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Section 8: Bush's Legal Legacy

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VIII. BUSH’S LEGAL LEGACY

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The Bush administration’s legal performance in the war on terror is much like its performance in the war in Iraq. In both cases it had plausible objectives but employed mistaken, often counterproductive and occasionally foolish strategy. The Bush administration itself has admitted mistakes in Iraq. But it is also important to describe the errors in its legal strategy to which it has not yet admitted so that future administrations will not suffer similar defeats in the courts of law and the courts of public opinion.

The errors in the Bush administration’s legal strategy had common roots. One was an ideological focus on bolstering executive power and a consequent lack of pragmatic flexibility in choosing tactics that would maximize the chances of gaining public and judicial acceptance of its framework for detention, interrogation, and trial of terrorists as well as surveillance of individuals resident in America. The administration repeatedly failed to recognize that reliance on executive authority alone entailed a high risk of defeat at the hands of the Supreme Court.

Second, the administration radically underestimated the magnitude of the risk that the Court would curb the president’s discretion, because it misunderstood the changed legal environment for litigation in the twenty-first century. Every aspect of American life has been increasingly subject to court-made rules. As a result of this trend, even discretion in the war on terror would likely be seen through the prism of legalism that applies to domestic criminal law. Moreover, foreign elites, particularly European elites, would seek to influence our judiciary so as to tie down what they regard as a dangerous hegemon.

The third systematic error was a failure to recognize that all administrations tend to lose power as they age, and wars run a high risk of exacerbating that loss as they become progressively less popular. Of course, the scandals at Abu Ghraib and the more general lack of success in Iraq could not have been predicted. But an administration’s legal high command—and here I speak particularly of the White House counsel and attorney general and not of mid-level attorneys on their staffs or those simply defending the policies in court—must choose strategies that take account of the worst possible outcomes.

As a result, the administration would have been well advised to take every step to bolster its legal position as early as practicable. It could have secured from Congress framework legislation for
detention, military tribunals, surveillance, and perhaps even interrogation. Because citizens are generally most supportive of an administration at the beginning of a conflict (a phenomenon so well known among political scientists that is has been given the name “rally around the flag effect”), the terms of trade between the administration and Congress would likely have been favorable, even when the Senate was controlled briefly by the Democrats in late 2001 and 2002, not to mention in 2003 when Republicans took over both chambers and the United States was still savoring victory in Iraq. To be sure, nothing is certain in the legislative process, and deals would have had to be struck, but it seems almost certain the administration early on could have obtained legislation that would have met its strategic objectives. In this regard, the introduction of the Patriot Act is the paradigm the administration should have followed. It received overwhelming support in Congress for the new powers it sought. Its provisions have withstood judicial challenge, and the consensus support of the people’s representatives has made its harsh critics seem politically isolated.

The consequences of eschewing Congress and relying on judicial vindication of executive power in court have been grave. Far from strengthening executive power, the administration’s policies generated a series of Supreme Court defeats that have weakened it. These losses have contributed to a public perception that its policy for dealing with captured terrorists is in disarray and, still worse, that the United States is trenching on liberties as never before, when the reality is that the war in Iraq and the war on terror reduced domestic liberties less than earlier wars and even prisoners charged as war criminals had greater protections at trial than those charged previously. The unnecessary reliance on executive power has also permitted foreign critics to claim that President Bush is a lone ranger, whereas legislative endorsement of specific policies would have underscored the reality that these policies reflect the consensus of the American people.

Of course, it may be argued that these recommendations suffer from hindsight bias. The administration was faced with a dangerous new kind of enemy after 9/11, one made all the more fearsome in an age of weapons of mass destruction, and the optimal tactics to use against such an enemy were unclear. But recommendations offered here do not depend on any argument that the administration misunderstood the enemy—rather, that it misunderstood both the historical patterns of executive branch strength and weaknesses and the modern realities of the judiciary.

Let me stress at the outset that the administration’s errors were ones of prudence and judgment, not morality or ethics. The Bush administration’s lawyers had to confront novel kinds of questions without a clear legal map. These errors do not make their service any less patriotic and admirable. Yet some critics have criticized the work of these lawyers as incompetent and unethical. Amnesty International has even called for investigation of administration lawyers as war criminals without any showing that these lawyers’ arguments were made in bad faith or lacked a basis in law. The translation of legitimate disputes about law into matters of ethics and criminal law threatens to cut off the legitimate debate by which law is made in a democratic and pluralist society.

Getting Some Big Things Right

Before analyzing the Bush administration’s legal strategy on the war on terror, it is
important to reject some lines of criticism made popular by its opponents. First, critics are wrong to suggest that terrorism requires only enhanced law enforcement rather than the use of war powers. Second, critics are also wrong to suggest that the United States is bound by international law even if that law is not incorporated into our domestic law.

First, the 9/11 attack on the United States was an act of war no less than Japan’s attack on Pearl Harbor. Al Qaeda was a military organization that was attempting to harm and disrupt the United States as nation-state rather than simply harm individuals. As such, the action against it cannot be understood within a law enforcement paradigm, because that paradigm presupposes that the actors are within the bounds of civil society. Instead, al Qaeda and other Islamic terrorists act in a world that predates civil society, because between such strangers there is no common government responsible for law enforcement. Al Qaeda and its members are not part of our social compact and thus do not enjoy the rights that derive from it. Moreover, domestic criminal law is simply not adequate to deal with vast conspiracies that enjoy resources equivalent to those commanded by political entities rather than by a band of criminals.

Second, the administration should generally adhere to international law made binding domestically through the ratification of a treaty or incorporation into a statute. But when the critics of the Bush administration denounce it for violating international law, they do not confine themselves to complaints about international rules that have become domestic obligations. They complain, for instance, that Bush violated a norm of customary international law in invading Iraq or violated an interpretation of the United Nations Charter proclaimed by other nations or international bodies even if the United States has a different interpretation. They argue that the United States should follow interpretations of treaties made by international bodies and committees in treatment of enemy combatants.

The administration has no obligation to follow such norms. First, the Supremacy Clause of the United States Constitution makes only treaties and statutes the supreme law of the land. But it is more than a formal error for the United States to consider itself bound by international law unratified by the political branches. Such “raw” international law has a large democratic deficit. It does not emerge from any democratic process but is instead shaped by unrepresentative elites in the form of international law professors or international jurists who sometimes hail from authoritarian nations.

Indeed, American law is not only likely better than unratified international law for Americans, but in many areas is also likely to aid foreigners. Because of the position of the United States as the dominant economic and military power in the international system, it has strong incentives to provide international public goods, such as appropriate detention of international terrorists, that benefit foreigners as well as Americans. Thus, the administration not only has been doing Americans a favor when it does not allow unratified international law to constrain the President’s otherwise lawful discretion, but also has been doing a service for citizens around the world.

**Detention**

The United States faced three issues in adapting the war paradigm to hold prisoners
of war captured in the war on terror. First, unlike conventional wars, prisoners taken in the war against al Qaeda and other organizations are generally not in uniform and sometimes do not in fact proclaim their allegiance to their organizations. Their uncertain and often opaque identity creates a greater risk that individuals will be captured in error. Second, the war against al Qaeda does not have as clear a stopping point as conventional wars, because conventional wars generally can be ended by capturing the enemy’s territory or by peace negotiations. In particular, because these combatants are part of an irregular army and cannot be forced by their own domestic law to persist in or desist from fighting, their detention may extend long after their allegiance to the cause has dissipated.

The third difference affecting detention between conventional war and the war on terror is more general. The Bush administration should have realized that it would face a much more concerted legal effort to release these prisoners than would have been the case with respect to those captured in previous conventional wars. The precedents upon which the administration relied were generally from the World War II era. Yet since that time federal courts have constrained government discretion in running schools and prisons and ordered states to raise taxes. In 2000, they decided a presidential election. It is a short step to bringing more judicial regulation to war, particularly when that war is not conventional and may appear more closely related to law enforcement. Moreover, since that time the world has become smaller: Some of the justices of the Court have increasingly adopted a transnational perspective on constitutional jurisprudence—one that garners respect for the United States around the world and respect for themselves in their international networks of peer jurists.

In light of these potential problems, the Bush administration should have immediately acknowledged the differences that unconventional wars introduced into the legal framework for holding detainees and tempered the anomalies through the generous use of legal process, with military tribunals providing the initial process. Because of the legal climate and the possibility that its war effort would become unpopular and thus more liable to legal attack, it should also have sought Congress’s endorsement of these legal structures through framework legislation that would have supplemented the military process with review by Article III courts under a deferential standard.

Unfortunately, however, the Bush administration took a grudging approach to the granting of process and resorted to unilateral strategies that were easily portrayed as lawyers’ tricks. For instance, at first the administration argued that it could rely on ex parte assessments by the executive branch to determine whether those caught on the battlefield were in fact enemy combatants, even if they were United States citizens. This was a mistake even as matter of theory, not to mention prudence. The key question determining whether the war or law enforcement paradigm should apply is whether the individual’s action should be judged inside or outside our social compact. A citizen is within our social compact and should be treated within the war paradigm only if he has chosen to be an enemy combatant. He thus certainly deserves a more impartial and deliberate process to challenge his status before being treated as outside the pale.

Thus, there was a substantial risk that the Court would hold, as it did in *Hamdi v. Rumsfeld*, that an American citizen had a right to a more impartial process to challenge his designation as an enemy
combatant. Indeed, in *Hamdi* only a single justice, Justice Clarence Thomas, would have automatically deferred to the executive’s determination on *Hamdi*’s combatant status.

While the Court directly resolved only the question of a United States citizen’s due process rights, the Bush administration should have extended this right at the outset to noncitizens as well. By showing it was scrupulous in taking care not to have incorrectly detained noncombatants, the administration could have forestalled criticism and showed that its regime was not lawless, but carefully considered. Even more important, the more internal process it gave on such key issues, the less likely the Supreme Court would hold that individuals had full rights to habeas corpus. Some swing Justices, like Stephen Breyer, care about preventing errors and are not much concerned about the rubric under which that error correction occurred. In *Hamdi* itself, the Court indicated that the military tribunals, at least in the first instance, might provide sufficient process for a challenge to enemy combatant status.

For similar reasons, the administration from the outset should have publicly provided a process for determining when individuals were no longer substantial threats or could provide substantial information. Because members of al Qaeda are irregular enemy combatants, not common criminals, the United States cannot be put to the choice of trying these detainees and releasing them to the battlefield to fight again. But their irregular nature makes it less clear that they will fight again: No territorial power can compel them. A process for reviewing their dangerousness and information value might even have given detainees incentives to rethink their commitment to jihad and consider how they could make concrete commitments to show that they would not go back to the fight.

Whatever the administration did, however, lawyers in the United States were going to file lawsuits on behalf of the prisoners seeking more and better process and rights indistinguishable from Americans accused of crimes. The basic response of the administration to this prospect was to keep detainees at Guantanamo. Because Guantanamo is not part of the United States and yet is controlled by it, these legal strategists believed it was the perfect place to hold the prisoners more easily than they could in foreign territory and yet be immune from the reach of United States courts. To split metaphysical sovereignty from control was extremely clever, but it was clearly vulnerable to attack as a legal fiction. Although the Supreme Court a half-century ago refused jurisdiction over habeas claims in a case that arose in allied-occupied Germany, such precedent cannot be relied on to hold up when translated to a new context in a high-profile case like this one. Thus, the Supreme Court’s decision in *Bush v. Rasul*, in which it insisted on taking jurisdiction of habeas cases at Guantanamo, should have been seen as a substantial risk.

It is the Bush administration’s legal strategy that in large measure has made Guantanamo a symbol of lawlessness in the administration’s war on terror. Its creation at least in part for strategic litigation advantage suggests to the outside world that the United States was playing legal games rather than following principles of law. And because the administration was making these decisions without legislative input, it could be portrayed as eccentric and malevolent rather than a faithful agent of the American people.

Instead of resorting to a legal sleight of hand, the administration should have gone to
Congress to bolster its case. If Congress had from the beginning endorsed the framework for holding detainees outlined above, the Court would have been unlikely to disturb this settlement. The reasons for such deference are both doctrinal and practical. As a doctrinal matter the Court gives substantial deference to Congress’s weighing of the costs and benefits of various procedures. In a recent book, Professor Eric Posner and Adrian Vermeule suggest that the Court should give this kind of deference to the executive in cases concerning terrorism because the Court’s institutional competence in devising responses to terrorism is much less than that of the executive. But the executive may not have the appropriate incentives to make the trade-off between liberty and security. It is more likely to discount all liberty interests because of its recognition that the greatest risks to its political standing come from a lapse in security, however improbable the cause, rather than from complaints about liberties foregone.

More important from a strategic perspective, whatever degree of deference the Court should give to the executive as a matter of normative principle, as a matter of realpolitik the Court is much more reluctant to disturb the judgment endorsed by Congress as well as the president. Such action would fly much more clearly in the face of the popular will.

Moreover, such a framework statute would also have permitted the United States to hold these prisoners, as they did German prisoners and other previous captives, in the United States, thus dispensing with the negative symbolism of a place that can easily be portrayed as a legal netherworld. It may be argued that the administration still needed a jurisdiction outside the territorial United States to make prisoners’ habeas petitions less likely to succeed. The construal of rights protected by habeas, however, has been historically flexible and context dependent. If the courts were satisfied that the prisoners were getting the amount of process that Congress judged reasonable for enemy prisoners, it would be unlikely to require substantive changes.

The ready availability of a congressional solution raises the question of why it was not sought. One explanation is that the administration thought that using Congress would detract from its project of using the crisis to bolster executive authority. In particular, Vice President Cheney, who had seen the decline of executive authority occasioned by Watergate and Vietnam, has spoken out frequently of the need to restore executive power. This strategy, however, was imprudent.

First, it was not likely to succeed. The Supreme Court had only two consistent supporters of executive power—Justices Scalia and Thomas. Even Chief Justice Rehnquist, who had worked in the Office of Legal Counsel, an office dedicated to preserving executive power, had ruled against the executive in such important cases as that concerning the Independent Counsel Act and had celebrated the Court’s curbing of executive overreaching in Youngstown.

Second, it is a mistake to risk substantial harm to an important policy in order to build up precedents for an undefined future eventuality. The interpretation of executive power has waxed and waned over the course of American history, dependent largely on justices’ reaction to the felt necessities of the time and the constellation of political power in Congress and in the nation. Even had the Bush administration won a victory for the executive branch in the context of detention, it would be distinguished away if future
Interrogation Methods

Once again, the administration had serious issues to address in determining the interrogation methods to be used on those detained. On the one hand, any administration should have wanted to be able to use interrogation methods that would elicit information to stop attacks on the order of 9/11. On the other hand, any administration should have been eager to show that the United States acted humanely with respect to even egregious wrongdoers and in particular followed the strictures of the Torture Convention. Restraint and adherence to our own laws underscores the attractiveness of our civilization in the global battle of ideas against radical Islam. This American tradition goes back to the Revolutionary War when George Washington insisted that the American army take prisoners even after Hessians slaughtered his soldiers without quarter at Fort Washington.

That balance might have been best struck, again, by going to Congress and seeking framework legislation. Congress should and would have authorized the administration to use harsh interrogation methods short of torture in the circumstances where such methods were necessary to get information to forestall attacks. A system requiring personal and recorded authorization by a Cabinet official in specific cases would provide substantial safeguards that these methods would be used only selectively and where necessary. To be sure, such congressional deliberation would have been a messy process and would have publicized the administration’s methods when secrecy could itself have value by making it harder for the enemy to prepare for questioning. But nothing on a matter so controversial is kept secret long in Washington, and when Congress set limits to the administration’s interrogation process as it did in 2006, it was also a messy process. The debate that Congress could have provided at the outset would have helped educate the world to the reasons that such interrogations were needed in the interest of the safety not only of the United States but of other nations that were threatened by the mass slaughter of modern terrorism.

But whether or not the administration chose to go to Congress to reinforce the legality of its interrogations methods, it could hardly have chosen a worse strategy than it pursued. In a memo written to Alberto Gonzales on August 1, 2002, the Office of Legal Counsel provided a general interpretation of the Torture Convention by limiting the concept of torture to the infliction of physical pain “equivalent in intensity to the pain accompanying serious physical injury such as organ failure or impairment of bodily function.” According to the memo, the only psychological harm that amounted to torture would be that “leading to significant duration, e.g. lasting months or even years.” Finally, the memo concludes that the president has the constitutional authority to set even those strictures aside if they impair his ability to order interrogations pursuant to his authority as commander in chief.

It is not my purpose here to dispute these conclusions as legal matters, but to show that whatever its correctness, the memo was utterly counterproductive and should have been seen as such at the time. Indeed, my strongest reaction as a former official at the Office of Legal Counsel was not that of other observers who attacked the legal analysis or even the morality of the memorandum. Instead I saw it as a bureaucratic blunder committed not so much by the attorneys at OLC but by the White House counsel and others in the
administration who asked for this kind of analysis.

First, to anyone who has worked in the collaborative process of the executive branch, it was clear that this memo would be leaked, and leaked at the most inconvenient time to the administration. One rule I had at the Office of Legal Counsel was to consider how the phrasing and framing of a memo I wrote would look on the first page of the Washington Post. From this perspective, it should have been clear that the abstract analysis and sweeping language in both its statutory and its constitutional analysis would allow opponents of the administration to paint the memo as radical and unbounded, undermining support for harsh interrogation tactics as well as the administration’s general legal credibility.

Assuming that the administration chose not to obtain a framework authorization statute from Congress, a far better way to achieve the administration’s objectives would have been to catalogue the kind of interrogation methods the administration actually wanted to use and explain in some detail why those methods would not amount to torture. This memo would have been a far more limited and less controversial opinion, although some would still have disagreed with its analysis. It should also have omitted the unnecessary claim that the president could in some circumstances disregard the convention. This sweeping claim seems to have been motivated by an interest in restoring general executive branch authority. But it is fanciful to believe that unilateral declarations by the executive branch can accomplish this goal. And by putting that expansion of executive power in the context of what seemed to be an almost limitless power to torture detainees, the memo set back the cause it was trying to promote.

War Crimes Trials

The administration once again had legitimate objectives in establishing military tribunals to prosecute some of the detainees for war crimes. It wanted to bring those who violated the laws of war to justice and deter subsequent violations. But it did not want to use the Article III court system and all its protection. To do so would in some cases have exposed national security information. More fundamentally, our trial system would have taken a very long time and provided a panoply of rights which, however important to protect individual liberties within civil society, should not be extended to irregular combatants outside the social compact. Swift military justice is part of the necessary shock and awe against war criminals.

So far, however, the administration has succeeded in conducting only one war crimes trial. One reason for the delay was that the administration’s first set of rules for conducting the trials faced such vigorous criticism that they were sent for revisions. Even after revision, many military lawyers within the administration objected to some of the provisions, creating a kind of bureaucratic inertia that delayed indictments. But the most important reason for delay was the war criminal defendants’ successes in the lengthy constitutional litigation over the procedures. In Hamdan v. Rumsfeld the Court held that some of the administration’s procedures violated the Uniform Code of Military Justice as well as Article III of the Geneva Convention which, according to the Court, Congress had made applicable to military tribunals.

This signal defeat was quite possibly related to previous mistakes in legal strategy. Strikingly, the Court gave no deference to the administration’s interpretation of either
the Uniform Code of Military Justice or Article III of the Geneva Convention, despite precedent for deferring to the executive’s interpretations of treaties and statutes governing the military. Whatever the doctrinal categories of deference, the general credibility of executive branch positions will hugely influence the actual degree of deference the Court applies. This credibility was damaged by previous administration legal analysis, like that contained in the memo on interrogations, which the administration itself later repudiated.

In *Hamdan* itself, Justice Breyer noted that the president could “return to Congress to seek the authorization he believes necessary.” Of course, the president would not have had to return to Congress and would not have faced substantial bureaucratic foot-dragging had he sought congressional authorization for the military tribunals in the first place. The administration almost certainly would have been successful, because even after the Supreme Court defeat in *Hamdan*, it got most of the procedures previously proclaimed unilaterally with some exceptions, including restrictions on use of hearsay and classified information. But the president was in a stronger political position in 2003 and probably even in 2001 than at the end of 2006.

It could be argued that the administration’s ability to get most of what it wanted by Congress vindicated its strategy to try first to avoid congressional action. But the administration would probably have gotten a better deal if it had gone to Congress before its Supreme Court defeat. It could have sought authority for trials of war criminals while holding out the prospect of going it alone if Congress refused. And it would have avoided the delay in trials caused by the Supreme Court defeat. The legal strategy with respect to war crimes was not the worst aspect of the administration’s performance, but it still cannot be counted a success.

**Surveillance**

The Bush administration also had a choice about whether to obtain express authorization to undertake surveillance of individuals in the United States who were in contact with those in or near the battlefields of terrorism. It decided to rely instead on the president’s authority as commander in chief and the general authority of the statute that authorized the administration to undertake military actions against the terrorist organizations.

It was a mistake not to obtain express congressional authorization for surveillance when it could easily have been obtained. Indeed, it may have run more substantial risks to rely on executive authority in this regard than in the area of detentions and interrogations. First, Congress here had already passed framework legislation in the Foreign Intelligence Surveillance Act (FISA), which regulated the authority of the executive to wiretap individuals resident in the United States. That legislation by its terms appears inconsistent with the authority exercised by the administration because it requires warrants, which the administration has not sought. It appears to contemplate its applicability in time of war, because it provided additional time to obtain such warrants in wartime. Second, because the surveillance being undertaken was of residents in the United States, there was an even greater risk that courts would not extend precedent to protect executive discretion in this new kind of war.

**Wasting Assets**

The Bush administration’s legal strategy in the war on terror has been deeply flawed.
Because of its interest in establishing powerful precedent in favor of executive powers, it took bold positions that carried substantial risks of judicial repudiation and failed to obtain legislative endorsement at times of political opportunity. As a result, the Supreme Court said on two occasions that the president was acting illegally, confirming an impression that he was a rogue operator outside established law and popular opinion. The lesson for future administrations seems clear. First, recognize that we live in a time of much more activist courts even in the era of foreign affairs. That fact may be bemoaned, but it cannot be ignored, and the reality of their possible interventions must be factored into strategy from the outset. Second, rely more on Congress than on courts, particularly when the president enjoys support in the initial states of conflict or his party controls Congress.

It is the executive power to persuade from a position of strength rather than formal legal powers that is the president’s greatest asset. But it is generally a wasting asset, and the president should therefore translate it into more lasting legislative tools before its dissipation. The president has suffered reverses in the war in Iraq because he did not call in enough troops after the fall of Baghdad. He has had substantial losses in his legal wars because he did not call on citizens through their representatives to rally around a new, but carefully circumscribed, system of wartime detention and surveillance.
A deeply divided Supreme Court yesterday ruled that terrorism suspects held at Guantanamo Bay have a right to seek their release in federal court, delivering a historic rebuke to the Bush administration and Congress for policies that the majority said compromised, in the name of national security, the Constitution’s guarantee of liberty.

“The laws and Constitution are designed to survive, and remain in force, in extraordinary times,” Justice Anthony M. Kennedy wrote for a five-member majority clearly impatient that some prisoners have been held for six years without a hearing.

The much-anticipated decision was the fourth time the court has ruled against the administration’s ambitious attempt to create a framework for detaining and prosecuting terrorism suspects outside the protections the U.S. legal system generally provides.

The cases decided yesterday were brought on behalf of 37 foreigners at Guantanamo Bay. All were captured on foreign soil and have been designated enemy combatants. They have proclaimed their innocence—some say they were turned over to coalition forces for money—and for years have asked federal courts for a chance to challenge their captivity.

Their claim is to the writ of habeas corpus, the right with roots in English law and enshrined in the Constitution that gives a prisoner the ability to protest his confinement before an independent judge. The Bush administration chose Guantanamo Bay as the place to house those captured in other countries and suspected of terrorism because it thought such a right did not
extend to the base in Cuba.

The administration has sought to restrict access to federal courts by those captured in the fight against terrorism since the Sept. 11, 2001, attacks. Those efforts have led to clashes between the courts, the president and Congress.

Each time, the Supreme Court has ruled against the administration, but the majority noted yesterday that losing the battles has not kept the administration from winning the war: After six years, none of the detainees has succeeded in getting his complaint reviewed by a judge.

"The costs of delay can no longer be borne by those who are held in custody," wrote Kennedy, who, in a return to the pivotal role he played last term, joined the court's liberal justices—John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. "The detainees in these cases are entitled to a prompt habeas corpus hearing."

