is whether the fact that the defendants complied with the approval given to them by the FDA when they got this drug approved and whether the warning label as approved by the FDA was adequate.

Could the plaintiff nonetheless sue them? In effect, the defendants argue that the FDA approval is a ceiling as well as a floor on the conduct that state courts are allowed to hold people responsible, people who manufacture drugs. This doctrine notice preemption is also referred to by one of my former colleagues as "A get out of jail free" card;

main that if you injure somebody as long as you complied with Federal law you don't have to pay the damages.

The interesting aspects about this case are that for, since 1938 when the Food Drug and Cosmetic Act was enacted there have been lawsuits of this kind increasingly over the years. In which, the fact that the FDA had approved the drug and set forth conditions was something that the manufacturer could offer in evidence as a reason not to hold them liable but it was not an absolute defense which is what they're arguing here.

Beginning in the 1980s, defendants in a whole range of industries from cigarettes to shipping to banking started arguing that Federal approval was the ceiling as well as the floor. And they won a number of cases under different statutes. They actually did better in the lower Federal courts than they did in the Supreme Court, although the Supreme Court sometimes ruled in their favor.

The one thing that's been clear about the Supreme Court on this is that they have not tried to set forth any across the board principles for when they will find preemption. They have been looking at each statute and trying to discern from the meaning of the words that Congress enacted, what Congress meant to allow and not allow the states to do. So last year In a case called *Riegel*, the Supreme Court held with respect to medical devices that claims of failure to warn and design defect were

preempted by the fact that the FDA had approved this particular medical device. The decision was eight to one in favor of the device manufacturer.

This process by which the FDA approves devices is virtually identical to the way they approved drugs, that is in all material respects and so one would expect that the outcome could very well be the same. The difficulty is that the Court in the *Riegel* case went off on the grounds that there was an expressed preemption provision in the Medical Devices Act, which is not found in the drug provisions and there are substantial reason to believe that the Court is going to treat these cases quite differently.

If it does, and that's entirely possible, you could have a situation in which you have drugs are not preempted, devices are preempted and if those of you who were around when the FDA tried to regulate tobacco and cigarettes you may remember that one of the ironies was that the FDA concluded that nicotine was both a drug and a cigarette was a medical device so they could have regulated it either way. And if the cases come out split, you could end up with devices and drugs reaching different conclusions with respect to the same product.

The only thing that is certain about this case is that Congress will certainly step in afterwards. They stepped in and offered some amendments which got nowhere on the Medical Devices Act this year, which is hardly surprising. But they will surely step in when this

happens, either way, because the idea to any person who is familiar with regulation at all that these products should be treated differently for preemptive purposes when the FDA does essentially the same thing in both cases. It doesn't make any sense, which ever way you come out.

And so the outcome of the Presidential election may have a great deal to do with whether they will need a veto override in the Congress are not.

MR. TAYLOR: One quick question Alan. Does the process the FDA uses when it gives these approvals, approves the labels. Are they looking towards whatever the language of the statute says, are they looking towards, okay this is safe? In other words when a state says it's not safe enough are they contradicting what the agency said?

MR. MORRISON: Well, typically the thing about drug approvals and device approvals is that they are by and large conducted in secret. That is to say the public doesn't have any opportunity to be heard except in those cases in which there is an advisory committee and the advisory committee holds a public meeting as to whether to approve and sometimes what to say about the label.

In those cases the information which is ordinarily secret is given to the advisory committee and persons attending the advisory committee can get access to that information at the time. But they don't have access to the back up studies and so, states themselves to the

extent that states have any interest at all almost never participate in that process. Consumer groups may and sometimes competitors will come in because they want to say this product is no good and it shouldn't be allowed on the market at all and sometimes medical groups will come in. But the states as such don't come in.

And the other thing that I should have mentioned is, in many of these cases the FDA has information at the time that suggests the product is safe and there is indication to the contrary. What happens is when the product gets out on the market, the relatively small number of people who are subject to pre-market testing on human tests is greatly expanded and people take the drug for a much longer period of time. So that adverse side effects which would not have shown up in the pre-market testing through no fault of the companies at all in most cases, they show up afterwards.

The companies are supposed to report these things to the FDA and the FDA is supposed to keep on top of it. I think everybody has recognized that the FDA has been less than effective to put it charitably in that regard. And so there's that mismatch there as well. And that is one of the things that is going to be factored into account, both in the Courts' decision and with respect to legislation before Congress.

MR. TAYLOR: Thanks.

MR. HUNGAR: The other preemption case on the Court's

docket is called *Altria*, which is to say Philip Morris, against Good and it actually is being argued at the Court even as we speak.

That's a, obviously a cigarette case. The plaintiffs in that case are challenging Philip Morris' advertising of cigarettes as light and low tar. Their theory is that, although, Philip Morris based those claims as all cigarette companies did about light and low tar cigarettes on the so-called Cambridge Filter Method Tests. The plaintiffs argue that Philip Morris actually knew that the test dramatically undercounts the amount of tar and nicotine that smokers in practice actually receive when they smoke light cigarettes the way they typically smoke them. And so that it was false and misleading advertising for Philip Morris to call these light and low tar cigarettes without disclosing the truth.

This case has both an express and an implied preemption issue, because the Federal Cigarette Labeling and Advertising Act prohibits any state law of requirements about advertising that are based on smoking or health. Whatever that means. Not surprisingly the parties disagree about whether low tar and light cigarette advertising and the alleged falsity of that advertising is based on smoking or health and the relative sense.

And in fact they both invoke a 1992 Supreme Court case called *Cipollone*, which involved the same statute and produced one of those classic split Supreme Court decisions with opinions going three or

four ways and no binding majority opinion. Several of the Justices on the Court today, of course, have never address that question so there is an open question on the express preemption, statutory preemption issue which I think is going to be a close case. And interestingly, the government which filed a brief in the case did not address the express preemption issue at all. It ducked and addressed only the implied preemption issue, which is of considerably greater interest in potential significance depending on how the Court resolves it but the court may not even reach it.

The argument there is that because the FTC essentially, well expressly approved the use of the Cambridge Filter Method and according to the tobacco companies, in fact coerced effectively although not explicitly forced the tobacco companies two use the Cambridge Filter Method in their testing in disclose the test results in their advertising. The argument is because the government forced us to do it we can possibly be held liable by the states for doing what the United States forced us to do. And that principle is relatively straightforward, the problem is that there is a big dispute about whether that's in fact what happened.

