

BEYOND THE SIGH OF RELIEF: JUSTICES IN THE MOLD OF MARSHALL AND BRENNAN

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*A Conversation on the future of the Supreme Court with
Kathryn Kolbert, Julius Chambers, Dahlia Lithwick,
John Payton, and Jamin Raskin*



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Left to Right: Kathryn Kolbert, Julius Chambers, Dahlia Lithwick, John Payton, and Jamin Raskin.

Kathryn Kolbert:

We welcome to our panel all of you today. We've entitled it "Beyond the Sigh of Relief" – we can all breathe that together – "Justices in the Mold of Brennan and Marshall."

I'd like to begin by thanking all who've come, and a special thank you to our distinguished panelists who are here to share their perspectives and to help us think about nominating and confirming justices who will defend personal freedoms and fundamental rights which lie at the heart of this nation. It is incontrovertible that this election year and this historic election delivered a sweeping mandate for President-elect Obama to appoint federal judges who are committed to core constitutional values: justice, equality, opportunity for all.

In the election, the public rejected the efforts of the right wing to stack the federal courts with ideological jurists like Justices Scalia and Alito, often called strict constructionists, but rather the public selected now President-elect Obama after his repeated commitment to support compassionate judges who are faithful to the Constitution, its values, its principles, and its history.

The exit polling conclusively demonstrated that it's time to put to rest the notion that the Supreme Court is only an issue for conservatives. Voters who called the future Supreme Court appointments the most important factor in their vote went for Obama by 57 to 41 percent.

In the next four years, there will be – could be – as many as three vacancies or more on the U.S. Supreme Court, along with numerous vacancies on the lower federal courts, so today we will examine what an ideal justice may look like for the 21st century. We'll hear about the distinguishing characteristics of justices Marshall and Brennan that made them remarkable jurists, personal heroes of many of us in this room.

I'd like to first introduce our panelists and ask them then a few questions to start our panel. I then, around 3:15, plan to open it up to questions from all of you. During the question-and-answer phase, just raise your hand, and Drew Courtney, who is People For's Press Secretary, will come over and hand you the handheld microphone so that you can ask your

question and have it answered.

So with me today –

[Cell phone ringtone starts playing]

John Payton: Perfect timing. A musical introduction.

Kathryn Kolbert: I was going to say, that was a great introduction. We have Julius Chambers. In 1984, Julius Chambers joined the NAACP Legal Defense and Education Fund in New York City as its director-counsel, following Thurgood Marshall and Jack Greenberg. While at the Legal Defense Fund, Mr. Chambers maintained an active caseload of more than 1,000 cases, covering such areas as education, voting rights, capital punishment, employment, housing, prisons, you name it, in the civil rights arena. In 1995, Mr. Chambers was one of three lawyers who argued *Shaw v. Hunt*, the landmark legislative redistricting case before the U.S. Supreme Court. And he is currently in private practice with the firm that he started in 1967, Ferguson, Stein, Chambers, Gresham, & Sumpter.

Also with us is Dahlia Lithwick, who is a lawyer and senior editor/legal correspondent for *Slate*, where she writes a column entitled “Supreme Court Dispatches,” and has covered such important legal cases as the Microsoft trial and other issues. Before joining *Slate*, she worked for a family law firm in Reno, Nevada, and clerked for Proctor Hug, who was the chief justice of the U.S. Court of Appeals for the Ninth Circuit. Her work has appeared in a variety of publications, including *The New Republic*, *The New York Times*, *The Washington Post*, and she is the weekly commentator for the NPR show *Day to Day*.

John Payton is also with us. He is the current director-counsel and president of the NAACP Legal Defense and Education Fund. Formerly he was a partner in the law firm of Wilmer, Cutler, Pickering, Hale, and Dorr, concentrating on general litigation, including a wide range of civil rights cases. Mr. Payton has served as corporate counsel for the District of Columbia and has taught at a number of illustrious institutions, including Harvard Law School, Georgetown Law School, and Howard Law School.

And lastly, at the far end of the table, but not to be forgotten, we have Jamin Raskin, the director of the Washington College of Law’s Program on Law and Government and founder of its Marshall-Brennan Constitutional Literacy Project. Jamin Raskin teaches constitutional law and other courses at American University. He is a prolific author, and has written dozens of law review articles and several influential books, including the bestseller *Overruling Democracy: The Supreme Court Versus the American People*, which examines patterns of conservative judicial activism and interference with political democracy. In September 2006, he won an upset victory in the Democratic primary for state senate in District 20 in Maryland, toppling a 32-year incumbent, and went on to win the November general election.

So I am thrilled to have you all here with us, and let me start by asking all of our panelists, what does it mean for you for a justice to be in the mold of Thurgood Marshall and William Brennan? Mr. Chambers.

Julius Chambers: It’s really exciting to have some possibility now of being able to use the courts to correct the injustices that we see still perpetuated today. I had over these past few years really begun to worry whether we would be able to turn to the courts for the future to try to correct problems that we all felt should’ve been addressed under the Constitution.

One particular area that I have been interested in is the problems of discrimination against people because they are poor, and we have rather pervasive practices now in just about every area that we review. And the Supreme Court has never held that it violates the Constitution

to discriminate against people because they are poor. And we started back several years ago, when I was with the Legal Defense Fund, an effort to try to convince the Supreme Court that discriminating against people because they are poor was just as objectionable as discriminating against people because of their race or color. It's going to take a long time to address that, and we hope to continue with that effort. And I think a jurist in the vein of Justice Brennan would appreciate the arguments that we're making because I think we are trying to advance the same thing that he advocated for all people to be recognized under the Constitution. So I'm very excited to see the possibility that we might get a jurist like Justice Brennan.

Kathryn Kolbert:

Dahlia?

Dahlia Lithwick:

Thank you for having me. This is – it's a real honor to be on this panel. I think that I want to reflect a little bit in my role as a journalist on what it would mean to have a Thurgood Marshall or a Bill Brennan back on the Court. And by that I mean I think that we need a better pitchman, a salesman, on the Court, and it seems to me that, at the risk of sounding corny, the poetry of liberal jurisprudence has been lost at the high court.

And I've been saying for years – I've been covering the Supreme Court for ten years now, and there's pretty much one constitutional theory out there, and it's that the world is comprised of rigorous scientific, serious, strict constructionists, and then a bunch of hippies who do some kind of interpretive dance. That's it. And so hegemonic is the notion that there's either judicial activists or strict constructionists that you could even see last year in the *Heller* opinion in the guns case that whether – whatever side you took on that case, you did your best to be the best darn strict constructionist in town.

