

**Georgetown University Law Center
Supreme Court Institute Annual Press Briefing
September 19, 2005**

TRANSCRIPT

MODERATOR: **Professor Susan Low Bloch**, Georgetown University Law Center

**LAW CENTER
PANELISTS & TOPICS:** **Professor Chai Feldblum**, Georgetown University Law Center – Civil Rights Issues

Professor Nina Pillard, Georgetown University Law Center – Birth and End of Life Decisions

Professor David Cole, Georgetown University Law Center – Death Penalty & Criminal Procedure

Professor Robert Pitofsky, Georgetown University Law Center – Antitrust Law

Professor Viet Dinh and Professor Richard Lazarus, Georgetown University Law Center – The Changing Composition of the Court

Susan Bloch: . . . with the new Chief Justice and presumably someone to replace Sandra Day O'Connor I'm not going to talk much, actually I'm not going to talk at all about the likely impact of that because we've got Rich Lazarus and Viet Dinh who are geared to talk about that. Let me just tell you a little bit about the term. The Court has granted cert in about 40 cases which is a typical number at this time of the year. The docket is set for October, November and December and our panel is going to be focused on the cases that are already granted but if you have questions about cases that are pending, we are prepared to discuss those in the Q & A if you want. We're going to start with David Cole who is going to talk about some of the death penalty and search and seizure cases, then we'll move to Chai Feldblum who will talk about the cases involving the Solomon amendment and the ADA. Then we will go to Bob Pitofsky who will talk about the antitrust cases that are on the docket and finally Nina Pillard will talk about some of the beginning of life and end of life cases that are on the docket. I'll introduce the panelists as we go through them. Let me start with David Cole, partly because he's going to have to leave us early.

Professor Cole got his B.A. and J.D. from Yale and clerked for Judge Adams on the Third Circuit. Professor Cole joined our faculty in 1995 and teaches

principally criminal law and constitutional law. David do you want to get us started? Do you want to stay there or come here?

David Cole: I can stay here. I apologize that I'm going to have to leave early to catch a plane but I'm going to discuss the Court's criminal procedure cases. I think these are not ones generally that provoke 5-4 splits so perhaps they'll be less affected by the new appointments than other areas of the law, but nonetheless there are some important cases involving the death penalty and police practices. With respect to the death penalty there are four cases involving death penalty procedures and sentencing. None of them is a blockbuster case but in the death penalty area these days there tend not to be blockbuster cases but rather trend lines. And for some time the trend line has been a fair degree of hostility on the Court to death penalty appeals, frustration about what the Court many members of the Court particularly Chief Justice Rehnquist considered abuses of the review process, the habeas process in particular and over a series of decisions over the last 15 years or so the Court erected a variety of obstacles and hurdles to habeas review in death penalty cases. And the general attitude on the Court seemed to be enough is enough, the additional process is not likely to cure errors, the existing process is certainly enough to ensure that we don't have significant mistakes and the important task is to limit abuse of the writ. And this is one of the areas where Chief

Justice Rehnquist really I think prevailed in terms of changing the law in the direction that he wanted to.

In the last few years, however, I think the trend line has begun to shift somewhat and the Court has begun to show some more concern about the process in death penalty cases. We found the Court much more likely to take and then to find ineffective assistance of counsel in death penalty cases. It has declared the death penalty unconstitutional for juveniles and for the mentally retarded and it invalidated many death penalties based on the *Ring* decision. So there seems to be some shift on the Court in part I think because of the advent of DNA testing, its ability to conclusively demonstrate innocence or guilt in many cases, and the facts that it has conclusively demonstrated that a number of people on Death Row were in fact actually innocent of the crimes not just not deserving of the death penalty but didn't commit the crime. And that I think may be affecting the Court.

There is a as I say four cases on the Court's already this term that address these issues in one respect or another. Three of them I'll talk about very quickly involve the sentencing process in a capital case you first have a guilt phase, whether the person is innocent or guilty, once the person is found guilty then there is a sentencing phase, separate sentencing phase where the jury is supposed to consider special factors that narrow the class of cases that deserve the death

penalty and then consider any mitigating evidence about the individual that might warrant giving him life rather than death. The Court has accepted three cases that address this process, one *Oregon v. Guzek* raises the question of whether a defendant can introduce alibi evidence calling into question his guilt at the sentencing phase, so he's already been found guilty by this jury but he wants to argue that residual doubt about whether he is guilty or not ought to weigh in favor of life rather than death.

On the one hand the Court has said that defendants should be able to present any constitutionally relevant evidence as mitigating evidence in favor of life. On the other hand the Court has held that you are not entitled to an instruction to the jury that residual doubt must be considered, so the question is can you put that evidence on.

The second case *Kansas v. Marsh* involves a kind of unusual statute. Most states have statutes in which the jury is supposed to weigh the aggravating factors concerning the crime that would warrant death against the mitigating factors concerning the individual that would warrant life and only if the aggravators outweigh the mitigators is it supposed to impose death. In Kansas the statute says essentially if it's a tie the jury shall impose death. If the mitigators are in equipoise with the aggravators and the question is is that constitutional.

The third is *Brown v. Sanders*, this is a California case. It's specific to California but the question here is whether having found on appeal that some of the aggravating factors that made the person eligible for death or contributed to the decision to give the person the death penalty are invalid should the appellate court how should the appellate court proceed at that point. Must it send the case back down for re-sentencing or can it conclude that the factors were harmless error and the person would have been executed in any event. All of these cases really concern the degree of certainty we insist upon before permitting the jury to impose and reviewing courts to uphold a sentence of death.

The most interesting of the death penalty cases however, I think is *House v. Bell*, which involves how habeas courts should deal with new evidence of actual innocence. Roberts was asked about this at the hearing by Leahy because I believe he argued the *Herrera* case or signed the brief in the *Herrera* case which was a case from several years back that addressed this issue but did not resolve it. And in his answers he seems to suggest there might be some distinction between evidence of actual innocence that consists of someone after sort of belatedly saying I did it or I saw somebody else do it or this person who just died did it. That kind of innocence evidence that Roberts seemed somewhat skeptical about and scientific evidence of actual innocence, DNA evidence and of course that's what we're

seeing more and more of these days. In this case the DNA evidence directly undermined confidence in the guilt of Mr. House but doesn't prove his innocence. And so the question is how do you deal with that. The facts very briefly. A woman was killed, House, a prior sex offender, was convicted for her murder, the jury was told his semen was found on her clothes, that her blood was found on his jeans and that he was seen leaving the scene of the crime the following day. New evidence DNA evidence shows that the semen is not his, but her husband's. New evidence also shows that her husband had beaten her repeatedly, had threatened to kill her and had confessed to having killed her after the fact. New evidence also shows that the blood on his jeans may have been from her autopsy rather than from her actual murder. And that you couldn't actually see the scene of the crime from the place that the witnesses said they saw the scene of the crime. So serious new evidence calling into question his innocence but not certainly not providing his innocence and the question is what standard should the Court apply in assessing that innocence for two purposes. One as an exception to the procedural default rule which is a rule that says if you fail to pursue a claim properly through the state process, you can't pursue it even if it's meritorious in the federal process. And he failed to pursue an ineffective assistance of counsel claim and that's been procedurally defaulted under a set of rules that Justice Rehnquist had a big part in

developing.

But there is one exception to procedural default and that is where there is serious evidence of actual innocence, the question is, is this serious evidence of actual innocence sufficient. The second question is even if there is not a free standing constitutional claim that has been defaulted is it unconstitutional to execute the innocent and is this such a case. And that's the question that was presented in the Herrera case that John Roberts was asked about and the Court ducked it in that case, they assumed without deciding that it might be a violation.

So all of these cases I think are important in terms of trend lines with respect to the death penalty I think we are seeing more skepticism on the Court and in this in particular poses this conflict between the procedural default rule and this notion that enough is enough, the old sort of trend line and the new trend line I think driven by concerns about innocence and particularly DNA.

Finally I'll briefly mention two cases involving police practices that are on the Court's docket. The first is *Georgia v. Randolph*, it involves consent searches and the question is where two people jointly own a house and one consents to the search but the other says no and the other is present, can the police go ahead and search without probable cause. In a case called *Matlock* the Supreme Court said if two people own a house and one consents to search and the other isn't there, then

the police can go ahead. The Georgia Supreme Court said that doesn't apply where both people are there and one has objected and the other has consented. And the Court took cert my guess is probably to reverse the Court has been very, very lax about consent searches, this is a way that it allows the police to conduct searches without probable cause by quote unquote getting consent from people and it's liked this sort of loop hole. On the other hand it is a search of a home and the Court has been very protective of searches of the homes. So there is at least some question I think in the case but the odds are it will be reversed.

The last case I'll discuss is *Hudson v. Michigan* which involves the question of whether the exclusionary rule applies to knock and announce violations. The knock and announce rule is the Court has said is a part of the fourth amendment. It says in order to constitutionally carry out a search absent exigent circumstances the police must knock and announce that they are there, show you the warrant and conduct the search. They can't just break your door down and come in without announcing. And that's been fairly clear and I think it's also fairly strongly supported in the public. One of the most controversial provisions in the Patriot Act at least in the public eye, is the so called sneak and peek provision which allows the police to search people's homes without knocking and announcing and delaying their notification until a period of time after the search has occurred. That

provision was a Republican member of Congress offered an amendment to overturn that provision and it passed overwhelmingly in the House a couple of years ago. So this is an issue that people care about.