What happened here, both the plaintiffs and the Federal Trade Commission represented by the Solicitor General say that that's just not the case. The Cambridge Filter Method used in the advertising of that, those test results and the labeling of cigarettes as light or low tar was

completely within the tobacco companies' discretion and therefore even if there was some regulatory pressure to do that, the tobacco companies chose to do it themselves and are liable for their choices.

If the Court were to agree with the tobacco company claims, this would be a very significant preemption case because there is a wide array of areas where the government through regulatory encouragement, if you will, arguably encourages companies to engage in certain types of testing, certain types of disclosures and if that's enough to result in preemption we'd be even further along the road than Alan was suggesting.

My guess is that the Court will not go that far if they reach the implied preemption issue, they will rule against the tobacco companies.

MR. TAYLOR: Now that may suggest the answer to a question in my mind. Some commentators and critics have portrayed the preemption case and other business cases as evidence that a conservative Supreme Court becoming an engine of pro-business tort reform. To just take whacks at the ability of consumers to win big dollar verdicts. Do you think anything like that is happening?

MR. HUNGAR: I don't think so. I mean it depends a little bit on your perspective. But the Court, certainly last term was a good term for the forces that want to preempt state law regulation, but if you go back a term or two before that you can find counter examples. The *Bates* case

for example was a case somewhat similar to *Wyeth*.

MR. MORRISON: Absolutely.

MR. HUNGAR: --involving the Federal Fungicide, Insecticide, and Rodenticide Act or something to that effect, which is the regulation of pesticides essentially where there was a labeling requirement that companies had to get their labels approved by the EPA and then when the company was sued for failure to warn for injuries called by a pesticide and argued preemption because our label was approved by the EPA, the Court found after carefully analyzing that particular regulatory scheme, the Court said no preemption and I think it was –

MR. MORRISON: Nine to nothing.

MR. HUNGAR: Was it? I think there was some disagreement for a little bit, yeah, but for the most part there was widespread agreement that there was no widespread preemption under that regime. So it varies quite a bit.

MR. MORRISON: Tom, can the FTC is the FTC making any noises about changing the Cambridge Standard on the light?

MR. HUNGAR: Yes.

MR. MORRISON: It clearly has the power to do that, does it not?

MR. HUNGAR: Yes. This is kind of an irony because the FTC back in the ‘60s approved that test for use. What they said is we

won't claim that you are engaging in misleading advertising if you disclose the results of those tests and they have, after filing the brief in the Supreme Court they have announced that they are considering, they're re-evaluating that and examining whether in fact it should be revoked. And of course, the United States for a number of years now has been suing the tobacco companies on the very same theory that the plaintiffs in this case are enunciating. So I suppose one might argue the FTC is a little late coming to this view, but certainly they have signaled that they are not big fans of the Cambridge Test at this point.

MR. MORRISON: The next case I want to talk about is *Ashcroft vs. Iqbal*, which is a 9/11 case, sort of. It's not a Gitmo case, it involves conduct which occurred in Brooklyn, New York. The plaintiff who is Muslim and there were actually two plaintiffs originally in the case. One has since settled which may be kind of an interest to the Court because part of what the government is claiming is that the world is going to stop rotating and we're not going to be able to anything if we're forced to proceed with these cases.

Mr. Iqbal was arrested for a minor offense and he was designated as a person of interest, which meant that instead of going to the usual criminal location he was sent to a place in Brooklyn and he was subsequently transferred to a further place where persons of high interest were sent. It turns out virtually everybody who went to both places was a

Muslim and lots of other people were picked up, aliens who did not go to those places. Mr. Iqbal alleges that while he was confined for I believe about a year and a half, he was subject to very harsh physical treatment by Federal officials at the place of confinement.

The case before the Supreme Court doesn't deal with what actually happened to him there when the guards allegedly brutalized him. The claim, the only two people who are the defendants in the case before the Court or petitioners, are the Attorney General, the former Attorney General and the FBI Director. And the allegations are that these two individuals personally approved the process by which Muslims were singled out because of their religion and race and sent to these special places of confinement.

There is no question that if the plaintiff would have a claim, if in fact they had a piece of paper in which either of them said "We hereby direct that all Muslims picked up shall go to these special detention facilities." The difficulty, of course, is if there is such a piece of paper nobody has come upon it now. And the allegations are that the plaintiffs say that nonetheless they actually approved this detention. And the question is not the question of law so much, not at all. The question is one of fact, ultimately did they approve or did they not approve it?

The case comes to the Court in an unusual posture, which is that all that's happened so far is that the plaintiffs have filed a complaint as

to these two individuals. There's lots of other discovery that's been taking place, but not with respect to the Attorney General and the FBI Director.

Those two officials claim qualified immunity. That is to say that they have a claim that they've acted, if they act in good faith in accordance with the law, they're entitled to immunity, which means immunity not simply from judgment, but from trial and discovery and everything else. The interesting aspect is that there is no question that as a matter of law they are not entitled to immunity if they actually did what the plaintiff said they did. And so normally speaking the case would go on and allow some additional factual discovery.

The Solicitor General's Office on behalf of the two individual defendants is arguing two things. One is that because they are high ranking officials and this is qualified immunity, that to make that kind of immunity meaningful plaintiff has to show more even at this stage of the process. Make some additional factual allegations or put proof in, not entirely clear what they're actually claiming. And otherwise, in order to get a meaningful qualified immunity to have to throw the case out.

Of course, from the plaintiffs' perspective there's no way that they can gather this information because if they had made a request to the government for copies of all the documents approving, singling out Muslims they would have been told that they can't have them. To the extent that there has been discovery so far in the case, and there's been a

fair amount although not directly related to these two officials. All of the discovery is subject to a protective order indicating further willingness of the government not to come forward with anything. And there is no way they could get it short of coming to Court which puts the plaintiffs in a dilemma.

What's making this case go farther than it normally would have from the defendant's perspective is that two years ago the Supreme Court decided a case called *Bell Atlantic vs. Twombly*, an anti-trust case and I won't go into the details with you but it seemed to say in that case, at least in some categories of cases, the usual Federal rules about pleading which don't require a great deal of specificity are not going to apply in those categories of cases. And the government is relying on that case, which came up in a quite different context to say that in the qualified immunity context the Court ought to take the same approach.

