WASHINGTON, D.C. LAWYER CHAPTER
2003-2004 SUPREME COURT ROUND-UP

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LISA BROWN: I'm Lisa Brown, the Executive Director of the American Constitution Society. And on behalf of ACS I want to welcome all of you to our 2004 Supreme Court Review, which has been organized by our terrific DC chapter. I want to say an especially warm welcome to our distinguished group of panelists, although I can think of no more articulate expression of appreciation than this fabulous crowd that is here to hear your thoughts about the term that just ended on Tuesday.

What a term. The terrorism detention cases handed down on Monday demonstrate in no uncertain terms the importance of our third branch of government to the system of checks and balances at the heart of our democratic republic. The commitment to the rule of law so movingly articulated in several of the justices' opinions is what sets us apart as a nation. Indeed I daresay that to many of us it is what we are most proud of.

But the Court also left open a number of very important questions. And I know that all of us are eager to hear the panelists' views on how those issues may well be resolved.

Plus, these were not the only important cases this term. There were major decisions on redistricting, Miranda, disability rights, campaign finance reform, and many others – lots of fodder for discussion this morning.

Over the past year, ACS speakers have addressed and analyzed many of the issues that the Court grappled with this term. So we can think of no more fitting way to honor the end of the term than to host this Supreme Court round-up.

For those of you who are not familiar with ACS, we are a national organization of law students, lawyers, judges, academics, policymakers, and activists, whose goal is to ensure that the fundamental values of human dignity, individual rights and liberties, genuine equality and access to justice are accorded their rightful, central place in American law. We realize that the decisions we will discuss today along with lower court decisions and legislative and executive branch enactments will determine the nature of our society. And we are therefore committed to ensuring that moderate and progressive voices are heard in the critical legal and policy debates that our nation is facing today.

If you are not familiar with ACS and are not yet a member, I encourage you to pick up a brochure on your way out and please join our movement. I want to let you know about a couple of upcoming programs about which we are particularly excited that

will coincide with the Democratic and Republican National Conventions. They're entitled "Constitution at the Crossroads 2004 and the Future of American Law," the panels will address the legal and policy implications of the upcoming presidential election. The Boston panel will take place on July 27th at 4:00 at the Boston Public Library. And panelists will include Walter Dellinger, Larry Tribe, Charles Ogletree, Judy Lichtman, Pam Karlan, and Gerald Torres. The September panel in New York is still being put together and we will advertise it when it's complete but I hope that all of you will join us for one or the other.

And now, I would like to turn things over to my dear friend, Goodwin Liu, a former Justice Ginsberg clerk and now a law professor at Boalt Hall. Goodwin was an early leader of the D.C. chapter and is now a member of ACS's Board of Directors. He has spent, I have to say, more of the last two weeks at ACS events in Washington, D.C. than in his home in Berkeley. But I can think of no better person to guide us through today's discussion. Goodwin?

GOODWIN LIU: Thank you. Well, good morning. It's wonderful for me to be back in Washington and especially wonderful to be here at the D.C. lawyers' chapter event. I can still remember this time last year when we did the first Supreme Court round-up here at the Press Club. We had a much smaller room because we weren't sure how many people were going to come, and we did it and it was a full house. And it turned out that this year we got a bigger room and we are pretty much at a full house again. So that is both terrific and, in words of the great American philosopher, Yogi Berra, like déjà vu all over again.

It has become somewhat cliché to say that there are a lot of big cases decided by the Supreme Court this term. But the cliché bears a kernel of truth and this term was really no exception. The Court decided 80 cases this term and they covered a very wide range of issues: from the war on terrorism to separation of powers; from civil rights to criminal procedure; from environmental protection to the political process.

And, important as all the cases were, the results, I think, defy very easy characterization. Arguably, in the most visible and anticipated cases, the Court took the most modest steps. It held that American citizens detained as enemy combatants must have access to court, saving for another day what process they are due. It held that the vice president of the United States is not immune from civil discovery, saving for another day what discovery he must produce. The Court held that Congress can require states to make their courthouses accessible to persons with disabilities, saving for another day what other states' facilities are subject to this same requirement. And, the Court punted altogether on the Pledge of Allegiance, saving for another day the merits of that case.

Arguably, the boldest news that the Court made were in cases that occurred quite outside of the public spotlight and less familiar to the general public but having tremendous consequences. The Court extended the logic of the Apprendi decision to call into serious doubt the U.S. sentencing guidelines. It read the alien tort statute to permit suits in U.S. courts by foreign citizens claiming violations of widely accepted or national human rights. And, it construed ERISA to preempt state law causes of action against HMOs for negligence in coverage decision.

Some questions: Are the liberal decisions this term really so liberal? Or were they predictable decisions, hardly a stretch even for a conservative Court? Do the modest results this term show that the Court knows its proper role in the constitutional order? Or do they show that the Court knows how to keep a low political profile in a highly disputed election year?

To sort out these questions and more, we have an extremely distinguished panel this morning, which I will quickly introduce right now.

To my left is Drew Days, solicitor general of the United States from 1993-1996. Over his career he has argued 23 cases before the United States Supreme Court, including the term limits case in 1995. Drew is a professor at Yale Law School and he is also of council to Morrison and Foerster.

To his left is Marci Hamilton, professor at Cardoza Law School in New York where she teaches constitutional law, the First Amendment and copyright law. She argued before the Supreme Court on behalf of the petitioner in the *City of Boerne v. Flores* in 1997, the first of several important cases dealing with Section Five of the 14th Amendment. Like Akhil Amar, her neighbor to the left, she writes a column on FindLaw and she clerked for Justice O'Connor.

Akhil Amar is professor at Yale Law School where he teaches constitutional law, federal jurisdiction and criminal procedure. Akhil has written extensively on the Bill of Rights and legal history, and if you don't have time to read his brilliant books, you can read his column, which is writes with his brother, appropriately titled "Brothers in Law." (Laughter.)

To Akhil's left is Lois Schiffer. Lois was assistant attorney general in charge of the environment and national resources division at the Department of Justice from 1993-2001. She has argued before numerous courts of appeals and the Supreme Court in a wide range of environmental cases, and she has also written extensively in this field. She's a partner at Baach Robinson & Lewis, and she has taught at Georgetown and Harvard Law Schools.

Now to my right, Jenny Martinez, who is a professor at Stanford Law School, where she teaches international law, human rights and civil procedure. This term she might have been a familiar face to some of you because she argued the Padilla case before the Supreme Court and did a very impressive job, I might add. And before joining the Stanford faculty she worked at Jenner & Block and clerked for Justice Breyer.

To her right is Alan Morrison who co-founded the Public Citizen Litigation Group in 1972. For three decades Alan has brought dozens of law suits, involving consumer rights, environmental protection, civil rights, and separation of powers. He has argued 16 cases before the Supreme Court, including the Cheney case this term. This year he leaves Public Citizen for greener, or at least sunnier pastures, at Stanford Law School after a remarkable 52-year career in the Washington public interest community.

Finally, last, but not least, is Spencer Overton who is a professor at Georgetown – or, excuse me, George Washington University Law School where he teaches campaign

finance law and civil rights. He has written extensively on election law and campaign finance reform, including several articles on the McConnell decision this term. And he is a member of the national governing board of Common Cause.

Well, I hope you'll agree that this is a truly remarkable panel, and we owe a great debt of gratitude to the D.C. Lawyers Committee of ACS for putting it together. Now, with five law professors up here, and six if you count me, it's going to be a challenge to enable everyone to say their piece. So to keep things moving I've told all the panelists ahead of time that we're going to dispense with speeches and, instead, dive into the term topic by topic and see how far we get.

I'm going to use the moderator's prerogative to pose questions and sort of create a conversation and try to guide us through the term. And if there are any questions the panel can't answer then we'll begin to cold call from the audience. (Laughter.)

So let's go. Let's begin with the terrorism cases since they have been the most in the news this week. As everyone knows, there were three cases. Two brought by American citizens – those were the Hamdi and Padilla cases. And then one brought by foreign citizens held at Guantanamo Bay, the Rasul case.

Let me start with *Hamdi* and get us all on the same page. So, in *Hamdi* the Court holds that by virtue of Congressional authorization, the president has authority to detain American citizens as enemy combatants. But the detention must comport with judicially enforceable due process. Eight justices -- all but Justice Thomas -- reject the government's position that the detention, however long, cannot be challenged in federal Court.

Drew Days, let me begin with you. You've argued many cases before the Supreme Court on behalf of the United States government. Were you surprised that eight justices rejected the government's view of what is required to conduct a war? Or was this just a fairly predictable result of checks and balances that the government could have, or perhaps even should have, anticipated?

DREW DAYS: Well, I never like to predict how the Supreme Court is going to come out, but I was surprised at the fact that it was an eight to one, if one counts up the various opinions against the government's position. This was a flat challenge to the role of the federal courts and our system of government. And I think the justices responded in very different ways but all in the same direction; namely, that there has to be some role for the courts in evaluating the rights of people who are detained by the United States, even in times of war.

Of course there were different approaches to this. The plurality of Justice O'Connor, Rehnquist, Kennedy, and Breyer in her opinion really focused on the narrow circumstances of this particular case, given the fact that it was a U.S. citizen held in United States custody on the territory of the United States.

But I guess I was surprised in particular by the combinations. We have Justice Rehnquist and O'Connor. O'Connor, I think, was predictable given her desire to balance a number of issues in coming to a decision. But the Chief Justice being in that particular

group surprised me a bit. I was also surprised by Justices Scalia and Stevens. Again, a very interesting combination and the fairly dramatic position they took. Namely, that there're really only two choices for the government under these circumstances: either suspend the *writ of habeas corpus* or prosecute criminally. And then Justices Souter and Ginsberg took the position that the Non-Detention Act, which prohibits the detaining of American citizens without authorization of Congress, was a way to decide the case.

I think this decision in particular spoke so much of the experience of the country with respect to *Korematsu* and the Japanese detention experience. I think it kind of removed the black hole that existed after *Korematsu* and also after *In Re Quirin*, the Nazi saboteur's case.

MR. LIU: You know, it's interesting. You offered a nice overview of Justice O'Connor's opinion and the two opinions in addition to hers that form the eight. You know, in Justice O'Connor's opinion she applies *Matthews v. Eldridge* balancing to determine the process that's due, as if that's sort of almost a signal that this is just an ordinary case, decided on very ordinary principles.

MR. DAYS: Well, I no longer, but I think that certainly some of the justices responded by – particularly Justice Thomas in his dissent – wondering where *Matthews v. Eldridge* came from in a situation like this when we're balancing the power of the executive, and indeed of the nation, against the claim of an individual who's charged as an enemy combatant. But I think that really was the message. And the fact that the O'Connor opinion essentially leaves to the lower courts and perhaps the military tribunals the responsibility for working out this due process requirement is an indication of how much balancing was going on in her mind in writing the opinion that she did.

MR. LIU: Let me turn to Jenny Martinez. There are obviously a lot of issues left open by the Hamdi case. And you, of all people, have to think about that now because the Padilla case turned out a little bit differently. There the Court held that, in essence, that the suit had been filed in the wrong place. Your client was held in a naval brig in South Carolina and the Court said that the only proper defendant in your suit is the immediate custodian of Mr. Padilla, which in this case was a woman by the name of Commander Melanie Marr in Charleston, South Carolina. You sued in New York and the Court held that the only proper place to sue is the district of confinement, which in this case would be South Carolina, not New York. Is this a fair result in your case and what are you thinking about now as a result of the Hamdi decision?

