Justice Talking
Radio Transcript

The Roberts Court: What Can This Term Tell Us About the Future of the Court?—Air Date: 7/24/06

Each July, in cooperation with the National Constitution Center, Justice Talking asks constitutional experts to review the highlights of the Supreme Court's term. This year, with the appointments of Chief Justice John Roberts and Justice Samuel Alito, the Court has undergone its most significant changes in over a decade. Our distinguished panel helps us understand how the new justices will change the balance on key issues like executive power, states' rights, abortion and gay rights, and gives us insights on the future direction of the Court.

MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. It's been a whirlwind term for the Supreme Court, from the retirement of Justice Sandra Day O'Conner to the death of Chief Justice William Request and the appointment of two new justices, Chief Justice John Roberts and Associate Justice Samuel Alito. There were also decisions in several landmark cases. With rulings on campaign finance reform, redistricting and physician-assisted dying, this year's term has been an interesting one for court-watchers. One case, Hamdan v. Rumsfeld, will have lasting implications for presidential power.

UNIDENTIFIED MALE: Checks and balances could never give the same power to two branches of government simultaneously and the powerful check that the president has on the Congress in this regard is that they cannot oust him as Commander in Chief, even though they could set the general rules and regulations under which he has to labor.

MARGOT ADLER: More on this year's Supreme Court decisions after the news.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. In the last year the Supreme Court has witnessed some of the most extensive personnel changes in over a decade. We've seen the confirmations of Chief Justice John Roberts and Associate Justice Samuel Alito. The Court tackled key cases from executive power to culture war issues, from voting rights to the rights of criminal defendants. We'll talk about these decisions and how the new justices could change the direction of the Court as well as what we can expect in the term ahead. I was joined by Joan Biskupic, who covers the Supreme Court for USA Today, University of Chicago law professor Richard Epstein, and Stanford law professor Kathleen Sullivan. Here's our discussion at the National Constitution Center in Philadelphia.

MARGOT ADLER: Let's talk about a case that was decided at the end of the Supreme Court term about the imprisonment of enemy combatants at Guantanamo Bay. The case is called Hamdan v. Rumsfeld. Joan, this is a complex case. Would you spell out what the Court did and why it's so significant.

JOAN BISKUPIC: Sure, Margot. First of all, it involved a Yemeni national who had been a driver for Osama bin Laden and is alleged to have carried weapons to Al Qaeda. He was challenging the military tribunals that President Bush set up in November of 2001 to try enemy combatants in a particular way that wouldn't give the full protections of court martial or any other courts that exist now under U.S. law. The Supreme Court ruled by a five to three vote that these tribunals, as Bush envisioned them, violated two key provisions. One is Article Three of the Geneva Conventions and the second is a provision of the Uniform Code of Military Justice. The bottom line is that these tribunals did not give enough protection to detainees by having regularly established rules, by having ways in which a detainee could present evidence and have his full case heard and defend himself. What was important about this ruling was that the more liberal members of the Supreme Court took it over. It was announced from the bench in a dramatic way by Justice John Paul Stevens—who happens to be the only member of the Supreme Court who fought in World War II, won the Bronze Star—and essentially it said to President Bush: you cannot go it alone, you need to work with Congress to set up rules for these... The use of military force resolution from right after September 11th does not do the trick as the administration had asserted.

MARGOT ADLER: So will the Hamdan decision increase the pressure to close the prison at Guantanamo Bay and what does the decision mean for the prisoners there? Who wants to take that? Kathleen?

KATHLEEN SULLIVAN: The decision just covers tribunals by which the prisoners are tried. And in fact it may have some narrow effect because Congress has acted; it's passed the Detainee Treatment Act. The Detainee Treatment Act allows certain decisions about how people at Guantanamo are held to be handled in a new way. But that's authorized by Congress. They key to the Hamdan decision is that the Court said the president must follow the law laid down by Congress; where Congress has acted he can't make it up. And in fact, the Bush administration has pushed a very aggressive position in which it said the president has inherent authority, a kind of plenary authority as the commander-in-chief. That's just not true to the original Constitution in any way. The original Constitution was about fighting monarchical power, making sure that

you had an executive branch that was bound by civil law. And so here the Court is saying where Congress has acted, the president can't go it alone. But it did not reach the question of whether the president has any inherent powers.

RICHARD EPSTEIN: It didn't have to. Put it this way: Once it said that he did not have statutory authorization, then, in effect, the second line would be I don't need statutory authorization, I can win anyhow. And that part of the case never really came up. So I think in effect it's a pretty clear sign that Congress, which does have the power to make rules governing the regulation of warfare, certainly is within its core powers and it's very difficult to say that the president has independent powers. Checks and balances could never give the same power to two branches of government simultaneously. And the powerful check that the president has on the Congress in this regard is they cannot oust him as commander-in-chief, even though they could set the general rules and regulations under which he has to labor.

MARGOT ADLER: Richard, in the past the Bush administration has argued that its executive powers allow for wide latitude in waging the war on terror. Do you think that the Court's ruling in Hamdan will have a ripple effect on other issues, like the National Security Agency's wiretapping program, for example?

RICHARD EPSTEIN: Sure. Well, I mean, the president's position on FISA is two-fold.