Sp the case, although involving an incident of quite great significance has less overall significance because it involves only two of the defendants and it involves a rule of Federal pleading. It's also possible as the trial judge did here, to say and one of the things the plaintiffs is going to argue is this is all that should be done, is to say okay, we won't take any discovery against these two high ranking officials now. Before we can take their depositions, that is put them under oath, we have to have – we agree that we have to have some more evidence. But we

think we can get that evidence from the other people who are between them and the guards at the prison to show that they had some connection and if we can't then we can throw the case out, but don't throw it out now.

MR. TAYLOR: One question Alan. Suppose that in the end Mr. Ashcroft and Mr. Mueller lose and the jury awards $5 million each against them. Does that come out of their pockets? Does the government reimburse them and could the plaintiff here be suing the government itself rather than the individuals?

MR. MORRISON: Well, the answer is – let me answer the second part of the question first and then I will come back to it unlike debaters who don't answer the questions at all, I will answer it but I prefer to answer the easy part first.

And the easy part is that they actually have sued the government itself for certain of the activities. That is the physical abuse by the guards that is subject to the Federal Tort Claims Act. They filed a claim under that and they've also sued the guards in their individual capacity. So it's clear that if they lose that, if the government loses that under certain circumstances the government will have to pay the judgment.

My understanding of the law is that the government is not legally bound to pay the judgments of Mueller and Ashcroft but that in many cases it chooses to do so and so it could pay that. Whether it will

choose to do so in this case, I don't know.

Tom, is that your understanding of the law on indemnification?

MR. HUNGAR: And they also choose whether to provide counsel, which obviously in this case they're doing.

MR. MORRISON: Yes. And at some point if they think there may be a conflict between the officials and the government they will then advise them to get outside counsel and sometimes the government will pay for that as well.

MR. HUNGAR: All right. In the next case that we want to talk about is Winter, *Donald Winter, the Secretary of the Navy vs. The National Resources Defense Council*.

Although Stuart noted that there aren't any of these big clashes between the Executive and the Judicial Branch on the docket, this arguably fits into the category at least to some extent of the cases that the Court has been deciding about whether the Judiciary or the executive Branch is ultimately in charge of the Nation's military.

This case involves sonar testing that the Navy conducts in the Pacific Ocean, which although the parties dispute how significant this is, but it's clear that it has some impact on marine mammals particularly whales in the area of the testing. And so, the plaintiffs sued to halt the testing under the National Environmental Policy Act, NEPA, which is a

purely procedural statute that requires environmental impact statements and the like.

And the District Court and the Ninth Circuit Court of Appeals out in California enjoined the sonar testing unless the Navy adopted procedures that were so restrictive that the Chief of Naval Operations and the president concluded would render the sonar testing unworkable and thereby threaten national security because this sonar testing, the Navy says is essential to their ability to train sailors to detect advanced Chinese and Iranian submarines that would be capable of sinking the Navy's aircraft carriers in the event of a dispute.

So the government invoked an emergency exception, the regulation that's been around for many years that essentially allows them in emergency situations not to go through the whole lengthy procedural process required by NEPA, but instead to adopt other measures appropriate to the circumstances. And then when back to the courts and said set aside the injunction and the courts refused. The case is now in the Supreme Court on that question.

The environmentalists argue, number one, that there is no emergency exception that you always have to go through NEPA's full procedures even in an emergency situation and in any event they say to some extent there wasn't really an emergency here although they've largely dropped that. But they say that what the government has done

here is a violation of separation of powers because the District Court had already issued its injunction only then did the government invoke the emergency exception so they say the government by executive fiat is trying to override a judicial decision and that violates the separation of powers.

As the one commentator I saw recently noted the environmentalists are 0 for 15 in NEPA cases in the Supreme Court. So I think that that record is not likely to change with this case given the strength, I mean it's hard to argue when you've got Presidential and Naval determinations about the urgency of the situation and the national security interests at stake and the relatively weak proof of substantial harm to marine mammals.

MR. MORRISON: I didn't realize that Al-Qaeda submarines these days. Do they?

MR. HUNGAR: Not Al-Qaeda, well Iran and China and some other countries. These are not nuclear submarines, they're actually, it's sort of the German U-Boat, new and approved which operate by electrical motor which is much quieter than a nuclear power plant. Not surprisingly and so the Navy actually cannot detect them through their usual methods of passive listening and they have to use this very powerful active sonar in order to detect them.

MR. MORRISON: The next case I want to talk about is

called *Melendez-Diaz vs. Massachusetts*. This is a case which sounds like a lawyer's case but it actually is going to have enormous significance in law enforcement and other areas.

For many years prosecutors around the country have been offering in evidence at criminal trials the results of tests done by their state laboratories or the FBI laboratories.

And in a number of cases, they have not produced the person who did the test, who after performed the test in court to be subject to cross-examination, both as to how they did the test and what their qualifications are and so forth.

They have been allowed -- these documents have been allowed in as official records, and the defendants have from time to time raised objections about the absence of cross-examination.

In recent years, the Supreme Court, with Justice Scalia as the lead Justice on this issue, have ruled in a number of cases that the absence of cross-examination is a violation of the confrontation clause of the Sixth Amendment, including having very young witnesses be available for cross-examination at trial on sexual offenses.

And a strong majority has been very firm on this, and they took this case on the petition of a criminal defendant. And many people think that the court is poised to rule that these kinds of tests cannot be admitted consistent with the Sixth Amendment over the objection of the defendant.

Now, there's nothing stopping a defendant from agreeing to this. But, in many cases, they won't. Then, in addition, this is coming at a particular interesting time, because the forensic tests, including those done by the FBI, including in such areas as fingerprinting, are subject to substantial challenge.

Many of you will remember the lawyer in Portland, Oregon, who was arrested and held in jail for several months, claimed to be the person who was involved in the Madrid bombing when the FBI got the fingerprint evidence wrong.

In addition, the National Academy of Sciences has a major study on forensics which is due out in the fall, and that may be have some more -- shed some more light on this problem.

But there has been -- there have been questions not simply -- and, in addition, of course, in many of these DNA cases, where the science is very good, they found out that people who have testified on matters such as bite marks and shoe marks and other things like that, tool marks, have turned out to be completely bogus and that they have no scientific credibility at all.

And many of these cases have been thrown out, and they've had to start again.

So, the background against which this is coming is not simply an abstract concern about forensic testing, but some real problems in the real world.