And I think that once upon a time not so very long ago, liberals on the Supreme Court didn't feel the deep shame of the notion that what they do is fluffy and Kumbaya and substanceless and not rigorous. I think that there used to be a real pride in the progressive message at the Court, and so I think that it's not simply a matter of a court that's four-four with Kennedy in the middle. It's a matter of having a court that's absolutely selling only one vision of how we look at the Constitution.

And I have to say even President-elect Obama himself, in remarks to the *Detroit Free Press* in March, suggested that the Warren Court was, quote, "too activist," and that a court of that sort would be, quote, "troubling" today, that he wouldn't want to put a Brennan or a Marshall on the court. And it seems to me that when you have a liberal constitutional scholar of Obama's magnitude really buying into the notion that all there is is strict construction or activism, we need someone to, I think, jumpstart this conversation. And so for me, the answer is to have somebody who responds to an Alito or a Roberts with that kind of firepower, that kind of passion, and, I'll say it again, that kind of poetry from the political left. And that's, I think, the excitement that I really think that I as a journalist would like to be able to see filter out of the Court and back into the sort of mainstream conversation about what the court does.

John Payton:

I guess I want to put this in some perspective. I agree with what Julius said, and I agree with what Dahlia said, but the perspective would be this. I mean, what the Legal Defense Fund was founded to do, what Julius did, what Thurgood did, what Jack Greenberg did, what we all do is actually fight against the current existing law. When the Legal Defense Fund is founded, there is literally and figuratively no antidiscrimination principle in U.S. law. We had laws that required you to discriminate on the basis of race, that required you to discriminate on the basis of gender. And in that context, the argument that we want a strict constructionist view of the law would have left us with *Plessy*, okay?

So we start out as an organization that is seeking to change the law in a really fundamental way, and the animating principle that we bring is a concept of justice that is different than

just describing what exists on the ground, okay? It is an aspirational view of justice.

And I hear, Dahlia, what you say President-elect Obama may have said in March, but he certainly embodies that aspirational principle. I don't think there's any question about that. And I don't think he would disagree with the idea that we need jurists who understand that they are there to, in fact, expand the concept of justice so that everybody in our society is included in it. And one of the ways of doing that is to make sure we have a bench that is not as narrow as simply well-off white males, which is what the bench looked like when the Legal Defense Fund is founded, and it's a bench that would bring, I'd say, an aspect of democracy to that third branch by making sure we have a bench that has diversity in all aspects, and I think that makes a tremendous difference.

So what is a justice in the mold of Brennan and Marshall? You know, Thurgood Marshall is the first guy to sort of open the door of the nine white men and leave the door open, and I think that he's a singular figure, where he brought not just race but a completely different perspective in almost every conceivable way to the bench.

Brennan brought also a very different perspective to the bench. They were both animated by the principle of justice that I just talked about, and in the mold – we can't go back to that mold, because those times, they're almost so different that when I say we didn't have an antidiscrimination principle, there are some people even in this room that really didn't appreciate what that meant. We didn't have an antidiscrimination principle. That's a new concept. And people say, "Oh, yeah, we really did." No, we really didn't. We really didn't. You know, the Civil Rights Act is 1964. Before that, there were moribund federal statutes that essentially weren't enforced. Well, Brennan and Marshall come about in that era when it is really quite fundamental what you have to do.

Today's issues are more complex. I'm not sure they're more subtle; they're just more complex. We are now much more aware of our diversity, and that creates other issues that we have to be willing to confront. We don't need justices that essentially live in gated neighborhoods, and we have justices that live in gated neighborhoods. We have members of the federal judiciary that live in gated neighborhoods, and I mean it, again, literally and figuratively. We need the third branch to have some really important aspect of diversity that reflects the diversity that we have in our country so that our sense of justice from our court will actually be justice that embraces all of us.

Kathryn Kolbert:

Mr. Raskin.

Jamin Raskin:

Thanks. I'll pick up where John left off. I agree very strongly with what he just said. All of politics turns around two poles: power and justice. And the story of American history is the struggle between power and justice. It's the story of slavery and abolitionism and the struggle for vindication of the right to vote and the right of workers to organize and to engage in collective bargaining and the right of everybody to belong.

It was our last great Republican president, Abraham Lincoln, who spoke of government of the people, by the people, and for the people, but of course we didn't start like that. We started as a slave republic of Christian white male property owners over the age of 21, and it's only been through successive waves of social and political struggle that we've been able to open democracy up to everybody. And in that process, the Supreme Court has, for most of our history, been an extremely conservative and often reactionary force, and it's really only during the Warren Court period that the Supreme Court was an ally for democratization and a champion of freedom and liberty and democracy values.

So when we think about the struggle between power and justice, and judicial politics is no exception here, and I think that the choice is between appointing people to the Supreme Court and to other levels of the bench whose careers are identified with power versus those

whose careers are identified with justice. And if you look at a whole train of Republican appointees – Rehnquist, Scalia, Thomas, Roberts, Alito – their careers are very heavily identified either with certain kinds of law firms and/or – usually and – the executive branch of the US government working to champion a particular view about presidential power, vis-à-vis congressional power, and a particular view of governmental power versus the rights of the people.

And then you look at Marshall and Brennan. Marshall's whole career was about justice and opening America up, and he was one of the great architects of the legal strategy to dismantle apartheid in America, and challenged racial oppression on multiple fronts: education, public accommodations, housing, voting. One of his great cases was *Smith v.*



Allwright, which invalidated the white primary. Look how far we've come because of that, from the white primary to the election of Barack Obama. But it took activist lawyers who had a sense of passion and urgency to design a legal strategy to make that happen. Brennan was not an activist lawyer in exactly the same mode. He belonged to a prestigious New Jersey law firm but was very involved in court reform efforts and civil liberties efforts. He was a great champion of the First Amendment and the right to speak.

And so I think that we've got to be looking for justices in this mold, people who really have a passion and a hunger for justice. And the ideal would be is if we could find people like Marshall and Brennan, but the truth is, Kitty, I mean, I would be thrilled if we get people as good as Souter and Stevens, two Republican appointees, to the Court. I mean, the unspoken danger here is that if justices Souter and Stevens are the first to leave the court and the administration isn't careful – if it appoints people more in the vein of, say, Breyer or Ginsburg – the Court could actually continue its move to the right.

So I think that you're doing the right thing in holding us all to a high standard, and I'll just finish by going back to something that Mr. Chambers said. One of Justice Marshall's great, most stirring dissenting opinions was in *San Antonio v. Rodriguez*, which was the Supreme Court decision which determined that there is no right to a public education in our Constitution, much less an equally funded public education. And in that 1973 case, the court rejected an equal protection attack by Mexican-American families against a system of property tax-based school funding in Texas, where some districts were receiving double or triple the amount of public funds as other schools were. And the majority said that there was no constitutional problem with that because there is no right to education, much less a publicly funded one.