The question in the case is well there is a clear violation of knock and announce what's the remedy. And the lower court here a Michigan court held that there is no remedy because if the police had knocked and announced then they would have been able to conduct the search because they have a search warrant and it's a legitimate warrant. The only violation is that they failed to knock and announce. If they had knocked and announced they would have found the same evidence and therefore they shouldn't be put in a worse position simply because they failed to knock and announce. Other courts have said no the exclusionary rule applies in these circumstances. It is designed after all to deter constitutional violations. This is a clear constitutional violation and while there is an exception to the exclusionary rule the inevitably discovery exception which says if the police would have found the evidence anyway we will excuse a constitutional violation and allow the evidence to be admitted. But that has only been applied in the past where there is an existing ongoing independent source of investigation that would have led the police to the evidence. Here there was no independent investigation, it was simply they violated that this particular search which did violate this

constitutional rights led to the evidence. The Supreme Court, however, has never been particularly enamored of the exclusionary rule, it has been cutting back on it ever since it extended it to the states and so this too I think is a close case but I think the bottom line here is if the result were to say that in all cases as Michigan says a knock and announce violation does not lead to the exclusionary rule then you are effectively saying that there is no constitutional requirement of knock and announce any longer because there would be no effective remedy.

So those are the criminal cases that they've currently taken. There is another DNA case that is on the cert list involving whether or not it's permissible for states to dispose of, destroy DNA evidence while the post-conviction appeal process is still ongoing. Thank you.

Bloch: Thank you David. Now we're going to turn to Chai Feldblum. Professor Feldblum got her BA from Barnard and J.D. from Harvard Law. She then clerked for Judge Coffin on the First Circuit and then Justice Harry Blackmun on the Supreme Court. As a lawyer for the ACLU AIDS project she played a leading role in drafting the Americans With Disabilities Act. Chai joined the Law Center in 1991 and teaches legislation, civil rights and employment law here. She's also the founder and director of our Legislation Clinic. Chai.

Chai Feldblum: So you've got five cases that are in your program as civil

rights cases and obviously there is no way I'm going deal with five cases that are actually are much more disparate than the cases that David just talked about. Those cases, let me just tell you because in the Q&A session I'm happy to talk about each of them, but the first is *Rumsfeld v. FAIR*, which I will talk a bit about. *Goodman v. Georgia*, which is the ADA case that is up before the Court. This is basically the next shoe-dropping after *Tennessee v. Lane*, that is in *Tennessee v. Lane* the Court said that even though in *Garrett* it had ruled that Congress didn't have power under Section 5 of the 14th amendment to pass a, to authorize money damages against the states in employment discrimination cases, Congress did have the authority in Title II to prohibit discrimination in access to courts. Those of you who remember that case based both on the fact that there was this history of discrimination by the states in various areas of public services including access to courts, and so it wasn't quite clear was this because of a separate constitutional right of access to courts or because of this history of discrimination by the states. *Goodman v. Georgia* isn't really going to necessarily answer that question either because there is an 8th amendment challenge in this case you know really horrible facts of a guy with paraplegia, in a prison but the petitioner is arguing that there is a history of discrimination by the states that would meet the standard that the Court set up in *City of Boerne* for Section 5 authority but that also there is this 8th amendment

claim.

The interesting thing about this is that unlike in all the other cases that I'm going to mention the Solicitor General has come in on the side of Goodman in this case. That is the United States is arguing that there is a history of discrimination and coming in on the side of the history of discrimination that there is Section 5 authority.

Schaffer v. Weast is an IDEA case, Individuals with Disabilities Education Act and it's a statutory interpretation case basically under IDEA parents get what's called an administrative due process hearing where they can challenge whether the individualized education plan that was set up for their child in fact meets the standard of the law that this child gets a free and appropriate public education. In a divided Fourth Circuit and divided among the circuits as well, a majority of the Fourth Circuit says the parents have to prove that that IEP was not good enough as opposed to the state having to prove that the board of education has to prove that in fact the IEP will work. Again the facts of this case the IEP that they offered the parents said that is not going to work for our kid, we know it's not going to work for our kid and that is why they kept the kid in private school for another year. The school board ended up coming back and offering a placement that would work so this kid was educated in public schools in Montgomery County for most of his

time after the school board came after Montgomery County came forward with an IEP that would work.

An interesting thing about this case in 2000 when this case was up in some form the Solicitor General of the United States in the year 2000 came in on the side of the parents, saying the whole point about IDEA the education, IDEA I hate when they change these names on us, is that the school has to provide the appropriate education. And so it's on the school board to show that they did in fact do that. Now in 2005 it's switched, the SG says well no now that we actually looked at IDEA and actually the burden of proof is on the parents. And of course it's obviously a change in administrations. The other interesting thing about this is that Mike Luttig, not someone known as overly liberal, is the dissenter in the Fourth Circuit panel, saying just as a matter of statutory interpretation the burden of proof should be on the school not on the parents.

Garcetti v. Ceballos is a very interesting first amendment case where in fact the Supreme Court is going to have to clarify its you know *Pickering*/comic ruling of cases, a line of cases when a public employee speaks on an issue of public concern but is speaking as an employee, not as a general citizen, does that public employee get first amendment protection. And then finally *Gonzales v. O Centro* which is a Tenth Circuit en banc case, none of these do I think by the way are slam

dunk cases. I could see 5-4 decisions in all of these. *Gonzales* is the only one it seems to me pretty clear on the law, this is an injunction under the Religious Freedom Restoration Act but it has to do with a controlled substance so all bets are off I think.

Okay, let me now in the second half and I'm willing to answer questions obviously on those cases in the Q&A section. Let me talk a bit about *Rumsfeld v. FAIR* and point of full disclosure I was one of the people who helped create the organization called FAIR, the Forum for Academic and Institutional Rights, and I'm on the board of directors but since I'm about to tell you why this is not a slam dunk case you're obviously hearing me talk as an academic as opposed to someone who is involved in this case. In *Rumsfeld v. FAIR* the government is seeking review of a Third Circuit ruling that the Solomon Amendment which would remove federal funding from any institution that does not treat military recruiters exactly the same as all other recruiters violates the first amendment rights of law schools, law faculties. FAIR for example is a membership organization of both law schools and law faculties. Georgetown for example the Georgetown faculty is a member of FAIR not Georgetown Law School. So the Georgetown faculty is not a party to the FAIR case but we are part of a membership organization that is a party, like as if we were members of the Sierra Club and the Sierra Club was

bringing this and FAIR was found to have standing and that's not being challenged at the Court. Now here is why I think this isn't an easy case to predict either in terms of outcome and also why it's not necessarily slam dunk. The case is not so much about what the standard for compelled speech, you know what's compelled speech under the first amendment. Or what is forced association under the first amendment, these are the two main challenges FAIR and Springing. It's not so much what the standard is and the way the Court will have to decide the standard for public employees speech but rather whether what's happening on the ground at law schools today fits what is the existing standard. It's going to be very much a question of how the Court sees the facts as opposed to the Court announcing some, I think, new rule on association or compelled speech.

So let me concrete about it. On association the governing is not saying we're disagreeing with first amendment law as the Supreme Court has announced it in *Boy Scouts v. Dale*, right which says that an expressive association should not be forced to convey a message that is contrary to its beliefs, Boy Scouts shouldn't be forced to do that, and should be permitted to decide its own membership. That is how the Court described, that's how the government described Dale. But what the government says is given equal access to recruiters, having them show up at your fair, your government fair, this temporary episodic you know event is not you

being forced to convey a message. So here's their sentence. The presence of military recruiters on campus does not force educational institutions to convey the message that they support the restrictions on service by homosexuals in the military. Students and the public readily understand that when recruiters visit campus they speak for the employers not for the educational institution. You're not being forced to convey any message. Again the counter argument from the respondents is yes we are because our message is that employers should not be allowed to discriminate on certain characteristics race, sex, sexual orientation and the way that we are trying to convey that message our method of conveying the message is we won't help any employer who does discriminate. So from their perspective FAIR's perspective, helping this temporary episodic twice a year military recruiter that comes on is undermining their message that it is aiding and abetting an employer that discriminates is as bad as discriminating. Now query how will the Court see this. Now the Court was very deferential to the Boy Scouts both in terms of what message it was trying to convey and how it felt the presence of Dale as an openly gay scout master would undermine it. Query whether it will give that same deference to the law schools.

Same thing really on the compelled speech. The government is saying you don't have to say anything about the fact that this military policy about

homosexuals is good, FAIR comes back and says we speak constantly through this placement process, we're sending e-mails to students, we're setting things up, we're speaking, when you force us to do it for a military recruiter you are forcing us to speak, send e-mails, put things in folders about an employer that we disagree with. Again that's going to be the question. Is the Court going to see this as compelled speech.

In the last minute let me just say why the federal funding piece probably doesn't change this as much the general public sort of might think. For example the most common response from the general public is look law schools are taking federal money, if they don't want take federal money then they can do whatever they want with the military. Right if they don't like the rules they shouldn't take the money. Of course the government has to be a little more sophisticated in its brief because the government knows that in 1958 in *Spizer v. Randall* the Court held that the state of California cannot condition a property tax exemption for veterans on veterans signing a loyalty oath. It wasn't good enough to say oh you don't want to sign the loyalty oath don't take the tax benefit. I mean that's the basis of the unconstitutional conditions doctrine. The government in its brief does not say overturn *Spizer v. Randall*, does not say oh we don't believe in unconstitutional conditions. It says three things. It says this isn't an unconstitutional case because

the Solomon amendment even if was done as a direct mandate it's constitutional. That's their first argument. It constitutional and that's all the association this is an association of speech problem. Then they have two very odd things. One they say the only limit on Congress's authority to attach conditions to funds is when those conditions aim at the suppression of dangerous ideas. Like that was the loyalty oath, that's the when it's aimed at the suppression of dangerous ideas then the government can't attach to spending. And here they say the Solomon amendment is aimed solely at the institution's conduct in denying the military recruiters equal access and the government is indifferent to the institution's reasons for denying access. Therefore this isn't speech it's conduct. But of course this just goes back to the FAIR's argument that the conduct is itself conveying the message, the conduct of helping the recruiters. So I think it will dependent on how the Court feels the claim.

