Is the Supreme Court ducking the important issues? Has Rehnquist lost his juice? Is O'Connor more influential than Stevens? Did Scalia recuse himself too much, or not enough? And how will the election affect the High Court? A lesson in

SUPREM

THE COURT (FROM LEFT) SCALIA, GINSBURG, STEVENS, SOUTER, REHNQUIST, THOMAS, O'CONNOR, BREYER, KENNE

A *JUNGLE LAW* ROUNDTABLE DISCUSSION

THE EXPERTS (FROM LEFT) COSSACK (MODERATOR), ADLER, NACKENOFF, TUSHNET, WEINER

EOLOGY

To answer those questions and more, *Jungle Law* recently convened a virtual roundtable. Our moderator was **Roger Cossack**, who is of counsel at the Washington law firm Arent Fox, and an ESPN legal analyst. Joining Roger were **Jonathan Adler**, associate professor at Case Western Reserve University School of Law in Ohio; **Carol Nackenoff**, a professor of political science at Swarthmore College in Pennsylvania; **Mark Tushnet**, Carmack Waterhouse Professor of Constitutional Law at the Georgetown University Law Center, whose book *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, will be published in January; and **Robert Weiner**, head of the litigation practice at Arnold & Porter in Washington D.C. (Cossack was assisted in his preparations by Arent Fox summer associates David Adkins, Ali Arain, and Leonard Evans.) With the decisions of a momentous spring term still being sorted out, and with a rich fall docket on the horizon, these five veteran Supreme Court watchers sat in front of their computers for three days this summer and e-mailed to one another their views on what the Court has done, why, and what it means.

From: Roger Cossack
Subj: A New Center?
Date: 7/7/2004 10:00 AM EDT

Good morning, all. In the July 5th *New York Times*, Linda Greenhouse suggested that the recently completed term may be called the year Chief Justice Rehnquist lost his court. It can be argued that Justice Stevens has become the new Brennan, a justice who can create new and different majorities **(1)**. Stevens wrote the majority opinions in several key cases. Has the majority of the Court moved to the center?

1 A reference to Justice William Brennan, who sat on the Court from 1956 to 1990.

From: Mark Tushnet
Subj: Re: A New Center?
Date: 7/7/2004 10:10:34 AM EDT

It's always hazardous to generalize from a single term's work. (After the first year of Justice Kennedy's tenure, for example, conservatives were exulting that he was going to be even "better" than Judge Bork would have been. It didn't turn out that way.) The main characteristic of the Rehnquist Court, at least since the early 1990s, is that its conservatives have been persistently divided, with the Chief Justice, Scalia, and Thomas in one faction and O'Connor and Kennedy in the other. That's meant that the Court's "liberals" could win if they could capitalize on this division. This term we saw a somewhat higher level of success for the "liberals" in peeling away O'Connor and Kennedy from the conservatives. And yet, I think one of the as-yet-untold stories of the Rehnquist Court is Stevens's role as the strategist for the "liberals." He's pretty clearly been doing something that reduces the gravitational force that O'Connor and Kennedy might otherwise feel towards their "natural" conservative allies. Of course, there is division among the conservatives between hard-liners and more moderate conservatives. So, for example, in *Hamdi* **(2)**, the "hard-line" position was articulated by Thomas—and it was too much even for Rehnquist. These divisions provide the "liberals" with strategic opportunities, which they've been able to exploit more often than one might have expected.

2 **Hamdi v. Rumsfeld** An American citizen, Yaser Esam Hamdi, was detained by U.S. troops on a battlefield in Afghanistan. He was held for two years as an enemy combatant, and denied access to legal counsel or the courts. By an 8-1 vote, the Court held that while Hamdi may ultimately be determined to be an enemy combatant, his inability to go to court and challenge the evidence against him had deprived him of his right to due process.