Kennedy made it clear that the ruling does not mean the detainees could prevail in such hearings. He also said the decision does not address whether the president holds the authority to detain those thought to be enemy soldiers in the battle against terrorism.

Yesterday’s decision in Boumediene v. Bush and Al Odah v. United States continued an administration losing streak with regard to the Guantanamo detainees issue. The court ruled in 2004 in Rasul v. Bush that federal law provided the detainees the habeas privilege because of the unique control the U.S. government has over the land at the Cuban base.

The Republican-led Congress responded by changing the law, and after another adverse court ruling and at the urging of the administration, it passed the Military Commissions Act in 2006. The legislation endorsed a military system for designating detainees as enemy combatants and for trying those charged with crimes. It also strictly limited judicial oversight.

The court yesterday first had to decide again whether those held in Guantanamo have a right to habeas under the Constitution, since Congress changed the law. It ruled that they do, again because of the government’s control of the land.

The court acknowledged it was the first time it had ruled that “noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution.”

Such a constitutional right can be suspended by Congress only in times of “rebellion or invasion,” and the government did not argue that situation faced Congress at the time it changed the law.

Then, the court had to decide whether the method devised for determining whether a detainee could be classified as an enemy combatant—and thus indefinitely held—is an adequate substitute for a habeas hearing before a judge.

Those hearings, called Combatant Status Review Tribunals, are held before military authorities. The majority noted that the prisoners are not represented by lawyers and have limited ability to present evidence on their behalf, and that there is no mechanism for their release by a federal court reviewing the decision if the court feels there is inadequate reason to hold them.

The risk of error, Kennedy wrote, is too great, especially when a person is detained because of an executive order. "We hold that
those procedures are not an adequate and effective substitute for habeas corpus,” he wrote.

Chief Justice John G. Roberts Jr., joined by Scalia and Justices Clarence Thomas and Samuel A. Alito Jr., wrote a stinging rebuttal defending what he called “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.”

He assailed the majority for rebuffing the system “crafted” by the political branches before it had been fully reviewed and implemented by the lower courts. The decision, he said, “is not really about the detainees at all, but about control of federal policy regarding enemy combatants.”

Scalia, in the dissent he wrote, accused the majority of ignoring a precedent that declined to extend habeas protection to foreign aliens, and noted it had suggested in earlier rulings that the president and Congress work together to come up with a substitute for such hearings.

“Turns out they were just kidding,” he wrote sarcastically.

Even some members of Congress who voted for the Military Commissions Act, such as Sen. Arlen Specter (R-Pa.), had predicted that the court would find provisions of the law unconstitutional.

But Sen. Lindsey O. Graham (R-S.C.), a key figure in the passage of the act, denounced “what I think is a tremendously dangerous and irresponsible ruling by the U.S. Supreme Court. The court has conferred upon civilian judges the right to make military decisions.”
Observers at the Supreme Court on Wednesday should probably be excused in advance for concluding that they have wandered into a time warp.

The question before the court will be whether federal judges have jurisdiction to hear cases brought by detainees at Guantanamo Bay, Cuba. A lawyer for a group of detainees will argue that they do; the Bush administration’s solicitor general will argue that they do not.

But did not the court already decide that question? Did not the justices rule in *Rasul v. Bush* in 2004 that federal judges could review the legality of the Guantanamo detentions, rejecting the administration’s position that the detainees’ fate was a question for the executive branch alone?

No, history will not just be repeating itself at the court Wednesday. It has moved on, and the four years since the court shocked the administration by agreeing to hear the *Rasul* case have been busy ones.

Each of the three branches of government has made a series of judgments on how to strike the balance between individual liberty and national security in the post-9/11 era. This latest Supreme Court confrontation, round three of the justices’ encounter with the detainee question, reflects an extraordinary interbranch drama, played out as a series of actions and reactions that has now cycled back to where it began: the role of the federal courts.

This third round is potentially the most momentous, because at stake is whether the Supreme Court itself will continue to have a role in defining the balance or whether, as the administration first argued four years ago, the executive branch is to have the final word.

The roots of the new case, *Boumediene v. Bush*, No. 06-1195, lie in the court’s second-round detainee case, *Hamdan v. Rumsfeld*, decided in 2006. The court ruled that the military commission system the Bush administration had set up to try enemy combatants for war crimes was fatally flawed because the president had acted without Congressional authorization.

That decision came in an appeal brought by Salim Ahmed Hamdan, a former driver for Osama bin Laden. Mr. Hamdan’s route to court had been by means of a petition for habeas corpus, the traditional route for prisoners to get before a judge to challenge the validity of their confinement.

In its waning weeks under Republican control, Congress responded swiftly to the *Hamdan* decision by passing the Military Commissions Act of 2006. This new law not only authorized the military commissions—a commission at Guantanamo will begin taking evidence against Mr. Hamdan on Wednesday—but also provided that “no court, justice or judge shall have jurisdiction to hear or consider” further habeas corpus petitions from foreigners held as enemy combatants, at Guantanamo or anywhere else.

Now the question before the Supreme Court is whether that court-stripping action was valid in light of the Constitution’s injunction...
to Congress not to suspend "the privilege" of habeas corpus "unless when in cases of rebellion or invasion the public safety may require it."

No one disputes that those conditions have not been met. But resolving the challenge to the Military Commissions Act is not as simple as stating that obvious fact.

Modern Supreme Court decisions have put a gloss on the "suspension clause," as the constitutional provision is known, holding that habeas corpus need not be available in a formal sense as long as prisoners have an "adequate and effective" substitute for challenging the validity of their detention. The government offers a substitute: "combatant status review tribunals," which are panels of military officers who review the initial determination that an individual detainee has been properly labeled an enemy combatant.

As substitutes for habeas corpus, the tribunals are "structurally and incurably inadequate," Seth P. Waxman, a lawyer for six Algerian detainees, asserts in his brief. By sharply limiting access to evidence and witnesses and by forbidding defense lawyers from participating in the hearings, he says, the alternative procedure fails to offer "even the most elemental aspects of an independent adversarial proceeding."

Mr. Waxman, who served as solicitor general in the Clinton administration, will argue on behalf of the four groups of detainees whose separate cases have been consolidated for a single argument. The current solicitor general, Paul D. Clement, will argue for the government. It will be Mr. Clement's fourth argument in a detainee case; he argued the Hamdan case last year and, as principal deputy solicitor general, also argued a pair of cases that the court heard along with the Rasul case in 2004.

The government's position is that the detainees' complaints about the alternative procedure are irrelevant. Mr. Clement argues that the Military Commissions Act has rendered moot the court's 2004 decision that federal judges had jurisdiction over cases from Guantanamo. That ruling, in the Rasul case, simply interpreted the federal habeas corpus statute as it then existed, he says, before the Military Commissions Act amended the statute to withdraw jurisdiction.

Without a statutory basis for jurisdiction, the government's argument continues, there is no jurisdiction because as "aliens with no connection to this country who were captured abroad in the course of an ongoing military conflict," the detainees can claim no constitutional entitlement to habeas corpus.

In any event, the alternative procedure is more than adequate, Mr. Clement asserts in the government's brief, enabling the detainees to "enjoy more procedural protections than any other captured enemy combatants in the history of warfare."

The government's argument persuaded the United States Court of Appeals for the District of Columbia Circuit, which ruled in February that the Military Commissions Act had succeeded in removing the federal courts' habeas corpus jurisdiction. In April, the Supreme Court initially turned down the detainees' appeal of that ruling, before reversing itself in a startling about-face on the final day of its term in June.

The Algerians whom Mr. Waxman represents are among 34 detainees in the current case. The others include a Libyan, a Palestinian, 4 Kuwaitis and 22 Yemenis, who represent the biggest national group among the 300 or so men being held at Guantanamo. Most of those before the court were captured in Afghanistan or Pakistan by
bounty hunters or local tribes who turned them over to United States forces.

The Algerians are an exception. Lakhdar Boumediene and the other five immigrated to Bosnia during the 1990s and were legal residents there. They were arrested by Bosnian police in October 2001 on suspicion of plotting to attack the United States embassy in Sarajevo.

The Supreme Court of Bosnia and Herzegovina ordered them released three months later for lack of evidence. The Bosnian police seized them immediately and turned them over to the United States military, which transported them to Guantanamo.

Mr. Waxman is arguing that because these six do not fit any authorized definition of enemy combatant, the Supreme Court should order their release.

If the court rules for the detainees, a more likely result is an order to the appeals court to consider for the first time the merits of the men’s habeas corpus petitions. The government would then almost certainly renew the argument it made in the immediate aftermath of the Rasul decision: that even assuming the existence of the federal courts’ jurisdiction, the detainees had no constitutional rights that they could assert. That question, which the justices have not directly confronted in any of the cases so far, would then almost certainly come back to the Supreme Court.

The vote in the Hamdan case last year was 5 to 3. Chief Justice John G. Roberts Jr. did not participate, because he had voted in the case, on the government’s side, when he was a judge on the appeals court. The dissenting justices were Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., voting in his first detainee case.

The conventional wisdom that the outcome of the new case will depend on the vote of Justice Anthony M. Kennedy is almost certainly correct.

Justice Kennedy has been in the majority in the other detainee cases and, quite likely, gave a signal in June that gave the more liberal justices the confidence to add the case to the court’s docket with some assurance of the likely outcome.

Some of the many briefs filed for the detainees address arguments to Justice Kennedy.

Limiting access to lawyers presents a danger to individual rights and a “severe impairment of the judicial function,” the New York City Bar Association says in a brief addressed to the prohibition on lawyers participating in the review tribunals. The quotation is from a 1991 Supreme Court decision that struck limitations placed on Legal Services Corporation lawyers. Justice Kennedy was the decision’s author.
“Due Process for Jihadists?”

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Andrew McCarthy

“Isn’t the main issue,” Justice John Paul Stevens plaintively asked, “the fact that it has taken six years” to resolve the question whether alien enemy combatants “have been unlawfully detained” at Guantánamo Bay?

For the Supreme Court hearing arguments last week in Boumediene v. Bush, that should not even be a relevant issue. (Lakmar Boumediene is an Algerian who emigrated to Bosnia in the 1990s. He was arrested for plotting to attack the U.S. embassy in Sarajevo and turned over to the U.S military.) If it is lawful to imprison captured enemy operatives without trial until the end of hostilities, as it has been for centuries under the laws of war, then it should not matter how long they’ve been held. Thus did Solicitor General Paul Clement gamely counter that emphasizing the six-year delay serves only to “cloud the basic constitutional question before this Court.”

Yet, for most of the morning it was difficult to remember what that issue was. Not for want of skilled lawyering; Clement and his adversary, former (Clinton administration) Solicitor General Seth Waxman, gifted advocates, were at the top of their very considerable games. No, the problem is that the basic question is too bracing: Does the Constitution of the United States afford any due process for alien jihadists even as they conduct a terror war against Americans?

Waxman is far too clever to claim that the Framers somehow designed a Constitution which entitles enemies of the American people to use the courts of the American people as a weapon of their war against the American people: that the judiciary is not a governmental component of a nation at war but rather an impartial supra-tribunal whose only allegiance is to “the law.” So the combatants’ side resisted couching their claim as an entitlement of the enemy.

We were instead serenaded with a song of our constitutional commitment to that holiest of rhetorical holies, the rule of law. Even in the midst of hostilities, Waxman maintained, there can be no “law-free zones.” Not at Gitmo, and not, as Chief Justice John Roberts’s piercing questions teased out of Waxman’s euphonious sound-bite, in any place on the globe where the United States fights war and takes prisoners. To the contrary, there must always and everywhere be a judicial process for reviewing military detention: a process that is both meaningful and, Waxman stressed, swift—defly pouncing on Justice Stevens’s “main issue.”

Even if one agreed, for argument’s sake, that there should be such a process, however swift, that would not necessarily mean it needed to be a constitutional process. Congress has designed an adequate statutory procedure for testing the fundamental fairness of detention, so there should be no need to confront the more vexing issue of whether the Constitution imposes any limits on the harshness with which government may treat the enemy during hostilities. This, not surprisingly, was the tack that Clement took. Having had all manner of Constitution-shredding calumny laid at its feet since 9/11, the administration clearly preferred to gear its oral argument toward
how much, in reality, has been done for the combatants. How much, in theory, could be done to them is better left for the brief to explain.

The solicitor general had a very good case. Let's leave aside that in *Johnson v. Eisentrager* (1950) the Supreme Court flatly held that the Constitution does not vest foreign enemies with the right to habeas corpus—i.e., to challenge their military detention before the civilian courts. Let's instead compare what Congress has wrought (with the 2005 Detainee Treatment Act and the 2006 Military Commissions Act) and “the base line” of 1789, when the Constitution enshrined habeas rights for Americans.

Clement recounted that in the late 18th century, alien combatants faced three insuperable hurdles in front of the courthouse door: (a) the jurisdiction of the federal courts did not extend outside U.S. territory; (b) the judicial writ was simply unavailable to belligerents because taking prisoners of war was deemed a political act of the sovereign, not a legal question for the courts; and (c) judges were required by separation-of-powers principles to accept the executive branch’s determination of combatant status.

Now, by contrast, combatants are given systematic judicial reviews in the civilian courts despite being held in a location, Guantánamo Bay, that the political branches have reaffirmed is not part of sovereign U.S. territory. That civilian review comes after a combatant status review tribunal modeled on Army regulations for the treatment of honorable combatants (not terrorists)—except to the extent the tribunal is more solicitous of the welfare of Gitmo detainees, affording them rights to a personal representative and an unclassified summary of the factual basis for detention. In a close case, the executive is entitled to the benefit of the doubt, but the court may invalidate combatant status if it is not supported by a preponderance of the evidence. That, moreover, is in addition to its review of the military’s fidelity to its own tribunal regulations and of whether those regulations pass muster under the Constitution and other federal law.

The permissible scope of this review provided the day’s most intriguing exchanges. Court watchers widely assume that the conservative and liberal blocs are split four on each side, and that Justice Anthony Kennedy’s vote will be decisive, as it was when the justices held, in the 2004 *Rasul* case, that combatants had statutory habeas rights—rights Congress subsequently narrowed. In the course of Clement’s argument, Justice Stephen Breyer adduced the solicitor general’s admission that, broad as it may be, the judicial review prescribed by the Detainee Treatment Act does not permit combatants to lodge every conceivable claim against their detention; they are limited to challenging the validity of the combatant status tribunal procedures. So, Justice David Souter surmised, that must mean they are foreclosed from arguing that the concept of “unlawful enemy combatant,” the gravamen of any detention finding, is too broad? No, Clement responded, they most certainly can “raise a constitutional claim that the definition is broader than constitutionally could be enforced.” Kennedy, pleasantly surprised, interjected: He had not realized, during the solicitor general’s joust with Breyer, that Clement had made this concession.

It is a weighty point. In the Military Commissions Act, Congress defined unlawful enemy combatant expansively. The term includes not only al Qaeda, the
Taliban, and “any international terrorist organization, or associated forces” engaged in hostilities against the United States and its allies, but also any person the executive determines has “supported” those hostilities. While obviously justifiable in cases where support involves a knowing, material contribution to jihadist warfare, this definition could potentially stretch indefinite detention in a worrisome way—especially for judges wedded to traditional notions of “combatant” and “battlefield” that terrorist savagery has rendered passé. Clement, however, was emphatic: The D.C. Circuit “absolutely” has jurisdiction to consider whether Congress has too loosely defined the enemy.

Whether that will satisfy Kennedy remains to be seen. Plainly, six years have changed a lot of perspectives, even though that doesn’t (or, at least, shouldn’t) change the Constitution. Getting down to originalist basics, Justice Antonin Scalia pressed Waxman, “Do you have a single case in the 220 years of our country or, for that matter in the 500—the five centuries of the English empire in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England?” The issue might have been that simple on September 11, 2001. It no longer is.

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WASHINGTON—With the final passage through Congress of the detainee treatment bill, President Bush on Friday achieved a signal victory, shoring up with legislation his determined conduct of the campaign against terrorism in the face of challenges from critics and the courts.

Rather than reining in the formidable presidential powers Mr. Bush and Vice President Dick Cheney have asserted since Sept. 11, 2001, the law gives some of those powers a solid statutory foundation. In effect it allows the president to identify enemies, imprison them indefinitely and interrogate them—albeit with a ban on the harshest treatment—beyond the reach of the full court reviews traditionally afforded criminal defendants and ordinary prisoners.

Taken as a whole, the law will give the president more power over terrorism suspects than he had before the Supreme Court decision this summer in Hamdan v. Rumsfeld that undercut more than four years of White House policy. It does, however, grant detainees brought before military commissions limited protections initially opposed by the White House. The bill, which cleared a final procedural hurdle in the House on Friday and is likely to be signed into law next week by Mr. Bush, does not just allow the president to determine the meaning and application of the Geneva Conventions; it also strips the courts of jurisdiction to hear challenges to his interpretation.

And it broadens the definition of “unlawful enemy combatant” to include not only those who fight the United States but also those who have “purposefully and materially supported hostilities against the United States.” The latter group could include those accused of providing financial or other indirect support to terrorists, human rights groups say. The designation can be made by any “competent tribunal” created by the president or secretary of defense.

In very specific ways, the bill is a rejoinder to the Hamdan ruling, in which several justices said the absence of Congressional authorization was a central flaw in the administration’s approach. The new bill solves that problem, legal experts said.

“The president should feel he has better authority and direction now,” said Douglas W. Kmiec, a conservative legal scholar at the Pepperdine University School of Law. “I think he can reasonably be confident that this statute answers the Supreme Court and puts him back in a position to prevent another attack, which is the goal of interrogation.”

But lawsuits challenging the bill are inevitable, and critics say substantial parts of it may well be rejected by the Supreme Court.

Over all, the legislation reallocates power among the three branches of government, taking authority away from the judiciary and handing it to the president.

Bruce Ackerman, a critic of the administration and a professor of law and political science at Yale University, sharply
criticized the bill but agreed that it strengthened the White House position. “The president walked away with a lot more than most people thought,” Mr. Ackerman said. He said the bill “further entrenches presidential power” and allows the administration to declare even an American citizen an unlawful combatant subject to indefinite detention.

“And it’s not only about these prisoners,” Mr. Ackerman said. “If Congress can strip courts of jurisdiction over cases because it fears their outcome, judicial independence is threatened.”

Even if the Supreme Court decides it has the power to hear challenges to the bill, the Bush administration has gained a crucial advantage. In adding a Congressional imprimatur to a comprehensive set of procedures and tactics, lawmakers explicitly endorsed measures that in other eras were achieved by executive fiat. Earlier Supreme Court decisions have suggested that the president and Congress acting together in the national security arena can be an all-but-unstoppable force.

Public commentary on the bill, called the Military Commissions Act of 2006, has been fast-shifting and often contradictory, partly because its 96 pages cover so much ground and because the impact of some provisions is open to debate.

“This bill is about so many things, and it’s a mixed bag,” said Elisa Massimino, the Washington director of Human Rights First, a civil liberties group.

Ms. Massimino’s group and others criticized the bill as a whole, but she agreed with the Republican senators who negotiated for weeks with the White House that it would ban the most extreme interrogation methods used by the Central Intelligence Agency and the military.

“The senators made clear that waterboarding is criminal,” Ms. Massimino said, referring to a technique used to simulate drowning. “That’s a human rights enforcement upside.”

The debate over the limits of torture and the rules for military commission dominated discussion of the bill until this week. Only in the last few days has broad attention turned to its redefinition of “unlawful enemy combatant” and its ban on habeas corpus petitions, which suspects have traditionally used to challenge their incarceration.

Law professors will stay busy for months debating the implications. The most outspoken critics have likened the law’s sweeping provisions to dark chapters in history, comparable to the passage of the Alien and Sedition Acts in the fragile years after the nation’s founding and the internment of Japanese-Americans in the midst of World War II.

Conservative legal experts, by contrast, said critics could no longer say the Bush administration was guilty of unilateral executive overreaching. Congressional approval can cure many ills, Justice Robert H. Jackson wrote in his seminal concurrence in Youngstown Sheet and Tube Company v. Sawyer, the 1952 case that struck down President Harry S. Truman’s unilateral seizure of the nation’s steel mills during the Korean War.

Supporters of the law, in fact, say its critics will never be satisfied. “For years they’ve been saying that we don’t like Bush doing things unilaterally, that we don’t like Bush doing things piecemeal,” said David B. Rivkin, a Justice Department official in the administrations of Ronald Reagan and
George H. W. Bush.

How the measure will look decades hence may depend not just on how it is used but on how the terrorist threat evolves. If a major terrorist plot in the United States is uncovered—and surely if one succeeds—it may vindicate the Congressional decision to give the government more leeway to seize and question those who might know about the next attack.

If the attacks of 2001 recede as a devastating but unique tragedy, the decision to create a new legal framework may seem like overkill. “If there is never another terrorist attack and we never obtain actionable intelligence, this will look like a huge overreaction,” said Gary J. Bass, a professor of politics and international affairs at Princeton.

Long before that judgment arrives, legal challenges are likely to bring the new law before the Supreme Court. Assuming the justices rule that they retain the power to hear the case at all, they will then decide whether Congress has resolved the flaws it found in June or must make another effort to balance the rights of accused terrorists and the desire for security.
The Supreme Court declared Thursday that President Bush had overstepped his authority in the war against terrorism, ruling he does not have the power to set up special military trials at Guantanamo Bay without the approval of Congress.

In a 5-3 decision, the high court said the planned military tribunals lacked the basic standards of fairness required by the nation's Uniform Code of Military Justice and by the Geneva Convention.

The ruling is the most sweeping legal defeat for the administration in the 5-year-old war on terrorism, and it rejects the president's broad claim that the commander in chief can make the rules during an unconventional war.

Since 1929, the Geneva Convention has set rules for the conduct of wars and the treatment of prisoners, but Bush and his top advisors have maintained that it does not apply to suspected terrorists.

Still, the practical impact of Thursday's decision may be limited. The court said terrorism suspects could be tried under the rules for courts-martial used by the American military or under new rules that could be passed by Congress.

The decision does not free any terrorism suspects, as the president noted, nor does it change the status of the approximately 450 detainees at the U.S. military detention facility at Guantanamo Bay, Cuba. Only 10 of them have been charged with war crimes.

The opinion was delivered by Justice John Paul Stevens, 86, the court's last veteran of World War II. He set forth a view of the Constitution in wartime that stood in sharp contrast to that of the president and his lawyers.

The Constitution gives Congress the power to make the laws and set the rules for handling wartime captives, Stevens said. It says Congress shall “make rules concerning captures on land and water,” and also says Congress shall define the “offenses against the law of nations.”

Despite those words, the president contended that as commander in chief of the armed forces, he had the power to decide how suspected terrorists would be held, how they were to be treated, how they would be tried and what offenses amounted to war crimes.

But Justice Stephen G. Breyer, in a concurring opinion, said: “The court's conclusion ultimately rests upon a single ground: Congress has not issued the executive a ‘blank check.'”

Guantanamo Bay has become the focal point of international criticism of Bush's willingness to set aside established U.S. and international laws in the war against terrorism.

Civil libertarians hailed the ruling as a repudiation of that approach.

““The Supreme Court’s decision reaffirms
the importance of one of this country's founding principles: Trials conducted in the name of the United States must be full, fair and according to law," said Deborah Pearlstein, a lawyer for Human Rights First.

The case decided Thursday began two months after the Sept. 11 attacks. In November 2001, the White House issued an executive order announcing the Pentagon would set up special military commissions to try Al Qaeda suspects. The president said that he did not need the approval of Congress and that the federal courts had no jurisdiction over the cases.

Moreover, the White House said the Geneva Convention did not apply to terrorists because this was not a conflict between nations and their armies.

It took four years for a challenge to that order to make its way to the Supreme Court. No one has been tried and convicted under the Bush administration’s rules, which were challenged by Salim Ahmed Hamdan, a onetime driver for Osama bin Laden who was charged with conspiring with Al Qaeda to kill Americans.

Hamdan, who was captured in Afghanistan in November 2001 and has been held at Guantanamo since June 2002, has admitted he was Bin Laden’s driver, but said he was a $200-a-month hired hand, not a terrorist.

In the sweeping decision, the justices rejected all of the key assertions made by the president and struck down the military commissions set up by the Pentagon. The court also cast doubt on whether the general charge of conspiracy that Hamdan faced was a war crime.