JENNY MARTINEZ: Well, certainly as the dissent in the Padilla case pointed out, it is a bit unfair given that Mr. Padilla has been in prison for over two years without any sort of due process, most of the time without access to counsel, to be told that he must go back to a different court and then come up again. The facts of the case that led the suit to initially be brought in New York were not a matter of forum shopping by Mr. Padilla. In fact the government, when they initially arrested him, had brought him to New York city where his original lawyer and still his lawyer, Ms. Donna Newman, was appointed by the court there. So it was a natural place to begin the lawsuit. But, that having been said, we take the hand that's dealt to us and the case will begin again in South Carolina.

And has been pointed out by other members of the panel, a lot of things were left undecided by the Hamdi case. Certainly the type of process due to any enemy combatant was left to be worked out by the lower courts in that case. But even more fundamentally, the issue of the president's authority to detain American citizens arrested in the United States as enemy combatants was left open by the Hamdi decision.

A lot of people have lumped *Hamdi* and *Padilla* together as if they're sort of the same issue – an American citizen who's an enemy combatant. But in fact, they're very different cases. Mr. Hamdi was arrested – was captured allegedly on the battlefield in Afghanistan while engaging in very traditional armed conflict. Mr. Padilla, on the other hand, was arrested at Chicago O'Hare airport unarmed and is not alleged to have engaged in anything like traditional armed conflict. And so, while Mr. Hamdi fits much more closely in the sort of POW category, Mr. Padilla is very different as the lower courts recognize. The fourth circuit in deciding the Hamdi case said that *Hamdi* and *Padilla* were apples and oranges.

And certainly Mr. Padilla's case presents a much greater threat to American liberty. If the government's position had been upheld in the Padilla case it would have meant that the government could lock any American, anywhere, at any time, forever, without any process, based simply by labeling them an enemy combatant, which is far more extreme than being able to detain people who were captured on a battlefield.

The decision in *Hamdi* left unclear the status of that authority question. It's not apparent the four members of the Court, including somewhat surprisingly Justice Scalia, believed that there was no authority even to hold the people who were captured on the battlefield that are American citizens. Justice O'Connor's plurality opinion is very careful to confine its holding to the precise circumstances of that case, which is someone captured on the battlefield. And so, that issue remains open for litigation in lower courts.

MR. LIU: I think that's a very interesting observation. Just to be clear, the plurality opinion, the first part of which says that the president is authorized to detain an American citizen, in the first instance is only a decision of the Court because Justice Thomas, who is on the far, I guess I could say, right in this case, agrees with that proposition. But he would go even further to say that the president has inherent authority, I think, under Article Two, which is a position the plurality did not take.

But you mention Justice Scalia's view of this case, and I want to ask Marci Hamilton, who has a column, I think, on these cases out today, online. You say, Marci, that in your column that the cases show that the system works in a particular – in this sort of expected way almost. That when the president acts in an emergency the president may take aggressive measures, which are then in the sort of cool light of reason later, a little bit later removed, reexamined by the Court and then sort of cut back. Do you think that – I want to ask you about Justice Scalia's view of this matter. Do you think that the Court has, in essence, not merely cut back the executive's power but, as Justice Scalia argues, aggrandized its own power? Drawn itself further into these conflicts through its opinions instead of just simply acting as a backstop?

MARCI HAMILTON: Well, it's typical Justice Scalia to assume that if you engage in balancing as a justice that you have taken over powers that you don't have. I

mean, that's a general theory that runs through all of this jurisprudence. And he's repeating that here. What I find troubling, most troubling, among other things about Justice Scalia's opinion in this case is that he thinks that when you have an issue involving war that it is a sufficient to have a bright line rule, that balancing does not work in times of war. Now the rest of the Court rejects that. And I think they rightly reject that because there's no way for the Constitution to survive times of war unless it can be adapted to the dangers of the time.

So for example, had these cases been brought in the year after 9/11 when we had a sense that another 9/11 could happen at any corner, I think these cases may well have come out differently. I also think that if we have another 9/11 in the near future and we have these same issues come out again, I think you might lose the majority. And the reason for that is the context. And the context is whether life is secure. For after all, in Section Five in you know, the 14th Amendment and the 5th Amendment, the protection of life precedes protection of liberty.

So, what these cases, I think, show is the necessity of context-based balancing. Most of the justices are in favor of it. And I think, once again, Justice Scalia has marginalized himself through a reasoning that won't work in certain circumstances.

MR. LIU: What about the argument that he's not opposed to balancing per se, he's just opposed to the Court doing the balancing. He thinks that Congress, if there's a balance to be struck, that Congress should suspend the *writ of habeas corpus*, thereby recognizing the gravity of what's happening here and then by statute prescribe the appropriate procedures.

MS. HAMILTON: Right. Well, his vision is that all judges can be manacled in some way to be kept from reaching the wrong result from his perspective. So if you keep giving them bright line rules then they'll do what they're told to do and they will never reach a wrong decision. That's just contrary, in my view, to both the spirit of the Constitution, which the framers believed was inherently fallible because it was created by fallible men. And it's also contrary to what we know as reality, which is that you must take into account the facts in order to understand what the right constitutional result is.

I think the biggest contrast on the Court is between Justice O'Connor and Justice Scalia. Justice O'Connor believes in balancing across the board. She thinks that's the only way to get to the right decision because she would never let a fact, right, not stand in the way of a theory. Right? Facts are more important to her. For Justice Scalia, it's the theory that's more important. Consistency is truly his mantra and her answer to that has always been no, that's not sufficient.

MR. LIU: Let me briefly turn to the last of the terrorism cases, the Guantanamo case. And Alan Morrison, I know that you had some involvement in this case. This sort of narrow legal holding of this case is that the habeas statute, federal habeas statute 2241, authorized this jurisdiction where the custodian of the detainee, but not the detainee himself, is within the territorial jurisdiction of the United States Court. This, Justice Scalia says in his dissent, is a theory that, in his words, "extends the scope of the habeas statute to the four corners of the earth." Is that a fair characterization of this whole thing?

ALAN MORRISON: Well, it may not be an unfair characterization of it. The Court has – did a very strange thing. The case in which the Court primarily relies, a case called *Braden*, a case that was not cited by anybody in any of their opinions, in any of the briefs. And Justice Stevens seemed to me to be erecting a theory that was going to get him out of this bind he was in because of a case called *Eisentrager* that involved Germans who were caught in China, tried before a military tribunal there, and then sent to a German prison in Germany, over which the United States had control along with the other allies at the time. And the case is an interesting opinion because it both uses the language of jurisdiction as in no power of the courts to do anything about it but also mixes a lot of discussions of the merits. And in that case there was no question that the people who were detained were – the convicted were enemy combatants and they had a full military tribunal. Neither of which of course happened to either of the people in Guantanamo.

And we argued two things: one, that *Eisentrager* was just distinguishable on that grounds that you didn't have to go any further; and second, that if you did have to go further, if territory was a problem then Guantanamo was different. The difficulty with the Guantanamo argument is that in fact the prison that was keeping the people in *Eisentrager* was completely under the control of the United States. They didn't have a lease like they had in Guantanamo and to that extent, Justice Scalia is right. It's hard to know the difference between those two cases. And since the Court did rely upon the location difference it's hard to know what's going to happen in the next case.

We also suggested an alternative, which the Court did accept, albeit not in great length. And that is the argument that this is really a traditional, administrative law case. Since most of my practice is in administrative law that's the way I think about these things. And in that case you don't worry about territory. All you worry about is that the Secretary of Defense is under the jurisdiction of the Court and just as you can order them to stop bombing in Viegas or in the Philippines or not setting off atomic bombs in the ocean, you can order him to stop doing what he's doing in Guantanamo Bay. And you don't have to get into *Eisentrager*, which is a habeas case.

The Court accepts that as an alternative theory and what the APA does allow you to do if you go that route -- it has two exceptions that are very important. One is you cannot review determinations by court-martials or military tribunals, thereby saving *Eisentrager* if you view it that way. And the second thing is it doesn't apply in the field of combat. In other words, you don't have to answer the question, which is if Saddam Hussein, for example – let's pick a wild, hypothetical – filed a *writ of habeas corpus* before we turned him over to the Iraqis, would we have to entertain that because we're in control of Iraq, and the answer to the question in the APA is you don't get to it.

Now, Justice Scalia said, well, the APA implicitly adopts the limitations of *Eisentrager*. Where he gets that I don't know because there's nothing in the APA. Indeed, the APA is quite explicit in what it says its limitations are. It looks as though he was trying to find a reason not to find the end. But in the end he comes up with a result.

If you look at this and *Hamdi*, in which on the one hand he says that people who – 600 people are confined forever, literally, in Guantanamo Bay. The federal courts can't touch it at all. But Mr. Hamdi, once he gets brought back into the United States because

he's a United States citizen, the government has no choice but either to indict him and try him or just set him loose.

If you had to try to explain that to your grandmother or ten-year old child, most people would find that hard to understand. But that's Justice Scalia and his – the rule of law is the law of rules. And we've got rules. Rules are habeas no, and release yes. So that's kind of where we are. As Goodwin said before, we don't quite know where we are because at least in *Hamdi* there was discussion about what due process required. Nobody said a word about what kind of process is due, and it will be very interesting to see what happens next. Presumably the first step will be up to the government to decide what it wants to try to do with these people. It reads *Hamdi*. I don't think it can do nothing, and the question is what is going to happen and are lawyers going to get immediate access to the people down there and lots of other unanswered questions.

MR. LIU: Let me broaden our focus here a little bit and put a few more cases on the table. The terrorism cases were decided in the same term as a number of other very important international law cases, and so let me just try to put some of the situations together and see what we get.

Let me begin with the case decided this week – the Alvarez-Machain case. This is a case about, among other things, the Alien Tort Statute, which is a law enacted by the first Congress in 1789 that permits a cause of action in federal court by foreign citizens who claim certain violations of what are now recognized as customary international law. The Court says that modern federal courts can entertain claims by foreign aliens based on binding customary international law, which presumably is like a common law. It's a law that is in evolution and can recognize those norms in the international arena that become widely accepted by the civilized world.

Let me ask Drew Days – the Court says, in this case, that Dr. Alvarez-Machain himself is not entitled to release because of his claim that he was abducted from Mexico and then detained for a short period of time before being arrested in connection with an investigation in the United States. He is not entitled to release because those actions don't violate any binding customary norm, but in making this point, the Court says, however, as distinguished from Dr. Alvarez-Machain's case, prolonged arbitrary detention might violate international law, and so, what's the impact of this? Does this then mean that detainees, like the ones that we have been dealing with, might then rely on the Alien Tort Statute someday when they are released to claim damages against the United States government?

MR. DAYS: Well, the transition is a very easy one. In *Rasul*, the Guantanamo Bay case, the Court explicitly says that detainees who brought that case have at their disposal claims of action under the Alien Tort Statute. So, I think we can expect that that will be seriously considered by the lawyers representing detainees in Guantanamo Bay. The Court went to some length, I think, given the nature of the case, to outline the fact that these types of claims are available to aliens who are being held by the United States so it was a fairly explicit invitation for that issue to be raised, it seemed to me.