So in his opinion, Justice Marshall said that it's not just an equal protection problem, but it's a First Amendment problem, because what does it mean to say you have a right to speak, what does it mean to say you have a right to participate in politics, what does it mean to say you have a right to vote if you don't have a right to be educated and to get the same kind of education that other people in your state are getting? I think that we would do well to find justices who could at least catch up to where Justice Marshall was back in 1973 when he wrote that magnificent dissenting opinion.

Kathryn Kolbert:

Right. I want to pick up on some of the things that you all have raised. One question does present itself immediately to me, which is the judicial confirmation process that we've undergone since really the nomination of Robert Bork to the court, has become increasingly politicized, has become increasingly partisan, has really – I think really given presidents incentive to find people who are what I think of as stealth candidates, people who don't have a lot of record on issues that are somewhat controversial in the country, people who are perhaps already on a court and therefore have made it through a nominations process.

So my question is, how do we today, now that we have that history before us, ensure that we can have an open debate about people's judicial philosophy and really look for people who may not already be on a court, and do you think that's important? And let's just start at that end and come this way this time.

Jamin Raskin:

I'll let John start.

Kathryn Kolbert:

Assuming any of you have something to say. Yes.

John Payton:

I think that one's actually very hard to figure out how our politics changes quickly enough to get to where you just suggested, and that's about our own politics. The irony is that in the '50s and '60s, even when Thurgood Marshall is approved to be on the Second Circuit and in the Supreme Court, the Democratic Party itself contains the really, I'd say, forces that are against what I call justice. It's the Southern senators who end up jumping ship and becoming Republicans, but they're inside the Democratic tent, and Lyndon Johnson knew how to maneuver in there and work that out.

And there essentially wasn't anyone who thought that Thurgood Marshall did not bring a very understood judicial commitment to the Supreme Court with him. He was not a stealth candidate at all. And he got through because of Johnson and his knowledge of how to just play brutal politics in the Senate.

Since then, it has become much nastier and much more public and almost like if you have a judicial philosophy, there's something wrong with you. It's turned into something that's really, I'd say, bizarre so that candidates are supposed to say, "I really never even thought about that. That's interesting. Wow. How many amendments are there? Never really – it's interesting."

And we need a healthier politics in which we can address some of these issues much more directly, and I'm not saying that we ought to be able to know in advance how someone's going to come out on an existing burning issue very likely to be before them when they are judges. I'm not saying that. But we need a more confident politics where we could ask people questions about how they view the very discussion we've just had, listen to the answers, and not then hold the fact that someone answered against them, but hear what the answer was. We're not quite there yet.

But I think there is – in some sense it would be really important that this debate happen sooner rather than later. There is a magic moment now where sort of the optimism of the election lasts for only so long, and if we had our first Supreme Court hearings in two years, I don't think it would last that long. So I actually think it would be important to have that debate much sooner to attempt to change the ground rules for that debate, and if you change the ground rules, you have really achieved something. So I don't have a little game plan, but I hope we are in a position to try to change the game plan sooner rather than later.

Kathryn Kolbert:

Anybody else want to join in on this one?

Dahlia Lithwick:

I just agree. I agree. I agree with everything that John –

John Payton:

Write that down. Write that down.

Dahlia Lithwick:

– just said. Let's get it in writing. I think that having covered the Roberts and Alito confirmations, just in despair for the gotcha-ism and the simplicity of "Oh, let's find out what eating club he was at at Princeton and just pound him about it," using trivial things as proxies for important things because you can't get to the important things, and the notion that if you root through enough dumpsters, you'll find something. And I think the very misguided notion post-Robert Bork that if you poke someone with a pointy stick

long enough, they'll get really mad, which just did not happen in the Roberts and Alito hearings.

They both, I think, presented very, very charming, gracious faces. They're nice to children and animals. They don't publicly loathe workers and minorities. They don't do the sorts of things that you want them to cop to in order to make your point. Both presented themselves as warm, kind family men, and that was enough under the current regime, and I think the senators who ask the questions just do a terrible, terrible job of teasing out anything like a complicated constitutional theory. It's quite enough to hear that someone wants to be an umpire. Good. Umpires are good. Next candidate.

And it's just dismal, and so I agree. This is a really intractable problem as it exists right now. It's a problem at so many levels, but I do think that we have gone terribly far off the rails with the notion that we're going to find someone and get them with some dirty little secret, or we're going to somehow show this inner monster that never is going to appear. And so it seems to me this needs a lot of work, and I couldn't agree more that the time to think about it is not when the candidate is sitting on the hot seat. The time to think about it is now.

Jamin Raskin:

And I agree with that, but I would add to Dahlia's point this, that I think that our president-elect has given us a wonderful example of civic courage in running for office and in the kind of campaign he ran and in daring to believe and having the audacity of hope that the country could do something which many people believed could never happen, certainly not in our lifetime. Well, so could we be equally daring as participants in judicial politics to think, for example, that rather than the next nominee coming from the ranks of our very fine corporate lawyers, we could actually find someone from the ranks of union lawyers, including very fine federal judges who are currently on the bench right now, like Judge Marsha Berzon on the Ninth Circuit?

Does everybody have to come from one side of the labor management divide when we think about judges in the federal courts? Many of the outstanding liberal judges and justices have been participants and beneficiaries of our great civilizing movements, and Thurgood Marshall's the paradigm example of it. Ruth Bader Ginsburg was also very involved, centrally involved in equal protection strategies to dismantle sexist laws in the '60s and '70s.

Could we have people who've played similar roles in other kinds of struggles that define our times? We've never had an openly gay or lesbian justice on the Supreme Court. Is there somebody who's played a particularly creative role in some of the victories, like *Romer v. Evans*, who could be put on the court as an extraordinary towering symbol, again, of the social progress that we've made together as a country.

So I would say let's follow the example of our president-elect and be as daring and courageous as possible in talking about the kinds of people that would enrich our constitutional discourse.

Julius Chambers:

Well, I agree with everything that everybody said. I was wondering, however, whether we – even with today's discussion – are ready to admit or accept the proposition that was just last stated, namely that we have to go out and reach for someone who's already out advocating a position that we might not be overly enthused about. I was really concerned after Obama's victory whether it would encourage us to just abandon the kind of advocacy that the last speaker was advancing.

Haven't we convinced ourselves that we are no longer racist and we don't discriminate against anybody now? We elected a black as President of the United States. That's a major step. And why do we have to then go worry about doing anything else? Don't all of us really feel that we have done enough? That is a problem I think we all have to address, and

it's, to me, a major issue.