As Stevens noted, the Bush administration’s rules would have allowed the use of evidence obtained through coercion, and could have resulted in a defendant and his lawyer being excluded from the trial.

Bush said he planned to work with lawmakers to develop a process to deal with terrorism suspects.

“To the extent that there is latitude to work with the Congress to determine whether or not the military tribunals will be an avenue in which to give people their day in court, we will do so,” he said.

Two key Senate Republicans, Lindsey Graham of South Carolina and Arizona’s Jon Kyl, said they were disappointed with Thursday’s court decision. “However, we believe the problems cited by the court can and should be fixed,” they said in a joint statement. “We intend to pursue legislation . . . granting the executive branch the authority to ensure that terrorists can be tried by competent military commissions.”

Some legal authorities suggested that applying traditional rules of evidence and due process in proceedings against the detainees could pose problems for prosecutors.

“They can come up with a viable system that would pass judicial scrutiny. But I am not sure that it is going to result in convictions,” said retired Rear Adm. John Hutson, a former judge advocate of the Navy and now dean of Franklin Pierce Law Center.

“It is going to be real hard to prosecute these guys,” Hutson said.

One part of the court’s decision suggests that the Geneva Convention protects captured terrorism suspects. Stevens said that Article 3 covered all people caught up in a conflict, even if they were not regular
soldiers and not entitled to be treated as prisoners of war. Quoting that section, Stevens said these people must be tried “by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The Geneva Convention does not define a “regularly constituted court,” but five justices agreed Thursday that such a tribunal must meet “the standards of our military justice system.” Besides Stevens and Breyer, Justices Anthony M. Kennedy, David H. Souter and Ruth Bader Ginsburg agreed on this holding in Hamdan vs. Rumsfeld.

Some legal experts said the ruling could extend the protections of the Geneva Convention to all people held in the war on terrorism, including Al Qaeda members being detained abroad in secret prisons.

But the court stopped well short of saying that suspected terrorists were entitled to be treated as prisoners of war.

Four justices—Stevens, Breyer, Souter and Ginsburg—said that they would have thrown out the charge against Hamdan because conspiracy was not a war crime. Stevens said a war crime required some evidence that the defendant took some “overt act,” beyond joining an organization.

Kennedy did not join in that opinion, leaving the court short of a majority on that issue.

Chief Justice John G. Roberts Jr. did not take part in the decision because he was on the U.S. Court of Appeals last year that considered Hamdan’s case and voted to uphold the president’s special military trials.

Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. dissented Thursday.

Scalia and Thomas took the rare step of reading their dissents in the courtroom.

Scalia said the court had no authority to decide the case. In late December, Congress passed the Detainee Treatment Act and stripped federal judges of their power to hear claims from the Guantanamo Bay detainees.

Stevens and the majority said this provision applied only to new claims, not to pending cases like Hamdan’s.

In his dissent, Thomas said the court’s opinion “flouts our well-established duty to respect the executive’s judgment in matters of military operations and foreign affairs.”

Alito, who joined the court just before the case was heard, said he believed that the Pentagon’s rules were fair and that they complied with the standards set by military law and the Geneva Convention.

The court’s ruling was the second defeat for the administration in its handling of the prison at Guantanamo Bay.

Two years ago, the justices said the detainees were entitled to hearings to argue that they were being wrongly held. The Constitution says no one held by the United States “shall be deprived of life, liberty or property without due process of law.” Although the foreign detainees are not entitled to full trials, they are entitled to basic hearings, the court said in a 6-3 ruling in Rasul vs. Bush.

Like that ruling, Thursday’s decision does not require that these detainees be given the same trials due civilians, but only that they be tried under the military’s system of justice.
The Geneva Convention “obviously tolerates a great deal of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems,” Stevens said. “But requirements they are nonetheless. The commission that the president has convened to try Hamdan does not meet those requirements.”

**Defendant Rights**

Although the Supreme Court ruled that Guantanamo Bay detainees may not be tried by military commissions, the justices said the suspected terrorists could be subject to the rules used in military courts-martial. Here is a comparison of defendant rights in those two systems and in federal court:

**Presumption of innocence:** Presumed innocent.

Courts-martial: Presumed innocent.

Military commissions: Presumed innocent.

**Right to remain silent**

Federal courts: The 5th Amendment provides the right against self-incrimination.

Courts-martial: Members of the military can’t be compelled to confess; coerced confessions are not admissible.

Military commissions: Not provided; a rule against using coerced statements was adopted in March.

**Freedom from unreasonable search and seizure**

Federal courts: The 4th Amendment prohibits unreasonable search and seizure.

Courts-martial: Rules prohibit the use of evidence obtained through unlawful search or seizure.

Military commissions: Not provided. Private conversations between detainees and lawyers cannot be used.

**Jury**

Federal courts: The 6th Amendment provides for trial by jury.

Courts-martial: Rules prohibit the use of evidence obtained through unlawful search or seizure.

Military commissions: No jury. Trial is by a commission picked by the military. Detainees have challenged panel members.

**Presence at trial**

Federal courts: Defendants have the right to be present at every stage of the trial.

Courts-martial: The presence of the accused is required, unless the accused waives the right or engages in conduct justifying removal.

Military commissions: The accused shall be present to “the extent consistent with the need to protect classified information” and national security.

**Right to counsel**

Federal courts: *Gideon vs. Wainright* established the right to counsel under the 6th Amendment.

Courts-martial: Defendants have a right to military counsel at government expense and can also hire a civilian lawyer.
Military commissions: Defendants are provided a military lawyer. May hire a civilian attorney but the lawyer is not guaranteed access to classified evidence.

**Right of Appeal**

Federal courts: Federal convictions can be appealed to the Court of Appeals and then to the Supreme Court.

 Courts-martial: Defendants may pursue military appeals. After military appeals, they may go to civilian court.

Military commissions: No right to appeal sentences shorter than 10 years. A review panel makes recommendations to the Defense secretary.
One of the most dramatic moments in today’s oral argument in *Hamdan v. Rumsfeld* comes when an uncharacteristically agitated Justice David Souter presses Solicitor General Paul Clement about whether Congress last December effectively stripped the Supreme Court of the right to hear habeas corpus claims from any of the hundreds of detainees being held at Guantanamo Bay. Clement says it’s not necessary for Congress to have “consciously thought it was suspending the Writ.” Perhaps the lawmakers just “stumbled on the suspension of the Writ,” which would also be fine, Clement suggests.

Souter stops him, amazed. “The suspension of the Writ,” the justice sputters, is the most “stupendously significant act” Congress can undertake. “Are you really saying Congress may validly suspend it inadvertently?” he asks. It’s the morning’s best example of the degree to which, for Souter as well as for Justice Stephen Breyer, today’s argument is an agonizing exercise in Bush administration doublespeak. Clement’s arguments are frequently drawn from the well of “because the president says so,” or “because the president is the president,” or “because it’s wartime.” They start to sound like Alberto Gonzales or the president: legal analysis by assertion and justification by double standard. This war is like every other war except to the extent that it differs from those other wars. We follow the laws of war except to the extent that they do not apply to us. These prisoners have all the rights to which they are entitled by law, except to the extent that we have changed the law to limit their rights.

In other words, there is almost no question for which the government cannot find a circular answer.

The issue before the court is the legality of President Bush’s military tribunals. The two key war-on-terror cases of 2004—*Hamdi v. Rumsfeld* and *Rasul v. Bush*—established that the administration could detain enemy combatants. But these combatants would nevertheless be entitled to some neutral adjudicatory process, the contours of which the justices left to be determined. The question for the court is whether the military tribunals established by the president by military order in 2001 meet the justices’ standard for neutral and adjudicatory. The tribunals rely neither on the Geneva Convention nor the Uniform Code of Military Justice. They allow for the admission of unsworn testimony; may preclude a detainee from appearing at his own trial; and do away with the presumption of innocence. Punishment may include death.

Salim Ahmed Hamdan, alleged to be Osama Bin Laden’s chauffeur, faces trial before such a tribunal on charges of conspiracy to help terrorists. His appeal encompasses a host of statutory and constitutional challenges to the tribunals. Hamdan won in the district court and lost in the D.C. Circuit federal court of appeals. Chief Justice John Roberts joined in the D.C. Circuit decision before his promotion and has thus recused
himself today.

As if the court didn’t have enough weighty matters on its collective mind, it also must grapple with the Detainee Treatment Act, which Congress passed last December to amend the federal habeas corpus statute. The idea was to prevent the Guantanamo detainees from getting a full habeas review—which often includes a chance for the accused to present evidence—in the federal courts. The government argues that the DTA strips the Supreme Court of jurisdiction to hear Hamdan’s case. So, the court has to start there: Can it even reach the merits of the legality of the commissions?

The press corps begins the day with a different question: What the hell has gotten into Justice Antonin Scalia? Between his extracurricular pronouncements on the arguments in this case (and I urge you to listen to the whole speech yourself) and his extracurricular hand signals last weekend, nobody is quite sure what has come over the man. He is ever more the Bill O’Reilly of the High Court.

Neal Katyal represents Hamdan this morning in a special 90-minute session that is sufficiently important to merit audio broadcast, according to the unknowable metric used by the chief justice. Katyal launches into his argument about why the DTA doesn’t apply to cases like Hamdan’s that were pending in the courts when the law passed. Rookie Justice Samuel Alito—who speaks very little again today—asks why Hamdan can’t just raise these claims later, after the military tribunal has issued its final decision, the way he would in an ordinary criminal proceeding.

“This is not an ordinary criminal proceeding,” replies Katyal. “If it was we wouldn’t be here. This is a military commission unbounded by laws, the constitution, or treatises. It replicates the blank check this court rejected in Hamdi.” Katyal says that the Framers had a “deep distrust of military tribunals” and that the only thing that assuages this distrust is that Congress is charged with setting clear rules.

Katyal then turns to the conspiracy charge Hamdan faces. He explains that the laws of war reject the charge of conspiracy as a substantive crime. “Even if this tribunal is authorized,” he claims, “allowing this charge of conspiracy would open the floodgates to the president to charge whatever he wants.”

Alito asks whether the conspiracy charge can’t simply be amended. To which Katyal responds, with some frustration, that the “government has had four years to get their charges together against Hamdan.”

Katyal argues that the Uniform Code of Military Justice sets out the bare baseline rules for military commissions. But Scalia counters that there is no point in creating military commissions if they have to adhere to the same standards as the UCMJ.

Solicitor General Paul Clement has 45 minutes to represent the Bush administration, and here is where the smoke and mirrors kick in. He cites the executive’s longstanding authority to try enemies by military tribunal. When Justice John Paul Stevens asks for the source of the laws that such tribunals would enforce, Clement replies that the source is the “laws of war.” When Stevens asks whether conspiracy is encompassed within the laws of war, Clement says that the president views conspiracy as within the laws of war.

Neat trick, no?

Souter takes a slightly different tack: If you accept that the military commissions apply
the laws of war, don’t you have to accept the Geneva Conventions? he asks. Clement responds that the commissions can “adjudicate that the Geneva Conventions don’t apply.”

“You can’t have it both ways,” Souter retorts. The government can’t say the president is operating under the laws of war, as recognized by Congress, and then for purposes of defining those laws, say the Geneva Conventions don’t apply.

Sure it can. Clement replies that if a detainee has such a claim, he should bring it before the military courts. Even Kennedy seems alarmed now. He confesses that he’s troubled by the notion of bringing challenges about the structure of the tribunal to the tribunal itself. “If a group is going to try some people, do you first have the trial and then challenge the legitimacy of the tribunal?” he asks incredulously.

Clement objects to his word choice. “This isn’t just some group of people,” he says. This is the president invoking his authority to try terrorists.

Breyer goes back to the DTA and whether it stripped the court of jurisdiction to rule on Hamdan’s claims. He asks how the court can avoid “the most terribly difficult question of whether Congress can constitutionally deprive this court of jurisdiction in habeas cases.”

And Stevens serves up another can’t-have-it-both-ways query: When Congress takes away the courts’ habeas corpus jurisdiction, “Do you say it’s a permissible suspension of the writ or that it’s not a suspension of the writ?” he asks.

“Both,” replies Clement.

“You can’t say both,” chides Stevens. So this is where Clement claims that Congress could have accidentally suspended the writ, the way you might accidentally drop your eyeglasses into a punchbowl. “Wait a minute,” replies Souter, and I think he’s angrier than I have ever seen him. “The writ is the writ. You’re saying the writ was suspended by inadvertence!”

Later Breyer will add: “You want to say that these are war crimes. But this is not a war. These are not war crimes. And this is not a war crimes tribunal. If the president can do this, he can set up a commission and go to Toledo and arrest an immigrant and try him.” To which Clement’s answer is the fail-safe: “This is a war.”

And even as it starts to be clear that he is losing Kennedy—who asks whether Hamdan isn’t “uniquely vulnerable” and thus entitled to the theoretical protection of the Geneva Conventions—Clement stands firm in his claim that the Guantanamo detainees are different from regular POWs because, well, they are.

At some point, it must begin to insult the collective intelligence of the court, these tautological arguments that end where they begin: The existing laws do not apply because this is a different kind of war. It’s a different kind of war because the president says so. The president gets to say so because he is president.

For today at least, it appeared that the Bush administration would not readily marshal five votes for its core legal proposition: that if you just refuse to offer answers, the questions will go away.
Three Supreme Court cases generated by the Bush administration's detention of those it deems “enemy combatants” will be argued over the next 10 days, framing a debate of historic dimension not only about the rights of citizens and noncitizens alike, but also—or perhaps principally—about the boundaries of presidential power.

It was always evident that these cases would invite the justices to re-examine the balance between individual liberty and national security, and perhaps to recalibrate that always delicate balance for the modern age of terrorism. But the full extent to which the arguments turn on competing visions of presidential authority became clear only after the dozens of briefs filed in the three cases began to arrive at the court after the first of the year.

In each of its three main briefs, the administration's lawyers argue for a muscular view of executive authority that leaves no room for “second-guessing” or “micromanaging” by the federal courts.

For example, in its brief arguing that the courts have no jurisdiction even to hear challenges to the open-ended detention of hundreds of men taken from Afghanistan and Pakistan to the United States naval base at Guantanamo Bay, Cuba, the administration says judicial review “would place the federal courts in the unprecedented position of micromanaging the executive’s handling of captured enemy combatants from a distant combat zone” and of “superintending the executive’s conduct of an armed conflict.”

That would “raise grave constitutional concerns” under the separation of powers, the brief says.

The Guantanamo case will be argued Tuesday. Appeals in two lawsuits filed on behalf of separate groups of detainees, Rasul v. Bush, No. 03-334, and Al Odah v. United States, No. 03-343, are consolidated for a single argument.

In its brief appealing a lower court’s ruling that President Bush lacked authority to order the military detention of an American citizen, Jose Padilla, the administration argues that the decision to transfer Mr. Padilla from the civilian courts to a military prison was made under the president’s inherent authority as commander in chief. “The authority of the commander in chief to engage and defeat the enemy encompasses the capture and detention of enemy combatants wherever found, including within the nation’s borders,” the brief asserts.

Mr. Padilla was apprehended two years ago at O'Hare International Airport in Chicago on suspicion of participating in a plot by Al Qaeda to detonate a radioactive device, but he has never been charged with a crime. This case, Rumsfeld v. Padilla, No. 03-1027, will be argued April 28 along with an appeal by a second citizen detainee, Yaser Esam Hamdi.
Mr. Hamdi, born in Louisiana to Saudi parents, was taken into custody more than two years ago in Afghanistan, where government lawyers say he was fighting with the Taliban. He and Mr. Padilla are being held in the same Navy brig in Charleston, S.C. For two years, neither man was permitted to see a lawyer. The government recently permitted them limited access to their lawyers while maintaining that this was a matter of “discretion” rather than entitlement.

The federal appeals court in Richmond, Va., ruled last year that a nine-paragraph description by a Pentagon official of the circumstances of Mr. Hamdi’s seizure was sufficient to validate his continued detention. Dismissing Mr. Hamdi’s petition for a writ of habeas corpus that sought to challenge his classification as an enemy combatant, the appeals court said that once the government explained itself, there was no further role for the federal courts.

In its brief in Hamdi v. Rumsfeld, No. 03-6696, urging the justices to uphold that decision, the administration asserts that the determination of enemy combatant status is “a quintessentially military judgment, representing a core exercise of the commander-in-chief authority” and “entitled to the utmost deference by a court.”

These arguments in turn have galvanized a broad swath of the legal community to express alarm about the sweep and implications of the administration’s claims of executive authority. Liberal and civil rights organizations are not the only groups to have filed briefs on the detainees’ behalf. One of the most pointed is from the Cato Institute, a libertarian research organization here that is influential in conservative circles.

The institute’s brief in the Hamdi case describes the government’s argument that the courts cannot meaningfully review a determination of enemy combatant status as a “shocking assertion” that “strikes at the heart of habeas corpus.”

Tracing the habeas corpus procedure to its roots in ancient English law, the brief continues, “The right to habeas corpus is, in essence, a right to judicial protection against lawless incarceration by executive authorities.”

Global Rights, an international human rights legal group, maintains in its brief that “enemy combatant” is an “invented classification” that is not recognized in international law. Its use has the effect of “stripping Mr. Hamdi of any recognized status under international law,” the brief says, adding that “the government is engaging in the very practice of arbitrary detention that it has condemned worldwide for decades.”

In the Guantanamo case, which has received great attention in England because British subjects are among the detainees, 175 members of the British Parliament have filed a brief arguing that “the exercise of executive power without possibility of judicial review jeopardizes the keystone of our existence as nations—namely, the rule of law.”

Like a number of other briefs in all three cases, the Parliament members’ brief argues that the administration’s actions violate both the binding obligations and the norms of international law. “Indefinite executive detention without judicial review is inimical to the United States’ commitment to the rule of law and its international obligations,” the brief says.

While the international-law arguments will undoubtedly appeal to some justices, they
may well alienate others. In cases on subjects ranging from gay rights to the death penalty to the legal liabilities of multinational businesses, the Supreme Court is engaged in a vigorous debate over the extent to which United States courts should take account of foreign legal developments. In some respects, this debate represents the latest front in the legal culture wars that have been raging, sometimes beneath the public radar, since the battle over Robert H. Bork's nomination to the court in 1987.

Mr. Bork and 23 other conservative lawyers and legal scholars, including several recent veterans of the White House counsel’s office and the Justice Department, have filed a brief in the Guantanamo case that is likely to draw more than passing attention within the court.

Organized as Citizens for the Common Defence, this group, which includes a number of the current justices’ former law clerks, focuses sharply on the international-law arguments in maintaining that the detainees and their lawyers “rely upon and seek to have this court endorse an essentially political position that is adverse to the interests of this nation as asserted by the executive.”

Referring to Article II of the Constitution, which defines the office of the president, the brief says that “this case can be viewed as one battle between those who invoke ‘international norms’ and multilateralism to constrain the United States and those who believe that Article II empowers the executive to defend the nation subject only to legal constraints applicable and deemed relevant by U.S. law, including the Constitution and those international legal obligations that U.S. law incorporates.”

In the courtroom itself, the arguments may well proceed as rhetorical duels over the relevance and proper interpretation of formerly obscure Supreme Court precedents, dusted off for the first time since they were issued during or soon after World War II. In the Guantanamo case, for example, the administration invokes *Johnson v. Eisentrager*, a 1950 decision rejecting a right of habeas corpus on behalf of 21 German civilians caught spying for Japan in wartime China.

The lesson, the administration says, is that noncitizens held outside the United States do not have access to federal court. The Guantanamo detainees’ lawyers say the precedent does not apply—either because the Guantanamo Bay Navy base is effectively, even if not formally, United States territory or because the Germans, in contrast to the current detainees, had already had lawyers and trials before a military commission and were thus “adjudicated” rather than simply labeled enemy aliens.

One precedent of which the justices need no reminder is *Korematsu v. United States*, the 1944 Supreme Court decision that upheld, to the country’s lasting regret and eventual formal apology, the wartime detention of 110,000 Americans of Japanese descent, most of them citizens.

Fred Korematsu, the plaintiff in that case, is now 84. He received the Presidential Medal of Freedom in 1998. His brief on behalf of the Guantanamo detainees is a catalog of government overreactions to foreign and domestic threats, from the Alien and Sedition Acts of 1798 through the McCarthy period of the 1950’s.

“*Our history merits attention,*” Mr. Korematsu’s brief says. “*Only by understanding the errors of the past can we do better in the present.*"
WASHINGTON—Facing a wave of litigation challenging its eavesdropping at home and its handling of terror suspects abroad, the Bush administration is increasingly turning to a legal tactic that swiftly torpedoes most lawsuits: the state secrets privilege.

In recent weeks alone, officials have used the privilege to win the dismissal of a lawsuit filed by a German man who was abducted and held in Afghanistan for five months and to ask the courts to throw out three legal challenges to the National Security Agency’s domestic surveillance program.

But civil liberties groups and some scholars say the privilege claim, in which the government says any discussion of a lawsuit’s accusations would endanger national security, has short-circuited judicial scrutiny and public debate of some central controversies of the post-9/11 era.

The privilege has been asserted by the Justice Department more frequently under President Bush than under any of his predecessors—in 19 cases, the same number as during the entire eight-year presidency of Ronald Reagan, the previous record holder, according to a count by William G. Weaver, a political scientist at the University of Texas at El Paso.

While the privilege, defined by a 1953 Supreme Court ruling, was once used to shield sensitive documents or witnesses from disclosure, it is now often used to try to snuff out lawsuits at their inception, Mr. Weaver and other legal specialists say.

“This is a very powerful weapon for the executive branch,” said Mr. Weaver, who has a law degree and is a co-author of one of the few scholarly articles examining the privilege. “Once it’s asserted, in almost every instance it stops the case cold.”

Robert M. Chesney, a law professor at Wake Forest University who is studying the recent use of the privilege, said the administration’s legal strategy “raises profound legal and policy questions that will be the subject of intense debate for the foreseeable future.”

Some members of Congress also have doubts about the way the privilege has been used. A bill approved by the House Government Reform Committee would limit its use in blocking whistle-blowers’ lawsuits.

“If the very people you’re suing are the ones who get to use the state secrets privilege, it’s a stacked deck,” said Representative Christopher Shays, Republican of Connecticut, who proposed the measure and has campaigned against excessive government secrecy.

Yet courts have almost always deferred to the secrecy claims; Mr. Weaver said he believed that the last unsuccessful assertion of the privilege was in 1993. Steven Aftergood, an expert on government secrecy at the Federation of American Scientists,
said, "It's a sign of how potent the national security mantra has become."

Under Mr. Bush, the secrets privilege has been used to block a lawsuit by a translator at the Federal Bureau of Investigation, Sibel Edmonds, who was fired after accusing colleagues of security breaches; to stop a discrimination lawsuit filed by Jeffrey Sterling, a Farsi-speaking, African-American officer at the Central Intelligence Agency; and to derail a patent claim involving a coupler for fiber-optic cable, evidently to guard technical details of government eavesdropping.

Such cases can make for oddities. Mark S. Zaid, who has represented Ms. Edmonds, Mr. Sterling and other clients in privilege cases, said he had seen his legal briefs classified by the government and had been barred from contacting a client because his phone line was not secure.

"In most state secrets cases, the plaintiffs’ lawyers don’t know what the alleged secrets are," Mr. Zaid said.

More recently the privilege has been wielded against lawsuits challenging broader policies, including the three lawsuits attacking the National Security Agency’s eavesdropping program—one against AT&T by the Electronic Frontier Foundation in San Francisco and two against the federal government by the American Civil Liberties Union in Michigan and the Center for Constitutional Rights in New York.

In a filing in the New York case, John D. Negroponte, the director of national intelligence, wrote that allowing the case to proceed would "cause exceptionally grave damage to the national security of the United States" because it "would enable adversaries of the United States to avoid detection." Mr. Negroponte said he was providing more detail in classified filings.

Those cases are still pending. Two lawsuits challenging the government’s practice of rendition, in which terror suspects are seized and delivered to detention centers overseas, were dismissed after the government raised the secrets privilege.

One plaintiff, Maher Arar, a Syrian-born Canadian, was detained while changing planes in New York and was taken to Syria, where he has said he was held in a tiny cell and beaten with electrical cables. The other, Khaled el-Masri, a German of Kuwaiti origin, was seized in Macedonia and taken to Afghanistan, where he has said he was beaten and injected with drugs before being released in Albania.