MARGOT ADLER: You should define FISA for our audience.

RICHARD EPSTEIN: FISA is the Federal Intelligence Surveillance Act.

MARGOT ADLER: Foreign Intelligence.

RICHARD EPSTEIN: Foreign Intelligence Surveillance Act. I use the abbreviation, I forget the word. The revelation that took place last December in effect was a situation that there were some taps and some surveillance which was not in conformity with that statute, and the president's answer to that was: I don't need the statute as commander-in-chief when it comes to the superintendence of terrorist activities, I can go it alone under Article Two. The other question is whether or not the authorization of use of military force is an implied repeal to FISA. And generally speaking, the Congress and the courts have always taken the position, particularly the courts, that implied repeals of huge statutes by silence in another act, which could be read perfectly sensible without the repealer, are going to be disfavored. And the second statute says you can start using appropriate actions. And one of the simple arguments to make here is it's not appropriate to use things that are illegal under another statute. Indeed, Kathleen and I, on this issue, although we differ on many others, have actually written letters to the Congress trying to reinforce this particular simple-minded rule of law virtue that gets ever more important by virtue of its opposition from the White House.

MARGOT ADLER: Kathleen?

KATHLEEN SULLIVAN: Well, Richard and I do agree on this. If the president cannot use the authorization for use of military force to create military tribunals, he certainly can't use the

authorization for the use of military force to spy on domestic phone calls. And the second point about Hamdan is it says where Congress has passed a statute—in Hamdan the Uniform Code of Military Justice, in the National Security Agency case the Foreign Intelligence Surveillance Act—where Congress has set forth specific procedures for military tribunals in Hamdan or for getting a warrant from a special court that sits in the top of the Department of Justice, where Congress has set forth special rules, the president cannot violate them. He cannot violate them in the name of inherent Article Two power.

MARGOT ADLER: The Hamdan case throws the issue of how to handle the Guantanamo detainees back to Congress. And, in fact, they are already hearings on this. Joan, what do you think the Congress is going to do?

JOAN BISKUPIC: Well, this month there have been several hearings already and I have to say that Democrats and Republicans, key Republicans, remain very skeptical of the Bush administration's plan, and feel as if they're kind of caught in a bind. One important element that's changed for Congress is that the Supreme Court ruling was quite enabling. It essentially said to the legislative branch: get involved, don't abdicate your responsibility. And the tone from the Hill is that members of Congress are actually looking for solutions, and the initial search for solutions involves how to try these individuals. The second step is what to do with the remaining ones that are not charged and designated for military tribunals. I think also it was a reminder of the fact that Congress has to come in with new legislation on several fronts.

MARGOT ADLER: Well, do you think that the administration feels that they can get Congress to essentially pass legislation that will allow them to do exactly what they did under a different situation?

JOAN BISKUPIC: Well, here's the tricky part. Remember what kind of year we're in; we're in an election year. Right now we're just in the aftermath of the Supreme Court ruling that in effect really slammed the administration. But we've got a very political context here. And we've had members of the administration already talk about looking...again, of casting members of Congress as being potentially soft on national security, soft on terrorism. What the Bush administration is saying is that we at this point want to come back and try to have these military tribunals authorized by Congress but under the same sorts of rules that the administration wanted. And I think that this thing is going get caught up in both legal and political ramifications.

MARGOT ADLER: Joan Biskupic reports on the Supreme Court for USA Today. Richard Epstein, you wanted to get in?

RICHARD EPSTEIN: Yeah. I think the Congress is actually in a more difficult position than the president would like them to be in. The Hamdan case only dealt with the issue of authorization. It did not deal with the rights of individual persons to due process under various kinds of proceedings. There is a longstanding debate over whether or not non-citizens have to be given the same kinds of rights as citizens. But it seems to me that if you look at the combination of the Geneva Conventions and the basics norms that we have domestically with respect to trials, serious offenses like this require a fair bit of procedural protections unless you can show not

terrorism in the abstract, but rather show a disruption of the ordinary life so that, you know, transportation, communication and civic order aren't maintained. He can't show anything remotely like that. So my guess is that he's going to actually have to think if the Congress does its job as to whether or not the standards he uses are going to be sufficient unto the day. Now that then raises a further question: You have a trial for convictions, but what do you do with respect to the interim detentions? Do you let people just rot there indefinitely or do you require that there be some minimal process to see whether there's that kind of probable cause for holding them? And I think that the Congress has to address that as well.

MARGOT ADLER: Richard Epstein is a professor of law at the University of Chicago. You're listening to Justice Talking where we're doing our annual Supreme Court wrap-up. Kathleen Sullivan of Stanford University, would you like to get in here?

KATHLEEN SULLIVAN: Well, Congress has much more bargaining power, now that the Supreme Court has ruled, if it wants to fashion military tribunals in a way that's truer to our traditional American values and the Uniform Code of Military Justice. The administration has taken a truly extravagant litigating position in these cases. It has argued over and over and over again in different settings for such a broad view of executive power. The president issues signing statements where he says: I don't think that I'm going to follow certain bits of the law because it interferes with my inherent executive authority. If the administration had simply said we're going to try these detained suspects in Guantanamo according to ordinary military procedures, it wouldn't have had this rebuke from the Supreme Court and it might have had a better position in Congress to get some slight amendments of those procedures.