I started out talking about the poor, and I really think that is a major issue facing the United States. We're not ready yet to reach out and provide equal accommodations and educational opportunities for poor people. We just don't want 'em next door. We haven't abandoned the idea that they all are there through their own fault, and despite what we say, that is a real issue that we have to address. And getting a president to appoint somebody to the bench who's poor? Are we ready to admit that or accept that proposition?

We can associate with people who are members of major law firms. But what about a poor lawyer, even like Obama, who just hasn't been in one of the major law firms, who's out trying to evolve principles under the Constitution, to make it possible for others to



share in the American dream? That is a challenge for all of us, and not just a judicial committee that might be out looking for candidates. Once we find the candidate, we then have to ensure that the candidate will get confirmed. Are we ready to go campaign for a candidate? Someone made a suggestion that we ought to have gays and lesbians represented on the bench. Are we ready to go campaign for a gay or lesbian on the bench? That's a real challenge for all of us. It's a great question.

The last thing I want to mention, you know, I've been worrying about where we all are after the history and wondered, why haven't we become more interested in supporting affirmative action? I just pick affirmative action as one controversial issue. That's a major issue, talking about affirmative action. Is it really reverse discrimination? Does it ensure opportunities for people who are entitled to opportunities? Don't we all have some hesitancy about going that far?

In short, I think the issue that's been posed is one that goes to the concerns that are probably prevalent among all of us. Are we ready to admit that others are entitled to the same opportunities that Justice Brennan talked about? And isn't that a challenge that we all have to face in addition to trying to get someone on the bench to open up opportunities for all Americans?

John Payton:

I think that actually opens up a terrific topic here. One of the things that I think we have to see is just what the opportunity is that is presented, but I described it as this sort of window of optimism. And that's what I see the window of optimism as being ready for, and that requires – I take all of Julius's questions, but it also requires some real leadership from the top to say "This is what we now have to do."

One of the things that I think a lot of people are now very aware of is just how huge the gap between poor and wealthy-beyond-belief is in this country, and Obama talks about it quite directly. It is beyond unhealthy. It is a sign of something that is wrong in the fabric of our society, and it provokes some of the exact questions Julius just raised.

So what would we want to be our approach to dealing with an unhealthiness that has such a gigantic gap between the wealthiest and the poorest? Because it provokes the next question: what are we doing about the poor? What are we doing? And would we consider a much broader array of candidates to be not just on our courts but in all sorts of positions? And I think that this is the very moment to think about those things.

I would say – the suggestion was, would we consider a gay or lesbian candidate? Would we consider a labor lawyer? We're a profession that actually has a very substantial number of

us in nonprofits, okay? That's an unusual profession, so our profession – today, if you just look at it, it has a tremendous representation that include people like Barack Obama when he chose not to be in a corporate law firm and quite consciously talks about that as a choice. And I think this is the moment when he can turn that into something that benefits the whole country by saying, "I'm looking for candidates that care about the issues of justice, bringing us together as a country, and here are my candidates, and they include..." And it should be the whole range of people that we're now talking about.

That requires leadership from the top. Obviously, the president has nominated these folks, but he has to do it with, I'd say, a sense of confidence and taking advantage of the moment, and I think we ought to make it clear that those of us who would want that to happen will be there to support that if it does happen.

Kathryn Kolbert:

Let me just turn – I'm going to ask one more question and then turn it – give it open to the audience to ask questions, but let me take this in a slightly different direction, which really goes to a quality that I think Bill Brennan demonstrated more than most justices on this current court. That's his ability to build consensus and coalition across untraditional lines. I mean, he was kind of well known for his ability to be quiet on the bench and then go back behind closed doors and try to find the votes for the cases that wouldn't have had those votes prior to his lobbying in a variety of ways.

Some people have suggested that traditional politicians have that quality; that is, people who are able to build consensus across party lines or the deal-makers of the world. How important is that factor in your view, and is it something that our next president ought to take into account in appointing the next justice? Jamie?

Jamin Raskin:

Well, I think from our perspective it should be very important because I think, as Dahlia started off by saying, we need real intellectual leadership on the Supreme Court and on our other courts. And part of leadership is finding followers and allies, people who are willing to see things your way. So, now, I'm in the Maryland Senate now, and so I've gotten a rich tutorial in my first two years in the arts of legislative compromise and logrolling and conciliation and so on.

I mean, in legislative politics, you try to build coalitions around a combination of principles and interests. I think, in the judicial arena, you try to build coalitions exclusively around principles. That is, if everything's working right; you're not appealing to the self-interests of particular justices or judges.

So you're looking for people who do have the skills of compromise and coalition building, but also have the capacity to demonstrate intellectual leadership and a vision that other people can buy into. And there will need to be a reconstruction of liberal and progressive constitutional thought, so we want people who have some understanding of the sweep of our constitutional development and then some ideas about how to move things forward in a progressive and meaningful way that's tethered, obviously, to the Constitution and the other legal materials but also doesn't shy away from engaging in the kinds of acts of constitutional courage that Marshall and Brennan engaged in.

John Payton:

I'm nervous about the term "needs to be able to build coalitions" sounds like it is about politics. Most judges don't ever have to do that, because there's only them and they just decide, and on the Supreme Court, it's an unusual court. They don't sit around and talk about cases. They send memos to each other. I mean, it's unbelievably unusual when you think about it. There they are in the same building most days. They have a meeting in the conference where they will see how they voted. They will then be assigned whether or not they are writing majority or they're the lead in the minority, and the rest of the dialogue is on paper, okay?

It would never have crossed my mind to organize anything like that. But that requires a different appreciation for how you would want someone to be able to – with some intellect, be able to bring people together. It's different than Lyndon Johnson, who I think would not have actually performed. That's not how he did it. It's not to say that those things aren't important. It's just that the context is really very, very different, and for most judges it just doesn't matter at all. Most judges are – circuit judges, sometimes they scatter to different cities after they hear a case, and the district judges just decide.

So I'm not downplaying that. We do have to have that, but we also, I think – I don't want to underestimate how important it is to have judges and justices and Supreme Court justices in the mold of people who bring a commitment to justice in the inclusive sense that I said. That itself is a really different message.

We're in an extended era of wedge politics where everything is about how you use this issue to get that issue, and how you use that nastiness to get this nastiness. If there is – there's an anecdote about this campaign where someone was sitting around noting that when Obama was attacked in ways that – I think some people just casually dismissed it, but in really, really nasty ways, allegations about him that were way out of bounds. You know, Barack Hussein Obama.