This issue of the Alien Tort Statute has been about for about 25 years. I know because in 1980 when I was Assistant Attorney General for Civil Rights, I, along with the

legal advisor of the State Department, filed a brief on behalf of the United States in a case called *Filartiga*, which was the first modern decision that held that the Alien Tort Statute, in fact, applied to suits by aliens alleging torture. This was a suit brought by a family from Paraguay against a Paraguayan police officer, who was found in the United States. The Filartiga case stands as the precedent, at least in the Second Circuit, although, there have been a lot of disputes in other courts but the Court finally -- after avoiding this issue for many, many years – finally addressed it and held that the Alien Tort Statute is not only a jurisdictional statute, it is one that allows the courts to develop a common law based upon international law to address violations of those rules, or customary law.

Now, the courts in the 18th century were focusing on piracy and slavery and insults to ambassadors. What Justice Souter says is that courts have to find modern analogs to what was going on in the 18th century. My sense is that claims of torture, which was the case in the Filartiga case, and genocide and crimes against humanity would certainly satisfy that standard. But again, this is one of those situations where the Court is taking a bold step, it seems to me, but also admonishing the lower courts to do so very carefully. It raises a question of common law and, just as clear, once again, raises the specter of lower courts running them up, making up all types of claims against as, I think, we have read in the papers, even U.S. corporations such as the UNOCAL case that's in the federal courts in San Francisco involving activities in Myanmar.

So this is a very significant decision for the international business community, for the international human rights community, and a decision that will have a direct bearing on what happens to the enemy combatants.

MR. LIU: Let me put three more cases on the table, and turn to Jenny Martinez, you teach in this area. It seems that the – you know, when you put Guantanamo together with the Alvarez-Machain case, and the three I'm going to mention in a second, you have the – a trend line, it seems, that the United States Court – the United States Supreme Court is willing to insert the federal courts of this country into resolution of disputes that essentially involve conduct that's happening overseas, and so the three other cases, I think, that fit this, sort of, pattern – one is the Altman case, which is a case about the Foreign Sovereign Immunities Act. There was a suit in this case against the government of Austria by an American citizen who claimed that Austria improperly expropriated six Gustav Klimt paintings belonging to her uncle. And there, the Court held that the Foreign Sovereign Immunities Act covers a conduct that occurred prior to the 1976 enactment, and in particular, there is an exception to foreign immunity for after the expropriation that applies to this case, even though the conduct in this case occurred just after World War II. So, that creates federal court jurisdiction in a case like this.

The Intel case is a case that authorizes -- but doesn't require -- federal courts to help a party in a foreign proceeding obtain discovery against another party even if the discovery would be unavailable in that foreign pursuit, okay? And then a third case is the Olympic Airways case, where the Court interprets a treaty in conflict or in tension with the interpretation of sister signatories, thereby, in essence, inserting itself and creating some sense of disharmony in the international field between its interpretation of a particularly treaty and that of the sister signatories.

Do you think that this is a signal about the, sort of, robustness of U.S. courts sort of putting themselves onto the international scene and being a bigger player instead of, in essence, a withdrawal from that role?

MS. MARTINEZ: What I think it really reflects is not so much the aggressiveness of U.S. courts in general or the Supreme Court in particular in injecting American court into foreign affairs, but really it reflects a, sort of, globalization of litigation in general, and the fact that more and more cases that have an international element are being thrust onto the Court's docket. In a sense, it's almost unavoidable at this point for the Court to avoid deciding questions involving international issues. For example, in the Intel case, the one involving international discovery, the fact of the matter is, there is a statute that authorizes U.S. federal courts to order certain types of discovery at the behalf of individuals who are involved in foreign litigation. And more and more individuals and companies are involved in foreign litigation these days and so it's hardly surprising that there would be a number of cases involving this particular provision being litigated.

Similarly, in terms of the Olympic Airways case and interpretation of the Warsaw Convention – the more cases there are that call upon U.S. courts to interpret and apply international law, the more relevant it becomes for our courts to look at the decisions of other nations. As Justice Scalia said in the Olympic Airways case, particularly when we are interpreting a treaty that we have signed onto with other nations, the decisions of the courts of those other nations become relevant in interpreting what was the common understanding of those countries in entering into the treaty -- somewhat surprising to some people coming from Justice Scalia given his strong opposition to the use of international law in interpreting -- or comparative law -- in interpreting the U.S. Constitution. And what he says is, these are two very different things. It's one thing to look at what other countries do when trying to interpret our own constitution, but when we are looking at a treaty that we have signed onto with other countries, it's hardly surprising that we should try to see what they think -- that we have jointly agreed.

MR. LIU: In essence, he takes a jab, I think, in the –

MS. MARTINEZ: Yeah.

MR. LIU: -- Olympic Airways case against the Court for turning to international precedence in *Atkins*, the case that holds execution of mentally retarded unconstitutional, and in *Lawrence* and then saying, well, where is the look to foreign law where it really matters, where we have – but let me ask you about *Intel* for a second because there is a case where the Court really had a choice. I mean, they could have limited the reach of this discovery statute to those situations where the foreign proceeding would have afforded that discovery or whether there was some indication of the foreign state was interested in affording that discovery. Why did the Court take the extra step of rejecting that limitation on the statute in affording the discovery, even in situations where the foreign tribunal, or the foreign proceeding, is uninterested in it?

MS. MARTINEZ: Well, one thing the Court pointed out was that if the only situations where that statute could be applied were where discovery would be available in the foreign proceeding, that it would essentially be redundant. In other words, that the

foreign tribunal could then go ahead and order that discovery itself. And so, to the extent it was meant to add something to the foreign proceeding, that it had to be given meaning by allowing discovery not simply when it would have been allowed in the other proceeding.

At the same time, the Court left open a lot of questions in the Intel case just as in so many other cases this term, by saying that the courts have the authority to authorize discovery, but we are not required to authorize discovery, and it listed a sort of multi-factor test, where, among other things, the Court might look at whether discovery was, in fact, of the sort that would normally be available in the foreign proceeding. So, it's not that that factor couldn't be used by the Court, but rather that it's not an absolute bar to the issuance of discovery. And so, what exactly *Intel* means, other than that the district courts have broad discretion to order discovery, really does remain to be seen by further litigation.

MR. LIU: There was one case I should mention, which was the Hoffman-La Roche, which was an anti-trust – international anti-trust case in which the Court sort of goes the other way by limiting the reach of the Sherman Act to exclude situations where a foreign purchaser is suing on the basis of foreign injury, even where the price-fixing conduct that they are challenging has an independent domestic effect. And in those situations, the Court says, hey, there is no reason for us to, in essence, impose U.S. anti-trust norms on situations where the foreign proceeding wouldn't recognize a violation, so it seems that there are some limits.

Let me turn our focus to domestic issues, and there were a number of really big cases, obviously, in this area as well. And I'm going to begin with the Pledge of Allegiance because that's the one that we've heard probably the most about.

As you all know by now, the Court in essence did not decide the merits of the constitutionality of the Pledge of Allegiance; instead found that the plaintiff in that case, Mr. Newdow, lacked standing.

I want to ask Akhil Amar whether you think this was a principled decision with respect to standing on the merits of that particular issue.

AKHIL AMAR: Well, it does turn in some ways on questions of state law: What is Mr. Newdow's precise relationship to his biological daughter, of whom he doesn't have kind of complete and sole custody. And so here's one thing that they could have done, but didn't quite – and by the way, here I'm just borrowing from the other Professor Amar, who came – who taught me this, and he's usually right about these things, and he is out in California, and has been following the case.

They – usually the domestic law, the relationship between a father and a daughter, that's governed by state law – family law is, and they could have actually, in effect, certified that question to the California Supreme Court, had they been so inclined. Had they wanted to keep the case alive so then later the Ninth Circuit could have another crack at it. (Laughter.) And they chose not to do that. (Laughter.)

The term, I might note, began actually in its traditional way. Linda Greenhouse will tell you it begins traditionally the first Monday of October with "God save this honorable Court," and all the rest, but those of us who have been watching recently know that it really begins a couple of weeks later when the Ninth Circuit is summarily and per curium reversed. (Laughter.) Last year that happened three times in the first substantive day, this time once. It's the ultimate in Rehnquist court efficiency: cert granted, no oral argument, per curiam, no signed opinion, no dissent, a summary disposition, and there you have it. So they chose basically to resolve the case in a way that didn't send it back to the Ninth Circuit.

Now just one final thought on that. Remember there are lots of other players in our constitutional system. We've talked a little bit about the president. We haven't talked so much about Congress, who might, for example, have had a useful role in defining procedures for this war on terrorism, for example. Maybe rather than the Court just promulgating their own code, having Congress try to take a first cut at it.

If – suppose you believe that actually deep-down "Under God" isn't fully consistent with our long-term vision of a republic in which one's religious affiliation are not – shouldn't have anything to do with one's citizenship. Suppose that you would think actually that's what the world will and should look like in the year 2050 or something like that. But maybe the time isn't ripe for that now. If you tried to announce such a decision now, Congress might pass a constitutional amendment that will actually put "Under God" now into the Constitution itself in a way that's going to make it that much harder to undo. Then it wouldn't get undone until 2100 or 2150. If you thought that, the way maybe some justices thought, gee, if we announce that the equal protection clause actually forbids miscegenation laws in 1955, it's going to make it very difficult for us to enforce Brown against Board of Education because the argument against integration is it will lead to miscegenation. And the justices might think, well, deep down, that's right. There shouldn't be miscegenation laws. The government shouldn't be in the business of saying, you two can marry, but you two can't. But they waited until the country was kind of ready for that, ready to accept that – at least so that there wouldn't be a constitutional amendment overruling that in 1967, *Loving v. Virginia*.

So what they did in this case maybe is sort of put the issue in a kind of vichelian way. They sort of put it off to the side, and they'll revisit – they didn't affirm on principle the propriety of "Under God," although several justices said, gee, there's something to be said for that as part of American tradition and all the rest. But they lived to basically revisit the issue another day, and maybe that was just the right touch for now.

MR. LIU: Let me ask, though – let me bring Marci –

MR. AMAR: And keep it out of the Ninth Circuit. (Laughter.)

MR. LIU: Let me bring Marci into the discussion, too. I mean, there was a – you know, just as in – you mentioned the miscegenation example. That case – the case that preceded *Loving* came under severe criticism, I think, for the Court ducking that issue, expedient though it was, perhaps, in hindsight.

And similarly here, wasn't there a perfectly good theory upon which Dr. Newdow's standing could have rested, which was not that his daughter was in some way injured, but that he was injured? That, as Chief Justice Rehnquist says, the premise of the injury is his relationship with his daughter, not that his injury is derivative from some injury his daughter is suffering, and thus the standing is not third party; it is first-party standing. And does that then suggest that the Court is somehow behaving not quite on the up and up in terms of what its duty is in terms of to – in terms of exercising jurisdiction?

MS. HAMILTON: Well, I don't know about its jurisdictional duty, but I do think that they have strayed into an arena of state law they know nothing about, and I think that the majority does not understand the impact of this case on custody disputes around the country. If you take out snippets of this case, you can now quote the Supreme Court – which you rarely can – in a state law custody dispute. You can now quote the Supreme Court for saying that a father who does not have a live-in child does not have certain rights.

I don't think the Court was thinking in those terms. I always chastise my students coming up with political theories, but I do think this was a political punt. And so I agree with Akhil on that aspect of it.

But I think the most interesting part of the opinion, actually, is how small a minority of the Court was willing to say that "Under God" reflects a fact that we all share. I mean, I find it shocking any justice would say that. We did have atheists at the time of the framing, but we always forget that. But the theory is somehow that God has established us or was there from the beginning, or has always been there. A very small minority of the Court went with that theory.