RICHARD EPSTEIN: It seems to me to be just a guy who insists: I'm the boss on the block and I don't want to play according to your rules. And I regard this as...it's not only a silly litigation process, I don't understand in terms of international relations or domestic politics why he's better off fighting on whether to try them as opposed to going out and getting some convictions if it turns out the record would support it.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we're looking at the past term in the Supreme Court. Joining me at the National Constitution Center in Philadelphia are Stanford law professor Kathleen Sullivan, University of Chicago law professor Richard Epstein and Joan Biskupic, who covers the Supreme Court for USA Today.

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MARGOT ADLER: States' rights have usually been the territory of conservatives, but is it time for liberals to stake out new ground?

KATHLEEN SULLIVAN: When it comes to issues like medical marijuana in California, physician-assisted suicide in Oregon, gay marriage in Massachusetts, it may actually be that giving more decentralized power to the states serves liberal values. So in other words, I'm recommending that liberals go from singing the states' rights blues to endorsing blue states' rights.

MARGOT ADLER: The implications of Supreme Court decisions on assisted dying in Oregon, campaign finance in Vermont, and redistricting in Texas—stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're looking at the cases and decisions from the past year in the Supreme Court. I was joined by University of Chicago law professor Richard Epstein, Joan Biskupic, who covers the Supreme Court for USA Today and Stanford law professor Kathleen Sullivan. Let's return to our conversation at the National Constitution Center in Philadelphia.

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MARGOT ADLER: Let's talk about a case out of Texas involving the redrawing of voting districts. The Republican-controlled State Legislature had redesigned six congressional districts to pick up seats for the Republicans. They did this three years after the latest census for purely political reasons. Let's start with you Richard. What's your take on this?

RICHARD EPSTEIN: This is a classic situation in which everybody does it purely for political reasons. So there's no virtue on either side of the political spectrum. There are no clean hands in this. That's the first point. The second point is you have some concerns about doing this opportunistically between censuses and why it happened here. And I think the answer is it may not be kosher but there's nothing about it that's illegal. The third point I think that comes on is in order for a court to come in and to say this is simply not going to be acceptable, they have to have a theory of what is acceptable. Nobody knows what the normative underlying is, and so what the Court has essentially done is to play its usual game: it's too hard for us, therefore we defer, except in those cases where we think there's a racial overtone, at which point we will intervene. So I think that this is an area in which the passivity that you see in the Court is something which is likely to come for a very long time because the truth about the matter is democratic theory, majority votes, and congressional districts somehow or other don't coalesce in a very happy whole.

MARGOT ADLER: Joan Biskupic do you agree?

JOAN BISKUPIC: I agree somewhat, but I just want to elaborate on what was involved here. This is a map that many of you will be familiar with because it was engineered effectively by former House Majority Leader Tom Delay. He helped get money to get the Republicans control of the full Legislature in Texas. They redrew the map in 2003, scrapped a map that had been drawn by Democrats and then approved by a court. And that map did the trick. The Texas delegation in Congress switched in 2004 from Democratic-controlled to Republican-controlled. The Democrats who challenged this came to the Supreme Court and said okay, we know—just what Richard has said—that you don't like to get into these political messes, but this one is unconstitutionally political and partisan because look at when they drew this map. It was mid-decade when we didn't have decent census information, so you automatically have violated one person-one vote here. What the Supreme Court said, over six different opinions—as these professors note, toward the end of the term we get these splintered rulings that really end up not

setting any very good rules of law—but what the Supreme Court said over six separate opinions is you can keep bringing us political cases like this, but we have no idea how we're going to decide them because we don't have any standards here. But the one thing I want to amend to what we were talking about in terms of this political ruling there was a second ruling here that really showed that the Voting Rights Act still has some punch, because the Court did say that this one district that the Texas Legislature had deluded and really hurt Latino chances of electing one of their own after they had been building in strength and building in strength, that deluded district was a violation of the Voting Rights Act, so the map will go back and be partly redrawn.

MARGOT ADLER: Now, Kathleen, do you think that this verdict will set off a wave of attempts by both parties to redraw voting districts around the country?

KATHLEEN SULLIVAN: Well, as Richard said, we're *shocked* to think that politics would enter into the drawing of districts. [laughter] You don't want to put foxes in charge of hen houses, alright? Politicians in charge of their incumbency protection acts will always do things in their own favor. The Court can serve as a check on that, a bipartisan or non-partisan check on that, and to tell the legislatures they've gone too far, they've been too partisan, stop it, cut it out. Now it shouldn't be that inability to decide on the standard keeps you from ever intervening. It was very controversial at the beginning of the '60s when the Court intervened to create one person-one vote and to end malapportioned legislatures that gave the same number of votes to agriculture counties with very few voters and giant cities with many voters. That was very controversial at the time, but it probably was the single most important guardianship of democracy we've seen from the Court in the modern era.

MARGOT ADLER: Kathleen Sullivan, law professor at Stanford University. Richard, do you want get in?