From: Robert Weiner
Subj: Don't Jump To Conclusions
Date: 7/7/2004 10:18:59 AM EDT

I agree—it is hazardous to generalize. O'Connor and Kennedy remain the key swing votes in many cases. Their voting patterns vary, resulting in more "moderate" opinions in some areas, and not in others. It would be hazardous to read too much into Stevens's role. We cannot know whether he created new and different majorities; we can only determine where he was part of those majorities.

From: Jonathan Adler
Subj: The O'Connor Court?
Date: 7/7/2004 11:08:06 AM EDT

This term certainly saw many cases in which O'Connor or Kennedy provided the crucial swing vote. The number of closely divided cases increased significantly over last year. There were 21 5-4 decisions this term, compared to only 13 in 2002-03. More significantly for our discussion, in each of these years the Court divided into the traditional "left-right" camps in just under half of these cases (10 out of 21 in '03-'04 and 6 out of 13 in '02-'03). In six of the remaining cases, Kennedy or O'Connor voted with the liberals to form the majority. The line-ups in the remaining 5-4 cases were more closely divided.

Further evidence of O'Connor's influence as a "swing justice" is that she dissented significantly less than her colleagues. She dissented in only five of the Court's 79 decisions this term. Kennedy was the next least frequent dissenter (10 cases), followed by Rehnquist (11); Thomas, Stevens, and Souter (15); and Scalia (17). So I am skeptical we are seeing the emergence of a "Stevens Court." If anything, we're seeing the continuation of the "O'Connor Court."

From: Mark Tushnet
Subj: Re: The O'Connor Court?
Date: 7/7/2004 12:03:14 PM EDT

I'm not really advocating calling the current Court a "Stevens Court," but to make this an "O'Connor Court," the liberals have to hang together. I don't think that the range of views within the "liberal" camp is all that much narrower than the range of views within the "conservative" one. So, what's kept the "liberals" together when the "conservatives" divide? That's the place, I think, where Stevens comes in.

From: Jonathan Adler
Subj: Re: Re: The O'Connor Court?
Date: 7/7/2004 1:17:56 PM EDT

That's a fair point. Just to complicate the picture, while O'Connor may be the dominant swing vote, I don't believe she authored the majority opinion in any of the 5-4 decisions this year nor, if I recall correctly, was she ever in the position to assign the majority opinion for a five-justice majority. Stevens, on the other hand, authored several majorities in closely divided cases, including *Tennessee v. Lane* (3), *Groh v. Ramirez* (4), and *Elk Grove v. Newdow* (5). Plus he often assigns opinions.

From: Roger Cossack
Subj: Did the Court Duck the Question?
Date: 7/7/2004 1:48:35 PM EDT

Will this term be remembered as the one in which the justices ducked tough questions? I'm thinking about *Padilla* (6) and *Newdow*, in which the court took technical ways out rather than confronting the issues. Personally, I think the decision in *Padilla* is shameful.

From: Robert Weiner
Subj: Re: Did the Court Duck the Question?
Date: 7/7/2004 2:41:17 PM EDT

More than 40 years ago, Professor Alex Bickel of Yale Law School wrote a book titled *The Least Dangerous Branch*. He believed that when the Court reached the merits of an issue, it had to apply neutral principles. But he extolled the "passive virtues," the techniques of not deciding issues, when doing so was better for the country and the Court. In his view, judicial review, while essential to protect our freedom, was fundamentally undemocratic. He argued that judges who are elected by no one, answerable to no one, should exercise the greatest restraint in setting aside the decisions of leaders chosen by the people. Moreover, because of the undemocratic nature of judicial review, the Court does not have unlimited political capital. It needs to expend that capital, in a word, "judiciously." The Supreme Court has expended a great deal of political capital in recent years. A greater dose of those passive virtues might not be such a bad thing.

From: Mark Tushnet
Subj: Ducking
Date: 7/7/2004 2:45:12 PM EDT

I'm uncomfortable using "ducking" in cases where the Court offers reasons for doing what it did. In *Newdow*, there's a genuinely hard question about the relationship between the state law about who gets to decide matters affecting a child, and the national law about who can bring a claim that's ultimately derived from the interest of the child. Similarly, in *Padilla* you have to do a fair amount of work to explain why there should be jurisdiction in New York when the habeas petitioner—Padilla—is in South Carolina. There's nothing "shameful" in interpreting the federal jurisdictional statute to require that Padilla file his claim where he is.