The United States never made public any evidence linking either man to terrorism, and both cases are widely viewed as mistakes. Mr. Arar’s lawsuit was dismissed in February on separate but similar grounds from the secrets privilege, a decision he is appealing. A federal judge in Virginia dismissed Mr. Masri’s lawsuit on May 18, accepting the government’s secrets claim.

One frustration of the plaintiffs in such cases is that so much information about the ostensible state secrets is already public. Mr. Arar’s case has been examined in months of public hearings by a Canadian government commission, and Mr. Masri’s story has been confirmed by American and German officials and blamed on a mix-up of similar names. The N.S.A. program has been described and defended in numerous public statements by Mr. Bush and other top officials and in a 42-page Justice Department legal analysis.

In the A.C.L.U. lawsuit charging that the
security agency’s eavesdropping is illegal, Ann Beeson, the group’s associate legal director, acknowledged that some facts might need to remain secret. “But you don’t need those facts to hear this case,” she said. “All the facts needed to try this case are already public.”

Brian Roehrkasse, a Justice Department spokesman, said he could not discuss any specific case. But he said the state secrets privilege “is well-established in federal law and has been asserted many times in our nation’s history to protect our nation’s secrets.”

Other defenders of the administration’s increasing use of the privilege say it merely reflects proliferating lawsuits.

In all of the N.S.A. cases, for instance, “it’s the same secret they’re trying to protect,” said H. Bryan Cunningham, a Denver lawyer who served as a legal adviser to the National Security Council under Mr. Bush. Mr. Cunningham said that under well-established precedent, judges must defer to the executive branch in deciding what secrets must be protected.

But critics of the use of the privilege point out that officials sometimes exaggerate the sensitivities at risk. In fact, documents from the 1953 case that defined the modern privilege, United States v. Reynolds, have been declassified in recent years and suggest that Air Force officials misled the court.

An accident report on a B-29 bomber crash in 1948 was withheld because the Air Force said it included technical details about sensitive intelligence equipment and missions, but it turned out to contain no such information, said Wilson M. Brown III, a lawyer in Philadelphia who represented survivors of those who died in the crash in recent litigation.

“The facts the Supreme Court was relying on in Reynolds were false,” Mr. Brown said in an interview. “It shows that if the government is not truthful, plaintiffs will lose and there’s very little chance to straighten it out.”
LOOKING BACK: PRO-BUSINESS COURT?

“Bush’s Approval Rating Remains High with Court”

The Record (Bergen County, N.J.)
July 1, 2007
Michael Doyle

WASHINGTON—The Supreme Court smiled on President Bush and big business during its 2006-07 term, which just ended, gratifying a White House beset by problems nearly everywhere else.

Reinforced by two conservative Bush appointees, the court sided with the administration’s position more than 80 percent of the time. Even one of the administration’s highest-profile losses reflected the White House’s innermost political sympathies.

“A lot of people have been observing that the administration has kind of had its way with this court,” said Washington attorney Maureen Mahoney, a Republican frequently identified as a potential Supreme Court nominee.

The White House won big policy victories, as when justices upheld a late-term abortion ban, and scored key procedural wins, with the court blocking taxpayers from challenging Bush’s faith-based initiative. White House allies prevailed when the court sided with parents who oppose race-based school decisions.

The administration’s record was far from perfect, however.

In the year’s highest-profile environmental case, the court ruled 5-4 that the Environmental Protection Agency has the authority to regulate greenhouse gases. On Friday, in an even more surprising twist, at least five justices agreed to reverse a prior court ruling and hear an appeal from prisoners detained at Guantanamo Bay, Cuba. That hearing will take place next fall.

Every Supreme Court term combines theatrics with technicalities. The decisions with the longest reach can take years to unfold or require a doctorate to comprehend. The cases with the most vivid facts may drift to the legal backwaters, or turn up elsewhere in surprising ways.

Even glittering win-loss records can conceal more complicated undercurrents. Over the last term, the court’s conservatives have clashed among themselves, and its dissenters have revealed some hard feelings.

“The majority is wrong,” fumed Justice Stephen Breyer, taking nearly 30 minutes to read a recent dissent from the bench. “It’s not often in law that so few have changed so much so quickly.”

The administration weighed in on some 46 cases this past term, all handled by Solicitor General Paul Clement. Some cases involved the government itself. Many others involved private cases on which the administration had a point of view. Thirty eight times, the administration’s view prevailed.

Former President Bill Clinton, by contrast, sometimes lost as many as half of the Supreme Court cases on which he or his
aides expressed an opinion.

"The current administration may be more in tune with a majority of the Supreme Court than was the case during the previous administration," said Washington legal aid attorney Barbara McDowell, who served eight years in the Solicitor General’s Office.

In truth, McDowell added, solicitors general frequently have good batting averages with the court. They have considerable experience, pick their fights carefully and generally enjoy the court’s respect.

Still, the White House wasn’t the only big winner as Chief Justice John Roberts led a conservative if at times tenuous majority. Business interests likewise count the newly finished term a success. The Chamber of Commerce prevailed in 13 out of 16 cases on which it weighed in.

**Big Year for Business**

“We’ve been representing the business community before the Supreme Court for 30 years, and this is our strongest showing [ever],” crowed Robin Conrad, executive vice president of the National Chamber Litigation Center.

In some respects, the 2006-07 term was a modest one for a court in its second year under Roberts’ leadership. Unlike the previous term, justices didn’t render big terrorism or national security decisions. The court also issued fewer decisions, 72, than it had in previous years.

Roberts, moreover, fell far short of his ambitious goal of unifying the court.

During his September 2005 confirmation hearing, Roberts told the Senate Judiciary Committee that “the chief justice has a particular obligation to try to achieve consensus” and declared that that would “certainly be a priority for me.” Nonetheless, 24 out of the 72 cases this term were decided on 5-4 votes.

“There’s been more division in this court, [although] not on the business side,” said Washington attorney Beth Brinkman, a Democrat who has argued 21 cases before the high court.

More cases were decided by 5-4 votes than in any term over at least the last decade, according to figures compiled by the law firm Akin Gump Strauss Hauer & Feld. There also were notably fewer unanimous decisions than there were in previous years.

Consistently, Roberts joined with Justices Antonin Scalia, Clarence Thomas, Samuel Alito Jr. and Anthony Kennedy to form the majority. It was Kennedy, though, who really flexed his muscles.

With the departure of Justice Sandra Day O’Connor, Kennedy fully claimed the role of crucial swing vote this year. He was on the winning side in every one of the 24 cases decided by 5-4 votes.

Kennedy, moreover, periodically restrained what the Roberts’ majority otherwise would have accomplished. On Thursday, for instance, Kennedy joined with the slim conservative majority to strike down race-based student assignment policies in Louisville and Seattle.

The court sided with white families in ruling that the schools’ race-based decisions violated constitutional guarantees of equal protection.

But in a concurring opinion, Kennedy stressed that he wouldn’t go as far as
Roberts in eliminating race in school policies. Kennedy’s contention that Roberts shows “an all-too unyielding insistence that race cannot be a factor” effectively limits the reach of the majority’s decision.

“Within the five-person conservative majority, there were fascinating internal splits,” said Stanford Law School professor Kathleen Sullivan.

It’s a tug-of-war: Kennedy pulling in one direction and Scalia and Thomas pulling in another.

Roberts, for instance, wrote the majority opinion concluding that a campaign finance law limiting certain pre-election ads violated the free-speech rights of Wisconsin Right to Life. The law blocks unions and corporations from directly financing certain ads within 60 days of a general election and 30 days of a primary.

The Roberts opinion will make it much easier for unions and corporations to run ads. He didn’t, however, strike down the campaign finance law itself.

Scalia and Thomas joined the majority, but insisted separately that Roberts was being disingenuous. It would be more honest, they said, for the court to overturn the law it otherwise was gutting.

“This faux judicial restraint is judicial obfuscation,” Scalia wrote, speaking of one of his ostensible ideological allies.
In a stream-of-consciousness question during U.S. Supreme Court arguments, Justice Stephen G. Breyer framed—and seemingly decided—key issues in a suit involving federal pre-emption over state tort law.

“It’s a terrible thing if the drugs hurt people,” Breyer said during February arguments in Warner-Lambert Co. v. Kent, 128 S. Ct. 1168. But, he added, “there’s a risk on the other side if new drugs are not available for people who are sick or dying.”

So, who should decide “whether this drug is, on balance, going to save people or, on balance, going to hurt people? An expert [federal] agency, on the one hand, or 12 people pulled randomly for a jury role? Now, it seems to me . . . Congress has opted for the agency.”

There was an awkward pause. The case before the court involved drugs, but it turned on a Michigan law. Justice Ruth Bader Ginsburg came to the rescue. “We are going to hear that case next term,” she said.

Indeed, those issues will be raised in next term’s Wyeth v. Levine, No. 06-1249, in which Vermont musician Diana Levine claims she lost a hand and forearm to complications from an “IV push” of a popular anti-nausea drug. But if this term is any indication, the court has signaled the direction in which it likely will go.

HIGH COURT SUCCESS

While corporations and business lawyers have been mostly unsuccessful in persuading Congress or state legislatures to shield them from lawsuits and jury verdicts, they have found success before the Supreme Court. And they have done so by arguing that the federal regulatory laws already on the books pre-empt lawsuits under state common law.

Georgetown University law professor David C. Vladeck says the trend toward pre-empting the right to sue in state courts is one of the most important developments in recent years.

“We are talking about a dramatic, wholesale shift in the common law. This is definitely the year of pre-emption,” says Vladeck, former director of the Washington, D.C.-based Public Citizen Litigation Group, a public interest law firm.

But while Vladeck says the court has been overreaching, U.S. Chamber of Commerce lawyer Robin S. Conrad welcomes the rulings for recognizing the conflict faced by businesses that operate nationally. “They want one set of national regulations, not a patchwork of inconsistent state and local requirements,” says Conrad, executive vice president of the National Chamber Litigation Center.

This is particularly so for products such as medical devices or prescription drugs, she says. “These are federally regulated products. An expert agency says a drug or a medical device is safe and effective to be on the market,” Conrad says. But in a lawsuit, a jury may conclude the same product is not
safe and should not be on the market, she says.

The court adopted the pro-business and pro-pre-emption view in *Riegel v. Medtronic Inc.*, 128 S. Ct. 999, handed down Feb. 20. The plaintiff, Charles Riegel, had a balloon catheter inserted into a heart artery in 1996 but it burst, causing serious injuries. He sued in a New York state court, contending the catheter was defectively designed. (Riegel died in December 2004, but the U.S. Supreme Court allowed the case to continue.)

In an 8-1 vote, the high court threw out Riegel’s suit, as well as most other claims against medical devices that the Food and Drug Administration approved for sale.

Tort suits may offer “solicitude for those injured by FDA-approved devices,” wrote Justice Antonin Scalia for the majority. But Congress also had “solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 states to all innovations.”

The outcome turned on the meaning of the words any requirement in the 1976 Medical Device Amendments Act, passed in the wake of the Dalkon Shield disaster. The intrauterine device, introduced in 1970, led to serious infections in thousands of women, as well as several deaths. As a result, many states required makers of medical devices to obtain the state’s approval before they could be sold.

**SCOPE OF INTENT AT ISSUE**

The new federal law said no state “may establish or continue in effect with respect to a device intended for human use any requirement” that differs from those of the FDA. Congress intended to pre-empt state laws if they set extra requirements for device makers.

But did lawmakers also intend to pre-empt lawsuits and jury trials? Beginning in 1992, the Supreme Court has answered yes. In *Cipollone v. Liggett Group*, 505 U.S. 504, the justices shielded cigarette makers from lawsuits from smokers who claimed they were not truly warned of the dangers. The federal cigarette warning label act required tobacco companies to put warnings on each pack of cigarettes, but it also said “no requirement or prohibition” may be added by the states. A jury’s verdict saying the warning label did not go far enough would, in effect, constitute an extra state requirement, the justices said.

Now nearly all the justices have adopted this view of what Congress said—even if it may come as a surprise to members of Congress who passed the 1976 law. “Absent other indication, reference to a state’s ‘requirements’ includes its common-law duties.” Scalia said.

In her dissent, Ginsburg said there was no “sign of a legislative design to pre-empt state common-law tort actions.” Congress sought to give consumers extra protection through federal oversight, not take away the protection of lawsuits and jury verdicts, she concluded.

Nevertheless, Alan Untereiner, a D.C. lawyer who represents business, predicted Scalia’s opinion will have a wide impact.

“The *Riegel* decision is a resounding victory for the pre-emption defense and for the business community,” he says.

The pre-emption defense has proven to be a winner for business on other fronts this year. In *Rowe v. New Hampshire Motor Transport*
Association, 128 S. Ct. 989, also decided Feb. 20, the court shielded delivery services, such as FedEx and UPS, from state laws requiring they check with an adult before dropping off cigarettes at a residence.

In the era of Internet commerce, all manner of products can be bought online and shipped home. The states said the carriers must check before delivering goods such as cigarettes, alcohol or pornography, but the court said these state laws are pre-empted by the federal law deregulating the trucking industry.

Even TV’s Judge Alex was handed the same message. Alex Ferrer, a former Florida state judge, arbitrates disputes on TV and hands down a binding decision in minutes. But he refused to arbitrate a fee dispute with his manager, Arnold Preston, even though he signed a contract calling for arbitration. He won in the California courts by citing a state law that entrusted a state agency to review contract disputes between actors and talent agents.

It took more than a few minutes, but less than five weeks, for the Supreme Court to reject his claim. Preston v. Ferrer, 128 S. Ct. 978. The Federal Arbitration Act pre-empts conflicting state laws, the justices said, and those who sign contracts calling for binding arbitration must go to arbitration.

**RECUSAL LEADS TO TIE**

The other case this term, Warner-Lambert, ended in a 4-4 split, upholding an appellate court ruling that allowed a tort claim over the drug Rezulin to proceed. Chief Justice John G. Roberts Jr. stepped aside because he owned stock in Pfizer, the parent company of Warner-Lambert.

The next major test will come in the fall when the court hears cases testing whether makers of prescription drugs and “light” cigarettes should be shielded from lawsuits.

In *Wyeth v. Levine*, the court will reconsider a $6.8 million jury award to Levine for the loss of her right hand and forearm after an injection of Wyeth’s anti-nausea drug, Phenergan. Levine had gone to a medical clinic where they injected the drug deep in her arm. As a result of the so-called IV push an artery was punctured, resulting in gangrene and amputation. She sued, contending the drug maker failed to warn against a deep injection of the drug.

In its defense, Wyeth said the warning label included cautions against puncturing an artery. “Prescription drug labeling is precisely the type of complex and technical regulatory regime that warrants deference to the expertise” of the FDA, said Washington attorney Bert W. Rein for Wyeth. There are “tens of thousands of cases in our nation’s courts” where the same conflict is at issue, he noted.

Also next term, in *Altria Group Inc. v. Good*, No. 07-562, the court will decide whether the tobacco companies should be shielded from suits that contend they deceived smokers by advertising “light” or “low tar” cigarettes. These claims ask a jury to decide whether the warning label was adequate, and that is a new state law requirement, says former U.S. Solicitor General Ted Olson, representing Philip Morris.
"Big Business’s Big Term"

*Slate*
March 5, 2008
Doug Kendall

With the Supreme Court term moving past the halfway mark, corporate America’s long-term investments in the federal judiciary are yielding impressive returns. The U.S. Chamber of Commerce’s Robin Conrad gushed about a “hat trick” of Supreme Court victories one day in February, telling the *Legal Times*, “I don’t think I’ve ever experienced a day at the Supreme Court like that.”

Thirty-seven years ago, future Justice Lewis Powell, then a lawyer in private practice, penned a now-famous memorandum alerting the Chamber of Commerce to a “neglected opportunity in the courts.” Powell explained that “the judiciary may be the most important instrument for social, economic and political change,” and he urged the chamber and its corporate benefactors to invest heavily in this “vast area of opportunity.” In the wake of Powell’s memo, the business community seeded a vast body of scholarship and created a nationwide network of pro-business legal organizations. This investment has quietly borne fruit for decades-and, this term in particular, landed corporate America the wins that thrilled Conrad, and more besides.

On that hat-trick day in February, the court issued three pro-business decisions: striking down state rules designed to prevent children from receiving cigarettes via the Internet, *Rowe v. New Hampshire Motor Transport Association*; blocking state courts from holding manufacturers liable for the harms caused by defective medical devices, *Riegel v. Medtronic*; and using a federal arbitration statute to protect corporations against state jury trials in contract disputes, *Preston v. Ferrer*. These were all “pre-emption” decisions, which means that the court found a conflict between a federal law and a state statute or decisions reached by state courts. In such a conflict, federal law trumps, and this led the court in these three cases to free corporations from state limits on their conduct.

Earlier this term, the court gave the chamber another win when it ruled broadly against “scheme liability” lawsuits, which hold accountable everyone involved in an effort to defraud securities investors. As a direct result of that case, *Stoneridge v. Scientific-Atlanta*, the financial institutions that enabled Enron to perpetrate the largest corporate fraud in U.S. history won the dismissal of a $40 billion lawsuit brought by the investors in Enron whose retirement security was decimated by this fraud.

It’s not just particular cases that the chamber is winning, but also foundational issues that set the course of the law. *Stoneridge* is what lawyers call a “cause of action” case; it was about whether the plaintiffs could get into the courthouse to ensure the enforcement of the obligations that the federal Securities Exchange Act of 1934 imposes on corporations. Decades ago, the court ruled that the Exchange Act necessarily implied that victims of corporate misconduct could sue corporations for flouting the clear legal obligations that this law imposes. But starting in 1975, the court began a steady retreat from the idea that judges could “imply” a cause of action, forcing Congress to state clearly that it wants people to be
able to sue. In Stoneridge, the court took this a big step further, saying in effect that people cannot sue companies to enforce an obligation under the Exchange Act that the court has not approved in a prior case. This ruling essentially freezes the enforceability of the Exchange Act.

Another cause-of-action case in which a decision is still pending is the biggest civil-rights case this term, a suit by a black employee fired by Cracker Barrel. The law at issue here is the historic, if long under-enforced, Civil Rights Act of 1866, which gave freed slaves equal rights in making and enforcing contracts. The question before the court is whether this Reconstruction-era statute bars employers from retaliating against workers who complain of racial bias on the job. At oral argument last week, a number of justices, perhaps a majority, seemed poised to rule that even if the law covered retaliation, the court would not allow a victim of discrimination to go to court and enforce this mandate, even though he or she could sue to enforce other violations of the law. Without the ability to sue, any protection provided by the Civil Rights Act against retaliation becomes essentially useless.

It is extremely hard to reconcile what the court has done in cause-of-action cases like Stoneridge with its approach to pre-emption cases like Rowe, Riegel, and Preston. In the cause-of-action cases, the court says Congress must unmistakably express its intention to allow people to go to court to enforce federal mandates. If Congress isn’t crystal-clear, potential plaintiffs are out of luck. But in the pre-emption cases, the court seems untroubled by a lack of clarity on Congress’ part, ruling that federal law pushes aside state actions or remedies when it’s not at all certain that’s what Congress so intended. There’s one thing these approaches do have in common: They both favor business interests.

The Chamber of Commerce also appears to have won the day in disputes over the role of the jury in deciding contract and liability disputes that might be costly for businesses. The Preston decision this term caps a long line of rulings, dating from 1984, in which the court has interpreted the Federal Arbitration Act effectively to displace state juries in a vast number of contractual disputes. And in a suit against Exxon argued at the end of February, the court seemed poised to substitute for the jury’s view its own idea of the appropriate level of punitive damages for the worst oil spill in U.S. history, as the justices have repeatedly done in punitive damage cases over the past decade.

The court’s disdain for jury trials was especially evident at oral argument in Riegel, the case about manufacturer liability for medical devices. Justice Scalia responded to Riegel’s argument about the importance of preserving the judgment of the state jury by declaring “extraordinary” the very notion that a “single jury” could find a company liable for a defective product when the “scientists at the FDA have said [the product] is OK.” This is a remarkable statement for a justice who professes to be bound by the Constitution’s original meaning. Many things are obscure about the framing era, but this we know for certain: The framers of our Constitution loved juries. In siding with the chamber and viewing the jury more as a threat to the modern economy and less as a bulwark of our system of justice, the court is departing sharply from what our framers would have wanted.

There will surely be other cases this term that the Chamber of Commerce loses. The game is not rigged. Rather, by investing heavily in legal strategy and working
patiently in case after case, the chamber has won victories that have gradually shifted the ground rules in its favor. For that, the chamber can thank Justice Powell's advice and deep corporate pockets. For ordinary Americans and the victims of corporate misconduct, there is much less to celebrate.

Sidebar

These groups include the Pacific Legal Foundation, the Washington Legal Foundation, and the Chamber's own National Chamber Litigation Center. In addition, established power centers like the Federalist Society and the Heritage Foundation were founded to organize and orchestrate pro-business litigation efforts.
Jeffrey Rosen argued that it is, in a Sunday NYT magazine article, but he supplies little evidence:

"Of the 30 business cases last term, 22 were decided unanimously, or with only one or two dissenting voices."

—but how many of them were decided in favor of businesses? Weirdly, we’re not told. What if businesses won only half the time? Or less? Even if businesses won more often than other parties, we wouldn’t be able to establish bias without knowing whether their cases were strong or weak.

"Forty percent of the cases the court heard last term involved business interests, up from around 30 percent in recent years."

—Another meaningless statistic. Suppose that the additional cases involve disputes between businesses and workers and that the workers always win. We can’t tell whether bias exists unless we know whether the Court rules in favor or against those business interests. (For one case where the employee wins, go here.)

"While the Rehnquist Court heard less than one antitrust decision a year, on average, between 1988 and 2003, the Roberts Court has heard seven in its first two terms—and all of them were decided in favor of the corporate defendants."


"Exactly how successful has the Chamber of Commerce been at the Supreme Court? Although the court is currently accepting less than 2 percent of the 10,000 petitions it receives each year, the Chamber of Commerce’s petitions between 2004 and 2007 were granted at a rate of 26 percent, according to Scotusblog."

—Those 10,000 petitions include lots of hopeless cases. The Chamber of Commerce will obviously pick and choose on the basis of the quality of the case, and put resources only behind those cases that have a chance of prevailing. Hence its high win rate.

"And persuading the Supreme Court to hear a case is more than half the battle: Richard Lazarus, a law professor at Georgetown who also represents environmental clients before the court, recently ran the numbers and found that the court reverses the lower court in 65 percent of the cases it agrees to hear; and when the petitioner is represented by the elite Supreme Court advocates routinely hired by the chamber, the success rate rises
to 75 percent.”

—The overall success rate of petitions does not tell us the success rate of the Chamber of Commerce. The pertinent statistic is that last term the Chamber of Commerce won 13 of 15 cases for which it wrote an amicus brief. But, again, without knowing whether these cases were strong or weak, we have no way of telling whether this win record reflects bias or simply the Chamber’s ability to sniff out cases where lower courts erred.

—I looked at the 23 cases listed on the Court’s website for this term. I counted nine business cases: of these, businesses lost in 5 cases, more than half. But this doesn’t tell us anything either. If the court has become more pro-business, most parties will settle in line with the changing jurisprudence, and there is no particular reason to think that win/loss data will tell us anything (the “selection effect” problem that dogs empirical research).

Aside from these ambiguous statistics, Rosen cites four decided cases to support his argument. These four cases are less straightforward than they appear at first sight. To see why, consider the question, what does it mean to be pro-business?

1. Pro-Shareholder?

Businesses are owned by shareholders, so one might think that a pro-business Court would hold in favor of shareholders. However, in the Charter Communications case, the Court ruled against investors, who had sued Charter’s vendors for conspiring to commit securities fraud.

Alternatively, one might argue that this case is pro-business because Charter Communications’ vendors won. But that is just a way of saying that the vendors’ shareholders made (or did not lose) money. Is the case anti-business because Charter’s shareholders lost or pro-business because the vendors’ shareholders won?

2. Pro-Management?

Maybe the claim is that the decision in Charter Communications favored that company’s managers in some way. Henceforth, managers will more easily be able to conspire with third parties to violate security laws, at the expense of investors. This is also a puzzling claim. Suppose the Supreme Court held that managers of businesses could loot the treasuries of their businesses without facing any liability at all. Would that be a victory for business or would it mean that business as we know it has become impossible?