RICHARD EPSTEIN: One man, one vote, when you had Baker and Carr, was something in which you knew how to count, you knew how to do. When it turns out that you're trying to figure out the shape of districts, nobody quite knows what the optimal is. The first time this was tried was in the city of Tuskegee a long time ago, in which they took a square place, they turned it into a 37-sided monstrosity, and the Supreme Court struck it down because of the racial motivation of keeping black people out of that city. But one of the things that you could do is have an independent commission. We have those in Illinois; there are three Democrats and there are three Republicans. Then they pick a fourth and that guy determines in exactly the same corrupt fashion as before. So you do it in that particular fashion, or under something... What you have to is you have to rent a computer from somebody and say I have a compactness geometrical test and if I have to go right down the middle of a condominium to keep these things balanced that's the way I'm going to do it. And everybody says, gee, that might be wonderful, but then you're going to miss all sorts other important values.

MARGOT ADLER: Richard Epstein, law professor at the University of Chicago. Joan, in a case out of Vermont, the Supreme Court decided in a six to three vote that Vermont's limits on campaign contributions and spending were unconstitutional. Help us understand what happened here.

JOAN BISKUPIC: Okay, Vermont had a really unprecedented law in two ways.
One is that it had very low limits on what you could contribute to a political campaign in the state.

MARGOT ADLER: Like $200, $300?

JOAN BISKUPIC: It varied by state office. It went from $200 to $400. But then at the same time Vermont also had a cap on spending, how much you as a candidate could spend out there on your race. And the question before the Supreme Court was, first of all, is this contribution limit unconstitutionally low to impinge free speech, because the Court has equated electioneering as a form of speech? And, this limit on how much you can actually spend, does that fly in the face of a principal set in a 1976 post-Watergate case in which the Supreme Court said we're not going to allow any limits on what a candidate actually spends because that's free speech to try to get elected. And what the Supreme Court said, as Margot just mentioned, is that, yes, these laws are too restrictive.

MARGOT ADLER: Joan Biskupic covers the Supreme Court for USA Today and this is Justice Talking, where we're doing our Supreme Court wrap-up, our annual wrap-up, with Joan Biskupic and also Richard Epstein of the University of Chicago and Kathleen Sullivan of Stanford University. Richard, does this ruling send campaign finance reformers back to the drawing board? Is public financing of campaigns the only option here now?

RICHARD EPSTEIN: Oh my god, hold your tongue. No, I think in effect, I would hope, that it would send them not back to the drawing boards, but away from the drawing boards all together. I mean, even if you go back to the Buckley and Valeo of the 1976 standards and the higher limits, if abuse is your standard, the bribery statutes cover a very large portion of that, and in effect the great danger of these particular statutes is that they are incumbent retention bills, because incumbents get all sorts of free publicity in all sorts of ways and they don't have to spend their own money, they can spend public monies already with the franking privilege.
So that I think it's extremely important that in order to shake up this particular situation you allow people to get money from wherever they can and spend it how ever they will. And so my own view about it is that I want to see less of these kinds of restrictions in there and a much more open type of situation.

MARGOT ADLER: Kathleen, I see you looking somewhat askance.

KATHLEEN SULLIVAN: The Court is divided about campaign finance. If we go back for a minute, we remember that in 1976 the Supreme Court did something quite extraordinary. It said that the First Amendment does protect some political money. It says that government may limit the supply of political money by limiting contributions but it can't limit the demand for political money, but you can't limit expenditures. And the Vermont case this term just reaffirms that basic structure; contribution limits are generally more tolerated than expenditure limits. It struck down the expenditure limits in Vermont and for the first time it struck down some contribution limits. There are some on the Court who would overrule Buckley by getting rid of all campaign finance regulation, saying it's all a violation of the First Amendment.

MARGOT ADLER: Clearly Richard is in that camp.

KATHLEEN SULLIVAN: And I am too. There is another camp on the Supreme Court that would tolerate almost any campaign finance regulation it sees. And then there's a middle block, in which Justice Breyer wrote the pivotal opinion this time, and the new Chief Justice Roberts and Justice Alito fall. Roberts and Alito voted with the center this time, this center block that struck down the Vermont law, but implied that other contribution limits would be fine. But it may be that there are five justices now trying to roll back Buckley and to eliminate more contribution limits as well.

MARGOT ADLER: I'd like to ask Kathleen, in this case Chief Justice Roberts joined Justice Breyer in support of the view that precedent--that is, former rulings should be applied unless there are special justifications to change it--Justice Alito declined to join them. What do we learn from that?

KATHLEEN SULLIVAN: Justice Alito wrote separately saying that if an opinion is squarely challenged, a prior opinion is squarely challenged, then maybe he would consider overruling it and not stand by what's called stare decisis, letting the decision stand. You can't read too much into it. It just suggested that Roberts was showing more attachment to the idea that you respect precedent than Alito was in this particular case.

MARGOT ADLER: Richard, briefly.

RICHARD EPSTEIN: Yeah, very briefly. When John Roberts was campaigning, as we now say, for the Supreme Court, settled expectations was the centerpiece of his particular campaign. When Alito came forward it was a slightly more detached and cerebral kind of presentation. And basically both of these guys are true to form. And you will see more deference to precedence out of Roberts than you will out of Alito on this and every other issue.