And he, I think, with no exceptions, never responded in a way that some of his supporters wanted him to respond. People wanted him to stand up and essentially hit somebody in the mouth, okay? "Just play tough. If they say that to you, knock 'em out. Talk like that about them." And you know what? He never did that. It was a terrific message about what you can do when you're willing to not do that.

Okay, part of this discussion has to be about how we avoid some of those types of distractions even in this arena, and we try to figure out if we can't find the right jurist who can bring a different sense of how we go about discussing this. We have indirect evidence, but a lot of us have read it or heard the indirect evidence. We have a lot of clerks who were on the Court that I've talked to from the '50s, and some of the justices, and those discussions would have been foreign. They didn't sit around saying, "Well, you know, if we –" I mean, it was "how can we get this done?" Okay? We need a "how can we get this done," which is a really different approach to these things, but I'm for a "how can we get this done?" I'm not downplaying your question, but I'm just thinking there is a bigger frame to the question.



Kathryn Kolbert:

Dahlia.

Dahlia Lithwick:

I just want to – oops, sorry. Housekeeping interlude. This is why you put women on the panels, right? Everybody's water glass is filled. I just want to react and positively echo what I think I'm hearing underneath what John is saying. In preparation for this panel, I reread *The Brethren* this morning, and it's just astonishing because every chapter there is Brennan just popping out around the corner of somebody's chambers and sort of brow-beating them. I mean, he's really working it, and it's so foreign for someone who covers this court, where you just have the sense of nine people who live in these glass bell jars and really do, I think, communicate by memorandum and jump onto planes and don't even speak beyond the brass tacks at conference.

So I think there is a real sea change, and it's really – I think I share a little bit of John's concern that sometimes when Brennan was leaping out around the corner and brow-beating people, it was pragmatic, and that's helpful, but principles were not always the first order of business. The order of business was doing the deal.

But one thing that I do want to say is that when Obama talks about the quality he seeks in a judicial nominee as being empathy, and people like me mock him for that because it sounds just a little too guitar-strummy and a little too, again, squishy and liberal and not rigorous. I think that empathy is part of the quality that I'm trying to describe in Brennan, which is not just the ability to see what it would be like to live outside the gated community. I think that's a part of it, and it's an important part of it, but I think it's to think about who these other justices are and who these parties are and who these people are. And I think that that quality that is so lacking doesn't mean – and I think when Obama said his ideal judicial nominee would know what it's like to be a pregnant teenager or know what it's like to be a single mother, and that was resoundingly made fun of by critics. But I think that that empathy is exactly the thing that you're saying is really – should be the pole star at this point.

Kathryn Kolbert: All right. Should we – do you have anything you wanted to add? Let's turn to the audience. Do you have any questions?

Audience: Bringing up the instance of Justice Marshall reminded me of the deal that was made to get him onto the Second Circuit in the beginning, which was Kennedy got Eastland to agree to name Harold Cox to the district court in Mississippi, Cox being one of the most blatantly racist judges in the history of the federal courts, which I think is not saying – well, I guess it's not saying much. But I mean, there have been others, but he was particularly bad.

I wonder what progressives pushing for very progressive nominees would be willing to give up, right? I suspect – I personally would not be willing to have the equivalent of Harold Cox on the bench in order to have a very progressive person on a circuit court or the Supreme Court. But I am wondering, if there is that kind of horse trading that's required to get progressives on the bench, what would people be willing to cede on?

John Payton: Well, I'm not willing to bite. I mean, that's why I described what the Democratic Party was. So the Democratic Party then, in fact, included all of the people you would be nervous about and who had a veto over any deal to get the first black guy, and they exercised the veto and made that deal. That's not who is in the Democratic Party now, and so I think, actually, you're not going to see the odious compromise that you fear being necessary to achieve the person you would like to see nominated.

Audience: In view of what we've been saying to this point, I wonder if one of you could comment on the influence that you think the ABA should have in this appointment process. And in that context, do you think it should be a requirement that a candidate be a law school graduate?

Kathryn Kolbert: Who wants to take that?

John Payton: Now you've gone too far. *(Laughter)*

Julius Chambers: You're talking about the U.S. Supreme Court? I would say definitely yes. I think that a non-law graduate wouldn't be able to keep up with a lot of things that would be going on in a court, and you would need that. Like John, I would be rather hesitant in terms of a lot of the compromises that are likely to be proposed. I'm not so convinced that there won't be demands for accommodations recently that to me were a bit frightening, so I'm sure that's there. There is, to be realistic, though – and also, I think we have to go back and read Justice Brennan more.

People have different views about different things, and not everybody is going to be interested in improving the schools the way that I would like to see the schools improved. I know that. Not everybody's going to be convinced that you teach school the way that I think schools ought to be taught. There has to be some way of arriving at some happy compromise with

people who honestly disagree on particular points, not for any personal reasons, but people just honestly believe it's better to do things one way rather than another.

And I think judicial candidates have that difference as well, and I think we have to appreciate that not everybody's going to agree with every position that we advocate. And so I would readily acknowledge that there would be honest differences that we have to deal with, and I think we ought to be prepared to deal with them.

I've mentioned earlier that we aren't talking that much about affirmative action. We have basically abandoned it. A lot of people argue that we ought not to be giving that kind of advantage to the people who either are not prepared to take advantage of it or who would disadvantage some other person in that process. That's an argument that people make. I would argue that the only reason we're doing it is because that person is being excluded from that position for racial reasons or inappropriate reasons. And some, for instance, would argue with me that, well, the thing you do there is that you remove those barriers. And then I argue, well, you can't remove those barriers.

Well, there are some differences, and I understand that people will differ, and I think that if we are looking at a judicial candidate, I think some of you have talked about some attributes of the candidate that ought to be promoted. One has a real commitment to fairness and equality for all people. One has an appreciation of reasonable differences among people. One has an interest in trying to provide accommodations for those with whom one differs. And one could go down the list, and we may reach some happy medium on differences. But I don't think we can just assume that everybody is going to agree with everything that I advocate or that you advocate and cut off all discussions based on that proposition.

Jamin Raskin:

Can I just say one quick thing about the ABA? First of all, there's a very credible candidate for the Supreme Court, Dennis Archer, who was president of the ABA and got to know the legal profession very well and was also a distinguished mayor of Detroit. I don't think the ABA should impose a rule that's not in the Constitution that you've got to be a lawyer in order to be on the Supreme Court. Obviously, it would take a pretty special person, but maybe there's a great literary critic or writer or – Dahlia, are you a lawyer?

Dahlia Lithwick:

I'm not barred.

Jamin Raskin:

Okay, so maybe Dahlia Lithwick, for example, would be a great candidate –

Dahlia Lithwick:

But I'm a Canadian.