3. Anti-Consumer?

Businesses exploit consumers, don’t they? In the Philip Morris case, the court threw out punitive damages awarded to a smoker who had been deceived by cigarette advertising. Punitive damages deter firms from wrongdoing but they also raise their costs and hence the price of goods. Whether consumers are benefited from or harmed by punitive damages is unclear.

The antitrust cases Rosen mentions reflect some skepticism with traditional antitrust law notions that disapprove of various cooperative arrangements among business. But the intellectual foundation of this trend reflects a pro-consumer attitude, in contrast with the older antitrust law, which was anti-big business but not anti-business.

4. Anti-State?

In Riegel, the Court held that victims of a faulty medical device cannot bring a state-
law products liability claim if that device had been approved by the FDA. This case was a victory for a business, but its real effect is to ensure that FDA regulations of medical devices prevail over state common law regulation. This weakens the power of states relative to the federal government in this area, but does it help or hurt consumers? It depends on whether state common law judges and juries do a better job evaluating medical products than the FDA does. Do they? No one knows. Does it help businesses—shareholders and managers—in general? It depends on whether state judges (often criticized for being in the pocket of business lobbies) are more or less pro-business than the federal government. Some are, no doubt; others are not. There is no reason to think that recent cases that find preemption of state law are pro-business: they are pro-federal government, not pro-business.

5. Anti-Prosecution?

In Arthur Andersen, the Court reversed a conviction against the defunct accounting firm for shredding documents during the Enron investigation, holding that the government had failed to prove that the shredding was anything other than routine—as opposed to an effort to conceal guilt. In what sense can such a decision be considered “pro-business”? Compared to what? Is the idea that the Supreme Court would have affirmed the conviction if the defendant had not been a business? Or is the idea that any ruling that allows businesses to dispose of documents must be pro-business—as if the only “unbiased” view would be that businesses must keep all their records forever?

6. Anti-lawsuit?

The Charterhouse Communications case is the latest of a long line of cases that pull back on much earlier cases that found private rights of action in general regulatory statutes that vested the government with the power to enforce a law. In the past few decades, the Court has increasingly insisted that private rights of action should not be “implied” (that is, invented by courts) but should be recognized only when a statute creates them. Many of these statutes regulate businesses, so finding private rights of action may harm businesses, or some business. But these rights are also taken advantage of by businesses that seek to sue other businesses, so in aggregate, it is not clear whether the trend helps business or hurts it.

7. Pro-Market?

What’s really going on is that Rosen is conflating two separate ideas: “pro-business” (really: pro-rich-people; after all businesses are just legal abstractions that bring together investors, managers, employees, consumers, so that any victory for a “business” will help/hurt all sorts of people, rich and poor) and “pro-market.” The whole idea of being pro-business is, I suspect, incoherent (read Jack Balkin’s post and then ask yourself, what would an “anti-business” Supreme Court jurisprudence look like? Would businesses have to lose every case?). But one can coherently argue about the extent to which the government should, or should not, depart from enforcing ordinary property and contract rights that underlie the free market. Rosen’s piece is probably best read as arguing that the Supreme Court has, over the years, become less sympathetic to the view that government intervention in the market serves the public interest, a view that he calls “economic populism.” If so, only the antitrust cases are really on point; the Arthur Andersen case, the Charter Communications case, and the preemption cases have little to do with market ideology.
So the Supreme Court is not increasingly pro-business, but maybe it is increasingly pro-market, finally catching up to a change in the public mood that began in the Carter administration. To preserve the idea that its jurisprudence is “biased” in favor of business, rather than just sensible or reasonable or within the range of colorable legal argument or for that matter a long overdue reaction to its previous anti-business “bias,” Rosen argues that maybe there are people out there who really are populist; he seems to think that the Supreme Court and elite, bipartisan opinion that (he acknowledges) it reflects are “biased” in favor of business because this populist sentiment no longer plays a role in its opinions. “Unbiased,” in this view, is populist. But Rosen does not show that populism is on the rise; the fates of the two most populist presidential candidates, Huckabee and Edwards, suggest otherwise. Even if it were, it would be puzzling to argue that the Supreme Court should hold its finger to the wind and start ruling against businesses—indeed, should have started years ago, when this “pro-business” trend Rosen decries began—and if it doesn’t, that must be because of “bias.” The article boils down to the claim that the Supreme Court is biased in favor of business (that is, is excessively pro-market) because it failed to anticipate, and today shows no inclination to heed, marginal populist sentiment that has made no inroad on electoral politics.
"Justices Restrict Pay Bias Lawsuits"

Chicago Tribune
May 30, 2007
Robert Manor

A deeply divided Supreme Court ruling Tuesday[, Ledbetter v. Goodyear,] sharply limited the ability of workers to sue employers for gender pay discrimination linked to actions taken years earlier.

Employer groups praised the 5-4 decision, saying it protects employers from unfair liability and requires workers to act promptly to protect their rights. Civil-rights advocates criticized the ruling, saying it will prevent workers who are discriminated against from recovering all the money they are due from employers.

In its simplest terms, the court said alleged victims of pay discrimination must file a complaint with the Equal Employment Opportunity Commission within 180 days of the discriminatory act. They cannot seek redress for discrimination prior to that time.

A public policy law firm associated with the U.S. Chamber of Commerce praised the decision.

"What the court is doing is reading the statute the way Congress wanted it to read," said Robin Conrad, executive vice president of the National Chamber Litigation Center. "It was to resolve disputes as quickly as possible."

But Kim Gandy, president of the National Organization for Women, described the ruling as "a terrible, terrible decision" that "has turned our understanding of employment discrimination law on its head."

The legal decision involved Lilly Ledbetter, who worked for 19 years at the Goodyear Tire & Rubber Co. plant in Gadsden, Ala.

Shortly before her retirement in 1998, she filed an EEOC complaint alleging she was paid significantly less than men doing the same work, and that she had been discriminated against for many years.

Ledbetter argued that over the years her male counterparts received larger pay raises than she did, and as a result they eventually earned much more money.

For example, court documents say that she started out in 1979 earning the same as male co-workers. By 1997 she was earning $3,727 per month, the lowest of 15 male co-workers and significantly less than the $5,236 a month earned by the highest paid male co-worker.

Goodyear argued in court that Ledbetter got smaller pay raises because her work was not as good as that of other employees.

Under an anti-discrimination provision of the Civil Rights Act, which requires review by the EEOC, Ledbetter prevailed in court and eventually won a $360,000 award.

But the award was thrown out by a federal appeals court, which determined that jurors should have looked only at Ledbetter's most
recent pay increases, not pay increases dating back for years.

The Supreme Court agreed.

“Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her,” wrote Justice Samuel Alito for the majority. Joining him were Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas, the conservative majority on the court.

Justice Ruth Bader Ginsburg, writing for the minority, said pay disparity between employees can occur over time, as was the case with Ledbetter, and discrimination might not become apparent immediately.

She also said the court’s decision would offer a perverse incentive to encourage discrimination lawsuits against employers.

“Today’s decision counsels: Sue early on, when it is uncertain whether discrimination accounts for the pay disparity you are experiencing,” said Ginsburg, the only woman on the court. Joining her were Justices Stephen Breyer, David Souter and John Paul Stevens, the liberal wing of the court.

The National Organization for Women said the decision especially affects victims of job discrimination and harassment based on gender. Other civil rights laws often are used on behalf of people arguing they are discriminated against because of a disability or other reasons.

Quentin Riegel, vice president of litigation at the National Association of Manufacturers, said the decision “has important ramifications for all companies.

“It is fair to the employer to have these cases resolved promptly,” Riegel said. “It is fair to the employee to get it resolved promptly too.”

John Russo, co-director of the Center for Working-Class Studies at Youngstown State University in Ohio, said limits on how far back a discrimination victim can go in claiming compensation are common in arbitration. Unionized workplaces often use arbitration rather than litigation to settle discrimination claims.

“Frequently, arbitrators put some sort of limitation on time,” Russo said. “There is some precedent in arbitration law for limiting the amount of back pay.”

But Bob Bruno, associate professor of labor and industrial relations at the University of Illinois at Chicago, described himself as “stunned” by the court’s decision, which he said puts an unfair burden on women in the workplace.

“A female in a male-dominated workplace, she now has to be fully aware of her discrimination, and she has to be able to ferret it out as it is happening in real time,” Bruno said.

That is often be difficult to do, Bruno said.
Federal law prohibits discrimination on the job, requiring employers to pay their employees without regard to race, sex, religion or national origin. Many complexities lie behind that simple statement, as a Supreme Court argument on Monday made abundantly clear.

The question for the court was how to treat a discriminatory action that happened long ago, beyond the statute of limitations for the federal Civil Rights Act, but that has effects that continue to the present day. Is each new paycheck, reflecting a salary lower than it would have been without the initial discrimination, a recurring violation that sets the clock running again? Or does the passage of time, without fresh acts of intentional discrimination, render the initial injury a nonevent in the eyes of the law?

The case was brought to the court by a woman, Lilly M. Ledbetter, who worked for 19 years as a manager at a Goodyear Tire and Rubber plant in Gadsden, Ala. For years, Ms. Ledbetter was paid less than men at the same level, and by 1997, as the only female manager, she was earning less than the lowest-paid man in the department. In 1998, after an undesired transfer, she retired and filed a discrimination charge against the company with the Equal Employment Opportunity Commission.

She took her case to federal court and won a jury award of more than $3 million in back pay and compensatory and punitive damages. Because of caps imposed by the law, Title VII of the Civil Rights Act of 1964, the judge reduced the award, to $360,000. But the United States Court of Appeals for the 11th Circuit, in Atlanta, overturned the verdict entirely. It ruled that Ms. Ledbetter had no case because she could not show any intentional discrimination in the 180 days before she complained to the employment commission.

Other federal appeals courts, including those here and in New York, disagree with that analysis, as does the E.E.O.C. The agency has long applied what is known as the “paycheck accrual rule,” under which each pay period of uncorrected discrimination is seen as a fresh incident of discrimination. So although the 180-day limit applies to discrete actions like a discriminatory refusal to hire or failure to promote, it does not, in the view of the federal agency charged with administering the statute, prevent lawsuits for the continuing effects of past discrimination in pay.

But the Bush administration has disavowed the commission’s position. After the court agreed in June to hear Ms. Ledbetter’s appeal, Ledbetter v. Goodyear Tire and Rubber Company Inc., No. 05-1074, the administration entered the case on the company’s behalf.

Irving L. Gornstein, an assistant to the solicitor general, argued that "employees who allow the 180-day period to pass may not years later, and even at the end of their careers, challenge their current paychecks on the grounds that they are the result of a number of discrete, individually
discriminatory pay decisions that occurred long ago."

When Justice Antonin Scalia asked, "Why should we listen to the solicitor general rather than the E.E.O.C.?" Mr. Gornstein acknowledged that the commission "has taken a different position," one that he said was based on a misunderstanding of a Supreme Court precedent.

Ms. Ledbetter's lawyer, Kevin K. Russell, said it was often difficult for employees to learn that their pay was discriminatory. Employees who receive regular raises, Mr. Russell said, may well not realize that the raises were smaller than they should have been.

"It's only when the disparity persists," he said, "when the different treatment accrues again and again and the overall disparity in the wages increases, that the employee has some reasonable basis to think that it's not natural variation in the pay decisions but actually intentional discrimination."

Justices Ruth Bader Ginsburg and Stephen G. Breyer appeared most sympathetic to Mr. Russell's argument. Justice Breyer commented at one point that "there will be probably a significant number of circumstances where a woman is being paid less, and all she does is for the last six months get her paychecks and she doesn't really know it because pay is a complicated thing." It could take "even a year for her to find out," he said.

Chief Justice John G. Roberts Jr. appeared the most skeptical, several times raising the question of how employers could shoulder the burden of defending long-ago pay decisions.

"It could be 40 years, right?" Chief Justice Roberts asked Mr. Russell, adding, "I mean, if it happened once 20 years ago, you have a case that you can bring" under the plaintiff's analysis.

The Goodyear lawyer, Glen D. Nager, noting that the statute required proof of intentional discrimination, said the basic point was that "no one at Goodyear took Miss Ledbetter's sex into account" in the salary she was paid in the 180 days before she filed her complaint.

The law does not permit the accusation "that there is discrimination today merely because there was discrimination yesterday," Mr. Nager said, adding that when the "filing period passes and no charge is brought, the employer is entitled to treat that past act as if it was a lawful act."

Justice David H. Souter asked, "Is that so even if they know it was in fact originally an unlawful act?"

"Yes," Mr. Nager replied.
The Supreme Court broke new ground yesterday in upholding federal restrictions on abortion, with President Bush’s two appointees joining a court majority that said Congress was exercising its license to “promote respect for life, including the life of the unborn.”

The court’s 5 to 4 decision upholding the Partial Birth Abortion Ban Act passed by Congress in 2003 marked the first time justices have agreed that a specific abortion procedure could be banned. It was also the first time since the landmark Roe v. Wade decision of January 1973 that justices approved an abortion restriction that did not contain an exception for the health of the woman. It does, however, provide an exception to save the woman’s life.

“The government may use its voice and its regulatory authority to show its profound respect for the life within the woman,” Justice Anthony M. Kennedy wrote. He said the ban on the controversial method for ending a midterm pregnancy is valid because other abortion procedures are still available.

Kennedy was joined by Bush’s appointees—Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr.—and Justices Antonin Scalia and Clarence Thomas.

Kennedy announced the decision before a hushed chamber, and while his opinion did not overturn Roe or the court’s subsequent decisions, yesterday’s ruling marked an unmistakable shift.

Justice Ruth Bader Ginsburg acknowledged as much moments later, when she solemnly read a statement from the bench explaining her dissent.

The majority opinion, she told a stone-silent courtroom, “cannot be understood as anything other than an effort to chip away at a right declared again and again by this court—and with increasing comprehension of its centrality to women’s lives.”

The federal law bans a procedure used in a limited number of midterm abortions, but the court’s decision will probably have an immediate effect on U.S. politics and lawmakers.

The 2008 presidential candidates split along party lines in their reaction—Democrats had angry words for the court and Republicans were generally supportive. Activists on both sides of the issue predicted that the decision will encourage antiabortion state legislatures to pass laws not only adding new restrictions but looking to challenge Roe itself.

Bush said in a statement that the decision “affirms that the Constitution does not stand in the way of the people’s representatives enacting laws reflecting the compassion and humanity of America.”

He added: “The Supreme Court’s decision is
an affirmation of the progress we have made over the past six years in protecting human dignity and upholding the sanctity of life.”

The decision is especially significant because the court had rejected in 2000 a Nebraska law aimed at banning what opponents call “partial birth” abortion, because it lacked an exception for preserving the health of the woman. That five-member majority included all of yesterday’s dissenters, plus then-Justice Sandra Day O’Connor.

With Alito taking her place and approving the federal ban, the majority has shifted. Antiabortion activists now see the makings of a court they have longed for.

“It is just a matter of time before the infamous Roe v. Wade . . . will also be struck down by the court,” predicted Roberta Combs, president of the Christian Coalition of America.

“The impact of Sandra Day O’Connor’s retirement is painfully clear,” said Nancy Northrup, president of the Center for Reproductive Rights, adding: “It took just a year for this new court to overturn three decades of established constitutional law.”

The ruling capped an aggressive campaign on the part of antiabortion activists to outlaw the procedure known as an “intact dilation and evacuation.”

As many as 90 percent of abortions are performed within the first three months of pregnancy, and in most cases a physician vacuums out the embryonic tissue. Those procedures are not affected by the federal law.

Later in pregnancy, some type of surgery is required. Dilation and evacuation is the method most often used, in which the woman is placed under anesthesia, her cervix is dilated and the fetus is removed in pieces.

But some physicians say that in certain circumstances, it is better for a woman to undergo intact dilation and evacuation, which they say carries a lower risk of bleeding, infections and permanent injury.

It involves partly delivering the fetus and then crushing the skull to make removal easier. It is this procedure that Congress made a crime. Opponents say it is a form of infanticide, because the fetus could be viable at the time. It made doctors who perform such surgery subject to up to two years in prison.

The law has never taken effect. Lower courts, after conducting lengthy trials and considering previous Supreme Court decisions, declared it unconstitutional.

To write the opinion in his new court’s most important abortion decision to date, Roberts chose Kennedy, who has been in the majority in each of the court’s 5 to 4 decisions this term.

Kennedy was in the majority that reaffirmed the basic rights in Roe in 1992’s Planned Parenthood of Southeast Pa. v. Casey. He dissented in 2000’s Stenberg v. Carhart, which struck down Nebraska’s law.

While opponents of the federal ban said it was similar to Nebraska’s law, Kennedy went to lengths to show it “departs in material ways.” He said that it is specific enough to instruct doctors on exactly which procedures are allowed, and that it applies only when a physician “deliberately and intentionally” performs the banned procedure.
The opinion left open the possibility that a doctor or woman could bring a narrowly tailored challenge to the law, a prospect that abortion rights advocates discounted.

Kennedy wrote that the procedure is “laden with the power to devalue human life.”

In her stinging dissent, Ginsburg said the court’s “hostility to the right Roe and Casey secured is not concealed.”

She wrote that the answer to Kennedy’s concern that women would regret uninformed decisions to undergo the procedure is to require physicians to give them more information.

“Instead, the court deprives women of the right to make an autonomous choice. . . . This way of thinking reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited,” Ginsburg wrote.

Ginsburg, joined by Justices Stephen G. Breyer, David H. Souter and John Paul Stevens, noted that the court is “differently composed” than the last time it considered abortion restrictions. She added: “A decision so at odds with our jurisprudence should not have staying power.”

The combined cases are Gonzales v. Carhart et al. and Gonzales v. Planned Parenthood Federation of America.
Justice Kennedy has given new meaning to the aphorism that “anything worth doing . . . is worth doing badly.” The decision Wednesday in Gonzales v. Carhart seems to have set off chains of euphoria—and alarm—in the land. The pro-lifers have shown a joy that is surely out of scale with the narrow, constricted opinion that sprang from the mean nature of Justice Kennedy. And the pro-choicers, wringing their hands, seem not to have noticed that Kennedy has so cabined the approval of this federal law on partial-birth abortion that the “abortion liberty” seems to have been placed safely beyond challenge. As Kennedy was careful to assure his audience, the abortionist who goes merrily on his way dismembering a child—or, as he put it, the one who “disarticulates [a fetus] at the neck, in effect decapitating it”—is safely insulated from any danger of prosecution: The abortionist simply needs to avoid that indelicate matter of having a substantial part of the child dangling outside the body of the pregnant woman as he inserts a scissor into the skull of the child or finds another way of killing it.

Kennedy went out of his way to sound again the themes in the Casey case of 1992, in affirming Roe v. Wade. “We assume,” he said, “the following principles for the purpose of this opinion”—and then went on to list propositions that no one else among his colleagues in the majority is likely to accept. For example: that before the point of “viability” a state may not prohibit a woman from making a decision to “terminate her pregnancy.” Or that the state may not place an “undue burden” on a woman seeking abortion.

**Beneath the Surface**

During the oral argument on the case in November, the solicitor general, Paul Clement, argued that the bill on partial-birth abortion could be sustained without challenging in any degree the holding in Roe v. Wade. We took that as something he just had to say, and on the surface it was true. But what we sensed, beneath the surface, was that a decision upholding the law would mark the beginning of the end for Roe. The judges would be saying, in effect, that they were ready to start weighing seriously many limited restrictions on abortion, emanating from legislatures in the states. And in a chain those measures would surely come, step by step.

Now Justice Kennedy insists, in the same way, that the bill does not diminish Roe v. Wade, and we wonder whether we should discount that flat assertion in the same way we did Clement’s. But Kennedy, in control of the opinion, has acted precisely to foreclose virtually all piecemeal challenges to Roe. He has made it clear that the killing of the unborn can proceed almost wholly unchecked, as long as the grisly acts of dismembering or poisoning are taking place solely in the womb.

And yet, as he sought to mark off with exquisite precision the narrow dimensions of his judgments, he also took some remarkable steps to keep Dr. Carhart and his
friends from coming into federal court again next week, with new rationales, which can tie up the bill once again. It may be a narrow decision, but Kennedy, to his credit, has taken some decisive steps to insure that this decision will stick.

Allowing for Restrictions

In a piece last January in *First Things* ("The Kennedy Court") I anticipated that Kennedy would try to resolve the case in the most limited way by simply rejecting the decisions in the lower courts to strike down a law on abortion in a "facial challenge." In most cases, a facial challenge will be accepted only when there appear to be no conceivable circumstances in which the law could be constitutional. With laws on abortion, however, the situation is inverted: The federal judges have been willing to enjoin the enforcement of these laws in facial challenges if there is any conceivable circumstance in which the law might be unconstitutional. Kennedy has now made it clear that this inversion of the law has been ended, and that is no small point: It means that laws on abortion will be allowed to work, to have their effect; that they will not be struck down flippantly on the basis of airy speculations offered by people who object to having abortions restricted. The laws would not be challenged then unless there is a concrete case of someone actually denied an abortion that could clearly be tested.

My own apprehension was that the Dr. Carharts in the country, or the agents of Planned Parenthood, would simply come into court again with any of the rationales that have worked in the past. Judges like Richard Kopf in Nebraska have already shown themselves altogether willing to credit any argument that is offered by the challengers. Most likely, I thought, the charge would be heard again that the law is fatally "vague." But Kennedy moved decisively to foreclose those kinds of challenges. He argued that there is nothing vague about the definition of the partial-birth abortion. When the doctors who perform this procedure are intending to dilate the cervix and bring most of the body of the child outside the birth canal, they must know that they are intending this.

Kennedy also foreclosed the move to claim the need for a "health exception" to the law. The law already contained an exception for the cases, exceedingly rare, when a woman's life would be in danger. And if a partial-birth procedure did not seem "indicated," the federal court of appeals in New York had noted that the abortion could take place in the ways now common or conventional; so there were other, safe methods still available. The claim that partial-birth abortions were sometimes the safer form of abortion had been found, by Judge Casey in New York, to be a claim wholly speculative and theoretical, without any evidence offered in support.

Kennedy confirmed what I had written last January: that he was willing to accept an "as applied" challenge to the law: A pregnant woman with cancer might argue that it is especially risky for her to have instruments introduced into the womb. She might contend then the partial-birth abortion would be the safer method for her. But that kind of case is not certain to arise, or arise very soon. And Kennedy has been clear on the point that the law itself does not have to be overturned because it may not apply aptly in all conceivable cases.

The Next Steps

Then what kind of "good" may spring from a decision so limited? The decision in *Carhart* reaffirms yet again *Roe v. Wade*, but something else may be at work beneath
the surface. There is a certain dynamism that comes into play when legislators are allowed to take hold of the matter again. About thirty states had passed laws on partial-birth abortion before they were invalidated in *Stenberg v. Carhart* in 2000. The states can now pass their own version of the federal bill, just tracking the language of that bill. That is all good practice. And once legislators get used to legislating again, other things may readily follow. Kennedy pointed out that the Court in *Casey* had upheld the requirements of informed consent. The legislatures can now start enacting those provisions again—most notably, they may provide for the use of sonograms to assure that the pregnant woman has something more than a vague impression of the child she is carrying. The viewing of a sonogram could be required, or it may simply be offered in the interest of letting a woman know what she is choosing.

In India, the use of sonograms has penetrated even poor areas, and brought the beginnings of a demographic crisis: Families anxious for sons have been altogether too willing to abort female babies. And given the sensibility of the time, the disposition of the government in India has not been to ban the killing of babies based on their gender, but rather to forbid clinics to make the information available. Of all things, we are hearing denunciations of these multinational capitalist firms, like General Electric, which do such underhanded things as to produce the equipment that gives people such information about their unborn children.

The next plausible move, then, is to bring back the scheme of banning any abortion performed on the basis of the sex of the child. My hunch is that that position, too, would command a large level of support in the public, comparable to the level of support for banning partial-birth abortion, and it too would recruit people who call themselves “pro-choice.”

But if legislators could take that modest move of banning abortions on the basis of sex, the public mind could be prepared for reasoning about the next step: barring abortions based on the disability of the child. In surveys in the past, more than half of the public were opposed to aborting a child if the child was likely to be born deaf. The opposition seemed to be invariant by the period of gestation. My own reading was that, if people thought it was wrong to kill someone because of his deafness, they did not think that the wrong varied with the age of the victim.