MR. TAYLOR: Is there -- is there reason to think that there are lots of innocent people sitting in prison or even on death row because of erroneous or bogus tests? Is that part of the concern underlying this?

MR. HUNGAR: I certainly think so. I think that's what -- the Innocence Project, Full Disclosure, my daughter works there, has demonstrated in a large number of cases. Some on death row; some not on death row. And that's -- remember, these are cases in which they have DNA evidence that establishes a mistake. There's lots of cases where there are -- there's no DNA evidence, and so the faulty scientific evidence may be, in fact, what convicted the person, but there's no DNA evidence to the contrary.

MR. MORRISON: The Entergy case, Entergy against EPA, is one of the Clean Water Act cases I mentioned before that the government concluded wasn't sufficiently important to meet the Court's standards, and the Court disagreed.

This is actually of considerable importance to the electric power industry. Electric power plants in this country, and I think everywhere, whether nuclear, or oil, or gas, or coal-fired, use really incredible amounts of water to -- because they all use steam -- heat creates steam, which produces the electrical energy through turbines, and they use huge amounts of water to cool the steam to condense it back to water and so they can go through the cycle again--and apparently hundreds of millions or even billions of gallons of water per day per power plant.

So, they tend to be near lakes, or rivers that they can't draw the water in through huge intake systems, which, given the volume of water and the current that's formed, the intake systems tend to trap fish against the intake grates, which is not very good for the fish, understandably.

And they also tend to draw smaller aquatic life into the system, which, as the EPA put it, puts various stresses on the aquatic life, like it's boiled to death.

So, EPA issued regulations under the Clean Water Act that were designed to result in a 60 to 90 percent reductions in impact on aquatic life, but did not require existing power plants to adopt the absolute, most effective, and, also, of course, most costly techniques.

And they justified that, in part, by relying on a cost-benefit analysis. They said, in essence, it doesn't make any sense to require billions and billions of dollars in additional spending to get slight increases in the effectiveness of the measures, so we'll instead allow a more flexible approach.

The Court of Appeals for the Second Circuit invalidated that, and said they could not use the cost-benefit approach that they had followed, and, in fact, the Court said that, in their view, absent explicit authority from Congress to use a cost-benefit analysis, agencies can't do it.

I don't know if there are any economists in the room, but that might strike you as kind of crazy, and it may be -- certainly is probably part of the reason why the Court decided to grant review.

If the Court announces a relatively sweeping rejection of that proposition an affirmation of general authority and wisdom of cost-benefit analysis, this could potentially be a very significant case, not just for the electric power industry, but more generally for agency authority and rulemakings, as this has been an issue that's gone back and forth between agencies and various sorts of challengers over the years.

The Court, and maybe this is more likely, the Court could also -- there's a very intricate statutory argument about whether under this particular regime costs-benefit analysis is or is not appropriate. That's likely to attract the Court's attention, and, to the extent they focus on that, obviously its significance will be limited to this particular statutory scheme.

MR. HUNGAR: The next case is one that doesn't seem to have attracted as much attention, but I think it's quite important. It's called 14 Penn Plaza against Pyatt.

In recent years, many employers, and indeed many other people, including credit card companies, have been increasingly putting into their contracts provisions requiring that all disputes be settled by arbitration, as opposed to going to court.

In -- many of these cases have gone to court, and the Supreme Court has upheld against a wide variety of efforts to undermine these arbitration provisions. It has said that these are all valid under the

Federal Arbitration Act, a law that was passed in 1925, and it's even said that, even though federal statutory claims are being subjected to arbitration, those can also be arbitrated on the theory that the plaintiff and the company have agreed to the arbitration, even though, of course, in most cases, there is no bargaining over these provisions. They simply show up in a contract, and you're in a take-it or leave-it basis.

In 1974, in a case called Gardner Denver, a union and a company had agreed that all disputes would be resolved by arbitration, and the question was whether that included federal anti-discrimination claims. And the Court said it did not because the union could not speak for the individual members; that it represented itself. It could represent the members on matters relating to the collective bargaining agreement, but not to statutory claims.

In the meantime, great change has been much more receptive has taken place. The Court has been much more receptive to claims that individuals must have their statutory claims subject to arbitration as well.

And the question the Court is being asked to revisit, although there's some difference of opinion about whether it's actually being asked to revisit or not, is to whether that 1974 opinion in Gardner Denver is also going to apply to collective bargaining agreements that provide for arbitration of all disputes, which many of them do.

The concern on the part of the workers is that the unions may have other interests at stake besides that of a worker, and, therefore,

they are less willing to back up and firmly litigate the arbitrations involving workers' individual rights.

In addition, in some of these cases, the unions are just as anxious to get rid of the worker as the company is, either because the worker is an annoyance to the union or, in some cases, because the discrimination on part of the union itself.

If the Court upholds this, the claim of arbitration, it could have a significant effect. Of course, it would have had a much more significant effect 30 years ago, when a lot more parts of our country were unionized. And, today, many of the unions are in the public service area, and they have a whole set of other procedures, and they're not typically subject to the kind of arbitration that is agreed to between the union and the employer.

So, it's a case I think is worth watching.

MR. TAYLOR: Thank you.

MR. MORRISON: I wanted to talk a little bit about a voting rights case that is not yet on the docket, but may soon be. But before I get to that, I also to touch just very briefly on one that is on the docket, Bartlett against Strickland, which actually could end up having quite a significant impact on the makeup of the Congress and legislatures after the next redistricting cycle.

The question there is whether the Voting Rights Act, Section 2, requires the creation of so-called minority influence districts. The Act has long been understood in a variety of circumstances to require the

creation of a certain number of so-called majority-minority districts; that is, districts in which a minority group is a majority of the voters; and, therefore, can elect a representative of their choice.

There's an existing dispute that the Court is now going to resolve about whether the Act also requires, in addition, or perhaps in the alternative, the creation of so-called minority influence districts; that is, districts where a minority group is not the majority, but is large enough that, in combination with voters from other racial groups, can elect representatives of their choice.

This sounds fairly abstract and arcane, but actually it is usually is significant from a political standpoint. Basically, the Republicans have benefited over the last two redistricting cycles by the creation of majority minority districts. Now, obviously, those tend to vote Democratic, but they also tend to gather together a large super-majority of Democratic voters in a particular district, which means that the Republican voters spread out elsewhere can go considerably further, and, thereby, help the Republicans overall.