Jamin Raskin:

Oh, okay. *(Laughter)*

Dahlia Lithwick:

That would be a different lawsuit. *(Laughter)*

Jamin Raskin:

Under *Plyler v. Doe*, Justice Brennan would probably let you in. The other thing I did want to say, though, was that one of the reasons we named our project the Marshall-Brennan Constitutional Literacy Project, which sends law students into public high schools to teach about the Constitution, is because those two justices were the most emphatic about promoting public education of the Constitution, and public dialogue and discussion about the Constitution. And it's exactly a dialogue like this that should be taking place across the country now to ready ourselves for the conversation that will happen that John's talking about.

What changes between 1896 in *Plessy v. Ferguson* and 1954? Not the language of the Fourteenth Amendment. What changes between the *Gobitis* decision and *West Virginia v. Barnette* about whether a school can compel children to participate in the flag salute? Not the language of the First Amendment. What changes is people's understandings and the language and the concepts that people use to interpret the Constitution, and that's true

whether you want to call yourself a strict textualist or an activist or a pacifist or whatever. That is the very nature of constitutional interpretation, so we need to be having active constitutional dialogue in the country.

Kathryn Kolbert: Okay. Right here in front. I forgot to ask people to identify themselves before you asked a question, but that would be helpful.

Audience: Sure. Bob Weinberg. And sitting here listening to you, I wondered if I could throw out a few names and see if they meet the criteria that I gather that the panel is adopting. In addition to Dennis Archer, who's a wonderful suggestion with both prior judicial background and political background, and the first African-American president of the ABA. Certainly have a very good chance of confirmation.

How about Steve Bright, who's been sort of the leading lawyer in the field of fighting capital punishment? How about Gregory Craig, the new White House counsel, who's been a very progressive lawyer, very active in the field of human rights over the years? How about Deval Patrick? I first met Deval when he was running a capital punishment program as a young lawyer with the Inc. Fund [ed - NAACP Legal Defense and Education Fund, Inc.] And if you want to go to the sitting judiciary, how about Judge Tatel of the D.C. Circuit? He's been, I think, for years the most progressive member of the circuit, and among other things he would bring representation to the disabled community. So I just wonder if those are the type of people that you might have in mind.

Jamin Raskin: Well, just my reaction is those are four superb suggestions. One thing about Steve Bright that would be very interesting is the extent – when I talked about people coming out of social movements going on to the Court, it's usually after those movements have succeeded. The death penalty struggle is still very much in the throes, so the question for him would be, “Well, are you just going to take your advocacy position and translate it into constitutional law?” And he would, I think, have to really think about that and how he would answer those series of questions.

Another thing that I'd like to pose to my fellow panelists here – maybe they can pick up on your point – is about age. It seems like the Republicans were just vigilant about getting people as young as possible, both so that they wouldn't have a paper trail but also so they could be on the court for the next 85 years. And I wonder to what extent we are going to see the same kind of tilt in the Obama administration. Should we be favoring people in their 30s and 40s, like me, or are we going to be more open-minded? I think everybody you suggested, Bob, was actually and probably is 50s or 60s. Tatel, I think, must be in his 50s, right?

John Payton: No, no, no, he's older than that.

Jamin Raskin: Or 60s? Is he?

Dahlia Lithwick: His daughter's my age.

John Payton: No, no, no, he's –

Jamin Raskin: Oh, I was giving him the benefit – well, so I mean, should there be that kind of implicit, unspoken subtext to the appointments?

John Payton: Look, those four people would be terrific. There are a lot of candidates out there that would have a similar breadth of different experiences.

I think part of what I've been saying is we want to change how this works, and it's true we've had a lot of very young people put on the bench, on the federal bench. It's sort of some equivalent to the burrowing in, and I think the way we would want to look back on

what's about to happen in the next year and be able to say it was really successful is that those weren't the kinds of considerations. I mean, I'm not against people being younger, but I want to change how we do this so that, in fact, that's not the way you think about it.

So I want to find some people that bring a much more diverse set of life experiences, and I'm wide open to that, the ones you said and others. But I also want to break down, I'd say, the nastiness that filters who gets to come out on the other side, and that's really the most important thing. We have now, today – no one will deny it – very serious problems to confront as a country. When Julius says, “Gee, a lot of people want to act like we're post-racial already,” that is going to be the rhetoric out there. But, you know, the election of Obama didn't change anything for the kids that are in school right down the street from here who have a very inferior education where half of them drop out and therefore have no chance in our political or economic system. And some of that is related to things that happened many, many years ago that are still with us.

So we have all sorts of problems we have to deal with. I was at a meeting where someone was explaining healthcare. Very ambitious, how we're going to have universal health insurance. And I said, “Well, what about the people that don't have healthcare providers? I mean, the insurance is really interesting, but if there are no providers, it doesn't matter.” Okay? Well, we have a lot of people that don't have healthcare providers. We have a lot of problems. We have to figure out how we deal with those, and I think my point is, to deal with them, we have to openly address them and be willing to sort of wade into them with a different spirit of community and justice, and that's the most important thing that should happen to how we pick our judges. I want wide-open considerations, but I want a process that sort of takes the fangs out of this nastiness.

Kathryn Kolbert:

Dahlia?

Dahlia Lithwick:

I know there's more questions, so I'll be quick, but I also want to react to another sort of subtext that we've kind of danced around but we haven't confronted directly, and that is, should we be thinking about putting the first gay justice on the court? Should we be thinking about putting the first blind justice on the court?

I have a lot of enraged reader mail from women who say, in light of how Hillary Clinton and Sarah Palin were treated, Obama had darn well better put three women on the Supreme Court because it needs to look like Canada. Having outed myself as a Canadian, I'm all for that, but I think that – I worry a little bit about going down the road of trying to create a court that looks like America. We started talking about a short Irishman called Bill Brennan who did more for women and minorities than just the color of his skin or his gender would suggest.

And so I just want to put out there, in addition to, I think, Jamie's excellent question about should youth be a consideration or the consideration or the top 12 considerations. I think we need to think very, very carefully about whether it matters a lot or a little, the optics of putting another woman on the court. Ruth Bader Ginsburg really, really has made it clear that she wants it to be another woman. Whether the first Hispanic justice is of paramount importance, or the first Asian justice. And so I just want to suggest that I think there are costs and benefits to proceeding along that line.

Kathryn Kolbert:

How about right back here?