From: Roger Cossack
Subj: Padilla
Date: 7/7/2004 4:09:33 PM EDT

The facts in *Padilla* are unique and raise a question of such basic fundamental principle that failure to address the issue is "shameful." Padilla has sat in isolation for over two years, with no visits or lawyers until recently, and even then on a very limited basis. I am willing to admit that in a time of crisis less evidence than normal may be necessary, but at least some evidence must be forthcoming. It may turn out that the government is completely right about Padilla, but the arrogance of a government that claims that it can suspend minimum due process is scary. Perhaps the Court could have simply corrected the petition or even with a wink, claimed "harmless error," and changed the petition. Sending it back simply to get a corrected piece of paper while letting a petitioner rot in jail is just wrong.

From: Carol Nackenoff
Subj: Padilla, Newdow, and Ducking
Date: 7/7/2004 5:06:53 PM EDT

I agree with Roger. I was surely puzzled at first by what felt like technical decisions in *Newdow* and *Padilla*. I wondered why the Court would take the Newdow case if its chief purpose was to declare that Mr. Newdow lacked standing. I suspect that when the case was accepted, at least four members of the Court thought they would reach the merits of the case.

3 Tennessee v. Lane Two people with mobility impairments, George Lane, a defendant in a criminal case, and Beverly Jones, a court reporter, sued Tennessee for failing to ensure that courthouses are accessible to individuals with disabilities. Both plaintiffs were denied access to courtrooms on the second floors of buildings lacking elevators. The Court ruled in their favor.

4 Groh v. Ramirez Federal agent Groh searched Ramirez's ranch for illegal weapons. On the warrant, Groh mistakenly omitted the exact items sought (though he correctly listed the items on the application itself). Ramirez argued that the incorrectly completed warrant violated the Fourth Amendment; by a 5-4 vote, the Court agreed with Ramirez.

5 Elk Grove v. Newdow Michael Newdow's daughter attended public school in the Elk Grove School District in California, where teachers lead students in a voluntary recitation of the pledge of allegiance. Newdow argued that even if students don't participate, making them listen to the words "under God" violates the First Amendment. By an 8-0 vote, the Court ruled that because he does not have legal custody of his daughter, he lacked standing to bring the case.

6 Rumsfeld v. Padilla Jose Padilla, a U.S. citizen, was arrested in Chicago on suspicion of plotting to detonate a radioactive device. He was transferred to military custody and has not been criminally charged. By a 5-4 vote, the Court ruled that Padilla should have sought release from a federal court in South Carolina, where he is being held, instead of from a court in New York, and should refile his challenge in South Carolina.

Scalia paid his own way to go duck-hunting, but the central issue was bigger than that.

Like Roger, I was frustrated with the *Padilla* decision. This very important issue needed some fuller treatment by the Court. Why didn't the question of who to name come up earlier? Could not this problem have been avoided by naming several others besides Rumsfeld as defendants? It certainly seems as if the Court just doesn't want to take on the administration on *Padilla*, although their decision in *Hamdi* and the Guantanamo Bay detainees at least appears to have some teeth.

From: Mark Tushnet
Subj: Re: Padilla, Newdow, and Ducking
Date: 7/7/2004 5:43:52 PM EDT

On *Newdow*, I'm sure that some of the justices were quite happy to discover that the standing issue was a genuinely difficult one, and may have been surprised to find it so difficult—having anticipated reaching the merits when they granted review. It's worth noting, too, that Scalia's recusal (7) might have had some real effects here. Suppose a number of justices agreed with Thomas's analysis of the precedents—that is, that the doctrine the Court had articulated did imply that "under God" in the pledge of allegiance was unconstitutional. But, suppose that those justices, unlike Thomas, didn't really want to overrule the precedents. (Note that one of the leading precedents was written by Kennedy.) With Scalia having recused himself, there was a real risk that the Court would be evenly divided if it reached the merits. That would have been even more unsatisfactory than a dismissal for lack of standing.