What that means is there are a significant number of members of the Court who have not yet opined on whether or not "Under God" works, and I think maybe they were buying time because they've got to figure out how to explain to the masses that in fact their jurisprudence makes this unconstitutional, despite the fact 92 percent of the people think it ought to be in there.

So what we're going to see right now and what we're already seeing is that atheists and humanists who have clear standing and clear custody – joint custody as in mother-father at home – over children in public schools are now going to file lawsuits and have already started the process in almost every circuit, and they're going to get themselves a circuit split, and the Court is going to have to face it. But it will take a long time to get there.

MR. LIU: Do either of you – Marci or Akhil – think that it mattered very much that Justice Scalia was recused from this case?

MR. AMAR: We haven't yet talked about the Cheney case, and I think maybe Alan with have some thought about that.

MR. LIU: I'm sure he will. (Laughter.)

MR. MORRISON: I'm not so sure about that. (Laughter.)

MR. AMAR: But it actually is a little odd that Justice Scalia felt himself obliged to recuse himself in this Newdow case because, in some ways, I actually think that he had good reason for not recusing himself in the Cheney decision, but you could say, well, that involved at least issues of financial connection; you know, he got a free trip on Air Force One, but maybe it really – Air Force Two, but maybe it wasn't free because he would have paid the same for air fare anyway, or there's a friendship or a connection, so there are at least sort of issues that could be raised, although I actually think his opinion was pretty thoughtful about why that wasn't the proper case for recusal.

But why should he recuse himself in *Newdow*? Because he has expressed himself extemporaneously that, you know, the Ninth Circuit was really way the heck out there. Well, you know, all you have to do is read Scalia's other opinions to know that's what he thought. (Laughter.) Read his dissent in *Lee v. Weisman*, justices might express an opinion on an issue in a case, it gets remanded below. They might express on an issue that the other justices don't reach, and then it bounces back up to them and they're supposed to now recuse themselves because they took a position in that same case at an earlier moment? In other words, a view of the law, which is what really Scalia has in effect expressed – is it really an appropriate – having a view of the law isn't an appropriate basis for having to recuse yourself. You know, no one has – if you really want every justice in every case before they decide to have an utterly open mind – maybe, but an empty mind? (Laughter.) A mind utterly free from any views on the legal issues? All he basically said was, gee, the Ninth Circuit was way the heck out there, and that doesn't seem to me the sort of thing that really compromises one's judicial – it's not about any sort of financial or other impropriety or bias or connection to a party. It's just having a view of the law, which is what I hope justices actually have.

MR. LIU: I'm going to ask Alan Morrison in a second whether he has a different take, but before I do that and turn to the Cheney case, I want to make a short pit stop in the other religion case this term, the big one, *Locke v. Davey*, which was decided quite a bit earlier. In that case, the Court held that the State of Washington didn't violate the free exercise clause by refusing to give a scholarship, in essence, to a student who wanted to study for the ministry.

And Marci, I want to ask you whether you think that – why did the Court not think that this was a form of discrimination against religion? I mean, the scheme would seem to, pretty facially, disfavor religion.

MS. HAMILTON: Well, there was a very big question that was left open after *Employment Division v. Smith*, and *Church of Lukumi Babalu Aye v. City of Hialeah*. In those two cases, the Court made it very clear that a generally applicable, general law applies to everybody, and a neutral law is only subject to rationality review. In other words, it is presumptively constitutional. And the follow-up to those two cases was that many religious individuals and organizations around the country started to argue that if there was any exception to the law in any way, shape or form, that automatically that law was going to be subject to strict scrutiny. That was the view of – expressed in hundreds of cases in the lower courts.

This case, I think, was granted not because they were particularly interested in this scholarship theme at all. It was granted because the justices were clearly getting annoyed with what they thought was a misleading – as the chief says in his opinion – of what they said in *Lukumi*. What the Court does – this is a clean-up case; this is a clarifying case. And what the chief does is he says, look, strict scrutiny means presumptively unconstitutional. You will not have a law that is presumptively unconstitutional unless there is, on the face of the law – whether it's language or action – some kind of animus or hostility toward religion. If there is no animus or hostility, then we are going to presume it's constitutional. And for all of you who have been misreading *Lukumi* and all of these cases, you need to quit because now you're only going to get strict scrutiny if you can show us that not only is it not generally applicable, but it's not generally applicable because of hostility to religion. That settles no less than a hundred lawsuits around the country that have been brought solely on that issue by various religious groups. So I think it has humongous impact, but it has almost nothing to do with the topic of the case, which is this notion of whether or not a state is required to fund ministers in training.

MR. LIU: Alan Morrison, let me ask you – do you think that – I mean, is – the chief says a lot about animus in the Locke case. Is that the right standard?

MR. MORRISON: Well, I'll defer to others on that, but I just want to make one observation about the case, and that is, during the oral argument, Justice O'Connor, in the way she often asks the questions, said to Jay Sekulow, the lawyer arguing for the group urging the Court to say that it was unconstitutional – she said to him, if we agree with you in this case, does this mean that tuition tax credits and everything else we do has to go automatically to all religious organizations, no matter what happens? And he hemmed and hawed back and forth as though he had not thought of the question – which is hard to imagine, given where this case is – and he finally said, yes, and you could see the air visibly go out of Justice O'Connor at the time, and she would – this is another example of her – you don't say never or always with Justice O'Connor, and she was not about to take the position that just because they had allowed tuition tax credits to go to a religious school, that this meant that the entire floodgates were open and we were going to have it that way. And I think that the case was about that as much as it was about anything else, and that the chief – as Marci said – put a brake on it, said, no, wait a second, we're not going to view our prior cases as anything like that.

MR. LIU: Alan, while you have the mike, let me turn right to Cheney then, and this is a case, obviously, that you are obviously very intimately involved in, and let me just quickly summarize it so we're all on the same page. This was a case about the energy task force that Vice President Cheney convened early in the administration, and the specific dispute was about a discovery order that was approved by the District Court to – directed at the Vice President to produce documents to enable the plaintiffs to inquire into whether non-federal officials, members of industry had participated in the panel, in the task force to such an extent that this should be considered, under D.C. Circuit precedent to be de facto members of the panel. And the vice president sought a writ of mandamus directed against the District Court to enjoin, in essence, the discovery of order.

Now the Court sends it back to the D.C. Circuit and says that we reject the absolute position taken by the government that no discovery is appropriate here – they reject that view – but it is extremely hard to figure out what the Court, beyond that, decided.

MR. MORRISON: Well, one never likes to lose cases in the Supreme Court, or for that matter, any other court. But of all the losses I've had, this is certainly the best one I ever had. (Laughter.) It did the least damage to our case.

The government had a very serious jurisdictional issue because there was no final decision, but the District Court simply said we deny the government's motion to dismiss, we're going to have some discovery on the limited issue as to whether there's a – the de facto member doctrine applies, well-established D.C. Circuit law, and we're going to have some discovery. And the government immediately refused, said it wasn't going to comply, and finally, it went up to the Court of Appeals, the Court of Appeals said, no, this is interlocutory, we can't do anything about it now, and the government asked for rehearing en banc. That was turned down, and then it went to the Supreme Court, and we argued no jurisdiction, you can't do any of these things, you can't reach any of the questions that the government has presented.

The Court took the case, and the government had three different theories on which the case should be thrown out entirely: first, that the de facto member doctrine was not authorized by the statute; second, that in cases like this, even if the theory was all right, you weren't entitled to any discovery whatsoever; and third, that it violated separation of powers to allow any discovery. While it's true that one of the defendants is the vice president, there is no indication that the vice president himself personally had any of these records in his office or that we couldn't get discovery from other people who had all the information that we needed.

And the Court rejected all of those efforts to dismiss the case entirely. Instead, it said that the lower courts had approved orders in discovery that were too broad. As Justice Ginsberg's dissent points out, the government never made that argument at all. It was asking for no discovery, not for less discovery, and Justice Kennedy said, no, they had made the arguments in a couple of places in oral argument and in a brief, the kind of throw-ins that you see, and besides that, it's overbroad.

For those lawyers in the room, the notion that five – eight interrogatories and nine requests for documents could somehow be constitutionally overbroad is kind of bizarre. Most of us think it's probably malpractice if you don't serve at least 900 of each of those.

In any event, the Court was troubled in some way. They had this case up there. I have a feeling that they may have gotten the case, and the solicitor general – almost certainly at the prodding of the vice president – pushed the case up there to get it – to try to get it dismissed, and the Court saw that it didn't have any authority to dismiss, and the only thing it had any authority over was discovery, and so it did the least harmful thing by ordering some more discovery. This, of course, has further delayed the case, but it was going to be delayed anyway once the government started on its inevitable efforts to take it up through the appellate process, and certainly once the Supreme Court got hold of

it, there was no chance of any of these documents coming out before the election, which in my judgment is one of the principle goals of the defense of this case.

So where it goes from here – hard to know. The government could agree to produce the limited discovery documents that we seek, but I think that's probably not going to happen, so we'll be back doing more litigation in the Court of Appeals, and the government will undoubtedly try to raise some of the issues that the Supreme Court refused to decide or – in my judgment – perhaps most clearly from the decision of Justices – the opinion of Justices Scalia and Thomas, which would have thrown the case out, rejected those arguments for any number of reasons. But the government will try to argue those again in the D.C. Circuit, and we may be in court for a very, very long time.

MR. LIU: I can't resist asking you, Alan – you had filed a petition for recusal against Justice Scalia in this case, and in response, he sent you a very nice letter. It was 21 pages –

MR. MORRISON: Yes. (Laughter.)

MR. LIU: -- and addressed to you as a friend.

MR. MORRISON: Yes.

MR. LIU: And he traced the history of the numerous friendships between members of the Court and members of the bar, putting perhaps your relationship within the grand tradition of those relationships.

Were you persuaded by his – (laughter, inaudible) – memorandum?

MR. MORRISON: No.

There are actually two very interesting aspects of this motion that are worth some additional thought. The one is the procedural aspect, which is should a single justice have the final authority to decide what is a question of law, which is does the federal recusal statute require him to recuse himself in this situation.

I said this publicly so it's no secret. We had planned to file a motion directed to the entire Court asking it to take up the recusal motion if Justice Scalia had not issued his opinion. And when he did, we decided that with the argument less than a month away and a very lengthy opinion and what it would have required to respond to it, we decided it was not appropriate to carry the matter any further. So, the very much open question is whether Supreme Court Justices should be different from everybody else and be able to decide for themselves. Not simply to recuse themselves as Justice Scalia did in the Newdow case but to not to recuse himself as he did here.

And the second question is, do – the American Bar Association now has under reconsideration its canons of ethics, which include the very similar language to what's in the Federal Statute. And the question is not whether Justice Scalia was right as a matter of law under the circumstances, but whether people think that that ought to be the law and if so, whether the law ought to be changed. And you'll hear more of that in

connection with the ABA's canon review and I should think that other people will continue to comment on the issue.

This was a situation in which we thought that there was a solid basis for recusal and it would have been not proper for us to not have made the motion. I say this with no surprise that it was not without some trepidation that I chose to do it but I'm a big boy and I'm used to getting attacked from various places. And when it happened I took it – I took my lumps as I take them on the merits as well. But we will see in the end how it all comes out.

MR. LIU: You can feel free now to send Justice Scalia your duck hunting invitation – (laughter) – holding in advance.

Let me move now from energy to the environment. And there are actually several important environmental cases decided by the Court this term, probably didn't get as much attention as they deserved. Let me just put four of them on the table and ask Lois Schiffer to comment on them.