And then what I think is the most astonishing is the government's assertion on page 24, not astonishing but for you to know and look for, page 24, the government says the Court's decision in *Grove City v. Bell* demonstrates that when a party voluntarily accepts federal money it may not claim that the conditions on the receipt of that money violate its first amendment rights to associate. That's a pretty strong statement. Right when a party voluntarily accepts federal money it

may not claim the conditions on the receipt of that money violate its first amendment rights to associate. And they say the Court's decision in *Grove City v. Bell* says this. Well when you got to *Grove City* it's true there is a sentence that reads almost exactly like that, Grove City's final challenge to the court of appeals decision that conditioning federal assistance on compliance with Title IX infringes first amendment rights of the college and its students warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. The problem is there is no analysis in *Grove City* on the first amendment claim. And it wasn't even as I understand a first amendment claim around right to discriminate based on sex but right to decide on its own whether they going to not discriminate. But it was a pre-*Dale* case, I just don't see any sort of case post-*Dale* being able to get away with just this statement like that unless you get rid of unconstitutional conditions. I think that the Title IX would be upheld number one because remember you have to prove that you have an expressive message that is being undermined by having to comply with Title IX you know so you have to have that already about sex, etc. and two, you would have to show that the government rule isn't narrowly tailored to compelling government interest or closely related to government interest. And we have tons of cases where the Court

has held burdens are allowed because it's narrowly tailored to an interest. So but it is interesting that the government decided to put that in that sort of blatant way in its brief. Thanks.

Bloch: Thanks Chai. Now we're going to turn to Professor Pitofsky, a preeminent expert in antitrust law in the country. Professor Pitofsky has served as the chairman of the FTC, the director of the Bureau of Consumer Protection, chair of the Department of Defense Task Force on Downsizing the Defense Industry, the author of several books and as you all know was our Dean from '83 to '89.

Professor Pitofsky.

Bob Pitofsky: Thank you Sue. Good morning everybody. This is a very unusual year from the point of view of antitrust in the Supreme Court. The Court has taken 40 cases and three of them already are antitrust cases. That's three more than they took last year and probably more than they've taken in the last decade or so. And there are two other cases on the cert list that they could easily take as well, so who knows what's going on. And the irony is that the Court has ducked several times in recent years on cases that everybody, not everybody, that many people thought they really should have taken, clarifying the line between antitrust and intellectual property which is quite a mess in the federal courts and splitting the circuits on bundled discounts. If you take A and B we'll give you ten percent off

quite a division there and companies don't exactly what they are supposed to do. So it's oh and then finally of the three cases they've taken I would say one is very important and the other two are hardly blockbuster cases. So you have to wonder what's going on.

Let me go through the three cases quickly. Independent Ink against Illinois Tool has to do with tie-in sales. Under conventional tie-in law the seller must have substantial market power in the tying product enough to coerce the person to take the unwanted tied product. About 40 years ago at a time when the Supreme Court was very hostile to tie-in sales, that's changed quite a bit since then, they decided several cases . . . involving tying good movies with bad movies. They decided if a seller had a patent or a copyright that presumptively satisfied the standard for significant economic power to implement a tie-in. And it was probably wrong at the time. There are lots of patents that really don't confer very much market power, certainly not enough to satisfy the tie-in standard. Four concurring justices about 8-10 years ago in a case that had to do with a different issue reached out and said that rule is wrong and we really should do away with it. Scholarly criticism of the rule is unanimous and you don't find scholarly criticism that is unanimous very often and the lower court in this case strongly suggested that the decision is wrong but it's the Supreme Court that made the mistake and it's up to the Supreme Court

to overrule their own past mistakes. So I'm going right out on a limb here and suggest that the *Loew's* rule will not survive this review.

The second case is also surprising because it's a Robinson-Patman case. The Supreme Court hasn't taken a Robinson-Patman case in 12 years and they've taken one in 20 years. Not only that but this case has to do with discrimination with respect to bids. The Robinson-Patman Act declares illegal discrimination among competing purchasers with respect to price or service. It was introduced in the depths of the Depression to protect small business against the growing larger chains. In this case the disfavored purchaser was selling a fleet of trucks, Volvo trucks to school districts or industrial organizations and would submit a bid but by the time the buyer had narrowed the group that were to submit the final bids usually in fact in all but one situation there was only one Volvo bidder left so even if you say that that bidder didn't get as much support as others where are the competing purchasers who were discriminated against. Cleverly the plaintiff argued that maybe they weren't two bidders to this particular school district but there were other bidders to other school districts and we didn't get as good a deal from Volvo as the other bidders got and that's the discrimination. Very original. I don't think the Supreme Court has ever had a big Robinson-Patman case in the past and the United States the Solicitor General has intervened and said that sellers like

Volvo should be able to discriminate among distributors who aren't competing with each other and are competing in other markets. So no matter how the case turns up the idea of discrimination on bid markets to school districts is not a major doctrinal issue and doesn't have all that much economic effect anyway.

The third case is different, is important in an increasingly important area of the economy. I should disclose that I along with other law professors and professors of economics urged the Court to take this case on cert. We then did not file on the merits after the Court agreed to take the case. This involves, comes out of the Ninth Circuit and this involves a joint venture between Shell and Texaco to jointly refine and sell gasoline on the west coast. The original joint venture was cleared by the Federal Trade Commission with some restructuring of the deals, sales and refineries and so forth. And I think cleared by all the states on the west coast maybe all but one. The interesting aspect of this is that the plaintiffs sued exclusively on a *per se* theory.

Let me take a minute to explain that. A *per se* theory in antitrust means the agreement is illegal regardless of the market power, the purpose, the effect or the redeeming efficiencies of the transaction. And the alternative is rule of reason where all these things become irrelevant. The plaintiffs said we don't want a rule of reason case we want to apply the *per se* rule. I should also say that joint

ventures have become a very fashionable organization tool here and abroad. Partly because they are popular in high tech, partly because of global competition, so if there is a *per se* rule to be applied to certain joint ventures regardless of how efficient they are, that would make a big difference. The Ninth Circuit pointed to several reasons why a *per se* could apply here. First, even though it's a joint venture called Equalon and Texaco and Shell have joined forces, they still sell under the Texaco sign and the Shell sign separately. They haven't integrated into a single brand name. And somebody at Equalon some executive decides at what price the Texaco oil is sold and the Shell oil is sold and there is some suggestion in the opinion that even 4-5 years ago when oil was relatively cheap it was more expensive on the west coast under the Texaco and Shell brands.

Second, the Court said unlike other joint ventures this combination was not necessary to achieve the efficiencies that the company asserted. Now that's not a standard that has been applied before, that would be a departure. Generally speaking efficiencies are relevant whether they are necessary to produce the joint venture or not. In any event the Ninth Circuit concluded 2-1 that this whole business of the joint venture was a pretext and it's just a price-fixing arrangement in order to be treated as illegal *per se*. The dissent strongly argued that integrated joint ventures deserve fuller explanation, let's sit back and listen to the defendants

explain to us how much power they had, what their purpose was and specially whether there really were significant efficiencies to their joint arrangement. The judge said joint ventures must have the right to agree about the price that different products within the joint venture is sold. That would almost go to a *per se* legal rule as opposed to a *per se* illegal.

In any event, it's a hot case. I think there must be six or eight amicus briefs already filed with the Supreme Court and depending on how it decides the case could make a big difference to industrial organization in the United States. I'll stop there.

Bloch: Thank you everybody. Everybody is being so punctual. I don't have to send any nasty notes. So Nina the pressure is on you. We're going to turn now to Nina Pillard. Professor Pillard graduated from Yale, got her J.D. from Harvard, after clerking for Judge Lou Pollack on the U.S. District Court for the Eastern District of Pennsylvania, Professor Pillard worked for the ACLU and NAACP and then the Solicitor General. She joined our faculty in 1997 and teaches principally civil procedure and civil rights. She will discuss the hot button issues of the beginning and end of life issues.

Nina Pillard: Thank you Sue. As you know these issues have engendered fierce and ongoing battles in federal and state statutory and constitutional law and

one thread that runs through these battles and that's present in the case I'm going to talk about today is the federalism, the balance between state and federal authority to regulate and we're going to see some interesting sort of cost cuts in terms of who is on which side of the federalism battle in these cases. There are three cases that I want to talk about are the *Ayotte* case involving the New Hampshire statute requiring parental notice for minors seeking an abortion, *Scheidler v. NOW* which is up to the supreme Court for the third time involving the use of RICO the Racketeering . . . Corrupt Organizations Act to support an injunction and award of damages against abortion blockaders and finally *Gonzalez v. Oregon* which deals with Oregon's death with dignity act.

Ayotte I think is the most important of these decisions. The other two are really statutory cases on what legally are rather confined issues. But *Ayotte* I think is an extremely important case for reproductive rights. The Roberts hearings and the press coverage that I saw I think really miscast the constitutional abortion debate generally as having to do with whether *Roe v. Wade* would be overruled. Nobody including a Roberts Court is about to overrule *Roe v. Wade*. I think looking at the issues in those terms diverts attention from the real battleground which is centered in cases like *Ayotte* on the nature of protection afforded the abortion right which is currently governed by *Planned Parenthood v. Casey's*

undue burden standard.