MARGOT ADLER: The Court issued decisions in several, what we might call culture war cases, this term. The first I want to talk about is a case from Oregon about assisted dying. Here the U.S. attorney general wanted to prosecute Oregon doctors under the federal controlled substances law. These doctors were prescribing drugs to terminally-ill patients under Oregon's Death with Dignity Act. The Bush administration lost this case. Richard, what should we take away from this decision? Will other states now pass their own assisted dying laws?

RICHARD EPSTEIN: What we should take away from this decision, I think, primarily, is that the Controlled Substances Act should not be used as the method to try to regulate medical practices. It's the simplest point at the state level. One of the things that's so depressing about both parties when it comes to this issue is the opportunistic way in which federalism arguments are going to be used. Here for the most part you have a system of Republicans who always believe in state rights but they also believe in drug control as a more passionate device.

KATHLEEN SULLIVAN: They believe in red states' rights.

MARGOT ADLER: They have red states' rights and blue states' rights now?

RICHARD EPSTEIN: Well, actually even that is kind of complicated because they vote down some. They knock out some stuff that their own states are winning. But if you go back to the Rife case from the previous term, where they knocked out the medical marijuana-type distributions, this was clearly a situation in which localism, which was a strong Republican theme, was absolutely overridden by the drug interests, and they were trying to do the same thing here. The reason the two cases came out differently is the Democrats and the liberal branch of the Court, when it comes to the commerce clause, they basically roll over and die; whatever Lola wants, Lola gets, so Congress can do what it pleases. But when it comes to an issue of statutory construction, like in the Hamdan-type situation, they are willing to be much tougher on that because they don't think that it's going to force them to undo the great New Deal reforms of Franklin Roosevelt. And I think in this particular case, if you just read the statute, it's something of a stretch to say that this is what they were trying to do.

MARGOT ADLER: Joan, I see you wanting to get in here.

JOAN BISKUPIC: This was a wonderful decision where Justice Kennedy really called it for what it was. He mentioned that as a Senator, John Ashcroft had wanted to get rid of statutes that would allow physician-assisted suicide, he becomes attorney general, he immediately issues a directive without consulting anybody in Congress or anyone beyond his own department, as Justice Kennedy even says in his majority opinion, and he just summarily says we're going to use our federal anti-drug laws to block this. By a six to three vote the Supreme Court says where does the federal government get off dictating medical rules within the state? So I think this was an example that went much further than six justices could tolerate. Two moderates, both Kennedy and O'Conner, signed onto this. And I thought that really made this case distinctive. The other thing that made this case distinctive is that we really saw something interesting with new Chief Justice John Roberts. He signed onto a fairly hostile, bitter dissent, written by Justice Scalia about problems with drugs, problems with the administration being able to have its leeway here. And I thought that was kind of an early sign of some of his issues on the federalism question and anti-drug issues.

MARGOT ADLER: And Kathleen, do you agree with Richard that essentially the marijuana case in California is very similar to the Oregon case? And why did different decisions come down?

KATHLEEN SULLIVAN: On the federalism point, liberals have been mistrustful of states' rights because they associate states' rights with Jim Crow, White Supremacy and the recalcitrant Southern states and the civil rights reforms. But liberals ought to rethink states' rights when it comes to issues like medical marijuana in California, physician-assisted suicide in Oregon, gay marriage in Massachusetts. It may actually be that giving more decentralized power to the states serves liberal values. So in other words I'm recommending that liberals go from singing the states' rights blues to endorsing blue states' rights.

RICHARD EPSTEIN: Work that line up.

KATHLEEN SULLIVAN: But you shouldn't go too far in seeing the physician-assisted suicide case this term as a blue states' rights case, because it was after all about a rebuke to the executive branch of the federal government. We should really take away from this case that like in Hamdan, the Supreme Court was standing up to unbridled assertions of executive power; in this case Attorney General John Ashcroft's assertion of almost personal privilege to tell Oregon physicians that they couldn't prescribe certain drugs. And that kind of, together with Hamdan, it really suggests that the Court is going to stop the executive from making up its own law.

MARGOT ADLER: Another culture law case, or at least you could call it that, would be the case Fair v. Rumsfeld. Some law schools challenged a law which cut off federal funding to their universities if they prevented the military from recruiting on campus. The law schools were opposed to recruitment because of the military's "don't ask, don't tell" policies. Kathleen, I'm sure you knew some of the people who were involved in this case. Were you surprised that the Court so soundly rejected the school's First Amendment claims?

KATHLEEN SULLIVAN: No, I wasn't surprised with the result, because it is a case in which there was a very close question about whether speech was involved. We think of academic freedom clearly as involving what we teach and what we research. It's a little bit more of a stretch to say that speech is involved when we're running our career placement office, although I can say as former dean of a law school: before I went into being a dean I thought it was all about academic research and teaching; after I finished being dean I realized it was all about career placement and our alumni creation and function. Now, I happen to think that the case was wrongly decided, that in fact there was speech at stake. There was academic freedom at stake, saying that we decide on the basis of merit who gets a job, not on the basis of sexual orientation, is part of a school's academic freedom. But the good thing about the case is that it did not reach the issue of federal funding. It just said this isn't speech, so we don't reach the question of whether Congress can heavy-handedly say we're going to take away all the money at the university including biomedical research just to get at those law schools who won't let military recruiters in. They didn't reach that.