One of them, the one we've probably heard the most about, is the one that dealt with Mexican trucks. The court there held that a federal agency didn't have discretion to prevent the cross-border movement of these trucks and thus, the NEPA, the National Environmental Policy Act, neither that nor the Clean Air Act required the agency to evaluate the movement of these trucks for environmental impact.

A second case came from California, in which the Court held that the Clean Air Act, in essence, preempted local regulation of new motor vehicles in accordance with state motor vehicle pollution standards.

The third case held that the Clean Air Act authorizes the Environmental Protection Agency to stop construction of pollutant emitting facility that is authorized by state authority when the EPA itself finds that the state authorities' best available control technology determination is unreasonable.

And then a fourth case is related to the regulation of off-road vehicles in federally designated wilderness areas. There the Court held that the Bureau of Land Management and the Department of Interior is not obligated to regulate off-road vehicle use.

Lois, is this a bad term for the environment?

MS. SCHIFFER: Goodwin, it's a big term for the environment because I would actually add to your list two more clearly environmental cases. That is, *Mikasuki*, which is a Clean Water Act case and a case called *BedRoc*, which goes to interpreting something called the Pitman Act, which is an act that relates to what happens when the government conveys land to somebody and what minerals are reserved to the United States. And that's an important public lands kind of an issue. So that was six and that's not counting *Cheney*, which isn't really an environmental case but arose in an environmental context.

And it's not counting an original jurisdiction case called *Virginia v. Maryland*, which was very much an environmental dispute, which related to whether Virginia had to get the permission of Maryland before it took water out of the river and built structures related to the river. It had gotten the permission of Maryland for 40 years and then decided it didn't like the outcome anymore. The reason Maryland cared was for reasons of sprawl and water shortage in the east. And so that's could be seen as an environmental case.

That's before we get to what happened on the certs denied and the case where cert was taken for next term. So it was an enormous year for the environment and it covered a broad spectrum of environmental issues. This was really the range of statutes, both public land and pollution protection kind of – protection against pollution kinds of statutes, original jurisdiction.

And I would say if we see this as a smorgasbord or feast that the environmental protection side came away with their – put on quite a strict diet. It wasn't a very favorable set of rulings for the environment at all. The truth of it is that the vast majority of these cases were not particularly cert worthy, with one exception – the public lands and case that you mentioned, the Sewa case. There had been no dissents in the court below. In the engine manufacturer's case, which was one of the Clean Air cases, there was so much disinterest at the Ninth Circuit level that what the Ninth Circuit did was just adopt the decision of the district court. So it was quite perplexing how suddenly there was this very broad environmental docket before the Supreme Court.

Having said that, I would say focusing on the four cases that you raised that environmental protection took quite a step backward. And some of it is quite puzzling.

For instance, if you look at all the three cases that raise Clean Air act issues altogether. Indeed, by a five to four little thread the Supreme Court read the Clean Air Act, which has been referred to by others as a bold experiment in cooperative federalism. Justice O'Connor read – I'm sorry, Justice Ginsberg read that quite specifically to say, well, indeed there are checks and balances in the statute and there's a federal role and there's a state role. And here we think that the state didn't give us any of the information that's required and indeed the company that was seeking this permit wouldn't give the state any of the financial information that was required and so based on that there really is a role for the federal government here.

Justice Kennedy, in a dissent for four people, really went on a tear about how you have to pay attention to the dignity of states and what do the feds think they're doing here without really tethering that view to the words of the statute. That comes back to haunt the states who indeed have done quite a lot to step up to the plate on pollution protection.

In the engine manufacturer's case, which was a case where, the air – one of the air management districts in California known by everybody as a very highly air polluted state, said in effect we're issuing some orders that when people buy motor vehicles that are already on the market and they have to be commercially available, they have to buy less emitting rather than more emitting vehicles. And the Supreme Court said no in the motor vehicle area, that's not the case; there's federal preemption.

And similarly, despite the fact that the state of California wrote a quite eloquent brief in the trucks case that you described, where the trucks were coming over from Mexico saying it's very important that we look to be sure that the federal action isn't going to cause us, California, not to be able to meet our air obligations; that's the purpose of these air conformity requirements. The Supreme Court said no, the Clean Air Act doesn't apply here. I actually think Mexican Trucks is ultimately a very peculiar circumstance because it was a combination of presidential action and agency action and it doesn't happen too much. And so I think that is a case which will ultimately will be somewhat – have narrow application.

MR. LIU: Do any of these cases, Lois, prompt a cry for legislative fixes?

MS. SCHIFFER: Well, certainly, for instance, the engine manufacturers case, that is when the local agencies want to promulgate, purchase kinds of rules, Congress might fix it. On the other hand, it was a very peculiar decision by the Court where they went on a big discussion of what was claimed – a big discussion of what the Clean Air Act did. I should say, by the way, it is a eight-to-one decision.

Justice Souter, I would certainly say, had the better understanding of what Congress was about. He said we actually might look at what Congress wanted to do in the legislative history. And nobody else was so interested in the legislative history. And I will certainly say that Justice Souter's dissent comports with what most of us had ever thought Congress intended to do with those statutes, which is to say 50 states can't each say people who are manufacturing cars have to build into their emission systems. The purpose of this is to say there's one kind of a car so it's going to be federally established and California has special rules, which it does throughout the air act.

So that could be legislatively fixed but actually what the court did there ultimately is it said we're sending this back. And we will let the court below and the agency below take a look at whether they can characterize these rules or find these rules that the air district had in such a way that they really are just local purchase decisions for the public purpose, some of them affected what private comp – private entities were doing, too. But if it's really just an air district saying it's the rule in our district that our – we as an air district who buys cars have to buy environmentally sound cars, environmentally preferable cars, that might be okay. So it hasn't really run its string yet and we'll have to see what happens with running its string. I think in general, there's great reluctance to reopen the environmental laws to fixes in Congress because I think it's no secret. This isn't the most environmentally friendly Congress that's existed.

MR. LIU: Alan, I know you were involved in the Mexican trucking case as well. I observe from my score sheet here that many of these cases were quite lopsided, including the Mexican truck case, which was a 9-0 decision, with the exception of the Alaska case involving best available control technology of the court. In a 5-4 decision authored by Justice Ginsberg said that the EPA can override, in essence, state determinations of best available control technology. Are you surprised by how lopsided the rest of the cases are? I mean there are very few dissents apart from the one of Justice Souter that Lois mentioned.

MR. MORRISON: Well, not entirely. And part of this is just the question of the limited time the justices have to write dissents. They've got a lot of cases in which they're going to write dissents about it.

And I think the Mexican truck case illustrates the serious problem with our environmental consideration of international trade agreements and treaties. We have brought public citizen cases before the NAFTA agreement was both finalized by the U.S. trade representative and after it was finalized and on the way to the president and to Congress. And we were told by the courts that it was too soon to do it then or you couldn't do it because it was not agency action. And now we're told it's too late because the president has already approved it. So this is one case in which, without opening up the environmental laws in general, when the trade agreements, trade agreement authorization statutes come up, which they come up regular – that is, they're all fixed terms – that there ought to be a real effort to require a mega analysis of the environmental consequences of these kind of situations because nobody did it in 1992 and 1993 and 4 when they were actually being considered by the executive and ultimately by Congress. And so in that sense the loss was a closing of the door. It was either too soon or it's not too late. And that's hard to believe that nobody cares at all about the environmental consequences of massive amounts of Mexican trucks coming over the border into southwestern United States.

MS. SCHIFFER: I would also add that in Mexican trucks the plaintiff's theory kind of changed as that case went along. And if they had brought it originally on the theory that they landed up in the Supreme Court they may well have had a different outcome.

MR. LIU: Let me turn now to cases decided even earlier in the term. And the biggest one, which we haven't even touched on yet is the campaign finance decision. It was an extraordinary case, argued at an extraordinary time frame, and arguably produced at an extraordinary time frame, given its tremendous length.

I have been trying my best here to offer quick summaries of the decisions but I'm not even going to try – (laughter) – to do that with the McConnell case and I will refer to our resident expert Spencer Overton who's written about these cases. Tell us, first of all, try to give us a little map of what happened in the case and then we'll talk a little bit about practice implications.

SPENCER OVERTON: Okay, sounds good. Long and short of it, in *McConnell* there were three main opinions.

O'Connor and Stevens the primary opinion. That's the opinion that upheld this soft money contribution limit and also the electioneering spending restrictions. This is the law that says that 30 days before a primary, 60 days before a general election, a corporation, a union, cannot spend money on an ad that mentions the name of a federal candidate. So the Court actually upheld that provision.

We also had a second set of opinions authored by Justice Rehnquist where a number of challenges – there were no standing, such as the challenge to the increase in contribution limits from $1000 to $2000. Probably the most notable aspect of that

Rehnquist opinion there would be that the prohibition on contributions by minors. That was struck down. Basically that was put forth because people were circumventing contribution limits by having their children give contributions. But the Court struck that down as not being nearly tailored.

And then finally, Justice Breyer wrote kind of a third majority opinion that dealt with disclosure requirements by broadcasters. So that's kind of in a nutshell.

MR. LIU: So three majority opinions. Let me ask, I mean, I think many observers were surprised to see the Campaign Finance Reform Act upheld so broadly, as it was. In fact, the ones that you mentioned, the provisions you mentioned that were declared unconstitutional, one might say, are fairly marginal to the overall thrust of the act. Is that surprising to you and does this sort of signal some retreat from the equation of money and speech that the Court has sort of been toying around with for the last 30 years?

MR. OVERTON: I think there's certainly a retreat. *Buckley* had a kind of free speech, dicta, etc. This majority opinion, at least that first opinion by O'Connor and Stevens, that did not have that language. Instead, it had language about restraint, and respecting congressional judgment. It also acknowledged that campaign finance works in a structural manner, right? So if a judge pokes a hole in one place, hey, maybe that will create a loophole that undermines the entire system as a whole. I think the big theme here with regard to both *McConnell* and *Vieth* has to do with these deep divisions, this struggle, right, among the justices about what's the proper role of the Court in overseeing the political process here.

And because there's this division, we didn't have any bold, clear principles. This majority opinion in *McConnell*, the primary majority opinion with regard to soft money and electioneering communications – that was five-four. So we didn't have any bold, any bold statements or principles put forth here. We did, though, have this pragmatic analysis put forth by the Court. It was a little more sophisticated. The Court recognized that hey, loopholes will pop up. Congress will close them and then we'll have a future case back here in the Court in the future. This is an ongoing process here.

Now, I think a problem about, with the case though – as a result of the absence of broad principles, and as a result of really this kind of fact-specific, context-specific type of analysis here, there wasn't a real rigorous analysis of the First Amendment issues or the entrenchment issues. The Court really punted on a number of those very, very important issues. And as a result we don't have a lot of guidance for future campaign finance cases.

MR. LIU: Let me put on the table the other case you mentioned, the other big political process case this term, which was *Vieth v. Jubelirer*. This was a case was about whether or not political gerrymanders are challengeable under the equal protection clause. Four justices thought that the answer should simply be no because there are no manageable standards under which you can adjudicate those kinds of claims. But, Justice Kennedy, you know, sort of toeing a very thin middle line says that I generally agree with the Court but I wouldn't close the door entirely. Let me ask, and bring Alan in the conversation too, what does this signal about the Court's appetite for regulating the

political process. In some ways, you know there's this memorable line in *McConnell* where Court upholds the act but "money, like water, will always find an outlet." And so there's sort of in some sense a confession of almost futility in the patchwork of regulations that we can enact. So what does it really mean on the ground, these decisions?