Of course, by the same token, he did Democrats would prefer from a political standpoint to be able to have influence districts that spread the Democratic votes out more to other districts, and improve their chances, which would tend to mean more democratic representatives, but perhaps fewer minority representatives.

The Republican strategy has had the effect of increasing minority representation in Congress and the legislatures to the highest

levels we've seen. Who knows what would happen if minority influence districts become mandated.

And the significance or the potential significance of that case is heightened by the other case I'm going to talk about, which is *Northwest Municipal Utility District against Mukasey*, which has to do with another -- the other key provision of the Voting Rights Act, Section 5, which as Stuart mentioned at the outset, requires state and local governments in certain covered jurisdiction, mostly, but not entirely in the South, to go to the Justice Department to get approval every time they change their laws affecting voting, which is not just redistricting, but any sort of government structural reforms -- changing the number of representatives, annexing territory to a city, changing the location of polling places.

I mean, it's a hugely intrusive statute that requires state and local governments to go running up to federal bureaucrats in Washington to get approval to do things intrinsic to their governmental structure.

The Supreme Court upheld this originally back in the 1960s, but obviously times have changed considerably, and so this district is claiming that the intrusiveness of Section 5 on state and local rights and federalism concerns is no longer justified in the current situation in the country.

And that case, as I say, the request for a court review is pending. If the appeal rather than -- which I won't bore you with the technical details -- but basically it's a lot harder for the court to avoid

deciding the case. And so, it seems reasonably likely that the Court will ultimately decide, perhaps in December, review the case.

And, of course, what Section 5 does, because of the Justice Department's involvement, depending on who's in charge of the Justice Department in the 2010 redistricting cycle and depending on how the minority influence district case is resolved, could give the Justice Department a significant ability to influence the state and local redistricting, as well as, of course, congressional redistricting after 2010 in ways that would significantly benefit one party or the other, not obviously that that would be the stated purpose of what they're doing, but it can have those effects.

MR. TAYLOR: One question on Northwest Austin. Now, and then cases come along where the Solicitor General's Office has a duty to defend a federal statute that's under constitutional attack. This is such a case, but where the ideology of the administration in power might suggest being on the other side. I'm not sure whether that's true in this case, but, for example, I think that was true of campaign finance cases.

Could you talk a little bit about what it's like, you know, how the Solicitor General's Office resolves those kind of conflicts. There's a statute. You have to defend it. But the President maybe doesn't like it. How does that work itself out?

MR. HUNGAR: Sure. Yeah, the Solicitor General's Office and the Justice Department generally in general view themselves as being under a duty to defend the constitutionality of any statute passed by

Congress as long as a reasonable argument can be advanced in its defense. There's a slight exception, or caveat, to that, which is that if the statute itself is arguably an intrusion on the separation of powers, particularly on the president's prerogatives as the chief executive officer, the burden is higher, and the government might decide not to defend the statute, even though a reasonable argument could be advanced in its defense.

But in a statute like this, the Voting Rights Act, the government will defend it as long as a reasonable argument can be made. The Civil Rights Division has been very vigorously defending this statute in the District Court, and I would expect that the Justice Department -- they've obtained an extension until after the election to file their brief in response, but nonetheless, I would expect that the Justice Department will vigorously defend the statute in the Supreme Court as well.

MR. HUNGAR: Thank you. And there will be a new Justice Department, at least, in part, whoever gets elected because by the time the government's brief, the Justice Department's brief, is filed, if review is granted in December, it wouldn't be until sometime in late February --

MR. MORRISON: Right.

MR. HUNGAR: And so, whoever the President is would be the president who would express views positively or negatively about it.

MR. TAYLOR: It reminds me of the case of yours involving gun control.

MR. HUNGAR: Yes.

MR. TAYLOR: Alan was going to be arguing the District of Columbia's side of the gun control case, the big one that the Supreme Court recently decided 5 to 4 against the District of Columbia, and then there were certain machinations at the top of the District of Columbia government resulting in Alan's not arguing the case, and the District --

MR. MORRISON: Finding other employment.

MR. TAYLOR: -- and the District of Columbia, of course, lost. Had Alan argued the case, it would have come out --

MR. MORRISON: That's absolutely right.

MR. TAYLOR: -- it would have come out differently, I assume.

MR. MORRISON: Yeah, that's right. And if my mother were still alive, she would believe that, too.

MR. TAYLOR: Okay.

MR. MORRISON: All right. So, I want to talk about three other election-related cases, and I'll try to deal with them quickly -- that have not been granted. One of them is -- all three of them are actually (inaudible) in the pipeline, and ready to go up there.

The first case is called *Caperton v. Massey* and this involves the state of West Virginia court system, which, like many courts around the country, has elected judges. In this particular case, the president of the Massey Corporation donated $3 million to election campaign involving the sitting justice on the court, and the sitting justice proceeded to sit on

the case and vote in favor of the Massey Corporation, casting the deciding vote overturning a judgment of $50 million against the company.

There's lots more. This being West Virginia, I leave it to your imagination or to go read the papers, but the question is, does the federal Constitution and the due process clause that gives everyone a right to a neutral decision-maker require a judge who receives a substantial contribution in this case to a third-party independent expenditure -- but I don't think that makes any real difference under the facts of this case -- recuse himself and not sit on the case or is the sky the limit?

And these issues have been welling around for some time. I had a case involving State Farm out of Illinois in which a very similar thing occurred a couple of years ago. The Court turned it down. There's another case pending also from Ohio now, plus one from Texas, all of which raise this issue. And my guess is that the Court is going to take this case, because the lower courts have taken the view that it doesn't matter. That is to say they're not saying $3 million is not enough. If it was $100 million, if it was the entire contribution, as long as it's "just for the campaign," it doesn't matter.

And I think the Court has to -- ought to resolve that case. I joined an amicus brief filed in support of asking the Court to take the case and answer the question do you have to do it all and, if so, what the standards are.

The second case is the case called *Duke v. Leake*. This is a case that almost nobody has heard of, but you will, I think. It's from North

Carolina, and North Carolina did something that West Virginia has not done, which is that it tried to take the money out of judicial elections by providing for public financing of the judicial elections. It could not constitutionally require anybody to accept public financing if they chose not to do so.

One of the candidates for justice on the Supreme Court of North Carolina did not accept public financing, and he sued, claiming that the way the statute was set up, which I'll explain to you in just a second, penalized him for not going into the public financing.