7 Scalia recused himself because he had publicly discussed his views about including "under God" in the pledge.

In *Padilla*, his lawyers named Rumsfeld and the military officer who had custody of Padilla in New York, and then filed in New York, where the lawyers were located. But Padilla was transferred to South Carolina before that. The Court wasn't doing anything novel in saying that you have to name the immediate custodian and not the ultimate one (Rumsfeld). The issue was raised throughout the litigation, and it's just as easy to criticize Padilla's lawyers for filing suit where it was convenient for them as it is to criticize the Supreme Court for insisting that the suit had to be filed where Padilla was being held.

From: Roger Cossack
Subj: Re: Re: Padilla, Newdow, and Ducking
Date: 7/7/2004 6:44:18 PM EDT

Mark, I agree with your analysis of *Newdow*, and while I'm not happy that they didn't reach a result, or more honestly the result I want, I can live with it. However, when the Supreme Court is asked whether it is acceptable for the government to put an American citizen in jail and throw away the key, the only answer must be a resounding no.

From: Carol Nackenoff
Subj: The Effect of Scalia's Recusal
Date: 7/7/2004 8:51:04 PM EDT

Mark is quite right about *Newdow*. Scalia's recusal certainly affected the result. There has been significant disagreement between O'Connor, Kennedy, and Thomas on some of the tests and approaches they would employ in post-*Lee v. Weisman* (8) establishment clause cases. Some would surely not have wanted to go along with Thomas's proposition that, under current jurisprudence, "under God" didn't pass Constitutional muster, and that this was wrong, and that the Court should thus revisit the issue and overturn the precedent. Thomas's position might possibly have gained Scalia's assent, and might have appealed to liberals who wanted to revisit the issue but get a different result.

8 A 1992 case in which the Court affirmed that prayer at the graduation exercises of a public middle school was unconstitutional

From: Robert Weiner
Subj: More Ducking
Date: 7/8/2004 11:02:11 AM EDT

The Court did duck in *Padilla*. But the Court did rule in *Hamdi*, and that decision strongly suggests what the result in *Padilla* will be. Arguably, *Hamdi* was a harder case than *Padilla*. Both Hamdi and Padilla are American citizens, but Hamdi was captured in a combat zone. Padilla was in Chicago. So under the Hamdi case, I think Padilla is entitled to effective representation by counsel in a proceeding that provides a meaningful opportunity to challenge his confinement.

From: Mark Tushnet
Subj: Re: More Ducking
Date: 7/8/2004 11:38:32 AM EDT

I agree with Robert on that, but Padilla's not home free. The Court could interpret the pertinent legislation in a number of ways to cover the unusual circumstances of a war on terror. Plus the administration could contend that the statute limiting detentions is unconstitutional because it limits the president's power as commander-in-chief to detain for purposes of interrogation. Nothing in *Hamdi* precludes these interpretations, although in my view the plurality opinion indicates that the district court judge who gets Padilla's case would be well-advised to rule in his favor.

From: Jonathan Adler
Subj: The Padilla Decision
Date: 7/8/2004 11:46:10 AM EDT

I certainly understand Roger's consternation over *Padilla*. Indeed, I am sure all of us remember some moment in law school when we were aghast that the cold, technocratic application of procedural rules or jurisdictional requirements could produce an unjust result. Yet if one assumes the Court was correct in its jurisdictional holding in *Padilla*, the only way for the Court to reach the merits would be to establish a faulty precedent on the jurisdictional question that lower courts would have no choice but to apply in future cases. The desire for "justice" in the instant case would corrupt the rule of law for years to come. Perhaps the Court could have concocted some "good-for-this-flight-only" ruling to reach the merits without making a hash of the jurisdictional rules, but no one is particularly happy when the Court adopts such an approach. I think it is untenable to argue that jurisdictional requirements should only be considered when the stakes are sufficiently low.