MR. OVERTON: I think really this reflects this big split, this big battle, right? Kennedy plays the role of like Powell in *Bakke* here, right? He says, hey, there's no Fourteenth Amendment violation here in this case but I'm not going to say that we can't hear the claims in the future. So he keeps this thing alive and there's this real split on the Court here. What's really interesting about this is the folks Thomas and Scalia, who talk the most about entrenchment in the campaign finance context, right, they're totally willing to walk away in the redistricting context where it's clear that there's some entrenching activity going on here. So I think that that is you know this interesting division here.

I think something else is interesting in terms of *Veith* is this predominant intent standard, right? We know in the race cases with regard to *Shaw*, *Miller v. Johnson*, etcetera, we have this predominant factor to us. Well, hey, if race is a predominant factor in drawing the district then it's unconstitutional, right? Here are the four justices who are in the plurality and Justice Kennedy – they distinguish race from politics, right? They say, hey, a predominant factor test where partisan politics is a predominant factor, hey that's just too unmanageable, right? That's just too unmanageable. And they try to distinguish race from politics and you know, Stevens really calls them on it. Now, of course Scalia and Thomas would probably go for not considering race at all, right? So maybe our predominant race test is just a compromise that progressives want to kind of keep up and they don't want to question how manageable it really is.

But I guess my point is there is just this huge division and it's going to play out on the ground. Next term the Court may hear this Texas case -- we're all familiar with that -- where Texas is basically engaging in redistricting in the middle of the decade. And just yesterday the court summarily affirmed an opinion in *Lavios v. Cox*, right? In that case, basically, the justices are using the one-person-one-vote principle to try to check partisan gerrymandering in Georgia.

So I think that this is a live issue and on the ground. It really is, you know, this is going to play out over the course of the next couple of years. And this is one of the important areas where the winner of the presidential election will really matter if there are any future appointments, I hear.

MR. LIU: Alan, are you optimistic that cases like the Texas case will find their way into sort of meaningful resolution at the level of the Supreme Court?

MR. MORRISON: Well, the Texas case is complicated, has a lot of issues. I don't hold out much hope that Justice Kennedy's mind will be persuaded on the ground. Some other better fact case is going to come along.

This was a clear case of partisan gerrymandering where the Republican knowingly and with malice aforethought – (laughter) – designed the system so that it

would come out their way, and it's hard to imagine a better fact case than this. They have approximately 50 percent of the votes in the state, and they were getting 65 or 70 percent of the seats in Congress, and they had the power in the state legislature, and they did it.

The two questions that strike me as being at least open are -- the first is: What do we do about the almost as pervasive -- in some places more pervasive -- problem of bipartisan gerrymandering, in which the two parties simply say, let's divide up the world, you get your share, we get our share? -- And all the people in the middle -- that is the unregistered party members -- don't even get to vote in the primary, and they are completely frozen out of the process. Unlike the situation here where the majority purports to be saying, well, we don't know who is a Democrat. We don't know whose rights are being violated.

The independents in this bipartisan gerrymandering -- we know who those people are. They can be readily identified. And they are saying, as they do in the one-person-one-vote cases, my vote is essentially negated. I don't have a vote anymore. And therefore you have to do something about it. And if you could prove intent, they may have a case. So I would look for some of those cases, at least because there's no good alternative -- with one exception, which is that the court also, majority, rather in an offhanded way, simply announce that the clause in the Constitution which gives the states and hence the federal government the right to control the time, place and manner of elections, gives the power to Congress to engage in redistricting. I don't know of any previous case which has actually even raised the issue, let alone holding it. But the majority opinion, the plurality opinion, just simply says, well, of course Congress can do this.

Now, whether Congress is willing to do this or willing to try to take on some efforts to do neutral standards, such as requiring commissions and forbidding certain things, which would then give legislative guidance, is a different question. But at least it offers an opportunity, because one cannot expect state legislatures to do it. It's possible Congress -- not this Congress, but some other Congress in a time of uncertainty, not knowing how the next decennial redistricting comes, might feel more inclined to along with it.

MR. LIU: Spencer, last word. And then I'm going to move us to the federalism case.

MR. OVERTON: One last point to look out for in the future would be a move from the Fourteenth Amendment to the First Amendment in these cases, in the redistricting cases. Justice Kennedy -- he nods at a possible First Amendment claim where groups of voters are discriminated against essentially because of their political views, their interest in political association and expression. And Justice Stevens even says as a result this should be subject to the same type of strict scrutiny that maybe race would be subject to. So in light of the fact that Kennedy is the swing here, certainly look for future briefs to at least include a strong First Amendment argument.

MR. LIU: Let me turn our attention now to a few of the federalism cases that were decided this term. As everyone here I am sure is aware, the subject of federalism has been something that has occupied the court in many, many important cases in the last

decade. And what seems to me odd about this term is that we don't really have any huge federalism rulings. There are four important cases -- one, *Tennessee v. Lane*, in which the court upheld Title II of the ADA as applied against state courthouses, I guess. And then there are two cases dealing with the Eleventh Amendment in which the court rejects, turns away, Eleventh Amendment claims, one in which the court says that federal consent decrees can be held valid against the states, can be enforced against the states, and the other in which the court essentially doesn't decide whether Congress can abrogate limited immunity under the Bankruptcy Clause, but says that bankruptcy discharge proceedings are not proceedings against the states for purposes of the Eleventh Amendment. They are rather in the nature of in rem proceedings.

And then finally there's a spending clause case, the Savory case, in which the court upholds a federal statute that prohibits bribery involving federal funds, but requires no connection between the alleged bribery and the federal funds. And so I guess -- let me ask Marci Hamilton to start us out here. Is the federalism issue sort of the dog that didn't bark this term?

MS. HAMILTON: Well, actually last year I was at the Second Circuit Conference, and Justice Ginsburg gave a small presentation, and essentially her presentation was, I'd like you to know how many federalism decisions we did not reach. So maybe this is the second year of the non-federalism revolution. I've been saying since the beginning of the federalism so-called revolution that it is not a revolution, but rather an adjustment. So I think this term is actually indicative of where we're headed with respect to federalism. The court is not permitting the states to go to the extent that they asked in *Frew v. Hawkins*, where state officials say, we don't have to abide by a consent decree agreed upon by our preceding officials, because we now have a different vision for the states. The court said, are you kidding? -- of course you have to abide by consent decree. You are the state. You were the state before. So the court is not interested in doing anything radical.

But I think the big news on federalism is that *Tennessee v. Lane*, which is where the court says that Section 5 of the Fourteenth Amendment gives Congress the power to enact Title II of the ADA, is quite clarifying on what it takes in order to survive a Section 5 challenge. The court is very specific giving guidance to Congress on what they need to have or what there needs to be in order to prove it.

There are two factors in order to prove Section 5 power. And that is, first, are there widespread and persisting constitutional violations by the states? That has been the criterion that has doomed those statutes that haven't survived, and it has been the dominant factor -- I think will continue to be the dominant factor -- and the court provides a number of indicia to figure out, well, are the states engaged in widespread and persistent constitutional violations? And I'll just go through them quickly. But what the court has done is to say, of course you don't just limit yourself to the congressional record. Congress doesn't have to go out and collect every piece of evidence when there is a problem. But there are other ways of figuring out if we have -- if the states are misbehaving.

One -- the first one is if the right is highly protected, we are going to be more inclined to look for less evidence rather than more. So you don't need to show us as

much that the right is highly protected, as it was in this case, which this involved access to the court.

Then the court makes this list: Is the record voluminous with respect to fact -- not conclusions, not adjectives, but facts regarding the discrimination? But that's not enough: Are there Supreme Court cases that show that this has been a persistent problem? Are there numerous lower courts cases that show that this has been a persistent problem? Is there pervasive discrimination against this group with respect to other fundamental rights? Are there existence of laws that plainly discriminate against this group? And is there historical experience that shows that this group has problems with the state? So the court has given this big-picture answer to how do you prove that there's been widespread and persistent violations by the state, and they are guiding the Congress, which I think is very helpful. I know that many members of Congress have been quite annoyed with the court, who are seemingly limiting their power, but also kind of confused about how to make it work.

And very quickly -- I know we're running out of time -- but the second aspect of Section 5 jurisprudence is whether or not there is congruence and proportionality. This has been probably the most debated aspect but the least talked about by the court. The court here makes clear that it's really just a tailoring requirement, and where the statute is reasonably tailored to the end that the Congress is trying to achieve it will be fine. So reasonable accommodation under the ADA -- that's perfectly fine. Further evidence that they've been careful about tailoring is that if there are exceptions to what Congress is requiring and there are exceptions to the ADA where the states don't have to make reasonable accommodations. So it's a very interesting case, and it will make a big difference in future case.

MR. LIU: Let me ask Drew -- you've been following this case also. And in some sense the court reaches a result that upholds the federal statute here but leaves in place I think an analytical framework which I think Marci laid out quite nicely that has been criticized for its departure from the basic rule of deference that existed at an earlier time in these kinds of cases, thinking back to *Katzenbach v. Morgan* and some of the 1960s cases. Is this decision to be read as a sort of portent of scenes to come in terms of a moderate approach to the application of what is essentially still a judiciary supremacy point of view in terms of the application of Section 5 of the Fourteenth Amendment?

MR. DAYS: Well, I disagree a bit with Marci in this regard. I'd be the last to call anything a revolution, because it might happen. But I think that it's clear since the mid '90s that the Supreme Court under the leadership of the chief justice has been determined to create a very high bar for which Congress has to jump in order to justify legislation I think in an earlier time we understood, and certainly members of Congress understood, to be very much within the province of the Congress. For one thing, in the seminal case the Supreme Court decided that the Congress could not rely upon any of its Article I powers -- at least it seemed to say that, focusing specifically on the Commerce Clause, to abrogate state sovereign immunity. And as you know -- I won't go through the cases -- what the court has done is gradually expand beyond the language of the Eleventh Amendment to create a doctrine of sovereign immunity that is not tethered to the language of the amendment itself, to the point where in some recent decisions the court has been focusing on whether action offends the dignity of the states. This is a very, very broad doctrine --

capacious, and I think there still to be filled by later decisions. I think Goodwin is correct in identifying that the structure is still there.

But let me point out a couple of things with respect to *Lane*. In *Nevada v. Hibbs* last term, you may recall that the chief justice wrote an opinion upholding the Family and Medical Leave Act. This came as a great surprise, because what the chief justice did was not engage in the type of very detailed analysis of the legislative record to arrive at the decision as to whether Congress was operating along the lines it has been announced earlier -- indeed in the Garrett case with respect to Title I of the Americans With Disabilities Act. It was a very quick study of what went on.

What we have in Tennessee v. Lane is Justice Stevens taking the chief justice at his word, and looking at Title II -- at least part of Title II of the Americans With Disabilities Act, and saying, Well, in *Hibbs* you didn't go into this great detail -- you relied upon court of discrimination in the private sector, not state discrimination, not discrimination with respect to state agencies themselves. And I think it's very interesting that Justice Scalia in his dissent -- although I do not agree with the solution he provides to the problem that he has -- but he says this notion of congruent and proportional is one that opens a great manipulation by the court. It is very difficult for Congress to know what is the right thing to do. Indeed, Congress was acting completely unaware of what the Supreme Court was going to do in this area when it was putting together the legislative record leading up to the passage of the acts that had been challenged.