And what the statute does is, it says that if the candidate who joins the system is opposed by somebody who has not joined the system, but who raises more money than the candidate in the system would get, the state will give additional money up to certain maximum to sort of even out the odds.

And what the plaintiff is claiming is that the state has no business doing that. It can't step in and even out the odds. And it points to a case decided by the Court last year called *Davis*, involving what's referred to as the so-called "millionaires' amendment," under which Congress tried to respond to a similar problem, not by providing money, because Congress doesn't provide any money for congressional elections, but by raising the amount of contribution limitations so that instead of being able to accept only $2,300 from a person, they could accept double or in some cases triple that amount.

And the question is, does the *Davis* case focus entirely -- I mean, entire -- that it's only the method by which the Court tried to even it up, or does it say something more general, because if it says something more general about the ability of states to help out in public financing situations, we're going to be in a situation where it's going to be impossible, even in the context of judicial elections, to do anything about it.

My own view is it's hard to know whether the court is going to take it. One thing it could do it could send it back to the Fourth Circuit, which ruled in favor of the state, and say think about the *Davis* case some more, because it was decided after *Davis*. Or it could decide very broadly.

In many respects, having a judicial election up there, indeed if it comes up at the same time as the West Virginia case, might suggest to the court that the last thing you want is to have judicial free-for-alls which may continue to happen.

The last case involves a unique situation, but it also involves the federal election laws. And the Court -- the plaintiff in this case is called Citizens United. And it's a pre-existing nonprofit organization, and it makes movies. Everybody admits that these movies are both conservative and they are legitimate. That is to say nobody is claiming that this is a bogus attempt to get around the laws.

They have had movies that have won awards. They've been on television and been at film festivals as well as on cable.

They made a movie called “Hillary: The Movie.” There is no direct advocacy in there. Nobody says vote for or against it. But the problem is, if it is to run on cable television, a clearly identifies a candidate for a federal office or it did during the period when it was trying to run.

And in addition, they had some advertisements for it, which were also run when they were trying to get the film shown in the movies.

The FEC said that a couple of the ads were okay because they were sufficiently short, but one of them was not okay and was too long. And it's more than just an advertisement for a product or services.

The lower court said that the -- oh, but they also said that the plan to run the movie on television was what's referred to as an election (inaudible) communication. And since it was going to be run during the period when primaries were being run, it was going to be run on television -- on cable -- that that violated the Federal Election Communications Act, and, in addition, because it was a corporation that did it, the corporation was forbidden from showing the movie entirely and could be fined, and people could go to jail as a result of it.

The lower court has upheld the FEC, and the case is coming back up to the Supreme Court. It is undoubtedly a unique case, but one that's designed to show that the FEC is capable of deciding that almost anything is subject to the federal election laws.

MR. TAYLOR: Thank you. That -- those are the cases we decided to go through, although if someone wants to ask about another

case, please do. At this point, I do have some more questions, but I'll hold them while inviting questions from the floor. Yes, sir.

MR. SMITH: I'd like to raise and go back to the preemption issue, and I just was curious as to whether there's anything that came up under the sub-prime mortgage situation, because I understand that in '05 or '06, several states -- I think California may have been one -- sought to intervene to try to do something, a regulation in the sub-prime area, but were in several appellate court decisions were barred on the grounds of an implied preemption by the '98 financial statute that Congress passed.

Now maybe there was even an explicit provision on preemption in that. And I wonder if there any cases that are working their way in this area or whether that is such an absolute preemption under that legislation that there are none.

MR. HUNGAR: I'm not familiar with preemption cases specifically involving the mortgage situation. There has been a long line of National Bank Act preemption cases involving national banks, and I believe it's all implied preemption in that context. The Court decided one just a couple terms ago. And the preemption is quite sweeping that national banks by, except for sort of extraneous matters, are not regulated by the state regulators and only by the federal regulators of the Comptroller of the Currency. That's one of the stronger and longer lived preemption doctrines around.

So, to the extent you're talking about national banks, I would think there would be some very significant preemption. If you're talking

about other types of entities involved in mortgage-backed lending and securities and so forth, then it would just depend on the nature of the entity at issue.

SPEAKER: The issue was apparently this particular congressional legislation. I'm not quite sure the scope of it, but was passed in the late ‘90s, I think ’98.

MR. HUNGAR: Graham-Leach-Bliley, the big financial reform act?

SPEAKER: Maybe it was -- was it? Could that be --

MR. HUNGAR: That was somewhere in the late ‘90s. Yeah.

MR. MORRISON: I think that was ’99, wasn’t it? I think.

MR. HUNGAR: Yeah. Somewhere in there.

MR. MORRISON: I’m not aware of any cases better. I agree completely with Tom that the preemption under the federal banking laws is as sweeping as it is in any regulatory area. And I know that states did try to do some additional things and were unsuccessful and surely would have been under the existing law unsuccessful as far as national banks are concerned. But if there are other institutions that are involved, they wouldn't get the banking preemption. There may be some other preemptions or there may be other reasons why they wouldn't be subject to regulation.

The problem, of course, now is that state regulation doesn't do any good, because the horse is out of the barn. And some of the worst offenders, of course, you can sue them, that they don't have any money,

and so, it's not clear, even if you could find a way around the preemption doctrine now, it would make any difference. In the preemption cases that are before the Court now, there are solvent defendants, and, so, that problem is not part of the analysis.

MR. TAYLOR: And interesting sidelight if it is Graham-Leach-Bliley we're talking about, which I think repealed the Glass-Steigel Act, and, thereby, allowed banks to get into investment banking, I believe Barack Obama has been blaming that law and Phil Gramm, with the famous line calling American voters "whiners," has been blaming that law for something of the current meltdown. And Bill Clinton gave an interview recently in which he said, well, I signed that law, and it was a good law. And Phil Gramm didn't pull the wool over my eyes. I'm not sure whether Barack Obama appreciated that, but --

MR. HUNGAR: Well, I actually --

MR. TAYLOR: (inaudible) brought the Clinton-Obama relationship remains interesting.

MR. HUNGAR: Yeah. I actually think that that was not the problem. The problem was that people were doing some of these things before that happened anyway, and it was a bow to reality.

The problem has not been -- it's only in part the law -- it's partially whether the law has been enforced since that time, and that's not Bill Clinton's problem at least since 2001; right.