Audience:

It occurs to me that in listening to all the comments about what the ideal justice would look like, if you put them all together, somebody who comes from a different sort of background and has all these rallying capabilities and can articulate a vision and talk about it well and can build consensus, you'd probably come up with Barack Obama. But if you accept the proposition that he's a once-in-a-generation type of guy and that the candidate who

ultimately gets nominated for that next vacancy will probably not have all of the qualities that Barack Obama has, I guess I would throw it open to all four panelists. What's the number one quality that each of you would sort of say is uncompromisable, that we have to have this one quality in the next justice? All of the others notwithstanding, what's the one that each of you would look for?

Kathryn Kolbert:

Julius?

Julius Chambers:

Well, it's a good question, but I still think that we are looking at a person who believes that every person in the country is entitled to fair representation, equal representation, and on that I don't think I would want to compromise.

Dahlia Lithwick:

I think I would go back to John's first point that it would be a vision of the law as aspirational, a vision of the law as something that is more than just a sort of crabbed algebra problem, and somebody who, regardless – again, I'm not sure that their background is as important to me as their ability to believe deeply that the Court exists to protect minority rights and that there is this urgent burning need to sell that vision, to lead on the Court.

Audience:

What word did you use earlier? Empathy?

Dahlia Lithwick:

I used –

John Payton:

That was derisive.

Dahlia Lithwick:

I wasn't sure where I came down on empathy.

John Payton:

You've heard my speech twice.

Jamin Raskin:

I mean, I would say a passion for justice, including integrity. And by the way, I want to expand the idiom here. It's not just to defend the rights of the minority, but it's also to defend the rights of the majority, because a lot of what we saw over the last eight years, for example, was a trampling of the rights of the majority, like in the 2000 presidential election. We've seen lots of assaults on the rights of people to participate in politics and to effectuate the will of the majority through elections. Anyway, I'm expounding too much, but I think that justice includes the rights of the majority to govern, as well as the rights of the minority not to be trampled in the process under the Bill of Rights.

John Payton:

I want to make a point about what diversity means, because I do understand the point that says you don't want to just pick the short Irishman because he's the short Irishman. I hear that point. Bill Brennan actually presented a completely different aspect of diversity at the time, though. It was really something to pick him at the time.

The point about diversity that I hope we don't lose sight of – I'm going to use sort of an anecdote from the Michigan case. I did the Michigan case, and at one point I went around and I interviewed all of the very senior members of the Michigan Law faculty. And I asked them, what happened that they saw in their classrooms which went from essentially no diversity and no women to much more diverse classrooms? "What happened? You taught in the '50s, and you're teaching now. What have you seen?" And there were actually more than you think. There were some law professors who could say, "Well, actually, I taught in the '60s, and I can tell you the answer to that."

And one very, very highly regarded law professor who taught courses in property said that he was actually against having a diverse classroom, and here's what he noticed. And the way I focused this is I wanted to know about women because it's easier to talk about gender than it is about race. And he said, "You know, when women came into the property class, we had discussions about things in property that we had never talked about before." Much of property is freighted with gender, okay? It is.

He said, "So things came up that never came up before, and some of the things that always used to come up, they never came up again." And he says, "I did not anticipate that. We have a much better class."

And the point is that there is something out of that diversity that is, itself, really important. Things come up that wouldn't otherwise come up, and things that would just wander in off the street don't wander in anymore. And I'm not saying that to say we ought to have slots, but I'm saying that to say there is a value in really thinking through what diversity brings to this. This panel brings something different than a different panel.

Audience:

Thanks. I'm Glenn Sugameli, and I've run the Earthjustice Judicial Nominations Project since 2001. But I wanted to just take a little bit different perspective and ask what your reactions are. Most of the discussion here has been talking about constitutional law issues, and, understandably, that's extremely important for the Supreme Court. But obviously, there's statutory and other issues, common law issues, that also can be really just as important in their real-world impact. And just a couple of examples from my legal career about what you called empathy or understanding or accepting or working outside your bubble or whatever.

I started my career back in the late '70s representing Indian tribes and Alaskan Native corporations, and there clearly were judges who just never accepted the fact that Indian tribes were sovereign nations and they have a government-to-government relationship and et cetera. You could just tell that they had a certain perspective that "Why aren't they all assimilated? These tribes are just anachronisms."

And then after that, I was with a firm representing air traffic controllers who'd been fired in the PATCO strike, and one of the things that happened there was the federal circuit blatantly violated their own rules, ruled against everybody, even when the facts of the law didn't present it. The one case that they actually ruled for them they refused to publish even though it was interpreting the statute regulation for the first time, when they were publishing cases that literally said nothing other than that "He loses *See Schapansky v. DOT*, period." Literally, that was published.

And then within the National Wildlife Federation, I was with surface mining, and we had an argument for the D.C. Circuit, and the argument was largely about undermining and collapsing people's homes. And near the end of the argument, one of the judges said, "Well, this Surface Mining Act is just about excess dust, right?" I mean, literally, he apparently had dozed off during the argument or something. I'm not sure. But the perspective that somehow that didn't really matter, and of course Roberts with his infamous comment about the hapless toad just not really understanding or accepting the importance of endangered species again.

And then the Exxon Valdez case, where you really have an example of they made up a rule. It was admiralty law, allegedly, but really, it was the question, do you worry more about the impact of punitive damages on the poor corporations and poor Exxon who has to pay one tenth of one percent of one day's profits and, God, that's gonna be awful, or do you worry about the impact on the fishermen and the fishers who did not get full compensation even with the punitive damages for a lot of reasons?

So in terms of which perspective do you take when you look at the case, whether you look at it, whether you understand the importance of tribes and the role of tribes, whether you understand the importance of species, whether you accept the fact that maybe people matter more than corporations, or at least as much. Those are perspectives that I would like to see in judges and justices as well, and that partly reflects constitutional issues, but, again, I think it's really very largely also statutory common law and treaty interpretation and other issues like that.

Kathryn Kolbert:

I think – let me just try to take that question one step further and really ask you how you would tell, because in some cases one’s history, one’s ethnicity, one’s – you know, the slot you take or the – it just doesn’t always – it isn’t always clear. And part of the problem is that the judicial confirmation process doesn’t give us many hints on those things and certainly doesn’t tell us a whole lot about people’s ultimate perspective when faced with difficult questions.

So my question for all of you is: How do you tell which side of the coin someone may land on? And the second part of that is: And what do you do about the fact that the court seems to change justices once they get there, at least for some?



John Payton:

Okay, I’ll bite. I think the reason I have made much of a justice or a candidate’s sort of commitment to the aspirational sense of what our Constitution is, and I think this applies with equal force to interpreting statutes, is that that does tell you something about what I think is important. One of the most awful things that happened to the Fourteenth Amendment is that the first decisions by the Supreme Court included decisions that decided that corporations were persons for the purpose of the Fourteenth Amendment. And then they went on to essentially strip the Fourteenth Amendment of having any impact for the people that it was in fact clearly enacted to try to protect. And so we were left with something that I think would fit right into your question, so that corporations got a lot of benefit out of the Fourteenth Amendment, and African Americans got nothing. Now, that’s just breathtaking.