In *Ayotte* the issues are whether a law that requires parental notification before a minor get an abortion has to include an exception for the health of the pregnant minor, if her health would be endangered by going through the process of getting of notifying the parents, can she nonetheless have her doctor give her an abortion. And then the second issue is whether an abortion restriction is subject to challenge only as applied to the individual in the case, only applied to the individual in the case. Unless the plaintiff can show that the statute would be unconstitutional in all its application so a very challenging standard for a facial challenge. Now why do I say that this case is so important. *Casey*, the case that reaffirmed the central holding of *Roe* was a 6-3 case with Kennedy and O'Connor in the majority upholding the core of the abortion right. So some would say that the O'Connor resignation doesn't really bring us to the brink, it doesn't jeopardize te abortion right but the big abortion case since Casey was *Stenberg v. Carhart* and that was a 5-4 decision with Justice O'Connor in the majority. And the distance between O'Connor's view in *Stenberg* which saw the lack of an exception to protect the health of the mother there in a case involving spousal notification the distance between her view striking down the statute and Kennedy's view which

was in dissent, is great. And if you are interested in these issues I really commend you to read the O'Connor opinion in *Stenberg* and contrast it with the Kennedy view which found the statute that the majority struck down would have found it well within the Court's competence to enact. Kennedy refers to a society shocked when confronted with a new method of ending human life and he gives detailed descriptions of abortion procedures clearly communicating his visceral inability to accept the procedure and so the question really for a court going forward is will a new justice assuming Justice Roberts is confirmed, stand with the opinion of O'Connor in *Stenberg* or with the opinion of Kennedy in the dissent, and if the latter obviously we have a new majority.

Let me just say a little bit more about the issues in *Ayotte* itself. The procedural issue is a little arcane but it's very significant. It deals with whether the plaintiff can challenge the statute facially or must limit a challenge to an application to her. Typically abortion statutes are challenges before they do into effect. The plaintiff claims that the law is invalid as written and need now wait until the law is applied to women on a case by case basis. In this case New Hampshire joined by the Bush administration argues that a challenge to an abortion restriction can only succeed if there is no set of circumstances in which that law can be validly applied to women. A facial challenge can only succeed if there is no

set of circumstances in which it could be legally enforced. And that's the standard that derives from a 1987 Supreme Court decision in a criminal case having nothing to do with abortion, *United States v. Salerno* and under that standard most of the abortion statutes that are challenged could constitutionally be applied in some set of circumstances and so it's going to be a very challenging standard for a facial challenge. But in 1992 in the *Casey* decision itself the Court seemed to apply different standards not to apply the *Salerno* standard, didn't even cite *Salerno* but instead said a new curb on abortion there the spousal notification provision was invalid facially where there was proof that it would pose an undue burden for a large fraction of women affected by the law. In this New Hampshire case now before the Court the First Circuit said the *Casey* rule not the *Salerno* rule applies to facial challenges. The government the S.G.'s brief says that core limitations on the scope of judicial power do not allow this kind of facial challenge. You cannot go beyond the parties before the Court and cast this as a kind of a facial challenge under *Casey* as inviting advisory opinions in effect. The respondents have yet to file their briefs but it's unclear where that analysis comes from because another way of looking at the issue is that the Court's precedents have only allowed regulation of abortion on certain conditions. They only allowed the regulations at all if they protect the life and health of the mother and if those conditions are not

met then it follows that the laws are not valid and cannot be applied to any women.

So we're going to see the Court in carrying a standard that could affect abortion challenges quite generally.

Then the specific issue at issue in the New Hampshire case is whether the Supreme Court requires that all abortion restrictions contain an exception where the restriction could harm a woman's health and under *Roe* certainly and it appeared that under *Casey* the health exception was required *Stenberg v. Carhart* that was the issue and the majority said clearly there is no health exception here we can't allow this because the government interest in maternal health is an interest that perseveres throughout the period of pregnancy and trumps even where the government has an interest in protecting potential life the interest in health must trump.

So and the government here is claiming in part that the issue is different from the issue in *Stenberg* because where you have a minor notification statute the minor has an opportunity to go if she can't get can't notify her parents because of potential for abuse or inability to contact them she is allowed to go to a judge and get what they call a judicial bypass and one of the arguments that the government makes that differentiates this case from *Carhart* is that this potential for medical emergency can be dealt with when the judge applies a best interest standard in the

bypass proceeding and therefore that it in a kind of implicit way there is a health exception. Now of course the opponents would argue or the supporters of the abortion right in this case would argue that that contains a lot of delay, it's going to be burdensome on the mother's health and should not be required.

The background issue here is the so called partial birth question itself coming back up. It was an issue in the state law in *Stenberg v. Carhart* and the federal Congress has passed a so called partial birth abortion statute also and several lower courts have invalidated that law and those cases are coming up. The Fourth Circuit has a case in which the law was invalidated and the petition would be due in December, the Eighth Circuit has a case in which a petition is due next month, and so what happens in *Ayotte* could affect the validity of the federal partial birth abortion statute.

I'm not going to say much about *Scheidler v. NOW*. As I said this is the case dealing with injunction and damages against abortion blockaders. It's a 19-year old case, it was filed in 1986 and up the Supreme Court, as I said three times and the issue is the extent to which RICO could be used as a vehicle to challenge these abortion blockades. And what happened, the second time the Court said the first time said yes you can use RICO the second time the specific issue was whether extortion was a valid predicate act under RICO and the Supreme Court said no but

when it went back down the court of appeals said well this injunction might still be tenable maybe needing to be narrowed because there are some other potential predicate acts here. There are four acts of violence that the jury found that were not extortion that might support the injunction or a narrower injunction. So let's send it back to the district court to see whether the injunction can persist and Joseph Scheidler and the Pro Life Network brought it back up saying no that the Supreme Court's second decision wipes out the whole thing.

This is an issue that I think has limited tactical importance even in the area of abortion blockades because it's kind of transitional case in between we saw in *Bray v. Alexandria Women's Health Clinic*, an effort to use Section 1985 the Ku Klux Klan Act which was enacted to allow injunctions and damages against state to state conspiracies, the Court said for the most part no you can't use that. Then there was an effort to use RICO and the *Scheidler* case came up but since then we have the enactment of the Freedom of Access to Clinic Entrances Act and that's really been the way that most legal challenges to these blockades has come up. So I think that the question of viability of RICO is going to be of limited importance to the abortion blockades but may have other implications for other criminal prosecutions.

And then the last case is the right to die case. And here is where you see an

interesting kind of federalism flip. Conservatives who spearheaded the federalism revolution of the last decade are relying on federal power here to try to stop or limit the affect of Oregon's death with dignity act and liberals are seeking refuge in state law and arguing for greater recognition of spheres of traditional state regulatory primacy. And the underlying dispute here arises out of a clash between Oregon's power to regulate the practice of medicine and the federal government's power to regulate the sale and distribution of drugs. The state's death with dignity act authorizes prescriptions of lethal doses of medication for terminally ill patients who are within six months of death according to the opinion of two separate doctors and some of the medications used for this purposes are medications that are restricted under the Controlled Substances Act. They are not schedule 1 like the marijuana and Gonzalez . . . but schedule 2 and lower where or higher numerically where some medical uses are recognized. So they are allowed to be prescribed as for example pain killers, palliative care and the controlled substances act allows that by a regulatory exception that allows doctors to prescribe these controlled substances for legitimate medical purposes. And the Oregon death with dignity act seeks to work within that exception by defining use of drugs for physician assistant death in the limited circumstances of the act as a legitimate medical purpose.

Well the federal law that stands in the way of that use of the death with

dignity act is a 2001 enforcement directive of former Attorney General John Ashcroft which says that assisting suicide is not a legitimate medical purpose under the federal controlled substance act. Now Hatch has so far unsuccessfully sponsored legislation that would forbid all use of prescription drugs for assisted suicide, hasn't gone anywhere. Attorney General Reno in the late 1990s issued a contrary policy statement that states may regulate their own doctors and the United States would not use its criminal prosecution power under the controlled substances act to prosecute physicians aiding death.

And so the legal issue in this case boils down to a statutory construction question regarding whether federal law or state law gets to give content to the meaning of legitimate medical purposes under this CSA and its regulations. The Ninth Circuit said this is a state law question and it's interesting this is such a refined kind of federalism question. The question isn't really even whether the federal government has the power to regulate such use of controlled substances, it isn't the question for example whether the Hatch proposal a congressional act to ban these drugs in aiding suicide would be constitutional under Congress's enumerated powers. The contention is the controlled substances act did not create authority for the regulation of medical practice. The controlled substances act was

enacted to restrict drug abuse and trafficking and addiction not to regulate medical practice. And the controlled substances act has a relatively broad anti-preemption language saying that it preserves state regulation except where federal and state law cannot consistently stand together. And what you hear here is the right to die people and the state arguing that medical practice is an area traditionally left to the states, it's like family, property law, education law, general criminal law, torts law, that the Court has often and increasingly vociferously insisted are areas of state regulatory primacy so that should lead to caution when the Court reads the controlled substances act and that they should read it in a way to avoid trenching on these areas, that you need a clear congressional statement to displace medical regulation in these areas and we don't have that here. So it's not a constitutional right to die case although it is a case with these sorts of constitutional federalism overtones.

Bloch: Thanks Nina. That's our discussion of the cases that are already on the docket. Now we are going to turn to Viet Dinh and Rich Lazarus to give us sort of some perspective on what we can expect with a new Chief Justice and presumably a new replacement for Justice O'Connor. I'll introduce them both. And then we'll hear their wisdom. Viet Dinh got his B.A, and J.D. from Harvard, served as a law clerk for Judge Silberman in the D.C. Circuit and then for Justice

O'Connor. He on our faculty teaches constitutional law, corporate law and Southeast Asian comparative law. He also directs our Asian Law and Policy Studies program.

Professor Lazarus got his B.A. from Illinois and JD from Harvard where he was a roommate right of John Roberts

Lazarus: After law school.