Here the legislatures could invoke the body of their laws dealing with discriminations against the disabled. And then perhaps they could get to the point of banning abortions after the onset of a beating heart. One survey recently found that about 62 percent of the public would support that kind of restriction. It is worth noticing, too, that in none of these cases except that of the beating heart would the legislation start offering protections based on trimesters or the age of the child. There would be no need to play along, and confirm, the perverse fiction that the child becomes more human somewhere in this scale of age, or that it is legitimate to kill smaller people with reasons less compelling than the reasons we would need in killing larger people.

**The Effects of an Impulse**

In the most curious way, then, a decision so narrow, so begrudging and limited, may invite a series of measures simple and unthreatening, but the kinds of measures that gather force with each move. We need to remind ourselves that we have seen such things before. We may recall, in that vein,
the Emancipation Proclamation. It was limited, as a war measure. For Lincoln did not have the authority to strip people of what was then their lawful property in slaves. The Proclamation freed only those slaves held in areas that were in rebellion against the government. It did not cover the slaves held in Delaware, Maryland, Kentucky, Missouri. And yet . . . it was understood instantly and widely in the country that this measure had an "anti-slavery impulse."

The decision on Wednesday, in *Gonzales v. Carhart*, was severely limited and diminished in its practical effects. But rightly or wrongly, there may be a sense that the decision opens the doors now; that it invites legislators and political men and women to deliver themselves from the reign of judges, and set their hands to this task once again.

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NEW YORK—It was just after Mother’s Day in May 2003 when Ilene Jaroslaw, about four months pregnant, learned that the fetus she was carrying had a fatal spinal cord and brain defect.

Jaroslaw, then a mother of two, says she was devastated but decided immediately to have an abortion. Because she wanted to have another child—and because she had had two previous cesarean-section deliveries and an unrelated surgery on her uterus—she agreed with her doctor’s recommendation to undergo a procedure that would do as little damage as possible to the uterus.

“There was absolutely no hope at all,” says Jaroslaw, a 43-year-old lawyer in New York City who talked with USA TODAY about her experience. “This baby was not going to survive long.”

For Jaroslaw, having what Congress and critics of the procedure call a “partial-birth” abortion was an intensely personal health decision that led to a happier ending: In 2004, she got pregnant again and delivered a healthy baby girl.

The episode also made Jaroslaw a symbol of the ongoing debate over whether Congress’ effort to ban “partial-birth” abortion violates a woman’s right to end a pregnancy—a question that goes before the Supreme Court on Nov. 8. Under a federal law passed by Congress in October 2003 and tied up in the courts ever since, Jaroslaw could not legally have undergone the procedure because her life was not in danger.

Jaroslaw’s reasons for having the procedure—to preserve her ability to have more children by avoiding the hemorrhaging and perforation of the uterus that can occur with other abortion methods—would not have cleared the legal hurdle set by Congress.

That’s partly why the pair of cases that come before the Supreme Court next week are widely viewed as a major test of efforts to restrict abortion. The issue is not the fundamental question of whether abortion should be legal, first established by the court’s ruling in Roe v. Wade in 1973. Instead, the cases test the Republican-led Congress’ power to limit the reach of that ruling by restricting medical options for women.

The law is called the Partial-Birth Abortion Ban Act of 2003. Lawyers for the two challengers now before the Supreme Court, Eve Gartner of Planned Parenthood and Priscilla Smith of the Center for Reproductive Rights, note that there is no medical procedure known by that name and contend that the phrase is needlessly offensive and misleading.

After O’Connor

On a more technical level, the cases put on exhibit dueling medical opinions over whether certain second-trimester abortion procedures are ever necessary.

For the court, the cases—Gonzales v. Planned Parenthood Federation of America
and *Gonzales v. Carhart*—represent the first significant test of whether abortion rights in America will change now that moderate Justice Sandra Day O’Connor, a key vote in favor of such rights, has retired.

Six years ago, when the justices struck down state bans on “partial-birth” abortions because the laws did not include exceptions for when a woman’s health was at risk, O’Connor cast the decisive fifth vote on the ideologically divided, nine-member court. Last term, she was replaced by Samuel Alito, a more conservative judge who, as a member of a lower court, voted for abortion restrictions that O’Connor later rejected.

The federal ban—which is similar to the state laws voided by the high court six years ago—has been rejected by three sets of U.S. district courts and appeals courts. The lower courts said Congress’ ban violates women’s rights to abortion because it lacks a health exception and is too vaguely written.

The lower court judgments conflict with Congress’ assertion that “partial-birth” procedures are never the best option to preserve a woman’s health.

“This is an excellent case to test the direction of the court on abortion rights,” Georgetown University law professor Randy Barnett says.

Abortion rights groups such as Planned Parenthood say Jaroslaw and thousands of women like her personify the need to preserve the second-trimester procedures known in the medical community as “intact dilation and evacuation” (or intact D&E) and “dilation and extraction” (D&X).

The methods involve dilating a woman’s cervix to allow most of the fetus to emerge into the vagina intact, rather than dismembering the fetus in the uterus by using forceps and other instruments. In the intact method, a doctor then suctions out the fetus’ brain to collapse the head and allow delivery.

The American College of Obstetricians and Gynecologists has reported that such methods increasingly are viewed as the safest abortion procedures for the second trimester of pregnancy, roughly the 13th to 26th weeks of gestation.

Second-trimester procedures account for about 11% of the estimated 1.3 million abortions performed in the USA each year, according to the Guttmacher Institute, a research group that supports abortion rights. It’s unclear, however, how many of those abortions are done with the intact D&E or D&X methods because no one keeps a precise count.

The Bush administration, in defending the Partial-Birth Abortion Ban Act of 2003, has argued in court papers that Congress had solid grounds to believe that any procedure in which a doctor “partially delivers a (living) fetus intact . . . and then kills the fetus” is never medically necessary.

The government is appealing a ruling by the U.S. Court of Appeals for the 9th Circuit, in a case begun by Planned Parenthood, and a ruling by the U.S. Court of Appeals for the 8th Circuit, in a case started by Nebraska physician LeRoy Carhart.

“*Resembles Infanticide*”

U.S. Solicitor General Paul Clement has told the justices that the “gruesome” procedure “resembles infanticide.”

Clement has said Congress’ ban is not unconstitutional because there are
alternative methods of second-trimester abortions that would remain legal. Those include a standard D&E procedure in which a doctor dismembers the fetus in the uterus, and another method known as “induction,” in which a woman is given drugs that cause her to go into labor and deliver the fetus.

Groups filing briefs in support of the administration include the American Association of Pro Life Obstetricians and Gynecologists. The association argues that such alternative methods are medically appropriate even for women such as Jaroslaw with uterine scarring from a prior cesarean section or other uterine surgery.

Elizabeth Shadigian, a physician affiliated with the University of Michigan’s medical school who is president of the pro-life group, says there is little evidence to suggest that “partial-birth” methods are better in preserving a woman’s health.

“There is almost no data on it,” Shadigian says. “It’s not good enough that someone believes it’s better. You have to prove it’s better.” She said women should wait until studies are done on “the long-term effects of the procedure.”

In court filings, Planned Parenthood counsel Gartner says that if Congress’ ban is allowed to take effect, doctors would not be able to give their patients the best medical care.

Physicians would be “chilled from continuing to provide these procedures, . . . (and) women’s liberty will be infringed and their right to choose abortion unduly burdened,” Gartner says.

She also notes that the records from the cases now before the Supreme Court show several instances in which women suffering from serious medical conditions or carrying fetuses with severe anomalies would benefit from the intact D&E procedure.

“You even for women whose health condition is not compromised, intact D&E is a significantly safer method of abortion,” Gartner says.

Clement acknowledges in his filings that physicians disagree over the necessity for the intact D&E and D&X methods. However, he insists that the justices must defer to Congress’ finding that “there is substantial evidence . . . that partial-birth abortion is never” medically necessary.

“A Nightmare”

Jaroslaw, a graduate of Harvard College and of Georgetown Law School, says she came forward to speak about her abortion because “the issues aren’t as simple as people think. Nobody in advance of a diagnosis says, ‘I want that procedure.’ What people want is proper medical care.”

Jaroslaw, a native of Flushing, N.Y., married a fellow lawyer, David, in 1992. She gave birth to a boy in 1997 and a girl in 1999. She says the children were delivered by cesarean section because she previously had uterine fibroids and other gynecological problems.

Jaroslaw says that when she became pregnant in 2003, everything looked good in early tests. “So we tell our families I’m pregnant. We tell friends. A few weeks after that, I tell people at work. I wasn’t worried.”

About 17 weeks into the pregnancy, however, a sonogram showed that part of her fetus’ brain was missing. The diagnosis was anencephaly, which is fatal.

Jaroslaw says she and her husband
considered abortion the only option. She says she did not want to wait a full nine months to deliver a child that would not survive.

“The idea of being pregnant for so many more months and having people ask about the baby, it would have been a nightmare,” Jaroslaw says. She was also concerned that her children would be traumatized by having their sibling be born and die. She says she talked with her rabbi, and he supported her choice.

Jaroslaw says her desire for a third child led her doctor to recommend that she have the fetus removed intact, to avoid trauma to her uterus. “When you’ve had so many cuts in the uterus, you want as little instrumentation and probing around as possible.”

Coincidentally, she underwent the abortion as Congress was debating its ban on “partial-birth” abortion. “I asked my doctor whether, if the bill passed, the procedure I was about to have would be illegal,” Jaroslaw says. “He said yes.”

Bush signed the bill into law in November 2003.

“I’m a family person,” Jaroslaw says. “I don’t think I’m unique in my situation, except that I will talk about it. When I went back to work, people opened up to me with their own stories.”

How Much Restriction?

So how might the Supreme Court—with Alito and Chief Justice John Roberts, who replaced the late William Rehnquist last year—view the most recent attempt to restrict abortion?

The “partial-birth” cases arrive at the court at a time when few Americans—15% in a Gallup Poll in May—believe abortion should be banned in all circumstances. That poll, typical of nationwide surveys, found that most Americans (53%) believe that abortion should be legal but with restrictions.

The high court generally has reflected that sentiment since Roe v. Wade, upholding abortion rights while opening the door to limits. The current cases could provide a hint of whether greater restrictions might be imposed with the new justices on the bench. However, a veteran justice—Reagan appointee Anthony Kennedy—is more likely to be the key player.

In 2000, when the court voted 5-4 to strike down state bans on “partial-birth” abortion that lacked an exception for cases in which a woman’s health was at risk, the bench was deeply divided. Kennedy, who had provided a crucial fifth vote in 1992 when the justices affirmed abortion rights, bitterly dissented in 2000. He said government should be free to outlaw the “abhorrent” procedure and that states had a legitimate “concern for the life of the unborn and for the partially born.” This time, a big question will be whether Kennedy, a frequent swing vote on the court, still supports a ban on the procedure without a health exception.

If he does, the court’s reshaped conservative wing—Justices Antonin Scalia and Clarence Thomas, along with newcomers Roberts and Alito—could be positioned to uphold Congress’ ban. Scalia and Thomas consistently have voted against abortion rights. Roberts’ record as a lawyer in the Reagan and first Bush administrations and Alito’s rulings as a lower court judge suggest that they also are likely to take a limited view of such rights.
"Justices Quash Suit over Funds for Faith Groups"

The Washington Post
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William Branigin

The Supreme Court ruled yesterday that federal taxpayers cannot challenge the constitutionality of White House efforts to help religious groups obtain government funding for their social programs, handing a victory to President Bush’s faith-based initiatives program.

In a 5 to 4 decision, the court blocked a lawsuit by a Wisconsin-based group of atheists and agnostics against the White House Office of Faith-Based and Community Initiatives. The court ruled that the suit, by the Freedom From Religion Foundation and three of its taxpaying members, could not go forward because ordinary taxpayers lack legal standing to challenge executive branch expenditures. The ruling reversed a January 2006 decision in favor of the foundation by the U.S. Court of Appeals for the 7th Circuit.

Liberal groups blasted the court’s decision in Hein v. Freedom From Religion Foundation as a setback for the First Amendment and a sop to the religious right, while the White House and religious conservatives hailed it as a major triumph for Bush’s program.

The foundation had complained that parts of the program favored religious groups over secular ones, violating the establishment clause of the First Amendment, which says in part that “Congress shall make no law respecting an establishment of religion.”

The administration argued that the foundation’s taxpayer plaintiffs lacked standing to sue because the faith-based initiatives office was not specifically funded by Congress.

In an opinion joined by Chief Justice John G. Roberts Jr. and Justice Anthony M. Kennedy, Justice Samuel A. Alito Jr. wrote that “the payment of taxes is generally not enough to establish standing to challenge an action taken by the federal government.” If it were, and every taxpayer could sue to challenge any government expenditure, the federal courts would be relegated to “general complaint bureaus,” he wrote.

Alito’s opinion stopped short of repudiating a 1968 Supreme Court ruling in Flast v. Cohen, in which the court recognized a narrow exception to the rule against federal taxpayer standing in an establishment-clause case.

While denouncing the decision, groups supporting separation of church and state took heart that only two justices favored overturning Flast. This means that most church-state lawsuits can proceed, they said.

Justices Antonin Scalia and Clarence Thomas concurred in the judgment but held that Flast should be overturned because it has spawned “notoriously inconsistent” rulings.

Justice David H. Souter wrote a dissenting opinion joined by Justices John Paul Stevens, Ruth Bader Ginsburg and Stephen
G. Breyer. Yesterday's decision "closes the door on these taxpayers because the Executive Branch, and not the Legislative Branch, caused their injury," he wrote. "I see no basis for this distinction in either logic or precedent."
WASHINGTON—The question for the Supreme Court on Wednesday was a jurisdictional one: whether taxpayers who object to the way the White House Office of Faith-Based and Community Initiatives spends its money can get into federal court to make their case.

Whether the office or its programs actually run afoul of the Constitution was not before the justices.

But any notion that this jurisdictional question was the sort of arcane, technical issue that only a law professor could love was quickly dispelled by the intensity of the argument, one of the liveliest of the term.

The fast-paced hour ended with the clear impression that the Roberts court will soon put its own stamp on the law of taxpayer standing, with potentially significant implications for the relationship between government and religion.

The real question by the end of the argument was whether a majority would be content simply to scale back a Warren court precedent that allows taxpayers to challenge the use of public money for religious purposes or whether the court would disavow the precedent altogether and keep such suits out of federal court.

Solicitor General Paul D. Clement revealed his hand slowly, bringing his argument to a pinpoint landing at the precise close of a three-minute rebuttal. If the justices could not see their way to applying the precedent narrowly, Mr. Clement said, the court should simply overrule it. “If something has to go in this area,” he said, “I think it’s an easy choice.”

Under either option the administration advocated, the court would reject a suit that the federal appeals court in Chicago reinstated last year, a challenge to conferences that Bush administration officials have held to advise religious groups on how to apply for federal grants as part of the effort to bolster the role of such groups in social service programs.

The plaintiff is the Freedom From Religion Foundation Inc. of Madison, Wis., which advocates strict separation of church and state. In a complaint filed initially in 2004, the organization argued that officials who convened and addressed the conferences used congressionally appropriated money in a way that “violated the fundamental principle of the separation of church and state.”

Under the ordinary doctrine of “standing,” which defines who may bring a suit, people who object to a government policy but who cannot claim a concrete injury from that policy have no right to sue. But in a 1968 decision, the court carved out an exception for religion cases. The case, Flast v. Cohen, gave taxpayers standing to challenge federal laws that authorized expenditures for purposes alleged to violate the First Amendment prohibition against the “establishment” of religion.

The administration position in the case argued on Wednesday, Hein v. Freedom
From Religion Foundation Inc., No. 06-157, is that the Flast decision should be understood to include two limitations. First, Mr. Clement said, taxpayers should be limited to challenging Congressional statutes, not executive branch programs like that in this suit. Second, the solicitor general argued, taxpayers should be able to challenge only spending outside the government, not internal spending like that cited by the Freedom From Religion Foundation.

Did that mean, Justice Antonin Scalia asked Mr. Clement, taxpayers could challenge a statute that gave money to outside groups to build churches, but not one that directed the government to build its own church?

It was a “horrible hypothetical,” Mr. Clement replied, but Justice Scalia had understood him correctly: taxpayers should not have standing to challenge “an internal government church.”

Andrew J. Pincus, representing the foundation, told the court there was “no basis for drawing the arbitrary lines that the government suggests.” The Flast decision did not include such limitations, he said.

Mr. Clement was unruffled as the justices tossed various hypothetical questions his way. Could a taxpayer challenge a law that commemorated the Pilgrims “by building a government church at Plymouth Rock where we will have the regular worship in the Puritan religion?” Justice Stephen G. Breyer asked.

“I would say no,” Mr. Clement said.

Justice Breyer persisted, asking about a law requiring the government to build churches “all over America” dedicated to one particular sect. “Nobody could challenge it?” he asked.

“There would not be taxpayer standing,” Mr. Clement replied.

Chief Justice John G. Roberts Jr. observed that members of other denominations would not need taxpayer standing and that as victims of government discrimination, they could sue under ordinary principles of standing. This was one of the times the chief justice intervened to make the point that in practical application the government’s position was perhaps not as extreme as it sounded.

His interventions in the other side’s argument seemed to have the opposite goal, rejecting Mr. Pincus’s effort to depict his client’s position as modest. When Mr. Pincus said taxpayers should not be permitted to challenge merely “incidental” spending, the chief justice said that was no real limitation because it would ensnare the courts in deciding “whether the activity you’re challenging is incidental or not.”

Mr. Pincus denied that this initial inquiry would make much work for the courts. For example, he began, “if someone’s claim is that people in the White House have five meetings in the course of a year that they’re upset about—”

Chief Justice Roberts cut him off, saying, “Well, then, five meetings isn’t enough. How many?”

“What about 10?” Justice Scalia offered.

“Twenty?” the chief justice asked.

“We’ll litigate it,” Justice Scalia said. “We’ll figure out a number eventually, I’m sure.”
For Mr. Clement, the most helpful hand was that of Justice Samuel A. Alito Jr. As the solicitor general batted back tricky hypothetical questions, Justice Alito asked him whether the lines he was drawing “make a lot of sense in an abstract sense” or were “the best that can be done” under existing precedents.

“The latter, Justice Alito,” Mr. Clement said, evoking laughter. “I appreciate the question.”
Of all the crazy ironies in modern church-state jurisprudence, none is more vexing than the notion that some fundamentally religious ideas and symbols have been so completely drained by time or overuse of religious significance that they are now essentially secular. The word God on coins and the Christmas in trees are oft-touted examples. And at argument in this morning’s case, *Hein v. Freedom From Religion Foundation,* we discover that the next casualty of lost religious symbolism is, well, the bagel.

In 2001 President Bush established the White House Office of Faith-Based and Community Initiatives, whose purpose was to “level the playing field” between religious and secular social-service providers. The government hosted a bunch of conferences that helped such religious groups compete for federal grant money. The Freedom From Religion Foundation likened those conferences to “revival meetings” and sued, claiming that the government was using taxpayer dollars to favor sectarian groups, in violation of the First Amendment’s bar on state “establishment” of religion.

Now you may be thinking: “Hey, wait a second. If being a taxpayer means I get to sue the government for every lame thing it does, there are some highways/health clinics/wars I’d rather to go to court about.” To which my answer would be the doctrinally important, if yawn-worthy, “You don’t have standing as a taxpayer to sue the government over every little thing that aggrieves you.” Nevertheless, a narrow exception has been carved out when the state pushes religion. That you can sue over, thanks to the 1968 Warren Court case *Flast v. Cohen,* which allowed taxpayers to sue the government for spending funds on religion. Whether the atheists can squeeze through this mouse hole and into court is the only question today. No one has yet determined whether Bush’s faith-based program in fact violated the Establishment Clause.

The federal district court ruled against the atheists. The 7th Circuit Court of Appeals, in an opinion authored by the prodigious Judge Richard Posner, determined that the taxpayers had standing to sue. The alternative, Posner said, could allow crazy amounts of unchecked executive-branch spending on religion.

Solicitor General Paul Clement represents the Bush administration, and he has the misfortune of being at the court on one of Justice Antonin Scalia’s all-time record-breaking “laugh-episode” days. Scalia appears to have forgotten that he is largely on Clement’s side in this fight. Perhaps purely in the service of the laughter gods, he gives the SG a pretty hard time.

Clement opens by explaining that the *Flast* taxpayer exception is a narrow one that has only been narrowed further by the cases that followed. He claims that only if the government gives funds directly to outside religious groups could taxpayers sue.

Scalia asks why Congress can’t pass a statute authorizing the construction of a church, if, as Clement insists, allowing the
government to build a church itself would be OK? Justice David Souter agrees that the test should be a Madisonian one: Has the state itself spent "thruppence" on religion? He rolls the R's in thruppence, thus getting as close as a New Englander gets to gleeful.

Justice Stephen Breyer offers a hypothetical in which the Congress passes a statute authorizing the building of a massive church at Plymouth Rock. Does a California taxpayer have standing to sue, he asks? Clement says no; Breyer comes back with, "I'm just trying to think of something even more amazing than what I just thought of." What if, he asks, all over America, in every city, town, and hamlet, the government builds Pilgrim churches? Chief Justice John Roberts replies that any religious group that felt excluded from that program would still have standing to sue, but not "just because he was paying taxes."

Justice Samuel Alito has to jump in to save Clement when the Pilgrim hypo becomes too silly. He asks whether the line Clement is drawing "makes sense in an abstract sense or whether this is just the best that can be done with the body of precedent the court has handed down in this area?" When Clement grins, "The latter, Justice Alito," Scalia snaps back with, "Well why didn't you say so? And here I was trying to make sense of what you're saying!"

When most of the justices are treating the key precedent as a punch line, it's a good clue they are preparing to pull the plug. Breyer tries to defend the Flast exception with the rationale that people become "real upset when they see other religions receiving government money to build a church." Which prompts Scalia to recall that he's actually on Clement's side after all. He purrs, "So getting upset is now a constitutionally valid basis on which to bring lawsuits?" Breyer looks annoyed.

Andrew J. Pincus is representing the Wisconsin-based Freedom From Religion Foundation, and the laugh episodes only ramp up on his beat. Chief Justice Roberts opens with a query as to why taxpayers can't sue the court's marshal for standing up at each argument session and "saying 'God save the court.'" Alito asks Pincus to show him how striking down the administration's faith-based program would reduce anyone's tax rates. Then Scalia asks whether spending federal tax dollars on Air Force One violates the constitution if the president travels in it to attend a church service.

Justice Anthony Kennedy performs some feat of acrobatic reframing by claiming this is all a speech issue somehow. He does make it clear where he ultimately stands, however, when he suggests that it's "unduly intrusive" for the courts to "tell the president he can't talk to specific groups about better using their talents."

Pincus tries to lay out a clear test: Is the sum the government spends on religion identifiable and more than incidental? But Alito, Scalia, and Roberts just keep poking him with the crazy hypos. Which eventually leads Scalia (who is on some kind of comedic crack today) to wonder whether there would be standing for taxpayers to challenge a presidential directive that would only fund the bagels for evangelical prayer breakfasts. Cross talk. Laughter. Then Scalia, with only a hint of an accent, wonders if there is taxpayer standing because, after all, "What could be worse than not buying bagels for the Jewish prayer breakfast?"

Pincus sits down.

Now, I could watch Paul Clement do two-minute rebuttals until the cows come home. He's just that good. And this morning is no exception. By the time he sits down, he
seems to have convinced a majority of the court that there's no harm in obliterating the taxpayer exception for religion cases because suits can still be filed on other grounds. And that if the court has to put a torch to *Flast* in order to preserve the constitutional well-being of the rest of the universe, well, hey. Some court watchers expect this to be a close case. It didn't look close today. But the enduring lesson of *Hein* may just be that the law is so confusing that it's unclear whether the constitutional violation is the hypothetical prayer breakfasts or just the hypothetical bagels.
WASHINGTON—The U.S. government can withhold funds from universities that protest the Pentagon’s ban on gay men and lesbians by denying military recruiters access to campuses and students, the Supreme Court ruled Monday.

In a unanimous opinion by Chief Justice John Roberts, the court rejected arguments from a group of law schools that claimed a federal law that allows the government to withhold funding in such situations violates colleges’ First Amendment rights of free speech and free association.

The law, known as the Solomon Amendment for its original sponsor in 1994, U.S. Rep. Gerald Solomon, R-N.Y., allows the U.S. government to deny funding to colleges that do not give military recruiters the same access and campus privileges that are given to other recruiters.

