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Justice Talking Radio Transcript

Highlights of the Supreme Court Term: How Has the New Conservative Majority Affected the Court?—Air Date: 7/23/07

In its first full term, the Roberts Court issued a number of blockbuster decisions on race and public schools, free speech, and abortion. In this special edition of Justice Talking, taped before a studio audience at the National Constitution Center, Supreme Court reporter for ABC News Jan Crawford Greenburg, Notre Dame's Richard Garnett and University of Chicago's Geoffrey Stone analyze the significant decisions of this term and tell us how the addition of two conservative Justices has affected the year's cases.

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. It's been quite a year for the U.S. Supreme Court, with rulings on the partial birth abortion ban, race in public schools, and free speech. It's also a court in transition: This was the first full term for Chief Justice John Roberts and Justice Samuel Alito.

JAN CRAWFORD GREENBURG: This is really a court now in struggle. Um, you've got four Justices, clearly conservative, who believe that courts should have a more limited role in society, and you've got four Justices who are clearly liberal and think that the courts should have an entirely different role. And then you've got, you know, the man in the middle, Anthony Kennedy, who sides with the liberals sometime and the conservatives one time and they're in this big struggle for his soul.

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

MARGOT ADLER: This is Justice Talking, from the University of Pennsylvania's Annenberg Public Policy Center. I'm Margot Adler. The first full term of the Roberts Court has ended.

The Supreme Court tackled key issues including affirmative action, abortion, free speech, and global warming. On today's show, a look at these decisions and the new direction of the Court. I was joined at the National Constitution Center in Philadelphia by Jan Crawford Greenburg, legal correspondent for ABC News. Also with me were University of Chicago law professor Geoffrey Stone and Notre Dame University law professor Richard Garnett.

Here's our discussion from the National Constitution Center in Philadelphia.

[APPLAUSE] MARGOT ADLER: We have a lot to cover, so let's jump in. Let's start with race. On the final day of the term, the Supreme Court struck down two school assignment plans that used race as a factor. The plan in Seattle used race as a tie-breaker to admit students. The plan in Louisville maintained a certain percentage of black students in each school to prevent re-segregation. The Court rejected both programs as violating the equal protection clause of the 14th Amendment.

I'd like to ask all of you to begin with: Both the majority of the Court and the dissenting opinions argued that they were acting consistent with the Court's landmark 1954 decision *Brown vs. Board of Education*, which declared racial segregation in public schools unconstitutional. Chief Justice Roberts, who wrote the majority opinion, proclaimed that the way to stop discrimination on the basis of race is to stop discriminating on the basis of race. Is this decision consistent with *Brown* or repudiation of it? Jan, you first.

JAN CRAWFORD GREENBURG: Well certainly the conservatives in the majority thought it was entirely consistent with *Brown* because they believe that *Brown* meant that everyone should be treated equally. And so any plan that treats students differently because of their race, even the ones today where they're trying to increase diversity in the classrooms, would therefore be in violation of *Brown*. But the liberal Justices certainly did not see it that way. To the liberal Justices led by Stephen Breyer that is a direct repudiation of that landmark ruling. They believe *Brown* meant that students of both races should come together in a classroom and learn together. And I have to say it was an incredibly dramatic moment in the courtroom when the Justices were summarizing these opinions. Justice Breyer spoke almost twice as long when he summarized his 70-page dissent. His tone was almost angry as he responded to the Chief Justice in that ruling at the end of the term.

MARGOT ADLER: Geoffrey, your thoughts.

GEOFFREY STONE: Well I wouldn't say that the decision was a repudiation of *Brown*, but I think it's a profound distortion of *Brown*. *Brown* itself was about the principle that the government may not treat individuals on the basis of race in circumstances in which the government is heaping additional disadvantage on groups who have been historically oppressed. And what *Brown* was about is meting of the equal protection clause that was designed to prevent the government from continuing to discriminate against groups that have been traditionally disadvantaged. And it was in my view a profound distortion of that understanding of *Brown* to suggest that it was about the principle that race may never be relevant to government action.

MARGOT ADLER: And, Rick, consistent with *Brown*?

RICHARD GARNETT: I want to be somewhere in the middle I guess. I don't think it's a repudiation of *Brown*, but I think the decision does highlight the fact that *Brown* is an incredibly rich decision with a number of themes. One theme certainly is this idea that we want to do what we can to achieve a more inclusive society, to provide better opportunities in education, and to bring sort of to the table those who have been excluded. At the same time, and here I disagree with Geoff a little bit, I do think that the conservatives could point to lots of material in the oral arguments, lots of material in the briefs, and to things in the decision itself that support this idea that classifications on the basis of race do need to be closely scrutinized, even if your aims are good.

MARGOT ADLER: Justice Kennedy seemed to come down somewhere in the middle. He said that encouraging racial diversity could be a legitimate goal but that the two school enrollment plans before the Court were not appropriately doing that. Some conservative Justices seem to want to go further and ban all race-conscious policies. Jan, do you think that all affirmative action policies are now in jeopardy?