Bloch: Oh after law school, began his teaching at Washington U. in St. Louis and then joined our faculty where he teaches environmental law, Supreme Court advocacy and torts. And he's also as most of you know the director of our Supreme Court Institute the sponsor of this annual event. I'll turn first to Professor Dinh and then to Professor Lazarus.

Viet Dinh: Thank you very much. I will be very brief because I know you want to hear from Richard more than I and certainly want to hear the questions and answers more than the same stuff I recycle here. Two very quick comments one is I think the first issue that will face John Roberts as Chief Justice should he be confirmed administratively and is quite a technically a challenging issue you all have identified which is [END OF SIDE ONE OF TAPE] not what to do with her but the even the Chief Justice does not have that power but the unique circumstances of the appointment of her successor will pose for the Court and for

the Chief Justice and then secondly very briefly about his affect on the Court as a new member and also new justice new Chief Justice of the United States.

With respect to the O'Connor resignation obviously we are in a little bit of a litigation pickle because she announced her resignation in June of this year subject to the confirmation of her successor. When Judge Roberts was nominated all indications are that he will be confirmed prior to the first Monday in October thereby not leaving any questions regarding the disposition of cases pending before the Court. Now that there is an additional vacancy Justice O'Connor's resignation letter also holds that she will hold office until the confirmation of her successor. Even if the President nominates somebody today it is highly unlikely I don't think the democratic process will see fit to confirm her successor until at the earliest November. More likely the President will wait until after Chief Justice Roberts is already confirmed before he nominates Justice O'Connor's successor in which case we're looking most likely in mid December. That leaves three sittings for Justice O'Connor to sit on if she stays her current course and the question is what happens to the cases that she sits on and has not been announced yet by the Court. I do not think that this presents an opportunity for litigants to gain the system because in order to move argument dates and disposition dates they would have to have a filing with the Court and the Court will be wise on such tactics and would upon

disfavor with any such attempt even if done by consent of both parties.

However it does raise a question of strategic gaming by the justices of the Court. If there is for example a 5-4 decision with Justice O'Connor in the majority then of course the dissenters would have a fairly strong and reasonable incentive to delay the announcement of that decision which they have a right to do by not circulating their dissent even though this would not be done explicitly or aggressively I do think that expecting any Court decisions to come out within one month of argument is quite optimistic. So it would be a quite reasonable expectation for dissents not to have circulated within that time period. One thing we do know is that if Justice O'Connor stays on the Court . . . is reasonable that if she is assigned the opinion that she will get as traditional and her competitive spirit will get her decision out in early November but who knows what other cases will remain. It poses a very significant question because what happens to those 5-4 subsequently presumably 4-4 cases after Justice O'Connor actually resigns from the Court, it is an open question whether or not these, it is not at all clear that the new justice can simply decide those cases and cast a vote on the briefs and on the oral argument that occur prior to his being sworn into office and also whether or not those should be relisted. There is of course a precedent in this and that is that a

resignation of John Marshall you recall that in early 1990s he, Thurgood Marshall, I'm sorry, great men both, you recall that Justice Thurgood Marshall said in early 1990s famously and I quote I have a lifetime appointment and I intend to serve it. I expect to die at 110 shot by a jealous husband. Of course history did not prove itself to be the case and his health prompted him to resign in June of 1991 subject to confirmation of his successor. On October 1st of 1991 really about coterminous with the Anita Hill controversy when it was clear that Justice Thomas would not be confirmed until after the start of the term Justice Marshall sent an immediate resignation letter thereby making it a 4-4 Court. If Justice O'Connor follows the same pattern that would mean that we have eight numbered justices on the whole run of cases that that should not matter but for the 4-4 cases the Court can dispose of those obviously by affirming the lower court decision without precedential value for an evenly divided vote. Or it can vote to relist the case for consideration by the newly confirmed successor to Justice O'Connor so you would have about three months lag if the normal confirmation process goes. I suspect that that would be a decision whether or not to affirm on evenly divided court or to relist the case would be one that would be taken with certainly in consultation but perhaps also with the vote of the new justice. And so you have a three-month period in which there will be some uncertainty although I would suggest a lot less uncertainty than

would be the case if Justice O'Connor continues to sit on these cases. Justice O'Connor has not made an indication as to how she would decide with respect to these issues. I think however she decides Chief Justice Roberts should he be confirmed would find a way out of it. I think the weirdest procedural pickle would be if Justice O'Connor sits in the first couple of months and then seeing a longer time before the confirmation process for her successor, then changes her mind and do an immediate resignation. Then we would have a fairly interesting conversation at that time. But again this is I think we are talking about eventualities Justice O'Connor will presumably make her decision and her announcement if she makes any prior to the first Monday in October and we will have a resolution if any of those issues then.

I want to talk very briefly about the effect of John Roberts on the Court itself. I do not think contrary to the prevailing political analysis that one can simply take controversial cases or cases upcoming this term or the following term or the next ten years on the Court guesstimate as to where John Roberts will be and substitute his vote out for either Justice O'Connor or Justice Rehnquist and make a prediction about the outcome of those controversial cases. Because almost every single member of the Supreme Court who made a public comment on this matter have observed as does Justice O'Connor does repeatedly that with the change of

any one member of the Court the decision making process of the Court changes. This is obviously both a reflection of the personalities that go on the Court as is the case with the case with the famous mentoring of Justice Souter by Justice Brennan and Justice Souter's very effective role in the joint decision in *Casey, Planned Parenthood v. Casey* emblematic of this interpersonal interaction but also whenever you shift out a person the median voter changes on the Court and how that median voter sees his or her new role is anybody's guess and so simply switching out a vote and substituting a new one would not have any indication.

I think where Chief Justice Roberts will have a significant role is in his . . . interpersonal skills in dealing with members of the Court who he knows intimately as an advocate and knows the fault lines of their jurisprudence and also their personalities but also in the development of the successor to Justice O'Connor. With respect to the last one I think is still an open book because one does not know how Chief Justice Roberts will develop. We all know in the words of our colleague Randy Burnett that John Roberts has all the attributes of a "typical A+ Harvard student." Actually if there is such a thing but do not have by his own admission a well formed unifying theory of the law. And so I think that he is by all accounts a technocratically proficient justice, one does not know where the jurisprudential development may lead. I think the closest analogy to Judge Roberts is not a Scalia

or a Thomas or O'Connor even the Chief but rather to his former judge Henry J. Friendly and I think it is widely acknowledged that Judge Friendly is a near perfect appellate judge if not perfect appellate judge. It is open how Justice Friendly or how Chief Justice Friendly would have fared or would have thought about some of these issues. And so in that sense I think that whatever role that John Roberts plays in guiding the new justice or his fellow justices will depend largely on his own jurisprudential development.

Richard Lazarus: Thanks. I'm just going to talk about a couple things and then leave time for questions for me and for other people. I want to first give a few reflections on judiciary committee hearings last week and then just a few comments about the prospect of a Chief Justice Roberts. I thought the hearings were fascinating. I was there the entire time. I don't spend usually any time on the Hill. I have no particular desire to go back again. I felt a bit like Hector in Hawthorne's *The Scarlet Letter*. I was wearing because I'm a guest of John Roberts I had to wear this red thing which had a big A on it for administration. And a result sort of all the Ralph Neas and Nan Arons and Elliott Minceburg looking at me sort of sideways and then I had all the White House people looking at me sideways as well.

I thought that Judge Roberts was a very effective witness for himself

because he had a consistent and very attractive theme. If you look back at it and I was sort of there the whole time everything he said supported either a very systematic effort to paint a portrait of himself over four days of testimony. Those of you who know him as an advocate could see how he used those advocacy skills as a witness, though instead of an advocate, so it was a different role. The first theme he did, the first theme did he led with it and he closed with it. He led with it on Monday, he closed with it on Thursday was all about who he is not which is an unusual theme. He started out by saying I'm not a law maker, I'm not a politician, and he closed with the same theme I'm not an ideologue embracing the Democratic side by saying you don't want one and I don't want one. That was a very persistent theme and his mantra was I am a lawyer, I am somebody who reads briefs, listens to arguments, deliberates with other people and sees whether things are right or not.

He also I think had a theme of who he was in addition to being a lawyer that he was really smart. He wanted to get that across. That he knew the Court really well and that no matter what area of law they talked about he would give a very expansive answer which had all kinds of strategic advantages which frustrated some of the Senators. But he gave a very expansive answer by showing the precedent, showing the analytical framework, identifying the competing

considerations on one side or another. There was a pattern to the answers. Sometimes he would apply them and sometimes he wouldn't but he would always more than I won't answer the question. He would almost take it back and show a mastery of the area of the law. And he tried to do so in a way which suggested which I think is true that he is open-minded. He did it in a very measured way and a very careful way describing the case and he made clear he was hardworking. He was someone who was working hard who spent a lot of time preparing for court. I think the third thing he tried to do in terms of themes he tried to show that he possessed the qualities necessary for a chief justice. And that was something which just his mere presence wasn't going to do as much as the other things because he's so young and he's so young looking. So he had a sort of a little more of a hurdle to overcome. I think he tried to do that by with his manner and with the way he addressed the questions by showing how congenial he is, by emphasizing how fair minded he could be, by trying to show the Senators he was a good listener and that he could be respectful of others and listen well to others. He could be a consensus builder.

I also think he tried to do by showing he could be forceful, that he could be a leader because the age wouldn't show it and why you say saw several times him sort of taking charge during the hearings. It was quite clear to me that he was going

to take charge of that Schumer moment with the film hypothetical. He had to do it. He had to not, he had to take over in a respectful way and give the humorous response but then answer the question. Answer the question in a three point taking apart the Senator's question, very respectfully, not in any kind of condescending way but he was showing himself as a leader there, someone who could take charge of the moment.