From: Roger Cossack
Subj: More On Padilla
Date: 7/8/2004 11:28:57 AM EDT

Here's my final two cents. Robert, I could not agree more with your analysis of "passive virtues" with regards to *Newdow*. The pledge of

The departure of Stevens and O'Connor could cause enormous changes should Bush win.

9 Blakely v. Washington Instead of a 53-month sentence, kidnapper Blakely received a 90-month sentence when the judge found that he had exhibited "deliberate cruelty." The Court held that the Sixth Amendment requires juries, and not judges, to find all the facts which can increase a defendant's sentence.

10 Missouri v. Seibert By a 5-4 vote, the Court invalidated a common police tactic to extract confessions by deliberately questioning a suspect twice, the first time before informing him of his right to remain silent.

11 U.S. v. Patane When police came to Patane's house to question him, they told him he had a right to remain silent. He said he already knew his rights, and then directed them to a gun in his bedroom. Patane later said that the gun shouldn't be used as evidence because its discovery was the result of a statement made without a Miranda warning. By a 5-4 margin, the Court found for the police.

allegiance is perfectly suited towards that type of review. But *Padilla* must not be viewed by a passive Court. An American citizen is in prison with no due process... none. This is a time that the Court must make a decision on the merits, and in my opinion, its lack of doing so will be viewed harshly by history.

I want to change the topic to the Court's holdings in the area of criminal law, the area where we see the most division among the justices. It seems that almost all of the cases are decided on a 5-4 vote. Does *Blakely* **(9)** suggest the end of the sentencing guidelines? Are *Seibert* **(10)** and *Patane* **(11)** somewhat inconsistent?

From: Robert Weiner
Subj: Blakely
Date: 7/8/2004 11:42:28 AM EDT

Blakely signals the end of guidelines as we know them, but not necessarily of guidelines. Either by judicial decision or legislative action, we're likely to end up with a system that allows sentencing based on factors beyond those traditionally considered elements of the offense.

From: Jonathan Adler
Subj: The Blakely Lineup
Date: 7/8/2004 12:27:49 PM EDT

The *Blakely* lineup is worth comment. Scalia's majority opinion was joined by Thomas, Stevens, Ginsburg, and Souter, while O'Connor, Kennedy, Breyer, and the chief justice dissented. This is anything but a traditional right-left split on the Court. Rather, it reflects a division of the Court's formalists and its pragmatists. The majority focuses on the constitutional text and history, while the dissents warn of the practical implications.

In *Blakely*, the formalists kept the court out of practical policy considerations concerning how sentencing should be structured. Instead, they identified a rather bright-line rule that criminal defendants have a constitutional right to a jury that only they can waive, and have left it to the political branches to sort out the details. The practical effect is confusion. One federal judge has already said that *Blakely* has rendered federal sentencing guidelines unconstitutional, while the Justice Department is arguing that because *Blakely* did not concern federal guidelines, they must still be applied. Meanwhile, there could be a flood of litigation challenging recent sentences for failing to comply with *Blakely*'s requirements.

From: Carol Nackenoff
Subj: Are Seibert and Patane Inconsistent?
Date: 7/8/2004 12:39:57 PM EDT

Let me comment on Roger's question about *Patane* and *Seibert*. While I do think that the logic in *Patane* is at odds with *Seibert*, I don't think they need to be seen as inconsistent. In *Seibert*, police were using a popular interrogation technique designed to delay the Miranda warning and to get suspects under interrogation to repeat and/or confirm, once Mirandized, what they had admitted or intimated in a pre-Miranda interrogation. The Court majority saw that the police were trying to circumvent Miranda through deliberate techniques. Kennedy seemed particularly interested in the question of deliberate versus simply negligent failure to Mirandize. He saw a deliberate police practice in *Seibert*, and something inadvertent in *Patane*. And he was the swing vote.