MR. TAYLOR: Gary, did you have a question? Yeah.

MR. MITCHELL: Thanks. Gary Mitchell from the Mitchell Report. I'm not sure whether this question is appropriate for the panel, but you'll tell me that.

On January 21st, 2009, Guantánamo will be closed, if you believe in what presidential candidates say. And my question is either in the context of cases that have been decided by the Supreme Court and restrictions, as I understand it, through the Geneva conventions, it's an interesting and obviously popular political stand. Can anyone talk to the legal implications if the President makes that decision. I mean, where do these people go?

MR. MORRISON: Well, I'll be glad to speculate, which is all I can do. There are -- the answer is it depends on two separate sets of circumstances. First is where they send the people.' Closing Guantánamo may be an interesting symbolic act, but it doesn't cause the people there and the problems to automatically go away. We still have to put them someplace.

So the first question of the depends is where do they send them. If they send them to the continental United States, there's no question about the applicability of habeas corpus and other relief.

If they send them other places, then it gets to the second depends, which is how you read the most recent Supreme Court opinions as to whether the rights and nominations of the government extend beyond -- we know they extend to Guantánamo because the Court has told us that. What we don't know is to whether other similar kinds of

locations, which are similar but not identical -- we don't have a treaty, for example, at the air bases in Iraq and Afghanistan or places in Europe. And, so, they are somewhat different depending on how you read the cases as to whether the obligations would run.

And, of course, the last thing is there is nothing that stops the current -- the new administration from providing the rights that would apply in the United States, even if the people are physically located outside the United States. There's nothing that prevents them from doing that, and the question is whether they will do that.

My hunch is that if Obama is elected, between a combination of all of these things, he will not take the position that we can go back to what it was before the Court decided all these cases involving Guantánamo. But that's just speculation on my part.

MR. TAYLOR: Alan, I've been assuming -- let's suppose this administration tomorrow shipped to all the people on Guantánamo to Diego Garcia or Afghanistan or an aircraft carrier in the Pacific. With that magically make the Supreme Court's rulings non-binding.

MR. MORRISON: Well, I don't think so. Well, Diego Garcia is that --

MR. TAYLOR: That's a British island.

MR. MORRISON: -- oh, that's not the one part of Puerto Rico.

MR. TAYLOR: No.

MR. MORRISON: Okay. Well, I don't know.

MR. TAYLOR: They've basically tried to ship and saying okay. They've said Guantánamo is close enough to be within the jurisdiction, so we'll just send them someplace that's farther out of U.S. jurisdiction. I mean, can they do that or are they locked in?

MR. MORRISON: Well, the first thing that would happen is there'd be a lawsuit --

MR. TAYLOR: Yes.

MR. MORRISON: -- which would seek an injunction, and that probably would continue until January 21st. That's my guess as to what would happen. Nobody's going to want to let that happen. And nobody is going to want to take the decision out of the hands of the new President.

MR. TAYLOR: Right.

MR. MORRISON: That is, it seems to me that the new President ought to have that authority, whoever the President happens to be.

MR. HUNGAR: Yeah. And I think once habeas jurisdiction has attached, which the Supreme Court says it has, the government has a hard time shipping somebody out of the jurisdiction and then saying to the Court, sorry, you no longer have any more jurisdiction. I think the courts would be reluctant to recognize that form of evasion.

MR. TAYLOR: Sir?

MR. CHEN: Yeah. Chao Chen. Could any one of you explain the immunity of government officials in terms of the level of the

government they serve, such like city, state, or federal, and also in terms of their ranking position; and third in terms of the (inaudible) and events they involve.

MR. TAYLOR: Do you want to tackle that? I think the general -- the question, if I understood it, goes to the immunities that various government officials at various levels have -- state, federal, prosecutors, judges. Of course, we've talked about the Attorney General -- qualified immunity, absolute immunity.

MR. HUNGAR: Right. That's a big question, a big field of law, and I'm not an expert in it. I mean, there is, depending on the legal doctrine, the courts have evolved, as Stuart said, both absolute immunity, that is, you just can't sue them at all for certain types, like for judges for judicial acts, for prosecutors for prosecutorial acts in furtherance of the judicial function.

And then there is a much wider array of qualified immunity, which in essence is that a government official who has a reasonable good faith belief in the permissibility of his or her official acts can't be held liable, even if it turns out that they were unconstitutional. But, you know, obviously it varies to some extent depending on whether we're talking -- this is -- what I'm talking about is federal constitutional or statutory liability. The state -- I'm not familiar at all with state law. And I suspect Alan has a greater familiarity with these issues.

MR. MORRISON: Well, I don't want to talk about state law because it varies in the principal immunity claims involving federal law as

to either federal officials or state officials. And generally speaking, unless the law is clearly established before hand, the person can't be held liable for money damages, which is what we're talking about.

They could be subject to a lawsuit requiring them to comply with the law. The immunity doctrine doesn't kick in on that, but insofar as potential in money damages, it doesn't depend on the ranking of the person other than with the President, who has absolute immunity. The Cabinet officers and the people who were field agents have the same obligation to follow clearly established law. As a practical matter, they may have different opportunities for injuring the rights of an individual.

But the immunity doctrine is analytically the same. Actually, it gets me talk about one thing, which I wasn't going to talk about, and that is there's another very important separation of powers case which is working its way up through the court system. And this involves the attempt by the House Judiciary Committee to subpoena Harriet Myers, Josh Bolton, who’s the Chief of Staff of the White House, and Carl Rove. Rove’s case is not in the Court, but it will follow. Whatever happens in that case will bind Rove.

And the issue is, does the House of Representatives, which issued a subpoena which was not honored, have the power to go to court and to order these officials to show up and then claim particular questions or particular documents that they seek are subject to some kind of presidential executive privilege.

The Executive Branch, the President and the Justice Department, have taken the position that they don't have -- that the Court cannot entertain the matter at all; that they have -- the courts have no business deciding who's right and wrong between these two groups, and that, moreover, these officials have absolute immunity from being required to appear before the Congress and testifying. I'm not talking about money damages.

The District Court, a judge who was appointed by this President, ruled in favor of the Congress, and the case is now on an interlocutory appeal in an odd procedural context. They're trying to get a stay of showing up to testify, and the court has been sitting there for about two weeks trying to decide what they're going to do about this stay motion.