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MARGOT ADLER: Next year's Supreme Court term is predicted to be a blockbuster. Late term abortion, affirmative action, global warming, and patents.

RICHARD EPSTEIN: There are a lot of patents, very interesting cases out there that would put the audience to sleep. But I would just mention one of them, which has to do with the question of whether or not you can both keep a patent license and sue the owner to challenge the patent. And you may sit out there and say who gives a darn. But before you all laugh this all off as just being lawyer's exotica, just think that every one of these cases are worth tens of billions of dollars in terms of the way in which the economy is going to run.

MARGOT ADLER: Stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We've been talking about what's happened in the Supreme Court this past term and what it means for our nation. I was joined by Joan Biskupic, who covers the Supreme Court for USA Today, Kathleen Sullivan, a law professor at Stanford Law School and University of Chicago law professor Richard Epstein. Let's go back to our conversation at the National Constitution Center in Philadelphia.

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MARGOT ADLER: This was a big year for the Court: two new justices, the death of a chief justice, the stepping-down of another, and a nominee that didn't make it to the bench. Joan, you wrote a book about Sandra Day O'Conner. What does the loss of Justice O'Conner mean to the Court?

JOAN BISKUPIC: Well, it means a lot substantively. It also means a lot just in terms of how the Court operates. We saw where her departure and the addition of Sam Alito caused a different outcome in a couple of different cases. A few cases in the criminal law area specifically had to be reargued and then we observed a few shifts in the law of the land. I think we're going to see some changes there. But also the Court looks and feels different. You walk in there and for 11 years you would have seen the same nine justices sitting there in their seats, two women, and O'Conner sat right to the left of the chief justice, so in a prominent seat. Now you have just one female Justice, Ruth Bader Ginsberg, off to a side, because you sit by seniority and she's just one in from the left side, next to Sam Alito. The bench looks very male. You also had Justice O'Conner being very active at oral arguments. She inevitably would ask the first question. And now you have a lot of kind of waiting on the part of these justices, wondering who's going to jump in first. That hasn't been set. So the Court looks and feels quite different. And then substantively we're going to have very big tests next term on abortion rights where she made a difference and affirmative action where she made a difference. So it's a whole new Court because of her departure.

MARGOT ADLER: Do you think that Justice Kennedy really will become the new O'Conner? Will he use his role as the swing vote in a different way? Kathleen.

KATHLEEN SULLIVAN: Justice O'Conner was a very powerful leader of opinion on the Court; she drove five to four majorities that reached clear results. People might not always agree with them because they drove down the middle and they sometimes split the difference finally. But she would line up five people into a single position. The decisions at the end of the term in which Justice Kennedy was the swing vote were much more divided and hard to follow. She was the only person on the Court during her tenure who had been an elected officeholder. She knew how to marshal forces and I think that Justice Kennedy, who doesn't have that electoral background, even though he grew up in Sacramento, may not be quite as skilled, but he will be

the pivotal swing vote, he will pay attention to the institutional role of the Court as not laying down with the other branches.

MARGOT ADLER: Kathleen Sullivan, professor of law at Stanford.
Richard Epstein.

RICHARD EPSTEIN: Yeah, let me give you an illustration of what Kathleen said. One of the cases that we didn't talk about was the question of whether or not the Army Corps of Engineers had jurisdiction over the wetlands. And this is one case that I regard as frankly preposterous, but it was four, one, four. But the interesting thing about it is that the Kennedy vote--you didn't even know what side he was lined up--it wasn't, as Kathleen said, that he carried four. What he did was he just had an opinion that carried one, himself, and...

KATHLEEN SULLIVAN: It was four and a half to four and a half.

RICHARD EPSTEIN: So it was four and a half. And, in fact, it turned out what he wanted to do was to get a remand on an issue which I didn't think was relevant to the case. You had four guys who said read it this way, you had four justices who said read it that way. His opinion prevailed simply because one of the groups decided that he was less obnoxious to them than the other three. So it went off in that particular fashion.

MARGOT ADLER: Richard, this term more of the Court's decisions were decided by unanimous votes. Chief Justice Roberts has reportedly urged his fellow justices to decide cases with fewer dissents. But by the end of the term, particularly in the more significant cases, the rulings were more fractured. Is Roberts' push for unanimity realistic? Appropriate? Harmful?

RICHARD EPSTEIN: I think in effect it's probably benign, but not effective. What will happen is you will get unanimity in cases in which the rest of us would fall asleep. But on the cases that really matter, everybody's going to start to fight one way or another. It's a case in which these sort of large institutional values count for one, whereas the individual, you on the case, would count for ten. And then if you look at it that way you can see it's going to be very rare, that one's going to beat ten, it's going to usually go in the opposite direction. I do have this fear ironically, this is a thought that came to me: If you want to get more unanimous cases, just take more unimportant cases and you could pad the roll. So maybe he'll do that.

MARGOT ADLER: Joan and Kathleen, do you agree?

KATHLEEN SULLIVAN: The unanimous ones are indeed ones that we usually don't care about. In fact, we talked earlier about the New Hampshire case that ended up being decided unanimously. Usually that's a signal that there really wasn't that much at stake in what they ended up doing. And so I think that's true. Richard did mention that he thought that one option was to take more cases and pad the rolls. They actually have not been doing that yet.