I thought the Democrats had a much more difficult time establishing competing themes during the four days. I think they tried several and they shifted. I don't think any of them particularly stuck. The first one they tried Judge Roberts the extreme ideologue sort of the Reagan ideologue and they had potential there. They had some ammunition based upon all the documents that had come out when he was in the Attorney General's office and the White House. I think the problem was that the discussion was too much inside baseball for people it was too intricate too detailed, Section 2 versus Section 5 of the Voting Rights Act. I think the other problem while Senators Durbin, Leahy, Kennedy and Biden sort of viewed Ronald Reagan sort of his epitaph where you could say the Reagan White House. The American people didn't view it as an epitaph at all and so while they were trying to suggest it was sort of a negative I think Judge Roberts responded very effectively by saying (1) I think you are characterizing some of the things I said, (2) you're

fighting old wars, you're fighting old wars. And one of the most telling moments was when he said I think it was to Biden ask about one of the memos and Judge Roberts said well what's the date of that memo. You think he didn't know the date of that memo. He was making them say over and over again, 1981, 1982, 1981, 1982, you're refighting old wars. Senator Kennedy that was a dispute we had, so it was trying to bring it back then.

I think the next theme that they tried was you're not answering questions and you're not following the Ginsburg rule. That was hard to maintain when his answers were so long. His answers were really long. They may not have actually come to closure clearly on certain fairly key important issues but it just didn't work well when he was answering questions so exhaustively and it would be hard to maintain over time when they had to people go back and look at the transcript to see if he was actually saying a fair amount. There was a fair amount in there. There were some surprising things he was saying during the hearings. I think it just didn't stick. I think ultimately it made it look like Ginsburg may have not followed her own rule at times rather than Roberts wasn't following the rule that he announced which became the Roberts rule by the end.

I thought the more interesting thing in the end where the Senators tried to challenge him to reveal his core values, his heart. John Roberts the man rather than

the legal automaton. I thought this was real interesting because I thought Judge Roberts largely seemed to refuse, he refused to do it. He really the end of life hypothetical about he would feel in those situations, he wouldn't really play along with that. And the paradox to me listening to that because I know Judge Roberts pretty well is that's actually when they were learning a lot about him and they just didn't recognize it. He's a very private person and those kinds of issues, those kinds of concerns are very private to him and he's not about to go talk about it on national television. He wasn't going to pander and sort of play politician because I'm not a politician, I'm not going to show you my heart, I'm not going to show you all those kinds of things, I'm not a politician and he fundamentally believes it's not relevant. And he received undoubtedly a lot of advice to play, to do that, to show it and he wasn't going to do it. He wasn't going to do because it wasn't who he is. I thought by the end of the hearings Democratic Senators found themselves in a dilemma, making fairly clear by Thursday that Judge Roberts is very likely to be confirmed and it became all about the next nominee and they couldn't decide that meant they should vote for or against him. Because it wasn't clear whether it was strengthen or weaken their leverage over the next nominee and I'm not sure the White House wants them to vote at all for Judge Roberts. What I can tell you watching the body mechanics is that Judge Roberts wants them to vote for him. If

you watch the way he worked on Thursday morning with Senator Feinstein in particular and some of the others it was like at the Court, he wants their vote. He really thinks he should get a unanimous vote. He really thinks that he's qualified and he wants their vote. Whether the White House has the same interest whether the Democrats have the same interest is a side show but it's quite clear to me that he wants their vote.

In terms of Chief Justice Roberts just a few things to think about and then we can talk in question and answer. You know it was two weeks ago today that he was nominated to be Chief Justice. And this is overwhelming. He had 200 questions to answer over the weekend which he received from the Senate Judiciary Committee which I think are due tomorrow, 200 written questions. If everything goes according to plan this has been a sprint since July 19, if you took all the Senators that he's met and all the forms and prepping for the hearings. If he gets confirmed according to the current schedule everything works according to what it looks like he'll be sworn in, receive his presidential commission either late on the 29th of September or early on the 30th of September, that allow him at least start moving in. He will be there first Monday of October, presumably there will be a brief investiture I would imagine at 10:00 a.m. on Monday where the justices will

come out, Justice Stevens will be presiding, Justice Stevens will invite Judge Roberts up, give him then the judicial oath I would assume and then he would sit down and begin. He will have had very little time to prepare for the first Monday of October. If you are an associate justice you can hide a little bit right, you can go way over somewhere. The other justices will be sitting where they have been sitting. Breyer is going to be stuck where he's been stuck because no one is moving as long as Roberts goes right there in the middle. He can't hide. He can't hide in the conferences, he can't hide in the Court. He has to be actually ready to go and this is going to be a major job, this is a lot of challenges associated. He may still have one vote but there is a lot more responsibility that goes along with it and a lot more jockeying for attention than he receives from the other justices have been there a long time some of them a very long time, many of them wanted to be Chief Justice under one president or another and they may like John Roberts a lot, and may have tremendous respect for him a lot, they may be all delighted in a personal manner that this is someone they could work with but boy they are going to be interested in influencing him as the Chief in the next few years. So there is going to be a lot of jockeying for position. A dramatic change in the internal dynamics of the Court. I mean Rehnquist was Chief he was senior justice there, he was both the senior justice and he was the Chief Justice. And he you know he ran that place.

And he ran and he was a man of few words at times. He was someone they had a lot of respect for him. This is a completely different dynamic that a Chief Justice Roberts will be walking into. And I think it's a lot of pressure, it's a lot of work. I think he is up to it but this is a big job.

Longer term I think on thing interesting. He's going to have different time horizons than a lot of the rest. He's coming in at age 50, he's thinking about the Court over along period of time. A lot of them are thinking about you know what can we do right now. They want to have things done, some of them are real short timers up there, others are chafing at the bit to get some things done. I think he's going to be more patient, more measured with a different time horizon. He's a lawyer a lot of them really have never been practicing lawyers up there. He was a practicing lawyer for a long time like Henry Friendly was a practicing lawyer. And I think he has a different approach. I think we'll see maybe some more business cases up there, may have less interest in some of the social policy cases over time. I think it's going to take him a number of years to define himself in front of the Court as with anybody. He'll be a little more measured now. He's going to be Chief, he's not going to have that same ability you would have as associate justice over several years to sort of define yourself as a justice and what your role is and what you think. He's going to be thrown in to that sort of leadership position and I

think that is going to affect how he develops over time as a justice. I think it's very hard to predict as Viet says how he'll vote in individual cases. The only prediction I will make with as close to absolute certainty as I can is that if Judge Roberts is confirmed and is sworn in by I assume Stevens on judicial oath on Monday, first Monday of October when he sits down he will not be wearing stripes. You heard it here. I predict no stripes. No stripes no way.

Bloch: Thank you everybody. Thanks for being so prompt. Now it's your turn to stump the panel. Ask us questions. Linda.

Speaker (Linda Greenhouse, NYT): Hi, . . . your understanding of the Solomon amendment itself is that the law school will be prohibited . . . at the recruiting fair have a little sign saying in effect the government is making us do this . . . given us this law . . .and even if the Solomon amendment would prohibit that is my reading of it says it might, isn't the real world impact of this litigation that any law school student approaching this table would know that the government said you do it and so is that . . . on the ground that you know . . . common knowledge that is compulsory . . .

Feldblum: That's two great questions. Let me also just say in terms of the general Roberts piece of coming in just preparing these five pieces reminded me of my year on the Court and how exhausting it is and at the symposium, that

wonderful symposium at Brooklyn Law School that was just done on Linda Greenhouse's book . . . day long symposium held . . .at the end you know every law clerk thinks their year was the most important but at the end of the year they just stagger out but . . . stayed year after year so I'm glad that you think he's up the task because it's going to be huge including, for example, how he would decide in a case like. I think will depend on these types of questions. First, could the law school have a sign right next to the JAG corps recruiter, for Georgetown they are over in the Washington Court Hotel you know . . . could Georgetown have a sign right next to the JAG corps recruiter that said

Speaker: Or even at the front door.

Feldblum: Well at the front door every law school because of the AALS American Association of Law Schools requires every law school as amelioration to put out some notice that says we are only doing this because we are being forced by the government. That is part of the amelioration effort. Not every law school does it but most law school if there is one amelioration effort to do they send out a memo like Dean Areen did and Dean Alex Aleinikoff will send out next week a memo to the whole school we are doing this only because the government is

making us do it. Now in one school the Department of Defense said to them we think this to be undermining the Solomon Amendment because you are making us less attractive than other recruiters. But that issue hasn't been joined and it actually hasn't been discussed much in the case other than for the government to say over and over again they can do it, they can protest, they can say they don't agree and because of that, there is no question here that it's compelled speech. I mean there is no question that this is their speech, it's very clear that they are doing it because they have to. So you know the respondents brief isn't filed yet, it will be filed on Tuesday, the 20th, the respondents FAIR's brief was due on Tuesday, the 20th, Goodman's brief the Wednesday the 21st, I mean the government in *Goodman*. So there will be a lot in that brief that sort of says actually it really doesn't matter under the compelled speech doctrine and there is . . . case that says it really doesn't matter if you can say look we're being forced to do it, the very fact that you have to say that you've been forced to do it is itself speech right, it's like it doesn't matter if you say next to your license plate Live Free or Die no really I don't want to live free or die. The very fact that you would add the thing of I don't agree with live free or die is itself a problem. Okay so that's one line of response. The line of response that I feel is more compelling to me is the reaction that I got from my students the gay students in year three of the protest okay because for a

long time by the way schools were letting military folks come on campus, they were just treating them a little bit differently you know so they could come on, they could recruit, but they had to be invited by a student group, not the Placement office, there were just these little, they had to come from the college not the law school in different schools. The big difference, what triggered this case was the Defense Department coming down and saying no, no you have to treat us exactly the same, there can't be any symbolic differentiation so for a long time we didn't have . . . government fair because we were paying for the Washington Court Hotel, they could recruit in other ways. The difference is now they get to sit at a table just like all the other government employers. So the first year all the students had energy about protesting, you know, second year, last year they were like this is bullshit, we just keep protesting but the school keeps complying. So the school says they consider race discrimination and sex discrimination and sexual orientation discrimination to all be bad, the school says it but they don't really believe it because it's if they were doing this based on race, the military, maybe the school wouldn't cave in, because they are I mean . . .so the students feel that the message of non-discrimination that the school is sending not really for real. And that is why I think it is like Dale in *Boy Scouts* you know. I always believed and this is not the classic gay rights line I always believed having James Dale show up

for one day as an openly gay proud scout master even if he is . . . instead of worrying about sexuality that would undermine the message that homosexuality is immoral, it would. You know it just undermines it. And that is what I think the gay students feel that the military recruiters who are saying we want you in the JAG corps unless you're gay and that the school accommodates lets that person come, pays for that person, part of the Washington Court Hotel that undermines the message that discrimination based on sexual orientation is wrong. And the question is . . .