From: Roger Cossack
Subj: The Vice President's Secrets
Date: 7/8/2004 4:01:01 PM EDT

Let's look at the Cheney case. **(12)** Did the VP win, or is he holding a slow and cruel death sentence because the Court failed to resolve an underlying discovery dispute? Can anything be said about executive privilege and separation of powers from this litigation? What about Scalia's refusal to recuse? An argument could be made that there was a stronger reason to recuse in *Cheney* than *Newdow*.

12 Cheney v. U.S. District Court Environmental groups wanted Vice President Cheney to disclose information about the membership of his energy advisory task force. By a 7-2 vote, the Court refused to order Cheney to comply and sent the case to a lower court for further argument.

From: Mark Tushnet
Subj: Cheney and Recusal
Date: 7/8/2004 4:20:11 PM EDT

Although there's no telling what the ultimate outcome of *Cheney* will be, in some sense the outcome was more favorable to executive authority than one might have expected. The Court said that lower courts should consider policy concerns about intrusion on the executive branch's deliberations, without requiring the executive to invoke executive privilege, with its attendant political costs.

My view is that Scalia demonstrated bad judgment in going on the duck-hunting trip, but that having done so, it was appropriate for him to refrain from recusal, mostly for the reasons he gave in his memorandum explaining his decision. **(13)** It would have been as appropriate, perhaps even more so, for him to recuse himself, but it wasn't required.

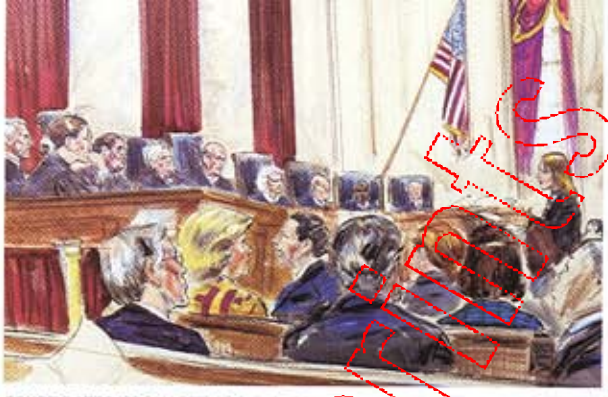
13 Scalia had gone duck hunting with Cheney in January, after the Court accepted the case. In May, Scalia issued a 21-page memo in which he explained why he refused to recuse himself.

From: Robert Weiner
Subj: Re: Cheney
Date: 7/8/2004 5:13:54 PM EDT

In *Cheney*, all the Court held was that the executive branch should not have to go through a large volume of materials to determine whether to assert executive privilege, before the district court made some judgments about the appropriateness of the discovery requests for those materials. From that perspective, it is an unremarkable result. On the other hand, the Court's stated concern about the burdens and distractions of litigation involving the executive branch was far greater than reflected in *Clinton v. Jones* **(14)**. The charitable interpretation is that the Court learned from that decision and its aftermath.

As regards disqualification, I note again the importance of political legitimacy to the fulfillment of the Court's role in our government. The disqualification rules protect not only the integrity of the Court's decision-making process, but also its political standing. In both respects, Scalia's refusal to recuse himself in the Cheney case, and his rationale for doing so, harmed the Court. His actions fueled concerns about impartiality.

14 Clinton v. Jones The 1997 case in which the Court ruled that a sitting president could be sued while in office.



COURT DATES (FROM LEFT) ARGUMENTS IN *PADILLA*, 4/28/04; NEWDOW PRACTICES HIS "UNDER GOD" ARGUMENT, 3/17/04; HAMDI LAWYER FRANK DUNHAM, 4/28/04.

From: Carol Nackenoff
Subj: Scalia's Recusal
Date: 7/8/2004 8:45:28 PM EDT

Perhaps Scalia's refusal to recuse himself in the Cheney matter is yet another indicator of his penchant for formalism. In *Newdow*, Scalia had made public comments about his position on the immediate issue ("under God") before it was on the Supreme Court docket. In *Cheney*, his position was that he had done nothing to predispose his vote, had paid his own way to go duck-hunting, and the central issue was far bigger than his friendship with Cheney. However, the appearance of impropriety didn't do the image of the Court any good.