JAN CRAWFORD GREENBURG: I think it will be very difficult for schools to come up with plans that take race into account even for noble reasons like diversity. You have four Justices now on the Court who think race should never be a factor. While they acknowledge that of course diversity is a good thing, they believe there are other race neutral ways to go about doing that. But Justice Kennedy's decision meant that the conservatives were one vote short of that sweeping decision saying race can never be a factor. Now that said, Justice Kennedy's decision makes clear that it's going to be pretty hard for schools now to come up with programs that take race into account. And he himself suggests several other things that schools can do to bring about diverse classrooms: you know, building new schools in minority neighborhoods for example, or using targeted recruiting. He suggests a number of different programs that would be possible to create those diverse classrooms.

GEOFFREY STONE: The critical difference I think between Kennedy and the other four conservative Justices is that the Roberts group essentially took the position that for the government to attempt to achieve racial integration is impermissible, that that's a goal that is, um, unlawful under our Constitution. Whereas Kennedy took the view that that was perfectly a permissible goal for the states and that it could attempt to achieve it as long as it did so without specifically treating people as individuals on the basis of race.

MARGOT ADLER: Rick, um, bottom line, will we see more desegregation or more racial polarity?

RICHARD GARNETT: We'll wait and see. But I think as these decisions are digested by local school boards across the country, certainly these boards are going to have to sit down and get some help, figure out exactly what Justice Kennedy has in mind when he points the way toward programs that are to him permissible. I think we're in for a lot of litigation.

MARGOT ADLER: Justice Breyer issued this stinging dissent. Perhaps the most strongly worded opinion he's issued since joining the bench. He said: "It was a decision the Court and

the nation would come to regret. It is not often in the law that so few have so quickly so changed so much." Geoff, what is Justice Breyer doing here?

GEOFFREY STONE: Well, he's angry. And I think he's angry about the term, but in particular I think he's angry about this case, because in Breyer's view, and I think quite rightly, what you see in this decision is a real repudiation of an understanding of the 14th Amendment to the Constitution that has and should guide American constitutional law for the last 140 years. And that's his principle, that what the real evil is is the use of race to oppress individuals and groups who have historically been oppressed, not to turn it around and to say the use of race in and of itself even for benign and affirmative purposes is necessary unconstitutional.

MARGOT ADLER: Rick, a quick comment on Breyer?

RICHARD GARNETT: Well, you mentioned the sort of sharpness of his tone. I think in response that you have an equally interesting and equally sharp concurring opinion by Justice Thomas, who after all is the one Justice who has experienced legally segregated schools. And although he and Justice Breyer are friends, I think Justice Thomas was equally firm in responding to Justice Breyer and saying look, do not assume, uh, that despite your good will that we should lightly permit classifications, even if they--even if they're well-meant.

MARGOT ADLER: Let's turn to another emotionally charged issue: abortion. In April the Court upheld as constitutional the partial birth abortion ban, a federal law which prohibits certain abortion procedures. The Court seemed to go against the decision it made only seven years ago finding unconstitutional a nearly identical law from Nebraska because it did not adequately protect a woman's health. Rick, what do you make of this opinion? The Court is upholding a law banning a form of abortion for the first time since 1973. Is this a big victory for abortion opponents or one that will affect only a small number of women, or both?

RICHARD GARNETT: I think both. That is, certainly I think this is a case where the change in personnel did make a difference. Everybody knew that Justice Kennedy was going to vote to support the ban. He had made it very clear seven years ago that he thought the Constitution permits legislatures to ban this procedure. Um, what was different in this opinion, I think about in Justice Kennedy's opinion this time around, is that he explicitly stated that the legislature's moral objection to this particular procedure was a permissible basis to regulate. And I think in the previous decision that Justice Breyer had written, as you said, seven years ago, the Court wasn't willing to endorse that theme.

MARGOT ADLER: Jan, for over three decades the Court has prohibited any law which could potentially jeopardize a woman's health, but the partial birth abortion ban was upheld despite the lack of a health exception. Does this mean that states and Congress can pass laws that protect fetal life without taking the woman's health into account?

JAN CRAWFORD GREENBURG: No, and the Court left open the possibility that women could still challenge this law if their doctors believe that they needed it specifically, if their health or life were in jeopardy. But that's certainly, you know, an unprecedented ruling, and it clearly shows that the Roberts Court is turning in a more conservative direction. Because if Justice

O'Connor had been on the Supreme Court that decision obviously would have gone the other way. The Justices would have struck down that law as unconstitutional, as being an undue burden on a woman's right to an abortion.

MARGOT ADLER: The Court took pains to distinguish this ruling from its decision seven years ago. At the same time it refused to say it was overruling it. Is the Court being disingenuous here, overruling a decision but saying it's really not doing that? What does the Court's action mean for stare decisis or the notion that one should respect precedent? I'd like both Rick and Geoff to answer this. Geoff first.

GEOFFREY STONE: Well, in their confirmation hearings, both Roberts and Alito made a big deal over their respect for precedent. And respect for precedent in the law means not merely, not directly overruling prior decisions. It means attempting to find guidance in prior decisions and allowing them to lead one towards a conclusion in subsequent cases. Throughout this term, Chief Justice Roberts and Justice Alito have behaved in ways that are I think for many of us quite startling in their utter disregard of the principle of precedent.

