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 SUPRE...
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 Atkins, 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 6th 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?

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. I 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 on 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 Handi (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.
I'm thinking about Padilla (5) 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: 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 rely too much into Stevens' 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 2003-04. There were 21 5-4 decisions this term, compared to only 12 in 2002-03. More significantly for our discussion, in each of these years the Court divided into the traditional 'left-right' camps, just under half of these cases (10 out of 21 in '03-04 and 6 out of 12 in '02-03). In six of the remaining cases, Kennedy or O'Connor voted with the liberals to form the majority. The tie-votes 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 of the claim that the 'Stevens Court' is anything we're seeing the continuation of a 'Stevens Court.' As I've already said, it's not such a bad thing.

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 Courts,' 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' drive? That's the place, I think, where Stevens comes in.

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 genuine hard question about the relationship between the state law about who gets to decide matters affecting a child, and the federal 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 North 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 federal principles that fail to address the issue is 'shameful.' Padilla has sat in prison 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 whim, 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.
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 5:43:57 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.

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 tessor 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

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. Beth 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 hopeless. 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 comment in law school when we were aghast that the cold, logical 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-faith-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, kidney-winner 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 of extending interrogations by deliberately questioning suspects twice, the first time before informing him of his right to remain silent.

11 U.S. v. Patane
Police arrested Patane on 12 drug charges. He told them he had a ninth-grade education, ready to write, and then dictated a letter to his wife. Patane later said the police should not be used to obtain a confession, but the district court found the confession to be admissible under Miranda warnings. By a 5-4 margin, the Court reversed the conviction.

allegiance is perfectly suited towards that type of review. But Parrella must not be viewed by a passive Court. An American citizen is in prison within the process ... none. This issue, 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 the guidelines. Either by judicial decision or legislative action, we might eventually 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 dissent warns 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 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 Nockenoff
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 don’t 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 implicated 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 simple 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 as long as possible before 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 not to recuse in Cheney than Newdow.

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 exclusion on the executive branch’s deliberations, without requiring the executive to invoke executive privilege, with attendant political costs.

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

From: Robert Weiner
Subj: Re: Cheney
Date: 7/8/2004 5:13:54 PM EDT
In Cheney, the Court held 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.

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

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

14 Clinton v. Jones
The case in which the Court ruled that a sitting president couldn’t sue while in office.
From: Carol Nackenoff  
Subj: Scalia’s Recusal  
Date: 7/8/2004 8:45:23 AM 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 on 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 agree with Mark that the Court’s language sounds a lot like “pay minimal 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 5:56:17 AM EDT

I wanted to get your views on another subject. Some commentators are saying that this term spells the end of what’s 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 on the Court’s docket for next term particularly important.

From: Mark Tushnet  
Subj: The Fundamental Split  
Date: 7/9/2004 2:55:52 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 Justice 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 narrow 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 justices or two to go will likely make significant differences. In 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 dramatic changes should Bush win again.

From: Robert Weigel  
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. If so, he might 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: Thx!  
Date: 7/9/2004 4:59:26 PM EDT

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