When the Court sent the Cheney case back to the circuit with "instructions," do you all think they were being very instructive? The executive has not won its broadest claims at this moment, to be sure, but I agree with Mark that the Court's language sounds a lot like "pay [more] attention to executive privilege" in your determinations. My first reaction to this case was: a) this is more of a victory for the administration than I expected and b) this feels like stalling.

From: Roger Cossack
Subj: The Future of New Federalism
Date: 7/9/2004 9:56:17 AM EDT

I wanted to get your views on another subject. Some commentators are saying that this term spells the end of what has been called "New Federalism" by the Court. But was this new federalism ever much of a movement? Is federalism the area where the traditional liberal versus conservative split is most evident?

From: Mark Tushnet
Subj: Not So New Federalism
Date: 7/9/2004 10:15:10 AM EDT

The "New Federalism" revolution was never what some commentators made it out to be. The limits the Court put on Congress's power to regulate interstate commerce were relatively modest, and left essentially untouched anything that could be fairly characterized as "commerce." Its restrictions on Congress's power to enforce the Fourteenth Amendment are potentially important, but the Court has receded from the most aggressive applications of its doctrines. Moreover, all of these doctrines are triggered only when Congress does something that infringes on state prerogatives, something which seems increasingly unlikely.

From: Jonathan Adler
Subj: An Overstated Trend
Date: 7/9/2004 11:53:16 AM EDT

Mark is correct that the net impact of the Court's federalism cases has been overstated. The Court's conservative majority has articulated some principles that, if they were to be applied faithfully and consistently, would significantly limit federal power, but it has given mixed signals about its willingness to follow through. This makes the medical marijuana case **(15)** on the Court's docket for next term particularly important.

15 Raich v. Ashcroft The Court will review a federal appeals court decision that federal laws prohibiting the use or cultivation of marijuana are unconstitutional when applied to medical patients in California who are using marijuana with their doctor's approval.

It presents an opportunity for the Court to solidify, and perhaps extend, the idea that the federal government has limited and enumerated powers; or it could spell the end for any meaningful commerce clause jurisprudence.

From: Mark Tushnet
Subj: The Fundamental Split
Date: 7/9/2004 2:59:52 PM EDT

The best way to understand the Rehnquist Court is that its decisions have been driven by a division not between liberals and conservatives but within the Republican camp, with Kennedy and O'Connor expressing a more traditional Republican set of constitutional views, and with the chief justice and Justices Scalia and Thomas expressing views associated with the modern (post-Goldwater, Reagan, Gingrich) Republican vision of the Constitution. This isn't to say that the justices (or their "liberal" colleagues) are simply voting their narrowly political preferences, but rather that they are voting on the basis of deeply held views about what the Constitution actually means, views that are associated with particular branches of the Republican party.

From: Carol Nackenoff
Subj: The Election
Date: 7/9/2004 3:40:18 PM EDT

That means, obviously, that a lot of the areas we've discussed will be affected by the outcome of the election. The first justice or two to go will likely make a significant difference. In so many important cases, we're seeing 5-4 decisions. I am reluctant to make any pronouncements about what the Court is likely to do because the departures of Stevens and O'Connor could cause enormous changes should Bush win again.

From: Robert Weiner
Subj: The Original Question
Date: 7/9/2004 4:32:14 PM EDT

Returning to Roger's original question: Rehnquist has not lost the Court, but the Court may have reached the limits of where it is willing to go. I, too, hesitate to predict what happens next. Much depends on the election. But the direction of the Court also could be influenced by external events. For example, success in preventing a major terrorist attack in this country. Or conversely, the occurrence of such an attack, could well affect not only the public's and the Court's views on executive power, but also—more subtly—their views of the proper balance between the federal government and the states. Conditions are more volatile and less predictable than ever. The Supreme Court mirrors those conditions more than its apparent insularity might suggest.

From: Roger Cossack
Subj: Thanks!
Date: 7/9/2004 4:59:26 PM EDT

Thank you all for participating. This has been informative and interesting. ◎