MARGOT ADLER: Rick, I assume you have a very different point of view on this?

RICHARD GARNETT: Yeah, my view is quite different. I do not believe they've mishandled precedence. It's true they have declined in some instances to extend cases with which they disagree. That doesn't strike me as disrespectful to precedent. That's just something that judges often do.

MARGOT ADLER: That was Rick Garnett, law professor at Notre Dame University. Also with me: Jan Crawford Greenburg, legal correspondent for ABC News and Geoff Stone, a law professor at the University of Chicago.

Coming up on Justice Talking, we continue our Supreme Court year-in-review with a look at some important free speech decisions. We'll also talk about a case in which a woman sued for 19 years of pay discrimination.

GEOFFREY STONE: Through all these cases you see the pattern of a highly ideological use of judicial activism. Not to meet the traditional purposes of why we have courts and why we have life tenure, which is to protect minorities and groups who would be otherwise disadvantaged, but rather to protect powerful groups in society who shouldn't even need the power of courts to protect them.

MARGOT ADLER: Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we're looking at the past term of the U.S. Supreme Court. Joining me to discuss some of the major cases

decided by the Roberts Court are Notre Dame University law professor Rick Garnett, University of Chicago law professor Geoff Stone, and Jan Crawford Greenburg, legal correspondent for ABC News. Let's return to our conversation at the National Constitution Center in Philadelphia.

MARGOT ADLER: Let's talk about some other decisions. This year the Court tackled two free speech cases. In *Morse v. Frederick* the Court decided against Joseph Frederick, an Alaskan high school student who was suspended from school for exhibiting a banner with the phrase "Bong Hits 4 Jesus" as the Olympic Torch passed by his school in 2002, the first time I think the torch had come to Alaska. Jan, what did the Court decide?

JAN CRAWFORD GREENBURG: Well the Court ruled for the school principal and said that she had acted reasonably when she tore down that student's sign when the TV cameras went by and suspended the guy. He then sued, saying, you know, he had a civil rights claim and that he could display this sign. The Court said principals can step in here, can take down the student's sign, can punish students for messages that advocate illegal drug use or illegal activity. So they're going to let the school administrators make these kind of calls and not the courts.

MARGOT ADLER: The Bongs Hits 4 Jesus banner, um, it seemed pretty silly to me, I have to say, um, and I think to many others, and somewhat nonsensical. Rick, what made Joseph Frederick's message so objectionable to the school and consequently to the Court?

RICHARD GARNETT: The principal had the view that this message, which strikes me as it strikes you, as being kind of silly, that it was glorifying drug use. And it's quite clear that there is a federal policy and indeed there are generous federal funds that are aimed at trying to reduce drug use in schools. So I think the account that the principal would have is that look, part of what we do in schools is try to discourage kids from using drugs. If this guy is waving a sign that glorifies drugs, we need to stop that kind of speech. Now it's interesting in all of the opinions, the Justices--it's almost as if they're a little embarrassed to be talking about this silly message. I took all of them to be saying if this were a serious political point, if this were, you know, a banner about global warming, or indeed a banner about reforming marijuana laws, we'd have a very different case. Justice Alito I think made it very clear this does not justify sort of sweeping regulations in schools of speech that teachers happen to find troubling or offensive.

MARGOT ADLER: And I'm wondering what you thought of the various religious rights defenders who actually came out on Frederick's side during this case, which is a very interesting difference between a kind of straight conservative/liberal split.

RICHARD GARNETT: Yeah, the concern was that the government's argument in this case was quite expansive. The government wanted to say that schools can suppress student's speech whenever it's necessary to promote the school's mission. And some religious liberty advocates were concerned that this might result in schools deciding, you know, if a kid wants to wear a t-shirt that says "I love Jesus," that might offend some people and so better just to tell them not to wear it. They were afraid this ruling would go too far. And Justice Alito and Justice Kennedy, again, I think took pains to say we are not buying the government's sweeping permission. This is a drug case, no more.

MARGOT ADLER: Geoff, do you think that that's what it is? Just a drug case? Is the Court's decision limited to speech about drugs or has the Court gone much further in this decision?

GEOFFREY STONE: Well, I think the Court attempts to limit itself to speech quote "about drugs," but the problem that it itself I think struggles with is there's no principle on which you can base the decision that limits it in that way. So the base of principle that Roberts stated in his opinion for the majority is that the state may prohibit students from engaging in any speech that could reasonably be interpreted as advocating unlawful conduct. And the problem with that is that would include all sorts of literature. That would include all sorts of debates that students might have about legalizing drugs which could be taken as encouraging drug use. It could be taken to prohibit speech that criticizes the government for a wide variety of programs because criticizing the government is often taken as a way of advocating that people not obey the law. So it's a very open-ended principle. And I think the difficulty is the Court allowed itself to be pulled into a bad decision because of the emotions of the fact situation rather than simply to adhere to a very clean and logical rule, which would suggest that you can't prohibit student's speech unless it materially or substantially disrupts the school day, which this did not.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're looking at some of the major Supreme Court decisions from this past term. With me are Geoff Stone from the University of Chicago Law School, Notre Dame law professor Rick Garnett, and Jan Crawford Greenburg from ABC News.