One of the things that happened in *Lane* is that the court looked at not a title of an act but part of a title of an act. I think people had predicted that maybe the court would approach Title II in a way that was different from Title I. But in *Lane* the court looked at Title II as it applies to courthouses and the ability of people who have legal problems to appear before the court. Because as I think many of you know, this involved a fellow who had a claim against him, charge against him, who was in a wheelchair, and had to climb up stairs to get to the courtroom, which was on the second floor. And the court held that the due process clause really required that the state provide a reasonable accommodation under those circumstances.

So I think that the structure is very much in place. What I would regard this court as having done this semester is slowing down the juggernaut with respect to the whole issue of sovereign immunity.

Let me just mention one other case that probably has not got very much attention, and that is *Tennessee Student Agency v. Hood*. This is a case that was very much in the minds of the corporate community in particular, and state agencies also. This was a student loan issue, and the question was whether Congress could abrogate state sovereign immunity pursuant to the bankruptcy clause of the Constitution. The Supreme Court punted on that issue and found that since the loan itself was a race, a thing not in possession of the state, the Eleventh Amendment issue was not presented. Justice Thomas in particular took great offense at the course that the court took. This is one of those cases like *Newdow*, where there was a great deal of media hype, with all due respect to the media, that a fundamental decision was going to be made by the court when in fact the court passed it by and we'll have to wait for another day.

MR. LIU: Let me ask Akhil -- you've written and thought about federalism quite a bit -- I think one thing that seems notable in the Lane decision is Justice Scalia's dissent -- just to be clear, what Drew was referring to was the dissent in which Justice Scalia said basically, I'm going to jump off this train because I just can't take it anymore. It's sort of like a self-flagellating dissent in which he says, I should have known better. You know, I signed on to this Congress in proportionality stuff, and I should have known that it couldn't be done with any sort of real principle behind it. And so from here on, henceforth, I'm going to take the following approach. When it comes to protecting against racial discrimination Congress has virtually free hand. But when it comes to everything else, Congress has a very, very limited hand.

You know, Akhil, is this revealing in some way? Presumably, Scalia could have jumped off of this train at any number of earlier points of time. You know, there were several cases litigated under this standard in which he voiced in essence no objection. Does this sort of reveal a disappointment in how far or not far an anticipated federalism resolution has gone?

MR. AMAR: Well, he's trying to push the law in one direction, which is using less power for Congress under the Fourteenth Amendment. Outside the race context they are actually now -- it really can't go beyond what judges have said. And here's what's striking: There isn't someone on the other side trying to say, wait a minute, we shouldn't even be talking about congruence and proportionality. Congress has independent substantive authority to define privileges and immunities of citizens of the United States. And if Thurgood Marshall were around, if Bill Brennan were around, if the first Justice Harlan were around, they would be shouting this from the rooftops. We've forgotten an entire generation of jurisprudence on the Warren court that revived all this, and you hear silence from Justice Breyer, from Justice Souter, from Justice Ginsburg, from Justice Stevens on this point -- and silence from many people in the American Constitution Society.

And here's part of the reason why I think that's so: I think you all are too much court worshippers, and that's a twofold mistake. One, you've got to pay attention to the other branches of government, including Congress and the president, even if you're court watchers -- because what Congress does constrains what courts can do -- see *Newdow* with presidents pick justices. So even if you just were a court person, you can't ignore those other branches. But, two, sometimes those other branches are going to be more protective of rights. And nowhere is this more clear than in the history of the civil rights movement with the Voting Rights Act of '65, with the Civil Rights Act of '64, or the first generation of reconstruction statutes. And in court-worshipping too much you all are also I think not paying enough attention to the original test history and structure of the Constitution. You're ceding the originalism ground to a group of justices who are actually in my view misreading it, and reading it in an overly conservative direction. So Scalia's is an originalist claim about the Fourteenth Amendment that is in my view deeply wrong. And the problem started with my friend Marci Hamilton's victory in *Boerne*, which I consider -- I know it was a big win for her, but maybe the worse case actually.

I love Justice Kennedy who wrote it -- the worst case of the recent era, trebly activist, overruled an act of Congress that went through 99 to 1 in the Senate, and by over 400-some votes in the House. It's overruling Congress, it's overruling some precedents

that had much broader readings of the Enforcement Clauses of the Civil War amendments, especially Section 2 of the Thirteenth Amendment. And it's in my view deviating from what the Reconstruction Amendment, the history, the original intent, was all about. Remember, the court hasn't always been great. *Dred Scott* strikes down free soil laws -- says Congress can't pass free soil laws. The first sentence of the Fourteenth Amendment is a repudiation -- it's a slap on one cheek of Chief Justice Taney saying everyone in America is a citizen, black and white, male and female. That's actually a repudiation of *Dred Scott*. The second sentence is a slap on Taney's other cheek, saying, you know, And here are actually certain rights that we are going to create. This is an amendment designed to repudiate a Supreme Court -- the Fourteenth Amendment passed by Congress -- they're the ones that are proposing it, drafting it in very broad language, because their interpreters and enforces it. It's the only branch of government that's explicitly mentioned in the Fourteenth Amendment as an enforcement arm, is Congress in Section 5. Do they think only Congress? No. They think Congress and the courts will both keep states -- this was Madison's theory 200 years ago. He wanted Congress to have a veto on state laws and the courts too. In effect, the Fourteenth Amendment got Madison what he wanted: states have to comply with whatever is the higher standard, whether it's set by Congress or the states.

When 45 states say we don't want to kill subject to the death penalty mentally-retarded folks, the fact that 45 states agreed to that -- that's a basis for a national consensus actually. And the court says that. And what it imposes on states, that's okay. But if Congress had passed a statute saying, Well, because now 45 states are actually on board on this thing, we are going to impose it on the other five, all of whom are in the old confederacy. The court has said that lacks congruence and proportionality. You can't do this. What about federalism? You haven't shown a widespread pattern of antecedent state violations that we the court have identified. And Congress is actually the place where states are represented. So when the court imposes it on states, that's somehow not federalism. When Congress tries to bring the states in line -- oh, that's federalism and the court restricts that. So we really I think someone should actually be answering Scalia. Someone should be saying, for example -- and then I'll shut up -- (laughter) -- here's a case -- *Jones v. Alfred Mayer*. It's decided -- the oral argument is the day after Dr. King's assassination, I believe, and in that case Congress passing a law saying whites -- private persons have to sell their houses on equal racial terms. They can't discriminate against black buyers. This Congress has that power. Because says the court, Justice Stewart, because in *Jones v. Alfred Mayer*, the Thirteenth Amendment allows Congress in the Enforcement Clause to prohibit private race discrimination in real estate.

Now, here's the point: When one private person refused to sell a house to another person on racial grounds, that's not slavery, as any court has ever defined it or would define it. That's not involuntary servitude, as any court has defined it or would define it. But Section 2 says the court gives Congress much broader mycolic-like, necessary and proper authority to sweep beyond what judges have done, and eliminate all the badges and vestiges and relics of slavery. And if that's so for Section 2 of the Thirteenth, it's so for Section 5 of the Fourteenth. Congress should have broad power to define privileges and immunities of citizens -- that first sentence -- things that are fundamental in America that no state should violate. And it can even be informed by international principles if it so desires.

MR. LIU: Akhil, I feel I need to give Marci an opportunity -- (applause) -- for rebuttal. Is it true, Marci, that the --

MR. AMAR: And this is based, by the way -- (laughter) -- on 10 years of research that I've done on this. So if she wants to do 10 years of research -- she's done it, great. But otherwise you all should research this yourselves and then decide.

MR. LIU: Is it true that the members of the American Constitution Society are court worshipers?

MS. HAMILTON: Oh, well, it's actually true that the academy is a harbor for orthodoxy, and you've just heard it. There is an accepted view in the academy, and that is it.

And the only answer to the charge of the imperialism of the court which Goodwin referred to before, or Akhil's impassioned attack on court worshiping is that there are a number in society, including all the members of the Supreme Court now, who don't believe in Congress worshiping. Congress is not an infallible institution. What we are talking about with the federalism revolution is the creation of some meaningful, some minor limitation on the power of Congress. If you start counting the cases since the Boerne decision in which rightly, Akhil has said, I crafted the test. I introduced both the congruence and the proportionality test and the requirement of widespread and persistent violations. They came out of preceding cases, including *Katzenbach v. Morgan*.

So the notion that we have an arena here which is plainly supported by the history in which the court is not permitted to rule on the power of Congress, from my 10 years of research -- (laughter) -- I don't buy it. I don't buy it.

Now, I will concede I'm in the minority. I do know what the betting was on the law and religion list-serve of law professors before I went to the court -- 24 that I would lose, and one was willing to take the bet I might win, just to get a case of beer -- he got it. But I think what we need to pay attention to here is the majority of the court. Every member of the court, including Scalia, now does believe that there are meaningful limits on Congress's power. But they are not very high limits. So in my view what's going on in the academy in response to these cases is a large number of Chicken Littles who don't yet have the facts to support their concerns.

MR. LIU: Okay, to be continued. (Laughter.) We have about 10 minutes -- we started a little bit late, and we have still a good amount of ground to cover.

I want to turn our attention to -- from civil law to criminal law. In this area there's actually some very significant rulings by the Supreme Court this term, and I'm going to start with the Blakely decision, which is the decision which extends the principle of *Apprendi*, which some of you recognize as the principle that says that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum has to be submitted to a jury and proven beyond a reasonable doubt.

In this case there was a guy who was convicted for a kidnapping, and the statute in the state of Washington prescribed a 10-year maximum for this crime. However,

Washington, like many states, has a sentencing scheme. And under that sentencing scheme he was subject to a maximum of 53 months. The court, however, the sentencing court found as an aggravating fact -- found an aggravating fact that increased his sentence to 90 months. And Justice Scalia, writing for five justices, held that this is unconstitutional, because aggravating fact was not submitted to a jury and approved beyond a reasonable doubt.

Let me ask Jenny Martinez -- this case is at one of the most difficult fault lines I think for the court. They have been struggling for years now with the *Apprendi* decision in terms of how far it reaches, how far it sweeps. And this seems to be in some sense the last shoe to drop. Is that a right reading of the case?

MS. MARTINEZ: I think that's right, and I think *Blakely* is one of the most important decisions that the court rendered this term in terms of practical impact. As Justice O'Connor said in her somewhat impassioned dissent, 20 years of sentencing reform are out the window under this decision, which in large measure invalidates the federal sentencing guidelines. And basically what this sort of historical backdrop was the history of indeterminate sentencing in which judges had large discretion to fix a particular sentence. A defendant might be convicted of robbery, and the sentencing range would be 10 to 4 years, and it would be entirely up to the judge on where to fix it within that range, which led to a lot of disparities in sentencing on the predilections of the judge, where you've got the hanging judge or the sympathetic judge more insidiously on the race of the defendant and things like that. And one of the ways in which the system attempted to deal with this was a switch to more determinate sentencing in things like the federal sentencing guidelines, where you had a sort of complicated grid of factors that the judge would tally up.

Now, the sentencing guidelines themselves have been criticized over the years for a number of reasons -- for shifting power away from juries, or shifting power to prosecutors, or shifting power in a variety of ways that are perceived to be harmful in the system, or perhaps constraining the discretion of judges in ways undesirable. What's so surprising is that the sentencing guidelines were upheld when they were originally enacted. And what's so surprising is that now finally what appears to be something of a fatal blow to them has come almost out of the blue to observers. When *Apprendi* was decided, certainly some members of the court were worried about the effect on the guidelines, but I talked to a number of criminal defense attorneys and prosecutors who said that this has not really been on their radar, until suddenly they woke up and had no idea how defendants in the federal system should be sentenced. Sentencing in many federal courts just simply shuts down. No defendants could be sentenced, because no one knew what to do.