Most law schools that host recruiters insist that they sign a statement saying they do not discriminate based on sexual orientation. The law school consortium that brought the case, the Forum for Academic and Institutional Rights, said requiring schools to accept military recruiters undermined their opposition to bias and forced them to adopt a message they oppose. The military’s “don’t ask, don’t tell” policy bars anyone who reveals his or her homosexuality from serving in the armed forces.

The case was not a test of the “don’t ask, don’t tell” policy. It drew attention in part because it became part of the national debate over gay civil rights and arrived at the court as the Pentagon was becoming increasingly aggressive in its wartime recruiting.

The American Association of University Professors, the American Civil Liberties Union and several universities filed briefs urging the justices to uphold a lower-court ruling that said the Solomon Amendment wrongly compelled schools to send, and subsidize, a message of discrimination.

In his first major opinion since becoming chief justice last fall, Roberts wrote, “Accommodating the military’s message does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions.”

Roberts said the basic communications required of colleges were bulletin board notices and e-mails. The chief justice said they hardly could be compared to the kind of “compelled” government speech that has been invalidated through the years, such as a West Virginia law that required schoolchildren to recite the Pledge of Allegiance and to salute the American flag, or a New Hampshire law that ordered the state motto—“Live Free or Die”—to be on license plates.

Joshua Rosenkranz, who represented the law schools challenging the law, said he did not expect universities to decline federal funds so they could block military recruiters.
However, he said he expects faculty members and students will accelerate their public opposition to “don’t ask, don’t tell.”

“Schools are not going to give up the money,” Rosenkranz said, noting that billions in college funding are at stake. “But there are other ways to get the message across. You are going to see banners over military interview rooms and signs that say, ‘Danger: Discriminating recruiters inside.’”

New Justice Samuel Alito did not participate in the case; he had not yet joined the court when the case was heard in December.
Law schools that refuse to assist military recruiters based on antidiscrimination principles say they should not be denied federal funding under the so-called Solomon Amendment for doing so. The Supreme Court recently heard oral argument on whether the statute unconstitutionally conditions funds on schools’ waiving their First Amendment rights. (Rumsfeld v. Forum for Academic & Institutional Rights, No. 04-1152 (U.S. argued Dec. 6, 2005).)

The Forum for Academic and Institutional Rights (FAIR), a coalition of 36 law schools, filed suit to challenge the Solomon Amendment in 2003. The Third Circuit ruled in favor of FAIR the next year, reversing a lower court’s decision.

Most law schools have long-held policies against assisting discriminatory employers, including the military because of its refusal to enlist openly gay men and women. Most schools allowed military recruiters on campus but did not help them by, for example, posting bulletins, disseminating literature, and making appointments for them.

“This is about law schools with a well-established policy saying that they don’t want to be a party in any way to discrimination against their students,” said Erwin Chemerinsky, a Duke University law professor and one of the plaintiffs named in the case.

Enacted in 1994, the Solomon Amendment initially allowed Department of Defense funds to be withheld from law schools that barred military recruiters. It was later expanded to include funds from other federal agencies and those given to the parent university as well as the law school. After September 11, 2001, law schools were required to provide recruiters not just access but access that is “at least equal in quality and scope” to what they provide other employers. Most schools threatened with losing federal funds have since reversed their policies.

E. Joshua Rosenkranz, a New York City lawyer who argued the case for FAIR, said the case involves two messages: the military’s message that “Uncle Sam doesn’t want you [if you’re openly homosexual]” and the law schools’ message that they “don’t abet those who discriminate.”

Rosenkranz said the Solomon Amendment, by forcing schools to advance the military’s message, compels speech and violates their freedom to associate. It also infringes on their right to advance their own message against discrimination, he said.

At oral argument, Solicitor General Paul Clement, who argued the case for the government, said the Solomon Amendment gives the military “equal opportunity to recruit from the same pool as other employers.”

But the military demanded not simply equal treatment but “exceptional treatment—a demand to be the only discriminatory employer that a law school will assist,”
FAIR said in its brief to the Supreme Court. Rosenkranz noted that under the Solomon Amendment, the government regulates speech in ways that advance only the government's message, which constitutes viewpoint discrimination.

At oral argument, the Court considered the practical meaning of "equal access." Justice John Paul Stevens asked Clement about a situation in which a law school gives military recruiters equal access but uses undergraduate facilities rather than law school facilities, to send a "separate but equal" message. Clement said such treatment is not equal in scope.

Justice Anthony Kennedy asked Clement whether the statute allows a school to organize a protest aimed at the recruiters. Clement said yes; it provides the right to equal access but not the right to be free of protest.

Clement noted that law schools could deny recruiters access for other reasons, such as the war in Iraq—not just because of discrimination against homosexuals. Justice David Souter said that, regardless of the law school's motive for barring recruiters, the question of compelled speech—"forcing them to underwrite your speech, forcing them to change their message"—remains.

Chief Justice John Roberts Jr. remarked that no one thinks law schools speak for the recruiters on campus, so the military's message is unlikely to be attributed to them.

Clement suggested that a ruling in FAIR's favor might actually threaten antidiscrimination protections. Exploring that point, Justice Stephen Breyer asked Rosenkranz whether Bob Jones University, which opposes racial mixing, would have the same right as law schools to protect its message and receive federal funding.

Rosenkranz responded that there is "an enormous difference between antidiscrimination laws and the Solomon Amendment" and that acts of discrimination are not entitled to First Amendment protection.

The decision also could affect the No Child Left Behind Act, which contains a provision requiring high schools to provide students' names and contact information to military recruiters, said Kent Greenfield, a Boston College Law School professor and president of FAIR. "Like the Solomon Amendment, the No Child Left Behind Act conditions federal funds on schools' willingness to assist military recruiters," he noted.

If the Solomon Amendment is upheld, Chemerinsky said, law schools that agree to provide equal access may print statements to distribute to students explaining why they accommodate military recruiters and condemning the military's policies.

FAIR expressed concern about the government's ability to condition federal funding on waiving First Amendment protections on a broader scale. "That's really what this case is about," Chemerinsky said. "Can the government use its tremendous coercive power to force people to give up their constitutional rights?"

The decision "could have a devastating effect on the role of the academy," Rosenkranz said. "The government's theory is that as soon as a school accepts the government's money, it has no First Amendment right to decline a request from any government agency to disseminate its messages."
Greenfield agreed. "We all receive federal benefits of some kind: Social Security, welfare, mortgage deductions, student loans," he said. "If the government can condition those benefits on the recipients' agreement to not exercise First Amendment rights, then only those who do not need the government at all could speak out against it."
The best piece of news to come out of Tuesday’s Supreme Court oral argument on *Rumsfeld v. FAIR* is the surmise, based on the justices’ questioning, that the court will roundly reject the argument of law schools who want to receive federal money while blocking on-campus military recruiting. Constitutionalists can also smile because of the logic that the justices might use to reach their conclusion. The universities argued that the case hinges on the First Amendment, but government lawyers asked the court to look beyond the free speech clause to other important parts of the constitution and it sounds like at least some justices are doing so.

The government argued in its brief defending the law that, as much as any question of the universities’ First Amendment rights to object to the military’s “don’t ask, don’t tell” policy on homosexuality, the court should also consider Congress’s constitutional responsibility, enumerated in Article I, to “raise and support” a military for the common defense. “To meet that challenge,” the acting solicitor general, Paul Clement, wrote in a government brief, “Congress has long required the armed forces to ‘conduct intensive recruiting campaigns’ to encourage military enlistments.” Therefore, any First Amendment interest—if there even is one—must be balanced against Congress’s responsibility to carry out its constitutional obligation as it sees fit. The Great Scalia suggested to Mr. Clement during the oral argument that the Article I issue ought to be enough on its own to settle the case.

If the point about raising and supporting an army does figure prominently in the court’s ruling, it will be a victory for those who still credit such quaint notions as separated and delegated powers. *Rumsfeld* is about whether Congress will be able to exercise its own judgment about how to fulfill its duties, or whether instead the courts will force the legislative branch’s hand by manufacturing “rights” where none exist. Universities undeniably have a right to free speech, for example, but not the right to require the government to pay for their speech.

This case is but another one in a long string of cases that have sought to secure a “right” to government money in many areas. One of the lawyers for the universities, Joshua Rosenkranz, assisted in another such case in the late 1990s when he was head of the Brennan Center for Justice at New York University. In *Velazquez v. Legal Services Corp.*, the center argued against a law prohibiting federally funded legal aid lawyers from using taxpayers’ money to sue to overturn welfare reform enacted by the taxpayers’ elected representatives. In that case, the Supreme Court ultimately sided with legal aid; *Velazquez* and *Rumsfeld* are not truly analogous, however, so the court will not have to overturn its own precedent to rule correctly in this case. It will be encouraging if the justices decide to credit legislative judgment.
Congress’ demand that law schools give military recruiters equal access to their students, despite the military’s policy of barring homosexuals from service, appeared to have survived quite easily its constitutional test in the Supreme Court on Tuesday, at least if oral argument reflects the Justices’ actual leanings. Aside from Justice Ruth Bader Ginsburg and, possibly, Justice David H. Souter, the so-called “Solomon Amendment” appeared to draw no serious opposition from the bench.

Chief Justice John G. Roberts, Jr., made it clear in several instances that he sees the case as solely one in which the law schools can pursue their desire to exclude the military’s recruiters simply by giving up federal funds. Other Justices, while making somewhat more nuanced comments, seemed to be troubled by the prospect that a major First Amendment ruling in favor of the law schools would open the way for individuals to resist obeying all kinds of laws—including federal anti-discrimination laws—by claiming their refusal to obey was a matter of their beliefs or conscience.

And, with some concessions by Solicitor General Paul D. Clement, some of the Justices—especially Sandra Day O’Connor—appeared to be satisfied that the law schools can get across their anti-discrimination message even while allowing military recruiters on campus and giving them equal access. Clement went quite far in saying that the Solomon Amendment would permit university and law school officials to engage in robust protests against military recruiters—including jeering when they walk into the room at a jobs or career fair.

Clement, in fact, was so expansive about the kind of protests he said the Solomon Amendment would not block that Justices Antonin Scalia and Anthony M. Kennedy voiced some concern that this might actually obstruct the military’s chances of any successful recruiting. The Solicitor General, however, did not yield, saying that military recruiters “were not afraid to confront speech” in opposition to their efforts.

The counsel for the law schools, New York attorney Joshua E. Rosenkranz, made reasonably well most of the points to be made on his side of the case, but to no apparent avail. And, by accepting somewhat extreme hypotheticals about extensions of his First Amendment protest argument, Rosenkranz opened the way for Clement, on rebuttal, to stress that there was “no limit to their argument” so that “more is at issue here than the exclusion of homosexuals.” The Court should be worried, Clement said, about law schools next objecting to military recruiters on a wide array of other grounds—objections to the military’s exclusion of women from combat positions that are the route to leadership, opposition to the war in Iraq, or to the war in Afghanistan. And, he said, “we have to worry about this coming back in the context of Title VI and IX.”

It was no surprise that the Solomon Amendment’s most avid supporter on the Court was Justice Scalia. He mildly scolded Clement for basing much of his argument on Congress’ power to attach strings to federal
funds’ receipt, and not on Congress’ power “to raise and support armies.” Recruiting officers on college campuses, Scalia suggested, was a constitutionally endowed activity of the military. “We have said the judicial deference [to Congress] is at its apogee when Congress acts to raise and support armies. That’s precisely what we have here,” Scalia said.

But Justice Kennedy was also equally fervent in his support of the Solomon Amendment, as he openly fretted that “resistance to any statute could be justified as expressive speech.”
In a victory for the White House, the Supreme Court[,] in *Cheney v. U.S. District Court*[,] set aside a judge’s order Thursday that would have required Vice President Dick Cheney to turn over documents that would show whether industry lobbyists had met secretly with his energy policy task force.

The 7-2 decision says that the president and his closest advisors are usually entitled to shield their meetings and messages from prying outsiders. And rarely, if ever, is a judge authorized to force the White House to disclose information to those who seek it through a private lawsuit, the high court said.

The justices sent the dispute back to the U.S. Court of Appeals here, advising its judges to give more heed to the “weighty separation-of-powers objections” voiced by the Bush administration. That alone will take many months and will put off a further ruling until after the presidential election in November.

Environmentalists have alleged that energy lobbyists wrote parts of Cheney’s national energy policy early in 2001, and have accused Cheney—a former energy executive—of meeting privately with industry leaders, including then-Enron Chairman Kenneth L. Lay. The vice president has denied the charges, but his office also has refused to disclose exactly who met with the task force.

When Judicial Watch, a conservative watchdog group in Washington, and the liberal Sierra Club sued to get the information, the case became a high-stakes test of the boundaries of an administration’s right to conduct business behind closed doors. On Thursday, the administration’s lawyers won most of what they sought from the Supreme Court, which itself operates behind a veil of secrecy.

The Constitution “affords presidential confidentiality the greatest protection consistent with the fair administration of justice,” Justice Anthony M. Kennedy wrote in *Cheney vs. U.S. District Court*. Judges must keep in mind “the paramount necessity of protecting the executive branch from vexatious litigation,” he added.

The high court cited only two cases that proved to be exceptions to this rule of White House secrecy.

In the first, President Nixon was forced to turn over secret tapes of Oval Office conversations because he was caught up in the criminal investigation that grew out of the Watergate break-in. When a person’s guilt or innocence is at stake, the courts need all “the relevant evidence,” the justices said Thursday, referring back to the unanimous ruling in *U.S. vs. Nixon*.

More recently, when President Clinton was sued by Paula Jones, her lawyers won a court order requiring the president to turn over information and submit to an interview. That order was upheld unanimously by the
high court in 1997 on the grounds that the lawsuit involved Clinton’s private life, not his conduct as the president.

The Cheney case fell into neither category. The president and the vice president were not caught up in a criminal investigation. And the lawsuit seeking information on Cheney’s energy policy task force involved the official business of the White House, not the private lives of the top officials.

In such cases, judges should be wary of requiring the president or vice president to turn over documents, Kennedy said. “Special considerations control when the executive branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated,” he said.

Lest the lower court judges miss the point, he closed by warning that “all courts should be mindful of the burdens imposed on the executive branch in any future proceedings.”

President Bush welcomed Thursday’s ruling. “We believe the president should be able to receive candid and unvarnished advice from staff and advisors. It’s an important principle,” White House Press Secretary Scott McClellan said.

A spokesman for Sen. John F. Kerry (D-Mass.), Bush’s presumed Democratic presidential challenger, countered that the administration should have released the information on its own. “The Nixon legacy of secrecy is alive and well in the Bush White House,” Kerry spokesman Phil Singer said.

Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O’Connor and Stephen G. Breyer signed on to Kennedy’s opinion.

During the oral argument, Stevens and Breyer questioned the underlying basis for the lawsuit. The two groups that sued Cheney accused him of violating the Federal Advisory Committee Act, which requires outside advisory boards to open their meetings to the public. But Stevens wondered why that law was even triggered, since the decision makers in Cheney’s task force were government officials, not outsiders.

In a concurring opinion, Justices Clarence Thomas and Antonin Scalia said they would have gone further and thrown out the judge’s original order, rather than requiring the appeals court to reconsider the case. Thomas said the district court “clearly exceeded its authority” by ordering the disclosure of documents. Scalia joined Thomas’ opinion and did not offer one of his own.

Scalia’s role in the case had drawn extra attention because of his friendship with Cheney. In early January, three weeks after the court agreed to take up Cheney’s appeal, Scalia flew to Louisiana with the vice president aboard a small government jet to go duck hunting.

When their trip came to light, Sierra Club lawyers urged Scalia to withdraw from the case, arguing that he could not be impartial. Scalia refused, saying the dispute involved the office of the vice president, not Cheney personally. In the end, Scalia’s vote in favor of Cheney’s position did not affect the outcome.

Justices Ruth Bader Ginsburg and David H. Souter dissented in Thursday’s decision. They said the appeals court handled the matter correctly.

Despite the setback, lawyers for the Sierra
Club found something to like in the ruling.

"We didn’t get all we wanted, but they didn’t get what they wanted either—which was to have the case thrown out," said Alex Levinson, deputy legal director for the group in San Francisco. "This keeps the public in the dark, but it keeps the case alive. We are unlikely to get anything more before the election."

The case has highlighted the legal barrier that shields the White House when it wants to protect its confidentiality. The Freedom of Information Act permits the public to seek data contained in the files of government agencies, but it does not apply to the White House.

Congress can demand information from the White House, but only if lawmakers are determined to press the issue. The House and Senate, controlled by Republicans, have not issued subpoenas for information in this case.

In seeking information on the Cheney task force, the General Accounting Office, the congressional watchdog agency, filed its first-ever lawsuit. The case came before U.S. District Judge John D. Bates, a new Bush appointee. He ruled against the GAO, and the agency dropped its suit.

But the Sierra Club and Judicial Watch had more success when they came before U.S. District Judge Emmet G. Sullivan, a Clinton appointee. Lawyers for the two groups claimed in their suit that Cheney had violated the Federal Advisory Committee Act by meeting in private with outside lobbyists.

Sullivan said he could not decide whether Cheney had violated the law without knowing who had met with or submitted recommendations to his task force. He then issued an order requiring the vice president’s office to turn over documents to answer these questions.

Cheney refused and took his case to the U.S. Court of Appeals. That court’s randomly chosen three-judge panel included two Democratic appointees and one Republican. In a 2-1 ruling, the appeals court panel upheld Sullivan’s order.

Judge David S. Tatel, a Clinton appointee, wrote the court’s opinion and pointed out that the Federal Advisory Committee Act had been applied by the same court when then-First Lady Hillary Rodham Clinton led a healthcare task force early in the Clinton administration.

Last fall, U.S. Solicitor Gen. Theodore B. Olson appealed the case to the Supreme Court, saying it would “violate fundamental principles of separation of powers” if the vice president were forced to turn over the internal documents.
The Supreme Court of the United States agreed Monday to hear a case involving Vice President Dick Cheney, an action that may save the vice president from a contempt citation—at least for now.

Cheney is asking the justices to help keep meetings of the National Energy Policy Development Group confidential, despite lower-court rulings in a case brought by two public interest groups.

At issue is whether Cheney allowed private energy lobbyists and high-profile campaign contributors to participate in the work of the group, and if so, whether that information should be made public.

Cheney, through the Justice Department, has asked the Supreme Court to review a judge's order in the case, even though it has not come to trial.

The Supreme Court should hear the case sometime this spring and hand down a decision before July.

The policy group was established by President George W. Bush as one of the first acts of his administration. The president ordered it to “develop a national energy policy designed to help the private sector, and as necessary the appropriate federal, state and local governments, promote dependable, affordable and environmentally sound production and distribution of energy.”

The executive order said the group was to consist of the vice president, as chairman; the secretaries of Treasury, Interior, Agriculture, Commerce, Transportation and Energy; the director of the Federal Emergency Management Agency; the administrator of the Environmental Protection Agency; and the deputy chief of staff for economic policy and deputy chief of staff for policy, both assistants to the president.

Bush also authorized Cheney to invite the secretary of State, the chairman of the Federal Regulatory Commission and “as appropriate, other officers of the federal government.”

The policy group issued a public report in May 2001 that encouraged the development of energy supplies and public conservation. The report also contained a public list of those who the administration said participated in the policy group meetings—minus private sector advisers. In accordance with Bush's instructions, those on the list were all members of the federal government.

At that point, the General Accounting Office, the investigative arm of Congress, tried to make the records of the policy group public. But when its legal action failed, the GAO dropped the attempt.

However, a conservative, Washington-based legal advocacy group, Judicial Watch, continued its own suit in federal court in Washington against the policy group, its members and several private individuals, alleging that the defendants had failed to comply with the Federal Advisory Committee Act.
FACA requires the public disclosure of all advisory committee reports, records and documents, but does not apply to those groups composed solely of "federal officials."

In its suit, Judicial Watch contended that in addition to members of the federal government, a number private individuals—such as then-Enron President and Chairman Kenneth Lay and GOP figures Haley Barbour and Marc Racicot, acting as energy lobbyists—"regularly attended and fully participated" in the group's meetings held behind closed doors, and were in fact members of the group.

As part of its argument, Judicial Watch cited a Washington appeals court precedent that said if private citizens' "involvement and role are functionally indistinguishable from those of the other members," then the FACA exemption does not apply.

Later, the Sierra Club, one of the nation's best-known environmental lobby groups, filed a nearly identical suit and the cases were combined.

When Judicial Watch announced it was continuing its suit, despite the GAO, the organization's chairman and general counsel, Larry Klayman, issued a statement blasting the Bush administration.

In pre-trial proceedings, a federal judge ruled against Cheney and the national policy group, saying they must produce its documents to the plaintiffs before a trial could begin.

A federal appeals court panel ruled 2-1 to uphold the judge, noting that the White House was not claiming "executive privilege." The split panel also rejected an attempt by Cheney to dismiss his name from the case, saying it did not have jurisdiction over that particular matter until a final ruling by the lower court.

Since George Washington's time, executive privilege has been claimed by presidents to withhold information from the legislative or judicial branches of the government, mainly information about confidential advice from presidential advisers.

In a petition filed by the Justice Department on behalf of Cheney and the group, U.S. Solicitor General Theodore Olson told the Supreme Court that the combined cases "present fundamental separation-of-powers questions arising from the (judge's) orders compelling the vice president and others to comply with broad discovery requests by private parties seeking information about the process by which the president received advice on important national policy matters from his closest advisers."

Olson said the lower court's orders "would subject the president to intrusive and distracting discovery every time he seeks advice from his closest advisers," the petition said. "They would open the way for judicial supervision of the internal executive branch deliberations."

"Where, as here, the separation-of-powers arguments do not take the form of—and are logically antecedent to—a privilege claim, it serves no purpose to require the president or vice president to assert privilege claims before filing an interlocutory appeal," the petition said.

Given the lower-court rulings, the "only way that the vice president can obtain appellate review of his constitutional objections to improper discovery"—the forced revealing of documents before trial—"would be to refuse to comply with any discovery, . . ."
suffer the indignity of a contempt citation and appeal the order holding him in contempt,” the petition said. “Such an approach is clearly inconsistent with (Supreme Court precedent), not to mention the separation of powers established by the Constitution.”

In its own brief asking the high court to reject the case, Judicial Watch said Cheney and the policy group “have made repeated attempts to transform the actual issues before the court of appeals into ones of urgent constitutional concern. As the court of appeals correctly held, however, no such issues exist.”
HOW THE BUSH ADMINISTRATION PROMOTED ITS AGENDA THROUGH JUDICIAL APPOINTMENTS

“Bush’s Conservatism to Live Long in the U.S. Courts”

USA Today
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Joan Biskupic

WASHINGTON—Within weeks of George W. Bush’s inauguration, he revealed a systematic, aggressive and tightly controlled approach to making lifetime appointments to the federal bench.

The new president ejected the American Bar Association from the screening process, ending its half-century role of reviewing candidates’ credentials before a nomination. Bush turned to lawyers who had been on Ronald Reagan’s judicial selection team to help seek out prominent conservative thinkers. All indications were that Bush was trying to emulate Reagan, whose conservative mark on the bench has been deep and enduring.

Now, as Bush enters the last months of his presidency, he has come close to accomplishing his goal. He is likely to end up with fewer total judicial appointments than his two-term predecessors, Reagan (1981-89) and Bill Clinton (1993-2001). Yet Bush has appointed conservatives to lifetime posts with the potential to affect the law in America for decades.

“I think that what he has done on judges is his major triumph,” says political science professor Sheldon Goldman at the University of Massachusetts Amherst, who has been tracking judges since the 1960s. “In almost every other area, domestic policy and foreign policy, there have been failures. But with judges, it’s a major success story.”

Bush has made key appointments to:

* the U.S. Supreme Court. John Roberts, 53, and Samuel Alito, 57, are the youngest of the nine justices, consistently conservative and were in the Reagan administration.

* the prominent U.S. Court of Appeals for the District of Columbia Circuit, regarded as a steppingstone to the Supreme Court. Janice Rogers Brown, 58; Brett Kavanaugh, 43; Thomas Griffith, 53; and, before he was elevated, Roberts. Perhaps the most controversial was Brown, who as a judge on the California Supreme Court earned a reputation as a bold advocate of property rights and an opponent of affirmative action.