In *Wisconsin Right to Life Inc. v. Federal Elections Committee*, a different kind of free speech case I guess you could say, the Court knocked down part of the campaign finance reform law saying that issue ads by unions and corporations could air all the way up to election day. Previously these types of ads were banned two months before a federal election. I'd like to ask all of you: Is this a blow to campaign finance reform or a victory for free speech? I'll start with you Jan.

JAN CRAWFORD GREENBURG: I think both. This was a case--a group wanted to air ads encouraging people to call up their senators and tell them not to filibuster President Bush's judicial nominees. I mean, that's kind of core political speech. So the Court has said yeah, you can do that even all the way up to the elections. So we're going to see a lot more of that. But at the same time I think we will see more challenges now to campaign finance reform.

MARGOT ADLER: Rick?

RICHARD GARNETT: Yeah, I see it as a win for free speech. And what's interesting about this case is it's not just Wisconsin Right to Life who's challenging these restrictions rights. It's labor unions. It's the ACLU. There's a whole range of groups and associations whose whole purpose is to try to contribute to the marketplace of ideas, who saw this particular provision of McCain-Feingold--not the whole thing but this particular provision--as particularly burdensome on protected free speech rights. So it seems to me that when you have Right to Life and the ACLU together celebrating free speech, odds are it's a free speech win.

MARGOT ADLER: Geoff?

GEOFFREY STONE: Well, again, it's clearly both a win for a certain kind of free speech and a very large loss, I think, for campaign finance reform. I mean, the big winners in this are big corporations. I mean, despite the fact that the party happened to be a political or religious speech corporation, the reality is that the big winners in this are corporate donors and union donors. And the idea of the reform act was essentially to limit the impact of the hundreds of millions of dollars that get spent by those entities that were seen by Congress as distorting in a serious way the American political process. That's who wins in this case, and I don't think that's good for free speech.

MARGOT ADLER: So you're saying that it's politics as usual that wins as opposed to all these grassroots organizations?

GEOFFREY STONE: Yeah. I mean, the reality is here, I think the Court took this case because it had a very sympathetic party. But the reality--it's not the WTRs of the world who are fundamentally going to make a change in the political system. This is going to be huge union and huge corporate donors where Congress I think rightly said this is totally out of whack and we need to put some constraint on the ability of those types of entities to dominate our political process. And the Court just swept it aside.

MARGOT ADLER: Anyone want to take him on? Jan, I see you looking.

JAN CRAWFORD GREENBURG: Well, Justice Scalia said that, you know, if we look at the whole campaign finance reform system and efforts to reform, it's been pretty much a flop because groups have found other ways to spend money and influence elections or gone underground. So, you know, I mean, I think they're encouraging, sometimes, more attacks in the future. So I'm not sure that I will go along with Geoff on that point.

RICHARD GARNETT: And, you know, Geoff and I would agree entirely that sometimes strong protections of free speech has cost. Sometimes speech offenses, sometimes it's disruptive. Sometimes it's inefficient. This is a case where even if we don't like sometimes the way that corporate speech seems to dominate our election season, the fact is that we've got the First Amendment and these groups are contributing to the marketplace of ideas. And I'm always suspicious, I suppose, of legislators telling me we have to silence some people because they're being too critical of us. I think we should be wary of that.

MARGOT ADLER: Let's take another issue. The issues of women and work were featured prominently in two cases on pay discrimination this term. In one of them, *Ledbetter v. Goodyear Tire and Rubber Company*, Lillian Ledbetter sued for 19 years of pay discrimination. Jan, tell us a little about this case and what happened.

JAN CRAWFORD GREENBURG: Well, this is a really interesting case that showed quite sharp divisions on the Court and very bitter divides between the conservatives and liberals. It involved a woman in Alabama who sued her employer for discrimination in back pay, and the Justices found under the law that she hadn't filed her complaint in time, that she'd blown the 180 day deadline, and that she should have filed it right away. So it was a very firm rule that, you know,

that they threw her case out. A jury had ruled for her but the Court said no, you blew the deadline. And it produced a sharp dissent by Justice Ginsburg who said the Justices were, the majority of the Court, had really turned its back on how these things operate in the real world, that the woman didn't realize that she'd been discriminated against, and it's really impossible for her to have filed that lawsuit in that time period.

MARGOT ADLER: As a matter of fact, I gather that some members of Congress are already attempting to create legislation that they'd try and pass so that this would not happen again. Um, Geoff, is the Court being unduly harsh here or were the Justices in fact really saying to Congress, be clearer when you write the laws?

GEOFFREY STONE: Uh, I don't think Congress needed to be clearer. I think that these laws have been interpreted with common sense for a long time. I think that this case, like the others, reveals a pattern that to this point is worth identifying, and that's that traditionally the courts in the United States have seen their function as using the power of judicial review to protect the interest of groups and individuals who would otherwise not have the ability to protect themselves in the political process. And judicial activism was seen as an appropriate intervention by courts to correct for a failure of democratic majoritarian politics. But what you see in these cases is the Court using its authority to protect whites against blacks, corporations against regulation of corporate political speech, um, businesses against women. Um, through all these cases you see the pattern of a highly ideological use of judicial activism. Not to meet the traditional purposes of why we have courts and why we have life tenure, which is to protect minorities and groups who would be otherwise disadvantaged, but rather to protect powerful groups in society who shouldn't even need the power of courts to protect them.