Bloch: Yes.

Speaker (Charles Lane, WP): I had three comments and one question. The comments were to Richard. I too noticed the sort of ability of John Roberts to push back at points to show forcefulness to the committee . . . and I think is a very consistent aspect of his character across the years because if you look at his memos at a young age William French Smith very often he was pushing William French Smith 25 or 30 or 40 years older to do various things that he really believed in and I guess I'm a little skeptical of your depiction of him as someone who will come in and kind of be subject to influence of other justices and then hang back for a few years. Instead I see him as someone who has always been from the earliest year of his career willing to take a stand in a polite and courteous and respectful way but . .

. actually I would expect him to come right in and hit the ground running and no hesitation about making his mark with the other justices. A question for Professor Pitofsky on this case about the joint venture, help us out a little bit here, we try to be intellectually honest as journalist but it's not an absolute requirement, so I would like to know to what degree . . . case about the rising price of gas and you know try to

Pitofsky: It's a stretch

Speaker: How come?

Pitofsky: Because even the plaintiffs, the 23,000 dealers who brought this case in California, didn't really push the fact that Texaco and Shell gasoline cost more in California than it did in Illinois or in New York. There was no record to that effect. It's really a case as I said about how you approach this business arrangement that is becoming so widespread especially in high tech. And whether or not you are going to take the time to have a rather lengthy trial and look at all the explanations as to why the companies say that they did it and then say the anti-competitive effects outweigh the redeeming virtues. An anti-competitive effect could be that it leads to an increase in gasoline but since I don't know the full record because they cut off the full record in this case, I can't fully answer your question but indications are that there is nothing in that record about increasing the

price of gasoline in California.

Speaker: I had a question before Chuck's comments . . . the Washington Post editorialized the Democrats support for Judge Roberts because a no vote would tell President Bush it doesn't matter you are not going to get our votes anyway so do whatever you want. My question is what if what effect if any would it have on Chief Justice Roberts if he had confirmed with a number no votes comparable to those received by Chief Justice Rehnquist . . . 33 sorry, would it in any way reduce his quote mandate, would he be more timid, more deferential or would he as Chuck's comments suggest be his own man just as he would if he got 98-0.

Lazarus: I don't think it will affect him one way or another. I mean in terms of how he'll be as Chief Justice, I do think it makes a difference to him on a personal, I think he really thinks he should be getting an overwhelming majority of the votes from everyone. It's not like when you are arguing before the Court and they all say I'm counting to five and after five I've won and I don't really care whether it's six, seven, eight or nine, I think that he does care whether it's 51 or 75 or 100. I think he cares, I think he cares in terms of the confirmation process, he cares in terms of the message it sends about the Court and the Court as an institution and sort of the stature of the Court. I don't think he likes the message

that it sends, that the Court is completely political and that the nominees are completely political. I think it matters to him but I don't think it will affect him in terms, I don't think it will make him feel more like he has a mandate. That strikes me as not at all what is at stake here the idea that he'll feel like he has a mandate if it's 99 and not a mandate if 51. I think he'll worry about the impact of the message it sends about the Court and the kind of institution it is. I think by the way, I don't disagree with a lot of the comments that Chuck said either. I think it's very likely, it's a very hard job to be under this pressure. I think it's very likely he will try to quickly make clear that he is in charge. I think he will be very respectful, I think he will be very measured, I think he is going to be very, very wary of looking like he's sort of the junior kid in the building and that he's being taken under anybody's wing. I think he'll resist.

Feldblum: Let me add just one thing but in the perspective of the director of the Federal Legislation Clinic which I gather I won't be getting Richie to visit in my clinic doing legislative work after his three days on the Hill, which is that you know so often the Court just doesn't understand legislatures and politics. You see that over time and I think we're seeing something of Congress in a sense not understanding sort of the Court. So for the Democrats, for the advocates, I mean the Ralph Neas, Nan Arons, the people I live my non-academic life with, it is all

about politics and it is all about how is this going to affect not only the next nominee but other things we have on the legislative front, you know, what are we doing to do in Social Security, I mean it's all part of the game plan you know and I guess what I think about this is not that it would affect one way or the other but I would almost like for folks to have heard which Richie just said about as you think about that also think about how this would feel to the Court, you know that doesn't really understand all the political games, doesn't understand why the advocacy groups have to come out before the hearings, there is just, I guess I'm struck by this, that there are these two different worlds and I see it all the time in statutory interpretation you know that courts often don't understand how legislatures work. Here is a moment in time where it would sort of be interesting if the legislature could sort of stop and think about how this might affect the Court. I'm not saying how they should vote or not I'm just saying it's a pair of glasses to put on that is not what a legislature will actually put on. Mostly they are just pissed off at the Court.

Bloch: Nina.

Speaker (Nina Totenberg, NPR): It's my impression that Justice O'Connor is probably going to sit because the President asked her to ... anything else. And my question is really why is this a big problem since we don't know how many of

these cases are going to be 5-4 and if a case isn't 5-4 there is no reason for it not to go ahead and if it is 5-4 why not hold it for reargument at that point.

Dinh: I think that's fine if was 5-4 I would hope it goes out before the confirmation of the new successor. It's not a big problem but it's a novel problem.

Speaker: I'm saying if it's 5-4 and it's a very strong likelihood that . . . start on work on it . . . hold it for reargument the way they did these . . . case I don't know why they held for reargument they held it over until the next term. I don't remember if it 6-3, 7-2, 8-2 I have no recollection

Dinh: 6-3 ultimately.

Speaker: But obviously at some point the . . . case was muddled, close and by the time it was heard for a second time that wasn't the case so why wouldn't you just let's assume I mean there is no particular reason to think that the Gonzalez case is necessarily going to be 5-4, well let's assume for the sake of argument the abortion case is, why can't t say okay let's hold it like they held I don't know how many cases for Harry Blackmun

Dinh: There would be nothing wrong or illegitimate about that but I think that is a decision the Court will have to make.

Bloch: I do say I totally agree with you Nina I think that is what they'll do. I don't think they'll rush to get a 5-4 out and I think that would be wrong, so I think

they'll just wait if it develops that way.

Lazarus: I think the awkwardness is Justice O'Connor . . . she thought she was off the Court and I think she probably would have much more happily just said turned it like Marshall did, turn it into an absolute resignation rather than a conditional resignation but the President put her in awkward spot by making that phone call and saying . . . but makes it look . . .

Bloch: I think the story was when she talked with Chief Justice Rehnquist and he said he wasn't going to retire that is when she made hers effective, it was my impression that had he said well I am going to she was going to wait a year. So it's not impossible I guess that she would. Yes.

Speaker: Professor Feldblum when you discuss *Schaffer* you were talking about the procedural issues . . . burden of proof the parents or the school district, correct me if I'm wrong but isn't there another issue about whether the No Child Left Behind standard of making sure every child meets a standard . . . which says you have to customize tailor education to each child, do you explain how that fits in

Feldblum: I'm not exactly sure how it fits so the government is definitely trying to argue that it does. They you know this case like many have been going

on for a while. In the meantime IDEA was re-authorized in 2004 so there was some changes made in IDEA and No Child Left Behind was passed. So the government the new government, not what it took in 2000, the new government position is saying you know the whole point is we want students to achieve a certain standard that's what their school boards are all striving for, there is no reason for them not to be trying to get the best education for this disabled child. We don't have in the No Child Left Behind you know the right of parents to make some of these claims, etc so we're just trying to get uniformity. So I think they are trying to do two things. They are trying to do two moves. One is one of the moves that they make is who has the burden of proof is there are two default rules. Okay there is one default rule that a person who is bringing the claim has the burden of proof. That's one sort of default rule. There is sort of another default rule that the person who has the most expertise knowledge is the one that bears the burden. So the majority in the Fourth Circuit said the default rule is the parents who are bringing the case have the burden of proof and here are all the reasons why we don't have to worry about the school board not doing a good job. We presume the public officials want to do a good job. There are all these way in which is which thing were equalized for the parents to get information about IDEA so they have a lot of information and resources already. So part of their reason why they went for that default rule, the

entity bringing the claim, depended on sort of the good faith, they had actually had the good faith of public officials and I think that sort of all part of the story of No Child Left Behind, they have this obligation, there will be good faith. You know when Judge Luttig point in dissent in most of the courts there is a split in the circuits the majority tends to say the burden is on the school says this isn't like them, he didn't No Child Left Behind but this isn't like one of those, here is an affirmative obligation on the schools to provide a free and appropriate public education. They have more information than most parents especially low income parents to know whether this is the right thing for this disabled child and this burden only kicks in when as was in this case the evidence is sort of exactly equal yeah it looks like this IEP would work for this kid, no he has evidence that it wouldn't work for this kid, the question is in that type of situation is it the school board that has the burden of persuasion, I mean both sides have to put in evidence that the school board has the burden of persuasion that yes this will work for this kid. So the other side is the No Child Left Behind is a red herring you know it's a completely different law.