RICHARD EPSTEIN: No, they have not.

KATHLEEN SULLIVAN: They actually have fewer cases ready for next term. And this Court, as many in your audience might know, is actually deciding half the number of cases that it decided in the mid '80s. They used to do 150 cases and they used to have oral arguments in the mornings and the afternoons. We're kind of skating these days.

MARGOT ADLER: Kathleen, following the Senate confirmation hearings for Chief Justice Roberts and Justice Alito, most commentators expected that Justice Alito would be the more conservative of the two.
I've since seen a few articles that actually say the reverse. What do you think of that?

KATHLEEN SULLIVAN: It's too soon to tell how Chief Justice Roberts and Justice Alito will turn out on the Court. It was a transitional term.
It was a term in which the Court got rid of as many cases as it could through the passive virtues of deciding as little as possible. But it is fair to say that Chief Justice
Roberts, although he proved a brilliant presence on the Court as expected--he asks extremely incisive questions in oral arguments, showing his skill as a previous very-experienced advocate before the Court--he didn't turn out to do anything liberal. The only liberal thing that he did on the Court this year was perhaps tell that somebody who's house is about to be possessed deserves to get more notice from the post office. But apart from that decision, which protected the right of property, which might be seen as a libertarian value, but not necessarily a liberal one, he really didn't prove to be one of those justices, who like Kennedy or Sooter, did liberal things some of the time. So the prediction would be from this term that both the Chief Justice and Justice Alito are very conservative, but they might be conservative in favor of executive power and the federal government rather than the states' rights conservatism of Renquist and O'Conner.

MARGOT ADLER: Joan, you sat in the courtroom throughout the entire term, you told us a little bit about the differences that you're seeing. Give us a couple of your favorite moments from this past term.

JOAN BISKUPIC: Well, I would say that the last day of the term when the justices read parts of their opinions over 35 minutes in this almost empty courtroom. It was unusual because the last day of the term happened to be a Thursday, and very few spectators had come, very few members of the bar had come.
But here we were observing history, and several of the wives of the justices had come also. So it was kind of neat to see the Court family there as three justices spoke from the bench about it.
There have also been some whimsical moments. The chief justice, John Roberts, is very funny, and he has a lot more give-and-take with the lawyers who stand at the lectern-- remember for 39 times he stood at the lectern and spoke before the justices.
So he's much more easy-going in terms of personal manner, although he does ask tough questions, than former Chief Justice William Rehnquist was.

KATHLEEN SULLIVAN: So, for example, when a light bulb fell unexpectedly at the beginning of the term into the courtroom, startling everybody for a moment, making a loud sound, the chief was reported to have said they do that to test all of the new chief justices.

MARGOT ADLER: And Joan, do you have any more insight about the change in dynamics that you're witnessing?

JOAN BISKUPIC: Well, he knows the Court as family in a lot of ways because he was a former law clerk there and he's gone out of his way to be differential in public settings to Justice John Paul Stevens, to try to continue some of the social customs that the Justices had, in terms of bringing little things like donuts and coffee at their justices-only conference meetings. They still toast each other's birthdays with a glass of wine. Those sorts of things. Justice Scalia used to say that Sandra Day O'Conner was the social glue of the court. And that's missing. In fact, Justice Breyer complained to a few of us recently about how he was the one who had to arrange the welcome-to-the-Court-party for Sam Alito. And he said that was a lot of work. So, you know, remember they're appointed for life and they hang around together a lot. So it's in their interest to try to have a lot of these customs going.

MARGOT ADLER: You mentioned Justice Paul Stevens, and I wanted to ask a question about that. One of the aspects of the new Court is that Justice Stevens, the most senior justice, has asserted his leadership on the Court, assigning opinions to the more liberal Justices when he's in the majority. Hamdan, the most significant case of the term, perhaps, was written by him. Someone observed that the liberals on the Court are hanging by the thread of one 86-year-old silver-haired man. Anyone like to comment on that?

KATHLEEN SULLIVAN: It's true. There's a song on the internet to the tune of Hang on Sloopy, called Hang on Stevens, Hang On.

JOAN BISKUPIC: I should mention that he comes from very long-living stock. And one of his brothers is still practicing law. His mother died I think at 103 or something. And he's very vigorous.

KATHLEEN SULLIVAN: He's still sharp as a tack.

RICHARD EPSTEIN: He's also from Chicago. He went to the University of Chicago laboratory school, so what more could one say on behalf of him.

KATHLEEN SULLIVAN: Plays tennis every day.

MARGOT ADLER: Let's talk about what's coming up next term. Joan, the Court has already accepted a number of cases for review. What's coming up on the Court's docket?

JOAN BISKUPIC: We have several really important litmus test cases that I think will help us know more about the John Roberts' Court. We mentioned the partial birth abortion law that the federal government adopted that's never been put into place but will now be tested before the Supreme Court to see if that impinges on a woman's constitutional right to end a pregnancy. We have two very intriguing cases involving school desegregation, affirmative action in public schools, from Louisville and Seattle, that are going to be before the Court. And there's a very good chance that the justices will look seriously at their 2003 ruling from the University of Michigan, where they said in higher education you can take race into account for admissions.