MARGOT ADLER: I guess I should have Rick respond to this because I have a feeling he has a very different position on this.

RICHARD GARNETT: No, I mean, I think a lot of what Geoff says is quite inspiring actually. Courts have played that role often. My only--

MARGOT ADLER: Should they?

RICHARD GARNETT: I would add that courts might also have a role to play in deciding cases on the basis of the merits of the arguments presented, and they probably should not always think of their role as picking the most sympathetic or the most disadvantaged party and ruling on that basis.

JAN CRAWFORD GREENBURG: And there was another case this term that really gets to this issue, and it involved a man, a convicted murderer, who had wanted to file a federal appeal and the judge told him he had 17 days to do it. He filed it within that time period and then lo and behold the law--at issue actually was only a 14-day deadline. So he was trying to say look, you know, the judge said this. I filed it when the judge said, so I should be able to go ahead and file my challenge. And the Court in a 5-4 decision said no, the law's the law, a rule's a rule. You blew the 14-day deadline; it doesn't matter what the judge said. And I think running through these cases, this term, is a real change, that this is a Court that is more willing to say the law's the

law, a rule's a rule. Congress can change it. We're judges. We interpret the law and we're not going to go beyond that. I mean, it's a lot of what we heard from John Roberts during his confirmation hearings, a more restrained role for Justices.

RICHARD GARNETT: And we saw that even in some cases that weren't 5-4 conservative vs. liberal. There were a couple of decisions involving securities litigation, or some other statutory interpretation cases, where healthy majorities of the Court, in some cases even a unanimous Court, seemed to take this--

MARGOT ADLER: Well, I actually was going to bring up--

RICHARD GARNETT: Oh, sorry.

MARGOT ADLER: --one case that was exactly like that, which was a Department of Labor decision. They upheld a Department of Labor decision that home health care workers are not entitled to the legal protections contained in the Fair Labor Standards Act such as overtime pay, minimum wage, etcetera, and home health care workers are mostly women. This ruling seemed pretty harsh to a lay person, I think. But it was unanimous. Liberals and conservatives clearly agreed. So, Jan, what was this case really about?

JAN CRAWFORD GREENBURG: Well, there's an exception to the minimum wage requirements for home health care providers, childcare workers, or people who take care of the elderly, and this case concerned people who were employed by some of these big companies who then go into your home and take care of elderly parents. And so the question was whether they have to be paid minimum wage since the mom and dad aren't paying them directly, and the Court said under the law that they also are--there's an exception, and that they don't have to meet these minimum wage requirements either. And it was unanimous that the law was clear.

MARGOT ADLER: And why do you think it was unanimous?

JAN CRAWFORD GREENBURG: I think that Court again was deferring to the way the law was written and that Congress could step in and change it. And Congress over the years had declined to do so. I mean this issue has been out there for a while. Congress has revisited this law and never changed it. So, you know, the door is open now. Congress can step in and do that.

MARGOT ADLER: Jan Crawford Greenburg, legal correspondent for ABC News.

The Supreme Court dealt a blow to the Bush administration's stand on global warming when a majority sided with Massachusetts and 11 other states who sought tighter emissions regulations on new cars. The Court said that the Environmental Protection Agency must consider greenhouse gases a pollutant under the Clean Air Act. It was one of the few cases where Justice Kennedy sided with the Court's liberals. I'd like to ask all of you: Was this decision surprising and do you think it's important? Rick?

RICHARD GARNETT: It didn't surprise me, although I know it did surprise a lot of people who follow this area. And it certainly is important. It involves this idea of standing, right? Our federal courts don't just answer questions in the abstract. They want to answer questions in the focused context of a particular case. And so the Court over the years has used this idea of standing as a way to sort of limit the cases it'll hear. Now in my view in this decision the Court goes quite a bit beyond where the precedence would've taken it in terms of finding standing in a case like this. It seems to me that the case for standing was quite weak and yet it's certainly going to be important. I mean, not only in terms of its impact on the regulation of emissions and the global warming debate, but in a more sweeping sense, this case represents I think an expansion of the idea of standing. And of course Justice Roberts in his confirmation hearings, one of the things he took pains to emphasize was how he thinks standing is important. So it's a setback to him as well I think.

MARGOT ADLER: Geoff?

GEOFFREY STONE: Well, I agree with Rick. I think that it's an important decision. I think it was mainly a procedural decision on the question of who has the ability to raise these questions. And it was a real setback to the Bush administration, which had taken the position that the Environmental Protection Agency did not have authority to regulate in this area and the Court said no, you do. And you have a responsibility to do so.

MARGOT ADLER: Jan?

JAN CRAWFORD GREENBURG: Well, I think it was a fascinating decision because obviously this is an issue that so many people are concerned about and global warming--

MARGOT ADLER: Everybody's seen "An Inconvenient Truth."