Bloch: Yes.

Speaker: I was just wondering how long do you think President Bush will wait to select a nominee for . . .and how do you think the impact of having a . . .

conversation will have on how controversial that nominee ends up being.

Bloch: I think he will do it the day after the Chief Justice is either sworn in or confirmed. I'm sure the White House knows who they are picking, My guess is they knew who they were picking when they picked Roberts as Chief Justice.

Feldblum: I don't know that they know. I think it really it takes it's all the politics again you know and so it takes the resources of figuring out who am I going nominate and how is that going to play, I think they certainly have an idea and I think that you are completely right that it will be the day after you know . . . if Chief Justice Roberts get sworn it, but I actually don't think it's going to make any, it's going to make it controversial because that is the O'Connor seat as opposed to the fact that it's mid-term and it think it's going to fairly controversial because of that.

Speaker: Could we get Professor Dinh to comment on that.

Dinh: I have no comment on that.

Feldblum: Oh is that because you know? It's like "Feldblum, forget it just say no."

Speaker: I guess this is for Professor Dinh but anyone else who wants to comment. Senator Specter had complained for months about the what he perceived confusing patchwork quilt . . .in *Hamden* decision and the situation that they have

there. How likely is it that both the *Padilla* and the *Hamden* case are going to be heard in this term and is there any will you give any forecast as far as the Court trying to bring more coherence to that part of law? I had another question too, on the duties they discussed, duties of the Chief Justice, they talked about appointments . . . other duties but I don't recall that they discussed a customary or traditional role of Chief Justice sometimes in the past has been to gently persuade an ailing member of the Court to retire. And Professor, I think his name was Atkinson has written a book called *Leaving the Bench* which goes through 107 Supreme Court justices and how they died or retired, can you I know it's a delicate thing to talk about but if you have any thoughts on that.

Dinh: On that last one I can be almost certain that that is too delicate certainly for me to comment or and almost certainly for John Roberts to intervene in the first year because there is nobody who is visibly in that state and if they are not visibly and publicly in that state then it would be much more delicate for a Chief Justice Roberts to bring it up as a new colleague and not a personal friend and so I don't think that is going to be a significant factor within the next horizon the time horizon of one or two years before the Chief Justice becomes a personal friend of one of his colleagues. With respect to *Hamden* your guess is as good as mine. Actually Neal would probably know better the pace of litigation and all the

strategic moves in order to get it up or to get cert granted within this term. I suspect that that will be dictated largely by the litigation moves rather than by the Court deciding to take it this term or next. Everybody keeps asking when is the perfect time to file cert and I always say 90 days after entry of judgment. Did they file okay in that case the guessing as to whether you have the four votes is as good yours as mine. I see Nina as Court watcher and tea leaf reader . . .shaking her head but the one thing that will happen, the one thing that I think it may especially when you bring up Chairman Specter and others in the House and Senate who may be working a different version of . . . legislation dealing with enemy combatants is that they may think that with the transition in the Court of two new members and with the prospect of one or other cases coming on, that they may not want to jump the gun and do too much hard work and take the political hit of trying to push through some alternative legislative plan which up to this point they have not seen, have not shown the political courage to do, and so and this may be another reason why they may delay any such aggressive work in the next year or two.

Bloch: Chuck.

Speaker: I have a question for you . . . you referred to the fact that this is an issue about cases that are really in equipoise [inaudible]

Feldblum: Well actually the irony of this is that if the burden of this goes on

the school district to really figure out the right IEP they might end up finding better IEPs and thereby saving themselves money in terms of the private tuition. The only time the school districts end up having to pay private tuition is when they offer an IEP that is inadequate, right, the parents take the kid and put the kid in a private school and then the parents prevail on the IEP being inadequate or the school district says we have nothing you know to offer and that is the only thing we can do but those are the only two times. So one of the things that the parents lawyer says in this case is you know that burden of persuasion only matters in equipoise but knowing ahead of time who has the burden actually shifts the dynamic so that if the school district knows we're going to have the burden to prove that this IEP is okay they will actually work a little harder to see if they have one that fits and this case is a great example. They actually have small classes available in one of their public schools but they didn't offer the learning center that place to this kid, the parents who knew their kid wasn't going to do well in the IEP in the large classrooms that was offered, took the kid out and put him in private school. A year later when they offered the learning center they moved him to the public school. Montgomery County is now on the hook for that one year of private school but if they had actually offered the second IEP the first time they wouldn't have had to pay. So you know I mean whether this will come through in the argument and I

don't know it's certainly there in the briefs although maybe not as strong as those of us who know it works would get but I actually think that if the burden ends up being on the school district ironically enough you end up getting better IEPs and for less money ultimately.

Speaker: Would their argument though be that if the burden is on them that will inevitably . . . more attacks . . . more law suits against them thus raise their cost of litigation.

Feldblum: Oh yes maybe in terms of I guess parents bringing the claims. I mean it could. The cost the bottom line is IDEA is not fully funded, I mean it puts this mandate on these school districts and doesn't really give them enough money to actually serve this special education need. So the thing is this is a costly law for school districts and you know Congress no matter how times they re-authorize this doesn't ever seem to quite step up the plate of that issue. But yes on that particular thing there may be some more litigation.

Bloch: Yes

Speaker: Richard I have a question of you . . . Watched every moment of the hearings but it seemed to me . . . we have a now a bar set exceptionally high in terms of the nominees . . . [inaudible]

Lazarus: One thing I can guarantee you is that they're not asking me who

they should nominate. My assumption here and I don't I've had the same thinking as soon as they nominated John Roberts, I thought this is going to be a problem for them in terms of the next nominee, all the credentials, all the Supreme Court advocacy I think it's tempting to move to a different model. In other words, not to have someone who you are trying to trumpet with those kinds of credentials, move to a very different model. My assumption is the White House is going to try to appoint from a very strong conservative base regardless. Unless the President goes with his friend, which is General Gonzalez. I way I view it's either going to be the President's friend because he believes in his friends, he believes in loyalty, I think he really really admires the Attorney General, and I think it may be Gonzalez. If it's not Gonzalez I think it will be someone who will be just not try to look like a John Roberts. I think it disadvantages people you know like Mike Luddig and Mike McConnell and I think it makes it more likely it might be Gonzalez. I keep thinking that there must be someone else out there that when I look at their short list I keep thinking there has got to be some good people out there they just haven't found yet. You know a Maureen Mahoney, I mean there are some very, very intelligent, smart, politically very conservative women and minorities out there and I just haven't seen them on the list yet.

Bloch: Yes.

Speaker: I've got a question . . . Justice O'Connor – if it turns out this becomes a long drawn out fight over replacement, then you were talking about 5-4 decisions I guess to back up would that be something [inaudible]

Bloch: The practice is to do that.

Speaker: At what point do they say well it doesn't look this next nominee is coming up any time soon we should probably get ahead with our work

Dinh: If that's the case it's entirely a personal decision by Justice O'Connor but they can set a default rule from the very beginning, all 5-4 cases will hold . . . an agree at the conference and that's what they'll do but if it drags out I think it's an entirely personal decision by Justice O'Connor.

Lazarus: It depends on whether her vote is in the five or the four

Dinh: Exactly. Right. All potential . . . decisions including by the way Hamdi because you've got an obvious vehicle problem with *Hamden* because Justice Roberts will not sit in judgment of his own case down below so that's down to 4-4 potentially 4-3 and whether you want to take a case in order to establish certainly in the law when there is a 4-4 or 4-3 case is a very, very big vehicle problem. And so you know because her decision to step down is entirely personal it would all depend upon her reevaluation of the decision at the time where it becomes a make or break point.

Bloch: Linda.

Speaker; [inaudible] Nina, . . . exception at issue . . . need to go the parents and notify them or the alternative having the judicial bypass . . . some sense of how these actually work in the real world

Pillard: My sense is that it's the confluence of the two things and what the government in New Hampshire . . . are saying we're actually dealing with a subset of health concerns. If there is a health concern that is not an emergency health concern then can't she go do the notification and we're only . . . conflict where there is a health concern for the mother that is an emergency and therefore going to notification is a problem and they said the courts are open 24 hours for bypass for that kind subsumes it so this is a case that sort of would take a triangle and collapse it into a two point issue whether you get a judicial bypass or you can go long enough to just get to the parents.

Speaker: [inaudible] minor presented at an emergency room with you know

Pillard: Pre-clamp. . .

Speaker: Would an emergency room doctor say oh my dear you have to go court.

Pillard: Well that's the question and there is also the question of rolling it back. I mean if you think about the dynamics of the availability of abortion,

doctors who are presented with . . . do the procedure and say I'll have to face the consequences but my Hippocratic oath comes first and you know after it happens to them a few times and they are in litigation maybe they change their course of business I mean they don't want to be in job any more where they are under threat of prosecution and it's a problem. I mean you know also the whole facial challenge thing is a little bit unclear too because what as S.G. points out in his brief is that doctors have you know you have this problem of is the minor going to run in there and bring a challenge to the law, you know if she can only challenge it as applied it's going to be a minor in an emergency health situation, she's not going to be challenging this law, and say oh well there can be class actions so that she's filing the challenge on her way to the hospital and there are other women who might be in that class and carry it on after it's mute in her case. But they also point doctors are third party standing and if there really is an opportunity for doctors who are likely to face these women coming into their emergency rooms, to challenge then it seems to me an issue I mean I think I must be missing something, I'm not at all competent [END OF RECORDING] . . .