There are two very good environmental cases coming up that are going to test for the first time the whole greenhouse gases issue, tailpipe emissions. And then finally a case that isn't as much of an ideological litmus, but one that I think a lot of people understand and that has to do with high punitive damages awards in tobacco litigation or high punitive damages awards in any kind of litigation. And what the Supreme Court will be looking at is is that unconstitutional to have it that much out of whack.

MARGOT ADLER: Joan Biskupic of USA Today. Kathleen, Richard, what cases will you be looking out for?

RICHARD EPSTEIN: Well, actually I'm a commercial lawyer, right? And there are a lot of patents, very interesting cases out there that would put the audience to sleep, but I would just mention one of them, which has to do with the question of whether or not you could both keep a patent license and sue the owner to challenge the patent. And you may sit out there and say who gives a darn. I've actually had four or five people who have called me up to write on a case like that. And that gives you some indication that the commercial community in fact is really quite concerned, both positively and negatively, about the Supreme Court's newfound willingness to get involved in the intellectual property rage which has affected particularly the Stanford Law School and everywhere else. The great bust of the last term was a patent case in which they were supposed to talk about the remedies for a patent infringement case and they wrote the shortest, most cursory, least informative opinion imaginable and there were actually people out there who were genuinely aggrieved. And before you all laugh this all off as just being lawyer's exotica just think that every one of these cases are worth tens of billions of dollars in terms of the way the economy is going to run. So I expect that they will take that one and maybe a couple of more, maybe an antitrust case or two. And I think that it's important to remember that the Supreme Court not only oversees the Constitution, but it also oversees the sort of business operation of the United States with patents, copyrights, antitrust laws, and so forth. And that's an important part of their jurisdiction.

MARGOT ADLER: Richard, is this the year that conservatives have dreamed about, the coming year, finally seeing the end of Roe v. Wade and racial preferences in education?

RICHARD EPSTEIN: The answer is no. I think that it seems pretty clear that these changes are not going to take place at that level. And let me give you two explanations of a kind of geopolitical explanation as to why. On abortion, it would be an unmitigated disaster for the Republican Party at this particular point to put this back into the political arena, just whatever it is for the nation, positive or negative. First of all, they're going to lose in a lot of states and then people will go back and forth between states. But more importantly it will break their conservative religious base from the commercial socially-liberal base. And as far as I'm concerned they really don't want to have to face that. So what they want to be able to do is be able to treat it like a piñata, but they don't to break it. The second case that you talk about on the racial preferences, the truth about the matter is the situation, the conservatives thought after it grew there would be this terrible outrage, indignation and so forth, but most people in the United States are basically of the view that this is more a management issue inside universities, less a high constitutional battle, so let's lower the voltage. And at this particular point if you ran a situation where you overturned the practice of every major public and private university in the

United States because you have this ideal, the reactions would be essentially nullification on the ground. And I don't think the Supreme Court wants to risk that. So I think what you're going to see is we're in a holding pattern on those two. Probably also on abortion.

MARGOT ADLER: Kathleen, do you agree?

KATHLEEN SULLIVAN: I think there's a good chance the Supreme Court will uphold the use of race in public K-12 education in the cases coming out of Louisville and Seattle for a couple of reasons. First, these cases involve shuffling on the bases of race. They don't involve preferring any one race, any part of the time. It's about moving kids around to achieve a balance. And sometime you'll move White kids, sometimes you'll move Asian kids, sometimes you'll move black kids. And as a conservative judge in the ninth circuit, Alex Kaczynski, put it, this is shuffling, not stacking, on the basis of race and it doesn't implicate the same kind of offense that other kinds of more quota-like use of race might do for conservatives. The other reason is that it's about federalism. These are local school districts voluntarily deciding to use race in this way, and one set of conservative values would say we ought to leave it to school districts. And so there's a good chance that this won't be Armageddon for affirmative action.

MARGOT ADLER: Joan, what are your thoughts about are we going to have a conservative revolution in the Court next year?

JOAN BISKUPIC: I don't think so, for a couple of reasons. John Roberts during his confirmation hearings talked against jolts to the system. I think if he were coming on as an Associate Justice he might be more interested in being more aggressive on the law, because he has some definite ideas of flaws in prior rulings. But he's chief justice of this group and I think that is going to have a moderating effect on how he votes and how he acts. Would he want his Court in his name to be known for reversing Roe v. Wade in its first couple of years? I doubt it. And I actually don't even think that he could get the votes. But I think that both for the kinds of political reasons that Richard mentions, the realistic reasons of this new chief justice and being very mindful of his own behavior and legacy on the Court, we're not going to see Roe v. Wade overturned.

MARGOT ADLER: Well, it's been a great discussion. Thank you so much for joining us on our annual Supreme Court wrap-up show. Kathleen Sullivan is a law professor at Stanford Law School, Richard Epstein is a law professor at the University of Chicago, and Joan Biskupic is a Supreme Court reporter for USA Today. Tell us your thoughts about upcoming cases or find out more about the issues we've talked about today. Check out our website, justicetalking.org. Thanks for joining us; tune in next week. I'm Margot Adler. Thank you so much.

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