JAN CRAWFORD GREENBURG: Yeah, right. But also because it shows the dynamics of this new Roberts Court so clearly. There's that man in the middle, Anthony Kennedy, and here's a case where he went with the liberals in a very sweeping decision. I mean, this is a decision by Justice Stevens that wasn't a narrow ruling, kind of, you know, mildly turning its back on arguments by the administration. I mean, this was a firm rejection of those arguments, a sharp rebuke, in some ways, to these arguments. And so, you know, you can see Justice Kennedy's going to be playing this pivotal role the Chief Justice, John Roberts, had a clear view that he wouldn't sign on to. So that case I think was also interesting for those internal dynamics that we're all kind of trying to figure out right now.

MARGOT ADLER: That was legal correspondent for ABC News Jan Crawford Greenburg. Also with me for our annual Supreme Court round-up at the National Constitution Center in Philadelphia were University of Chicago law professor Geoff Stone and Rick Garnett, a law professor at Notre Dame University.

Coming up, we talk about the Supreme Court Justices, the importance of Justice Kennedy as the new swing vote and how the additions of Justice Alito and Chief Justice Roberts have changed the Court.

JAN CRAWFORD GREENBURG: The liberals, when Roberts and Alito came on, had great hope that maybe, just maybe, they wouldn't be that conservative. And, you know, they had a Chief Justice who was talking about unanimity and consensus, and so maybe his vote was in play. Maybe he would side with the liberals on some of those big sweeping social issues that people care so much about. And now we've seen that, no, they're not. They're conservative just as the president believed them to be and just as they indicated they would be in their confirmation hearings.

MARGOT ADLER: Don't go away.

MARGOT ADLER: This is Justice Talking, where we make the connection between law and American life. I'm Margot Adler. We've been talking about some of this year's major decisions by the U.S. Supreme Court. With me to discuss some of the larger themes of this past term are University of Chicago law professor Geoff Stone, Notre Dame law professor Rick Garnett, and Jan Crawford Greenburg, legal correspondent for ABC News.

Let's go back to our discussion, recorded at the National Constitution Center in Philadelphia.

MARGOT ADLER: A third of the Court's decisions, more than in any recent term, were decided by 5-4 margins. Justice Anthony Kennedy voted in the majority in all 24 of the 5-4 cases. Jan, what does it mean for the Court and for advocates that nearly all hotly contested legal issues are decided by one individual, Justice Kennedy, and what happened to the unanimity that was supposed to be the hallmark of the Roberts Court?

JAN CRAWFORD GREENBURG: It evaporated this term pretty quickly, I think, when some of these very controversial issues got up to this Court. And I think we're going to see that in the future because this is really a court now in struggle. You've got four Justices, clearly conservative, who believe, as we were talking earlier, that courts should have a more limited role in society, and you've got four Justices who are clearly liberal and think, as Geoff was talking about earlier, that the courts should have an entirely different role. And then you've got, you know, the man in the middle, Anthony Kennedy, who sides with the liberals sometime and the conservatives one time. And they're in this big struggle for his soul. You know, which way is Justice Kennedy going to go? So in some ways, Justice Kennedy has stepped right into the shoes of Justice O'Connor, who retired, and had been serving in that swing vote role so well for so long. And now he's stepped in there and he's the new swing vote.

So, you know, people are now trying to figure out what this means for the Court. I think in the short term it means that the Court is still going to be much more conservative than it was with Justice O'Connor on board, because if you look at Justice Kennedy and all those 5-4 cases, and all the ones that we've been talking about, really there's just one that he clearly went with the

liberals on and that was the EPA case. He's just more conservative than Justice O'Connor was. He also is willing to side cases in a much more grand and sweeping way. If he goes with you, whether he's on the left or the right, he's going to go all the way with you. Justice O'Connor for her many years on the Court served this role of kind of keeping the Court deciding cases on a case-by-case basis, holding them back. You know, she would just go a little way with the liberals or a little ways with the conservatives. Kennedy is not like that. He's willing to swing for the fences if you get his vote.

MARGOT ADLER: Geoff, I see you nodding. What do you see as the difference between O'Connor and Justice Kennedy?

GEOFFREY STONE: Well, I think Jan's captured it exactly. I mean, it's first of all, a very large step to the right. So the fulcrum of the Court has moved from where it had been before to a place which is quite different. Um, I think that's created a great deal of frustration on the part of the what we call, by the way, the four liberal Justices. I actually don't believe that they are liberal Justices. They're only liberal relative to the other five. But--

MARGOT ADLER: You would call them centrists?

GEOFFREY STONE: I would call them moderate Justices. If you look at Justices over the last 40 years, 50 years, they're basically pretty moderate. But I would say it's caused real frustration on their part, and that's what, that's the kind of anger you see in Justice Ginsburg's dissent in the discrimination case or Breyer in the school case. I think they feel as if there has been a sharp turn in the Court. It's become much more ideological than it was with Justice O'Connor there, and there is no conversation that works any longer, that's there is almost no way for the two groups to talk to each other. It's all about Justice Kennedy. And Justice Kennedy, unlike O'Connor, isn't looking to try to pacify or to find common ground. He's going to vote the way he's going to vote. He's going to write a fairly expansive opinion and sign on or not.