Now, certainly Justice Scalia suggests determinate sentencing is not out the door altogether, it just needs to be structured in a different way. And the dissent says there are practical problems with the different way in which that should be structured. But certainly it throws the whole field into turmoil, and it -- again, it's also an interesting illustration of the difference in approach between members of the court. Justice Scalia holding firm to an absolute rule, and Justice O'Connor and Justice Breyer among others crying out over the practical impact and the fact that it's a decision that in some ways Justice Scalia says is supposed to preserve the role of juries. But in fact to the extent it

would draw us back to indeterminate sentencing and practical sentencing it increases the power of judges -- so a perverse decision in some ways.

MR. LIU: Yeah, it's interesting to note that the defenders, as you mentioned, in this case are O'Connor, the chief, Kennedy and Breyer, who are the four who compose the -- the four in the plurality in the Hamdi decision as well -- people who -- these are folks who don't mind a little play in the joints, as it were.

Let me ask though on the majority side though, Akhil Amar, is this -- I mean, it's not surprising that Justice Scalia would like -- would see the sort of inevitable extension of the logic of *Apprendi* to this kind of situation. But what about Justice Stevens and Justice Ginsburg? Are they -- wouldn't this for them raise significant concerns that this throws us back to the pre-sentencing reform regime, in which judges exercise very broad discretion, often having -- in the opinions they talk a lot about the racially disparate impact of that indeterminate scheme? Doesn't that take us back to those very concerns?

MR. AMAR: Well, it doesn't require that. There's some things that the legislature could do in response to this. One, they could give judges very broad discretion. The other is they could basically have juries decide certain things as elements of the offense, and we don't quite know which way they'll respond.

Whenever you create a constitutional rule there are possible responses. Since you mention the terrorism cases, when you say, look, if you bring people to Guantanamo they're subject to habeas corpus. Well, it's possible now that in the next case they just won't bring them to Guantanamo -- they'll keep them in Afghanistan or something. And yet we don't think -- or at least lots of people -- Justice Breyer and Justice O'Connor didn't think that was the reason not to have that rule, because it could be contracted around.

When you say, gee, we require elements of the offense to be proved beyond a reasonable doubt, a legislature could respond saying, Okay, well, we'll just get rid of those elements actually, because beyond a reasonable doubt is just too hard to prove. We would have had it as an element if it could have just been an affirmative defense or a preponderance or something. But if you're going to make us prove it beyond a reasonable doubt, we'll pull it out of the offense, so we'll say, now, you don't have to prove that the victim was seriously injured as an element, but we'll keep the same sentence and the same range, and we'll hope that prosecutors use their discretion in only charging this crime rather than some other one when there really was serious harm to the victim.

So any time you create sort of a rule it's possible that it could be contracting around. I think the majority basically says if the legislature is going to say certain facts of part of the real offense of the crime get certain numbers of years attached to them, that's the sort of thing that juries rather than judges should do structurally.

Two or three quick thoughts on that: One, it does call into question the federal sentencing guidelines. That's the next shoe that you might hear drop. Two, if this invalidated 20 years of past criminal sentences under the federal sentencing guidelines, the court would be very hesitant to do it, because it doesn't want to upset all these settled

convictions. So that's why in a companion case this term it is really important when they said we're not going to apply it to people whose past convictions have already been finalized. We're not going to apply it on habeas corpus. We're not going to apply it fully retroactively, but only to new prosecutions in the pipeline. Now, that's still a lot of cases, but if you change the sentencing regime, all that requires is a retrial or a resentencing of a recent judicially-imposed sentence, rather than going back 20 years and you can't get the witnesses together any more, and all the evidence has lapsed. So it applies perhaps to the sentencing guidelines of the next big case, but probably not retroactively.

Two final things quickly. One, if this applies when judges add to the top of the sentence, why shouldn't juries also be involved when certain facts determine the mandatory minimum sentence, just sort of as a matter of logic? That the court basically crafted the Apprendi rule not to deal with that and to avoid overlinking some precedents, but why shouldn't juries actually be involved in finding facts that determine minimum as opposed to maximum sentences?

Now, here's the final big thing: Here's -- if you really think the jury should be partners in this process, why shouldn't juries basically be -- the criminal defense attorneys be allowed to tell juries in effect, when you vote guilty, here's what you're actually voting for -- this is a three-strikes case, ladies and gentlemen, the jury. And when you convict this guy for stealing a slice of pizza, he is going to have to go away -- mandatorily, minimally -- for 25 years. So please think about that when you decide whether there really is proof beyond a reasonable doubt. You know, maybe there might be some sort of mitigation. Juries 200 years ago did that all the time. They took in effect sentencing considerations into account in deciding what grave first-degree, second-degree, third-degree to convict on -- it was called pious perjury. Juries sometimes winked a little bit and convicted a lesser -- included lower grade of sentence -- for sentencing reasons.

Today when defense attorneys try to in effect tell juries what they are really sending this person to, the judge cuts them off at the knees -- that's contempt of court -- you can't do that. And that's actually cutting juries out of the loop. Legislators pass these broad laws, but they don't see the effect on real people. Judges are somewhat hardened because they hear cases day to day. Ordinary juries who are tough on crime might say, gee, I actually thought I believed in this stuff, but when I now see this vulnerable human being before me I actually think she should go away for three years but not 25. Is there some other thing maybe I could convict him of if they're not told that? And many of them are horrified after the convictions come down when they are told basically what they really did with their own hands, what they had voted to do, because nobody had actually explained to them that's what was the consequence of the conviction.

MR. LIU: Okay, we have about three minutes, and here's what I propose to do: I am going to ask Drew for a very quick summary of the principal employment cases that were decided this term -- there were several in fact -- so he's going to have to talk fast. And then I'll ask each of our panelists for 15 seconds -- (laughter) -- of an observation that has gone overlooked by the panel, or just one -- one -- one concluding thought about this term. So, Drew, your minute started.

MR. DAYS: Well, the overview. It seems to me in this area the court is still struggling with issues raised by the Americans with Disabilities Act and with respect to

issues with sexual harassment under Title VII of the 1964 Civil Rights Act. It also is finding its way with respect to the Age Discrimination in Employment Act as well. These are statutes that have been around for a while, but the court, particularly with respect to the Americans with Disabilities Act, is still at the ground floor in working out a lot of the issues that that statute presents.

I want to focus on one of the cases, however, because I think it's particularly interesting. *General Dynamics Land Systems, Inc. v. Cline*. This was a case where the court held that the Age Discrimination in Employment Act does not prohibit employers from favoring older employees over old -- that is, 40 or over -- but still younger employees. This is a case where the over-50 retiring employees were favored over those who were under 50. This came as something of a surprise because if one is familiar with Title VII law on race, for example, the notion is Title VII applies to whites as well as blacks. If you're talking about sex discrimination, it applies to both men and women. For example, in the Oncale case where same-sex sexual harassment was at issue, it's a two-way street. This is a situation where the court has concluded that in fact one group within the protected area can be favored over another. And there was a very interesting dispute between Justice Souter, who wrote the majority opinion, and Justice Thomas. Justice Thomas was saying, How can you do this? And he invoked all the cases that I've just mentioned. What Justice Souter said was this was the evil that Congress had in mind when it enacted the Age Discrimination in Employment Act, and therefore we find nothing wrong with this.

This is a situation where the court is going to deal next term with whether disparate impact claims can be brought under the Age Discrimination in Employment Act, and I think we'll see greater fleshing out. But sexual harassment, age discrimination and the ADA are still problematic for the court.

MR. LIU: Let me start the 15-second statements. Spencer, why don't you go and start it.

MR. OVERTON: I want to respond to a question that you asked that I don't think I adequately answered, and that will be my final remark. You said, hey, does this thing work on the ground? And I think that what's going on in the campaign finance context is the court is saying, hey, Congress is better -- they're closer to politics, their hands are dirty -- they understand this stuff better than we do, and that may work out -- it may work out like that. In this term or in this election cycle, federal parties have raised more money than when they had soft money in 2000.

And then with regard to redistricting, this acknowledgement of how it works on the ground -- I think that pushes Kennedy right to say, hey, we can't abandon this area. I'm not willing to abandon this and say this is not justiciable. So I think Kennedy's recognition of the reality of the partisan entrenchment here motivates his lack of willingness to abandon the area.

MR. LIU: Lois Schiffer?

MS. SCHIFFER: On the environment, there's a wonderful Seuss book called "The Lorax" -- "I am the Lorax. I speak for the trees, for the trees have no tongues."

And I think that the Lorax is not sitting on the Supreme Court right now. (Laughter.) (Applause.)

MR. LIU: Alan Morrison?

MR. MORRISON: There's an old saying: Things are never as good or as bad as they seem. And I think that applies to many of the cases, in particular *Blakely*. There are going to be some serious problems with the sentencing guidelines, but there are some serious problems with the sentencing guidelines now. And if you have both Justice Scalia and Justice Thomas and Justices Ginsburg, Souter and Stevens all saying -- knowing this is a problem -- maybe we need to do something -- we better do something -- the chances are that they are probably going to come closer to being in the middle. And so that ended federalism. I think things are never as good or as bad as they seem.

MR. LIU: Akhil Amar?

MR. AMAR: If there are no Loraxes on the court, neither is there a liberal originalist in the great tradition of Hugo Black, let's say, whose ideas across the board on incorporation, on criminal procedure, on one person one vote, actually set the table for the Warren Court. And those of us who admire much of what the Warren Court did should take a page from Hugo Black. You in the audience should spend more time learning about the Constitution and not just the case law. And one great place to start would be studying the history and philosophy of the Reconstruction Amendment and their broad commitment to congressional power to protect civil rights above and beyond any judicial enema.

MR. LIU: Jenny Martinez?

MS. MARTINEZ: This term was one of the most international terms in the court's history, as I think some of the questions indicated. More cases this year involving international law, either explicitly or implicitly, than ever before. And I think that is a forerunner of things to come. I think not only the Supreme Court, but our entire judicial system, are becoming -- and our entire national policy -- are becoming more impacted by international affairs, and that's a trend that's going to continue.

MR. LIU: Marci?

MS. HAMILTON: I think this was a very remarkable term for Justice Stevens. He has brought together in a wide variety of decisions majorities that you never thought would coalesce in those cases, from *Tennessee v. Lane* federalism, to *Newdow*, the Pledge of Allegiance, to *Altmann*, FISA, to *Groh v. Ramirez* and the Fourth Amendment and to *Rasul v. Bush*. That is an amazing group. Stevens is starting to look like Brennan in his later years where he's more interested in finding a majority and consensus than he is in a particular extreme viewpoint. And it's fascinating to watch.

MR. LIU: You will recall he was called Justice Brennan in *Bush v. Gore*. (Laughter.)

Final last word goes to General Days.

MR. DAYS: I've been haunted ever since I read it as a law student the dissent by Justice Jackson in *Korematsu* when he said in essence that this decision will sit around like a loaded gun waiting for a government official in the name of the national emergency to use it to deprive people of their individual rights.

I think that the plurality opinion in *Hamdi* answers Justice Jackson and says here is your answer. And let me read one line. "It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested, and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." Justice Jackson, I hope you're listening.

MR. LIU: Thank you all very much. Thank you for this wonderful panel. (Applause.)

(END)