It is entirely possible that this case will continue on beyond the next administration, and that even if they have to reissue a subpoena, the House Judiciary Committee is going to do it. The principal subject of the investigation is the firing of the United States Attorneys, for whom there appears to be substantial belief, based most recently upon the Department of Justice's Inspector General report, that there were politically motivated firings of these officials. And Congress is trying to get to the bottom of it, among other things, to decide what kind of laws, if any, they should pass to preclude this from happening under whatever administration.

That case could quite possibly get to the Supreme Court this current term, and if it does, it will be a major, major separation of powers

case. I should also disclose that I have been helping out the House of Representatives trying to get the case in the Court, just so you know where my biases lie.

MR. TAYLOR: Just one aspect to this that I'll touch is there's no immunity from criminal prosecution, if that's why Richard Nixon needed to be pardoned by Gerald Ford.

And there is a clamor now from human rights groups, but also from, I think, General Taguba, the author of the Abu Ghraib report for prosecuting high-level officials of the Bush Administration for alleged war crimes based on interrogation techniques that were considered by some to be torture.

I think those -- there are very unlikely to be any such prosecutions, not because of official immunity, though, because they can all say with some justice, the high-level people, that they were relying on Justice Department opinions by your colleagues at the Office of Legal Counsel that what they were doing was legal. And there will be a lot of arguing about, but it is in a different category than all of the immunities we are talking about our civil lawsuits, not criminal, for monetary damages. And then, of course, the variety you mentioned. Yes, sir.

MR. PESHIK: As far as -- oh, my name is Adam Peshik. As far as the *Duke v. Lee* case, what are some of the arguments that the judge is framing for bringing that to court? More specifically, is he using the idea I've heard that in matching funds, it takes, you know, when you donate money to a certain judge, it takes that money, but you're basically

giving money to both candidates. I was wondering if he used that kind of frame of idea or if it's just a broad -- if it's really getting to matching funds or if it's actually just getting to public funding for judges. What rationality?

MR. MORRISON: I don't think there's any challenge to the public funding for judges as such. That is to say the federal constitution, which this is under, doesn't in any way speak to forbid North Carolina from funding candidates for judicial office so long as it's equally available to both sides.

The problem comes up with the fact that everybody agrees that a person cannot be required to limit their spending by accepting federal funds, which have a ceiling imposed on them.

And what happened -- what the concern of the legislatures is there's two ways they could deal with this. They could provide unlimited amounts of money. They could provide $10 million for the judge to run in North Carolina. There would be no problem with matching funds. The problem is, who's going to vote for $10 million for the judges?

So, they set a reasonable ceiling based upon what races in the past have been -- take it down a little because you don't have to spend any money to raise the money. And they say that's the amount, but they -- the theory is, and you seen this principally in funding for Congressional or for other legislative races is in effect -- that no legislator wants to go into this race with any serious possibility that someone can come in and outspend them by huge amounts of money. They feel that they need to have some protection against a very large spender.

And, so, legislatures have typically responded by saying, all right, if somebody comes in and spends more -- sometimes it has to be a substantial amount more; sometimes it has to be just a little bit more -- we will give you some additional funding, but there's always a ceiling on it. And this is what's happened in North Carolina.

North Carolina law is complicated by two other things. One is that in deciding what your opponent, the opt-out opponent, is standing, they account not only the money raised by that particular person, but money raised and spent by independent groups supporting that person or opposing the person who has opted-in. That's considered necessary because if you don't do that, they'll do an end run on it.

The problem for North Carolina is that in deciding whether the judges in North Carolina would -- the persons who've opted in would get more money, they excluded the independent expenditures on the side of the participating judge. So there's kind of an unevenness in it, and that may be the largest vulnerability in the North Carolina law, which they wouldn't have to go all the way to decide the constitutional question on matching funds and this evening up, if they decided it on that grounds alone, which has been raised in the cert petition.

MR. TAYLOR: We're almost out of time. Why don't we have one more? Yes, in the back there.

SPEAKER: I had read that there were going to be three death penalty cases reviewed this term, but I didn't see them on the

schedule at all. And I was wondering if you knew if those were going to still be considered.

MR. TAYLOR: Three death penalty cases. I know one that's gotten some publicity in the last few days, where the Court issued a stay of execution. I think the man's name was --

MR. MORRISON: Davis.

MR. TAYLOR: -- Davis. And there were substantial claims of innocence in that case, weren't there?

MR. MORRISON: Yes. I think the Davis case raises the question of whether there is a constitutional right to prove that you're actually innocent.

If the Court agrees to take that case, and it did not -- it was, I think, on the conference for last week, and it did not grant it, which might suggest that they're not going to hear the case. If we were at the Court now, we could have found out this morning. That would be a very significant case.

My understanding about the other two death penalty cases is they are cases involving the death penalty, but they don't go to the heart of the death penalty. That is, they're not like the lethal injection case or the child rape case that were up last term.

I confess that I looked them over, and I do not remember the details, but they didn't strike me as being cases of any significance for the death penalty, although, of course, they're significant for the person who is subject to execution.

MR. HUNGAR: I think one of them is this case in which one of the jurors took a Bible into the jury room and used arguments from the Bible to persuade other jurors to vote for the death penalty. So I think that's one of them.

MR. MORRISON: Has that been granted or was that on the con --

MR. HUNGAR: I believe that's been granted; yes.

MR. TAYLOR: Also, I think in our event announcement, we mentioned another death penalty case, which we haven't discussed, because the Supreme Court has already decided it since we did the event announcement.

Last June, the Court struck down a law providing the death penalty for the rape of a child on the ground that, in part, there was a national consensus against executing anyone for a crime of violence short of murder. And some things happened over the summer, including the discovery of something that everyone in the case had overlooked, which was a federal law, two years old, that said in the military you can be executed for the rape of a child. And some people thought that this undercut the idea of a national consensus.

So there was a petition for rehearing by the State of Louisiana of that case, saying, hey, you'd better take another look at this case. It looks like you missed an important fact.

And the Supreme Court decided last week, the same 5-4 majority that had issued the initial decision, reaffirmed it saying, well, it doesn't really make any difference to us what the military law says.

The same four who had dissented indicated in various ways that they still thought the majority had been wrong the first time, and thought that it was even more clear.

So that case is now over and done with because on the petition for rehearing, they just basically reaffirmed what they had said in the first place.

And I guess we're out of time. And so I thank you all, and I thank our panelists for an interesting discussion.

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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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