MARGOT ADLER: Rick, what do you see as the difference between having O'Connor and having Justice Kennedy as the swing vote?

RICHARD GARNETT: Yeah, I think Jan made a nice point. I mean Justice Kennedy sometimes has a bit of a flair for the grandiose and likes to try his hand at turning a big phrase and so he will sometimes come out with a sweeping decision that Justice O'Connor wouldn't have done. But that can go both ways. I mean, I'm hesitant to say on the basis of this term that there's been some kind of a dramatic, certainly nothing like a revolutionary shift to the right. Um, if this case, for instance, had featured a gay rights case, Justice Kennedy would have sided with the liberals. Next term I suspect Justice Kennedy's going to side with the liberals in the Guantanamo detainee case. Justice Kennedy is not like O'Connor in the sense that he's pragmatic and in the middle. He seems to have quite firm views. It's just they're sort of scattershot. This term presented a menu of cases that happen to play to Justice Kennedy's conservative side, you know, his free speech side, his views on abortion, and he's always been skeptical of race-based programs. But on the standing case, that is the Massachusetts global warming case, in the Guantanamo cases, and several death penalty cases this year, Justice Kennedy was with the liberals. He can always go either way, and I wouldn't be surprised if next term it's a whole different line-up.

MARGOT ADLER: We talked about stare decisis in regard to the abortion decision, but by the end of this term there have been a number of big changes in settled law on such issues as free speech and race. Is the Court taking what's been called an incremental approach to change or is it really overruling precedent no matter what it says? Rick, what do you think?

RICHARD GARNETT: I think it's more the incremental. I actually don't think the Court has overruled any significant decision in recent years. What's interesting about some of the cases we've talked about is that the Court was presented with the chance to overrule some cases that the conservatives clearly don't like. In the *Bong Hits 4 Jesus* case there's an old case called *Tinker* which sort of created robust free speech rights for students. It's clear that someone like Justice Scalia would like to get rid of that, or Justice Thomas. The campaign finance case, they could have gone further down the road sort of on the libertarian position. They didn't. So I think what we've seen is a lot of distinguishing, some incremental changes, some refusals to extend precedents they don't like. But I haven't seen any kind of a revolutionary turning back on any major precedent. I mean when you think of a revolutionary case, you think of *Miranda* or *Roe* or *Mapp v. Ohio*. We haven't seen anything like that.

MARGOT ADLER: Geoff?

GEOFFREY STONE: Well, I agree there haven't been revolutionary decisions, but I come back to the point that I made about intellectual dishonesty, which I think is really a problem here. Every lawyer knows you can distinguish a case in the most disingenuous way. That case was decided on a Tuesday. This case is on a Wednesday. We're not overruling that decision. We're just distinguishing it. Well that's the technique that Roberts and Alito have used repeatedly this term. They have completely disregarded the precedential force of prior decisions by distinguishing them in ways that are often quite disingenuous and then being able to say well we are not doing anything radical. We're not overruling prior decisions. We're not betraying what we said in our confirmation hearings. We're simply distinguishing those decisions, enabling Rick to say, well, they're no radical decisions this term. But I think the reality is that in some ways this is much more harmful to the judicial process, because it really betrays the rule of law which says if you're going to overrule a case then say why you're going to overrule it. Justify the decision to overrule it. And take the consequences for that.

MARGOT ADLER: Jan?

JAN CRAWFORD GREENBURG: Well I think that it's much more incremental. And I wouldn't call it dishonest. And I think it's completely consistent with how both Roberts and Alito testified in their confirmation hearings, the way they believed that the role of a judge, you know, should be, and the way that they intended to try to apply the law. We got the sense then that they weren't going to be out there trying to knock down *Roe v. Wade* or really overturning some of these landmark rulings at that point. In fact, conservatives were somewhat nervous about John Roberts and how far he would be willing to go. And we saw this term that Roberts and Alito refused on a number of cases, as Rick pointed out, and Geoff just discussed, to overturn cases. Again disappointing conservatives like Scalia and Thomas who hoped that they would go along. I think what we're seeing at the Court now, though, is that, you know, this is a

Court where they're still trying to figure each other out. So the liberals when Roberts and Alito came on had great hope that maybe, just maybe, they wouldn't be that conservative. And you know, they had a Chief Justice who was talking about unanimity and consensus, and so maybe his vote was in play. Maybe he would side with the liberals on some of those big sweeping social issues that people care so much about. And now we've seen that, no, they're not. They're conservative just as the president believed them to be and just as they indicated they would be in their confirmation hearings. And so I think that you're seeing that now, that that's also part of this kind of liberal pique and outrage that's causing them to, you know, summarize their dissents from the bench.

MARGOT ADLER: Some commentators have argued that the Roberts Court has reduced access to the courts. They've taken fewer cases. They've made it more difficult to file lawsuits. In one case they overruled 30 years of precedent and denied taxpayers the right to bring a challenge under the establishment clause, the First Amendment's mandate to separate church and state. Are we seeing a move to restrict access to the courts? Rick?