Bush also solidified GOP majorities on other appeals courts, including on the 5th Circuit, covering Texas, Mississippi and Louisiana. Bush appointed Priscilla Owen, 53, a former Texas Supreme Court justice and longtime friend of former Bush advisers Karl Rove and Harriet Miers. He also appointed Charles Pickering on a temporary basis.

Pickering and Owen faced strong resistance by Senate Democrats. After 14 senators brokered a bipartisan deal in 2005, Bush finally won a lifetime seat for Owen—four years after she was first nominated.

Abortion rights advocates had vehemently opposed her, partly because she had dissented from a state court ruling giving
judges great latitude to grant a teen’s request for an abortion without notifying her parents.

Advocates on both sides say Bush’s legacy of judicial appointments will be far-reaching.

“He made significant strides in cementing the modern court-packing legacy begun by Ronald Reagan,” says Nan Aron of the liberal Alliance for Justice. “So many circuits, whose decisions affect tens of thousands of people, now have Republican-appointed majorities.” Aron termed Bush appointees, as a group, “hostile to individual rights.”

Conservatives counter that Bush’s judges are rightly more restrained on social policy dilemmas. Leonard Leo, executive vice president of the conservative Federalist Society, says Roberts and Alito “may well prove to be significant additions to the court’s bloc of proponents for judicial restraint.”

Bush had some stumbles and setbacks. He first nominated then-White House counsel Miers to succeed Justice Sandra Day O’Connor. Miers’ name was withdrawn when several in Bush’s own conservative ranks, including former appeals court judge Robert Bork, criticized her. Bork called the choice “a disaster on every level.”

Bork’s complaint about Miers spoke to the longtime effort by right-wing advocates to alter the courts: “It’s kind of a slap in the face to the conservatives who have been building up a conservative legal movement for the last 20 years,” he said on MSNBC at the time and referred to “all kinds of people now on the federal bench . . . who have worked out consistent philosophies of sticking with the original principles of the Constitution. . . . (A)ll of those people have been overlooked.”

When Reagan campaigned for president in 1980, he said judges were usurping the role of legislators in social policy issues. His appointments narrowly construed individual rights and retreated from involvement in local problems such as school desegregation, prison crowding and the environment.

Reagan made four appointments to the high court, including the first female justice, O’Connor, and William Rehnquist, whom he elevated to chief justice in 1986.

Rehnquist, who died in 2005, and O’Connor are gone. But Reagan appointees Antonin Scalia, 72, and Anthony Kennedy, 71, are in their third decade and show no signs of retiring. Reagan tried to appoint Bork in 1987, but the Senate, then controlled by Democrats, rejected him, 58-42.

“President Bush might not get the total number of appointees that Reagan got,” says Barbara Perry, a political science professor at Sweet Briar College, “but in a way he one-ups Reagan with Roberts, who could serve as chief justice longer than Rehnquist, and with Alito, who is much more conservative than O’Connor.”
After nearly seven years in the White House, President Bush has named 294 judges to the federal courts, giving Republican appointees a solid majority of the seats, including a 60%-to-40% edge over Democrats on the influential U.S. appeals courts.

The rightward shift on the federal bench is likely to prove a lasting legacy of the Bush presidency, since many of these judges—including his two Supreme Court appointees—may serve for two more decades.

And despite the Republicans’ loss of control of the Senate, 40 of Bush’s judges won confirmation this year, more than in the previous three years when Republicans held the majority.

“The progress we have made this year... is sometimes lost amid the partisan sniping over a handful of controversial nominations,” said Sen. Patrick J. Leahy (D-Vt.), chairman of the Judiciary Committee, in a year-end statement.

This progress is not altogether welcomed by liberal activists, who have been frustrated in their efforts to block more of Bush’s nominees.

“Some of the appeals courts will be quite far to the right for a generation to come. So why is the Senate rushing to confirm as many of these terrible nominees as possible?” asked Simon Heller, a lawyer for the Alliance for Justice, a liberal advocacy group.

He gives the Republicans more credit than the Democrats for adhering to the party line.

“Republican senators have voted in lock step to confirm every judge that Bush has nominated. The Democrats have often broken ranks,” he said.

Conservatives tend to agree on that point. They say the ideological makeup of the courts has grown into a major issue on the right, and it has brought Republicans together, whether they are social conservatives, economic conservatives or small-government libertarians.

“This issue unites the base,” said Curt Levey, executive director of the Committee for Justice, a group that lobbies for Bush’s judicial nominees. “It serves as a stand-in for the culture wars: religion, abortion, gay marriage and the coddling of criminals.”

Nothing irritates conservatives more, he said, than having unelected judges decide politically charged issues that some believe should be left to voters and legislators.

“Conservatives tend to blame judges for the left’s success in the culture war,” Levey said.

While Republicans find themselves somewhat divided heading into the election year, Bush is widely praised for his record of pressing for conservative judges.

“From Day One, President Bush made the judiciary a top priority, and he fought very hard for his nominees,” said Washington attorney Bradford Berenson, who worked in the White House counsel’s office in Bush’s
first term. "He was less willing to compromise than President Clinton. As a result, in raw numbers, he may end with somewhat fewer judges than Clinton had."

In his eight years in office, Clinton named 367 judges, according to the Federal Judicial Center. When he left office in 2001, Democratic appointees had a slight majority among trial judges and on the courts of appeal.

Among the 12 regional appeals courts, all but one are closely split or have a Republican majority. The 9th Circuit Court of Appeals—which covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington—is viewed as the last bastion of liberalism, with 16 Democratic appointees and 11 Republicans. So far, Bush has named seven judges to the 9th Circuit, but he will not match Clinton's total of 14.

Does it make a difference whether a judge was appointed by Bush or Clinton?

Legal activists who closely follow the courts are convinced it does make a difference in a significant number of cases. "If you could pick only one thing, look at whether a case goes before a jury. The Bush judges vote to keep cases away from juries," said Judith E. Schaeffer, legal director for People for the American Way, a liberal advocacy group in Washington.

In job-discrimination suits, for example, the employee who is the plaintiff typically wants his or her case heard by the jury. The employer—usually, a business or corporation—wants the dispute decided or dismissed by a judge, she said.

Schaeffer said her organization has looked closely at such cases and found that Bush's judges have made it harder for plaintiffs to sue or to win damages if they prevail. "That is the mind-set. They are bent on denying justice to ordinary Americans," she said.

Berenson, the former Bush administration lawyer, said conservatives and liberal judges differ mostly on their willingness to strike down laws.

"Liberals tend to celebrate judicial power; conservatives tend to be suspicious of it," he said. "Boiled down to its essence, conservatives want the judiciary to play a smaller role in our society. They want more room for democratic self-government. That means a conservative judiciary will defer to the executive branch on matters like the war on terrorism. And they will be more inclined to defer to the legislature on issues like abortion."

He cited the example of the Partial-Birth Abortion Ban Act that Congress passed in 2003. In the past, the Supreme Court had struck down similar state bans, but last term, thanks to Bush appointee Justice Samuel A. Alito Jr., the federal law was upheld, 5-4.

In the year ahead, liberal activists will be playing defense. They hope to block as many Bush nominees as possible from winning confirmation to the lifetime seats on the appeals courts. And since the Supreme Court’s two oldest justices—John Paul Stevens, 87, and Ruth Bader Ginsburg, 74—are its strongest liberals, they are hoping a Democrat will win the White House in November.

In the party caucuses and primaries, the issue of judges hardly raises a ripple, but that will change in the months ahead, activists say.

"Once the Republicans and the Democrats
have selected their candidates, they will start talking about the courts as a major rallying issue," said Jay Sekulow, counsel for the conservative American Center for Law and Justice. "Look at the Supreme Court today, and you can say the next president will decide its future for the rest of our lives."
WASHINGTON—Iraq remains chaotic and immigration overhaul faces an uncertain fate.

But if President Bush wants to sing the old tune, “They can’t take that away from me” he can turn to the Supreme Court where his appointees Chief Justice John Roberts and Associate Justice Samuel Alito sit.

As the high court nears the end of its 2006-2007 term, the impact of Bush’s appointees is becoming clearer.

In high profile-decisions, Roberts and Alito have bolstered the conservative wing, which includes Justices Antonin Scalia and Clarence Thomas and occasionally Justice Anthony Kennedy.

Former Reagan administration Justice Department official Doug Kmiec, who is professor of constitutional law at Pepperdine University, said, “The headline of the term so far” is that “Anthony Kennedy in the presence of John Roberts and Sam Alito has rejoined the Reagan judicial philosophy.” (President Reagan nominated Kennedy to the court in 1987.)

Roberts-Kennedy Alignment

“Justice Kennedy and the chief justice are thinking along similar lines,” Kmiec said. “I don’t think that’s an accident. I believe it is a conscious result of the respect the new Chief Justice has given Justice Kennedy and the simple fact that they like each other.”

He added that when Justice Sandra Day O’Connor, whom Alito replaced, was on the court, “Kennedy was largely in conversation with her. She was the one with whom he would bargain over terminology. In her absence, Justice Kennedy, of course, has been pursued by both sides of the court, but in virtually every case, Justice Kennedy has discovered that he is more in affinity with the Roberts-Alito side of legal thought.”

Marcia Greenberger, the co-president of the National Women’s Law Center, which opposed the Alito and Roberts nominations, lamented O’Connor’s retirement.

“In the past, O’Connor often made the majority and Kennedy was part of the dissent, so we have clearly seen a shift to the right, in areas from criminal law to privacy rights for women,” she said. “Roberts and Alito have reliably and consistently been on the conservative end with Scalia and Thomas, and that was not the case with O’Connor. This was our great concern (during their confirmation hearings).”

Another opponent of the Alito and Roberts nominations, Nan Aron of the Alliance for Justice, said, “on the hot-button issues so far, Justice Alito and Roberts almost always join each other and almost always side with Justices Scalia and Thomas to form what’s become the court’s new hard-right flank.”

Not all Controversial Decisions

Not all of the Supreme Court’s decisions this year have been headline-making or ideologically charged.

Of the 64 decisions for the 2006-2007 term which the court has handed down as of
Monday, nearly one-quarter have been unanimous.

Another seven were brief, unsigned summary decisions in which there was no dissent.

So far, there have been seven 5-to-4 decisions in which the conservative justices have united to prevail over the more liberal minority of Justice Ruth Bader Ginsburg, Stephen Breyer and John Paul Stevens.

And of course, Roberts and Alito haven’t always been on the winning side: They were both on the losing end of April’s *Massachusetts v. Environmental Protection Agency* ruling, written by Stevens, that said the EPA has the authority to decide whether greenhouse gases from new cars contribute to climate change.

But several of the 5-to-4 decisions in which Roberts and Alito were in the majority have been on politically explosive topics:

Abortion: In April, the court, in a ruling written by Kennedy, upheld a federal law banning a specific abortion procedure, called “intact dilation and evacuation” or “partial-birth abortion.” The justices said the statute was not invalid on its face, but could be challenged in specific cases in which a woman could show it would violate her rights under the court’s previous abortion rulings, such as *Roe v. Wade*.

Alleged sex discrimination: Last month, the court, in a decision called *Ledbetter v. Goodyear*, written by Alito, ruled that a woman who’d alleged sex discrimination in pay had missed the deadline for filing her claims.

Death penalty: Last month in upholding the death sentence of a man convicted of murder in Washington State, the court, in a ruling written by Kennedy, said that trial judges could exclude potential jurors who voiced qualms about capital punishment.

“The biggest effect of the Roberts and Alito for O’Connor and Rehnquist swap has been to make Justice Kennedy, rather than Justice O’Connor, the swing vote that decides most of the big, contentious issues before the Court,” said Curt Levey, the executive director of the Committee for Justice, a group which supported the Roberts and Alito nominations.

The crucial cases, he said, are those in which O’Connor and Kennedy would have voted differently.

“By far, the most dramatic example of that difference is the partial-birth abortion decision, where Kennedy voted to uphold what O’Connor would have very likely struck down,” said Levey. “An equally dramatic example will likely be provided in the next couple of weeks, when the court rules on the Seattle and Louisville K-12 race-based admissions cases.”

Based on their votes in the 2003 University of Michigan racial preferences cases, Levey said, Kennedy would likely vote against using race in assigning students to schools, and “O’Connor probably would have upheld” the school assignment plan.

Also, because “O’Connor had a liberal streak when it came to women’s issues, she probably would have voted with the four liberal justices in *Ledbetter v. Goodyear*,” Levey said.

Greenberger said the recent pay discrimination and abortion rulings “strike at
the very heart of women’s autonomy, integrity, and ability to be full citizens in this country. . . . Women’s long-established rights, rights to bodily integrity and privacy, are unraveling. And that is a cause of enormous alarm.”

But Ed Whelan, a former law clerk to Justice Scalia and a former official in the Justice Department’s Office of Legal Counsel under Bush, dismissed the preoccupation with the shift from O’Connor’s views to Alito’s.

“I don’t think Alito has some sort of obligation to mimic O’Connor any more than Justice Ginsburg had an obligation to mimic Justice (Byron) White,” whom she replaced in 1993. On abortion, White dissented from the 1973 Roe v. Wade ruling which legalized abortion, while Ginsburg supports it.

“We sure hope that Justice Alito’s replacement of O’Connor is going to improve the court,” Whelan said. “I think it has, but there’s room for a lot more improvement.”

**Bush Effect on Appeals Courts**

While Bush may not get a chance to attempt more “improvement” by appointing another justice to the high court, he has named 49 judges to the courts of appeals. And that’s significant because many cases never reach the Supreme Court.

With 13 appeals court vacancies, Bush is in the midst of standoff with the Democratic-controlled Senate Judiciary Committee over the nomination of Leslie Southwick to fill a vacancy on the Fifth Circuit.

Aron’s group has accused Southwick of being too partial to business interests and voting “consistently against consumers and workers.”

So far Southwick hasn’t been able to get a vote on the Senate floor.

For both Southwick and the president who nominated him, the clock is ticking toward the end of the Bush era for the federal judiciary.
For those of us waiting to see what effect the replacement of Justice O'Connor with Justice Alito would have on the Supreme Court, the last couple months have begun to provide some concrete evidence.

First, there was the Court's decision in *Gonzales v. Carhart*, which upheld a federal law banning the abortion procedure known as "intact dilation and evacuation." When the Court struck down a similar Nebraska law in 2000, Justice O'Connor wrote a concurrence in which she stated that the law was invalid because it did not include an exception to protect the life or health of the pregnant woman. The federal law did contain an exception to protect the woman's life, but not her health, so it seems likely O'Connor would have voted to strike it down. Alito voted to uphold the law, and since the decision was 5-4, his vote in the case was decisive.

Second, the Court ruled 5-4 in *Schriro v. Landrigan* that a federal district court did not abuse its discretion in denying a habeas hearing to a death row inmate who claimed his lawyer had failed to present mitigating evidence at his sentencing trial. Alito joined the majority, and while it is not certain how O'Connor would have voted, there is some evidence suggesting the outcome might have been different if she were on the Court. Two years earlier, while Alito was on the Third Circuit, he rejected an inmate's claim that his lawyer's failure to investigate possible mitigating evidence violated his right to effective assistance of counsel. The Supreme Court overturned that ruling 5-4 in *Rompilla v. Beard*, with O'Connor joining the majority. Admittedly, the issue in *Schriro* was different than the issue in *Rompilla*—it focused on whether the inmate made a sufficient claim of prejudice to justify a hearing, not on whether the lawyer's failure to introduce mitigating evidence fell below objective standards of reasonableness. But given this history—and O'Connor's recent statements of concern about the quality of representation in capital cases—it is at least arguable that her replacement with Alito made a difference in *Schriro*.

Third, the Court ruled 5-4 in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* that Title VII permits employees to challenge pay disparities only if they filed a formal complaint with a federal agency within 180 days after their pay was set. The decision was written by Alito, and some commentators have argued that O'Connor would have voted the other way, given the implications of the ruling for women in the workplace. At the very least, it seems likely that O'Connor would have blunted the effect of the ruling with a fuzzy standard leaving open the possibility of challenges in some circumstances after the 180-day period.

Finally, the Court ruled 5-4 yesterday in *Uttecht v. Brown* against a death row inmate who claimed his trial judge erred by excluding a juror who expressed uneasiness with the death penalty but also said he would consider it in an appropriate case. Justice Kennedy's majority opinion—which Alito joined—said federal courts should show special deference to trial judges in such cases because they are "in a superior position to observe the demeanor and
qualifications of the potential juror.” It is unclear how O’Connor would have ruled in this case. During her early years on the bench, she wrote a number of opinions that made it harder for death row inmates (and other prisoners) to challenge their convictions and sentences. But in recent years, she has expressed concerns about the death penalty and the fairness of its application. It is arguable, though not certain, that she would have voted in the inmate’s favor, which would have changed the outcome in the case.

These are just four recent examples in which the replacement of O’Connor with Alito may have affected a Court decision and the shape of its doctrine. . . . It might be a useful exercise to compile a list of these cases over the next few years as a way of demonstrating the significance of Supreme Court appointments. Alito and O’Connor are not all that far apart on the political spectrum, so if his replacement of her has a significant effect, one can only imagine what the replacement of, say, Justice Stevens with a Bush appointee would mean.
Energizing his conservative supporters, President Bush on Monday named Samuel A. Alito Jr., a federal appeals court judge with a 15-year record on the bench, to replace retiring Supreme Court Justice Sandra Day O'Connor.

Alito was immediately embraced by Republicans who had parted company with Bush over the ill-fated nomination of White House Counsel Harriet E. Miers, who withdrew last week after it became clear that her prospects for confirmation were shaky.

"This moves the court to a more conservative tilt, no doubt about it," said Jay Sekulow, chief counsel for the American Center for Law and Justice, a Christian legal foundation, and a key White House advisor on judicial appointments. "Justice O'Connor was the swing vote on a lot of cases, and she sometimes swung in the other direction."

But Bush's choice of a candidate with a more certain conservative philosophy set the stage for a confrontation with Senate Democrats, who fear that Alito will move the high court further to the right on key issues—particularly abortion rights.

"We need to be careful here," said Sen. Charles E. Schumer (D-N.Y.), a member of the Judiciary Committee, which screens judicial candidates. "This is a nominee who could shift the balance of the court, and thus the laws of the nation, for decades to come."

Bush, who introduced Alito during a brief morning ceremony in the White House residential quarters, said he chose the 55-year-old jurist because his record indicated that he shared the president's view of the "proper role" of federal judges.

"He understands that judges are to interpret the laws, not to impose their preferences or priorities on the people," Bush said.

Alito, who worked as a Justice Department lawyer and a U.S. attorney before being named to the U.S. 3rd Circuit Court of Appeals in 1990, promised Bush that, if confirmed, he would interpret the Constitution and laws "with care and restraint, always keeping in mind the limited role that the courts play in our constitutional system."

One antiabortion group, Operation Rescue, predicted that Alito's confirmation would put the high court "on the fast track to derailing Roe v. Wade as the law of the land," referring to the landmark 1973 decision that affirmed a woman's right to choose abortion.

But legal scholars and court observers said it was not clear how Alito might rule if a case that could overturn Roe vs. Wade came before the high court—or whether a majority of the nine justices would vote to overturn if Alito chose to do so.

At the same time, it appeared to be clear that the addition of Alito would give the high court a more conservative cast than it has
had with O'Connor, a centrist who sometimes sided with the court's liberal justices.

Some legal analysts said that Alito was in the mold of justices Antonin Scalia and Clarence Thomas, who anchor the Supreme Court's conservative wing. He has even been called "Scalito," a reference to Alito and Scalia's Italian American heritage as well as their similar legal philosophies.

But others said they perceived Alito as more akin to Chief Justice John G. Roberts Jr., who was confirmed in late September to replace the late William H. Rehnquist. Roberts is regarded as a consistent conservative, but not as ideological as Scalia or Thomas.

Alito's nomination represents a sharp course change in the White House political strategy for replacing O'Connor, who announced in July that she planned to retire. Bush's first choice for the seat was Roberts, but he was moved to become chief justice when Rehnquist died in early September. In nominating Miers, the president chose a close friend and political ally with no judicial experience, wagering that social conservatives and other elements of his political base would trust his judgment. It proved a bad bet.

In naming Alito, White House advisors said, Bush reverted to the same game plan that led to the choice of Roberts: He chose from a short list of experienced jurists who had been blessed in advance by conservative activists and picked the candidate considered most likely to squeak through a divided Senate.

Bush rejected entreaties by conservatives and liberals alike to appoint a woman to replace O'Connor. If Alito is confirmed, Ruth Bader Ginsburg will be the lone female justice.

Among those who had urged the president to pick a woman were his wife, Laura, and O'Connor, the first woman to serve on the court.

"The president always considers a diverse group of potential nominees; he looks at people from all backgrounds and all walks of life," White House Press Secretary Scott McClellan said Monday.

In the end, however, Alito was "the person who he believes is the best one to fill this vacancy at this time," McClellan said.

Bush initially interviewed Alito in July about a possible Supreme Court nomination, McClellan said, shortly after O'Connor announced her intention to retire. After Miers withdrew her name from consideration, Bush called Alito on Friday and raised the possibility again.

The decision was settled by the time Bush headed for his Camp David retreat Friday afternoon, McClellan said. Alito met with the president in the Oval Office at 7 a.m. Monday and formally accepted the offer. His wife, Martha-Ann Bomgardner, and children Laura, 17, and Philip, 19, joined them 20 minutes later. The nomination was announced at 8 a.m.

On Capitol Hill, Bush's decision was roundly praised by Senate Republicans but met with a mixed response from Democrats. Some denounced Alito as an unfit replacement for O'Connor; others said they would reserve judgment until more was known about his judicial record.

California's two senators, both Democrats, reflected the competing sentiments. Sen.
Barbara Boxer said she believed the nomination was "aimed at appeasing the most right-wing elements of the president's political base," while Sen. Dianne Feinstein said she hoped "people on both sides would hold their fire, allow the Judiciary Committee to do its work and not take a position until that work is completed."

Although a contentious confirmation battle seemed certain, it was not clear whether Democrats would be willing to block Alito's confirmation by using their ability to filibuster or engage in extended debate. Doing so could prompt Republicans to approve a parliamentary rule change barring use of the filibuster in judicial confirmations, a possibility sometimes called the "nuclear option."

Members of the "Gang of 14," a bipartisan group of senators whose votes have been pivotal on previous judicial nominations, advised a more cautious approach.

"Judge Alito needs to have a fair and thorough hearing, and we should withhold judgment until that process unfolds," said Sen. Ben Nelson (D-Neb.), a member of the group, which helped avert a showdown over filibusters this year.

Although Alito's writings will be thoroughly dissected in the Senate to discern his positions on a range of issues, perhaps no subject will receive closer scrutiny than his limited record on abortion rights.

In one appeals court case, Alito was the lone dissenter in a ruling that struck down a Pennsylvania law requiring married women to notify their husbands before getting an abortion. But his dissenting opinion did not directly address the issues decided in *Roe vs. Wade*.

Even so, the prospect that Alito might replace O'Connor energized antiabortion groups and rattled abortion rights advocates.

Kate Michelman, who headed NARAL Pro-Choice America from 1985 to 2004, called Alito's nomination "the greatest threat to women's fundamental rights and liberties in more than three decades."

Michelman cited her own experience during the pre-*Roe* era, when she discovered she was pregnant after her husband abandoned her and their three young children. She applied for and received permission to get a legal "therapeutic" abortion, but only after obtaining her husband's consent.

"*Roe v. Wade* emancipated women from the humiliation I endured," Michelman said. "Judge Samuel Alito voted to return us to it."

The son of an Italian immigrant, Alito grew up in the suburbs of Trenton, N.J., graduating from Princeton University and Yale Law School. He worked in the U.S. solicitor general's office during the Reagan administration, arguing 12 cases before the Supreme Court, then became a deputy assistant attorney general in the Justice Department.

In 1987, Reagan appointed Alito as U.S. attorney for New Jersey. Three years later, President George H.W. Bush selected him to sit on the 3rd Circuit Court of Appeals, which is based in Philadelphia. The Senate approved both nominations by unanimous consent, a favorable portent cited Monday by the president and his allies.

During his 15 years on the 3rd Circuit, Alito has participated in thousands of appeals and
written hundreds of opinions, providing political friends and foes with plenty of documented evidence of his legal philosophy and judicial temperament.

One of the main criticisms of Miers was that she had no judicial experience, making it difficult to determine how she might interpret the Constitution. In introducing Alito, Bush noted pointedly that he had more judicial experience than any Supreme Court nominee in more than 70 years.