My point about what should the law be striving to do in order to increase our sense of justice is my way of sort of responding to your question. We’ve spent maybe the last couple of decades where people who view themselves as progressive have decided that they can’t win anything in the courts, so it’s been a defensive battle to maintain what has been there. And therefore, there’s been arguments about “Let’s not change anything; let’s just freeze things; the law’s good enough for me.” And that has precipitated some of the back-and-forth that Dahlia was talking about where everybody seems to use the same terms of debate.

Well, I think we want justices and judges who actually think much bigger about what our jurisprudence and what our country ought to be able to achieve with respect to justice. And that’s why I think that’s the most important thing that I would want to know about somebody who is a candidate.

Dahlia Lithwick:

Just one brief answer is, the way we’re going to know is by – and this goes to John’s point – not putting up candidates who are 17 years old. I mean, I think that – let’s agree that’s a silly game to put 31-year-olds up, and then I think we will know a lot more.

But I want to just also respond to this empathy point, and a little bit to the micro-dispute that we might be having about diversity and empathy because – and I think this also goes to your point about affirmative action. One of the most really interesting things that I’ve been witnessing in the last couple of years is Sandra Day O’Connor’s post-game show, and she goes around the country and talks a lot about affirmative action, and it’s clear that she’s deeply worried after the *Parents* decision.

And one of the most interesting things that invariably comes up when O’Connor talks is just her deep and abiding reverence and respect for Thurgood Marshall, and she talks about – and I just want to just briefly make the point that I think empathy is a two-way street,

which is to say I think you can be a person who's had diverse and interesting and varied experiences, and that will help you on the Court.

I think one of the things I've learned from watching O'Connor is that she had different experiences from other justices but was incredibly receptive to their stories, and incredibly receptive to arguments – particularly from Marshall, as it turned out – about things she knew nothing about, and she's quite open about that. And so I just – again, in pushing back slightly on the notion that one's own experiences are defining, I think that one of the qualities that I want to push a little farther toward is the ability to say, “Yes, my experiences are defining, but I also really deeply, deeply understand that other people's experiences are different, and I can hear that and sort of operationalize that.” And I think that that's – I hardly want to sit here and lionize everything O'Connor's ever done, but I do think that that's a quality that I've come to regard very highly in her is her ability to understand what other people were telling her.

Jamin Raskin:

Could I jump into this fight, Kitty? I mean, I think what you just described is empathy, so – well, let me make two points. One is on the age thing. I mean, I go back to – we should look to see how these people have designed their careers. There was no mistaking about the kind of career Thurgood Marshall had, that Ruth Bader Ginsburg had, for example, or, for that matter, Scalia or Thomas or Roberts. You can see from their career. The whole ploy of appointing someone who graduated from law school 20 minutes ago is to prevent them from having had a career, so you can't tell what actually their character and their basic values and commitments really are.

But on the diversity question, it seems to me that – I mean, I guess I agree with both of you. I think that diversity's a central value and commitment. I think diversity in itself can be completely illusory and cosmetic. See Clarence Thomas, for example. And so that that's the cheapest form of diversity, that's silly. It almost mocks the idea.

But I would go beyond to say – maybe this is just my newfound career in politics, but the idea that it was ever any different is ridiculous. We had racial and gender identity politics for centuries. You had to be a white male to get on the Court, and Bill Brennan's a great example. This was a complete ploy by the Republican Party to reach out to Irish-Catholic Democrats in the Northeast, and it was widely understood to be so, and they figured that he'd be sort of a moderate go-along kind of justice. It was a great stroke of good fortune for the country that he evolved into what he did.

But I mean, so I wouldn't tie ourselves up into knots about this question of diversity, and if we appointed a great circuit judge, like Judge Tatel, to the Supreme Court, would that be a form of tokenism or something? He's a great judge, and it would mean a lot, indeed, to people who are disabled, just like the appointment of Justice Brennan meant a lot to Irish-Catholic Americans, and just like the appointment of Justice O'Connor meant a lot to women, even if a lot of women grew, I think justifiably, disappointed in a lot of things she did on the court, including the most outrageous sequence of decisions we saw in the '90s, which was *Shaw v. Reno* and all of these decisions invalidating majority black and Hispanic congressional districts.

I mean, I think as a justice in terms of what she did, there's a lot to be disappointed about in terms of Justice O'Connor, but nonetheless, she was still a great symbol to people and will be for a long time.

Julius Chambers:

There is – I have a difference there. I know Judge Tatel, and I have known him for years when he was with the Department of Justice and before, and I would have no hesitancy of supporting Judge Tatel. I also know some other individuals who've gone with the Department of Justice, but then there are some people I don't know, I would be very concerned about going on the bench as a member of the Supreme Court.

A lot of us didn't know Justice Souter, and a lot of people were concerned about Justice Souter, and perhaps for good reason, but he's turned out to be a very good justice. Now, on the other hand, some justices have come along who didn't have a long history, and some judges have gone on with no history, who have been horrible. And speaking as a minority, from what I've seen from judges, it's been a terrible experience having them come on the bench to deal with issues that were a primary concern to me.

Now, I think there's one other argument for getting young people on the bench, and that is you keep some young people, good people on the bench after the present administration is gone. That is an argument. The Republicans have gotten a lot of young judges.

You ought to go look at the district court judges and the court of appeals. These guys really are actually frightening. I don't want to go in any district court now because of what they have done, and I think they know it.

But it's a concern. I guess you're deciding that you don't want to make the same move that the Republicans did in getting youth on the bench. I don't know who would follow Obama, and my guess is it might be a reaction to Obama, and you might get someone who believes in strict construction, and you would worry about the people that president would appoint. I would be concerned about it, and I don't know that you have any way that you can assure yourself, and certainly me, that five years down the road we wouldn't get the same kind of judges that we have out there today if we didn't have some young judges on the bench. It's a real question, and I don't think it should be pushed aside so easily.

John Payton:

Yeah, I think it's a conundrum here, because I think that everybody agrees that the way we go about doing this is broken, and that being broken, it is causing us harm, so I think everybody agrees with that. And Julius, if you're right that we can't fix that, then you're right that we have to figure out how we live inside of that broken system. But I think we all hope we can fix it, and how long the fix would last we don't know, and it requires taking a risk either way. So, I mean, I hear you. I don't have a clear answer. I share the exact same doubts you just articulated.

Kathryn Kolbert:

And on that wonderful note, thank you all for joining us.



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