RICHARD GARNETT: I have to disagree slightly with the way you characterized the establishment clause case. They didn't overturn the 30-year-old precedent of *Flast v. Cohen*. They did what I think--Geoff and I might agree actually--is a hyper-narrow reading of it, perhaps. And they refused to extend it to this particular case, but it's still the case that people can bring, um, taxpayer suits in a great many establishment clause cases. But your basic point, I think I'd want to say, yes, this Court is taking seriously--and not just the conservatives--this idea that it's not a bad thing if the Supreme Court is taking fewer cases. It's not a bad thing if lower court decisions are left to percolate or to stand on their own. And they're willing to leave it to Congress to expand the reach of federal courts if Congress wants to. But again, looking ahead to the Guantanamo cases, there where Congress appears to have tried to limit access to the federal courts on behalf of some detainees, I suspect the Court's going to reject that effort.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. With me to discuss the recent Supreme Court term are Jan Crawford Greenburg, legal correspondent for ABC News, University of Chicago law professor Geoff Stone, and Notre Dame University law professor Rick Garnett.

We're going to save discussion of the upcoming term for a full Justice Talking show this fall, but I did notice that the Court for the first time in decades reversed its own decision and decided to review whether detainees at Guantanamo Bay can challenge their detention in federal court. Why the about-face? Jan, you first.

JAN CRAWFORD GREENBURG: Well, unfortunately, you know, we don't know, because the Court never tells us why they decide to take a case or not to decide it. But what seems pretty clear is that it's, you know, that man in the middle again, Anthony Kennedy, changing his mind. You know, a couple of months ago the Justices said they weren't going to take up this case. Three of them, three of the more liberal Justices, said absolutely the Court had to step in. They should get involved in these Guantanamo issues, critically important. But Justice Kennedy and Justice Stevens wrote separately and said, no, not now. Let's wait until the time is right. And then a couple court filings came out a week or so ago. The lawyers for the detainees filed papers

saying that the military procedures were really a sham. And, um, some people believe that may have caused Justice Kennedy and Stevens to step in and change their mind and issue this very dramatic announcement that they were going to step in. Something that, you know, we were talking about: You know, many people who closely follow the Court didn't even think that the Court could do that. It's so rare. I think it hasn't happened, in what, four or five decades?

MARGOT ADLER: Geoff?

GEOFFREY STONE: Well, again, I think Jan's right that this is an extraordinary turn-around. And I think it is probably the result of the filings that gave the Court and Justice Kennedy in particular a better sense of some of the deficiencies in the existing procedures. I think it does strongly suggest that the Court's likely to hold unconstitutional the federal legislation stripping courts of habeas jurisdiction. And I hope that's the outcome.

MARGOT ADLER: Rick?

RICHARD GARNETT: Yeah, this is a case that plays again to a very firm view of Justice Kennedy's, which is that the judiciary ought to have the power to answer the really important questions. And to the extent that Congress appears to have tried to prevent the judiciary from taking a look at these detainee procedures, that's the kind of thing that's just tailor-made to rub Justice Kennedy the wrong way.

MARGOT ADLER: Looking at this Court I see that most of the liberal Justices are pretty old and many of the conservative Justices are relatively young. Conservatives have been working on re-fashioning the Court for probably close to 40 years, I think, ever since Richard Nixon made it part of his campaign to get rid of the war in court. Where do you see the Court going in the next 20 years? Start with you, Geoff.

GEOFFREY STONE: Well, that depends a lot on 2008. [LAUGHTER IN AUDIENCE]

MARGOT ADLER: Oh, do you think people care enough to really vote on the basis of the Supreme Court?

GEOFFREY STONE: I think that will be one of among many factors that people take into account. I mean, the reality is that Republicans have appointed I think 13 of the last 15 nominees to the Court, and part of that is because Republicans have won more of the presidential elections and part of it is because of the timing of replacements. But I think if a Republican is elected president in 2008, very likely Justice Stevens and perhaps Justice Souter would be replaced in the next four years. And that basically would give the Republicans seven quote "conservative" Justices to only Ginsburg and Breyer. So I think on that scenario the direction of the Supreme Court in American life will become quite troubling and extremely profound in a highly conservative ideological direction. And if a Democrat's elected in 2008 then it's not likely to have much of an impact because probably none of the what we call conservative Justices will leave in the next four years.

MARGOT ADLER: Rick, the next 20 years.

RICHARD GARNETT: Yeah, I think Geoff's diagnosis is accurate. It's certainly the case that a lot hinges on the 2008 election. I am struck, as you pointed out, that the conservatives have been trying to sort of in their view pull the Court back from where it had gone under Earl Warren for 40 years. And if you think about how long they've been trying, it is quite striking, at least to me, how little they've done in that respect. The landmark Warren Court precedents are all still standing even after 40 years of conservatives complaining about them. Chief Justice Rehnquist, for whom I worked, who has now passed of course, he spent 30 years, um, criticizing the famous *Miranda* ruling, only to end up writing the opinion that affirmed it. There's something about the institution, perhaps, that just doesn't lend to revolutionary shifts. Even if a Republican were to win in 2008 and replace Justice Stevens I think in 20 years we'll still see *Miranda*.

JAN CRAWFORD GREENBURG: It's like--

MARGOT ADLER: Jan?

JAN CRAWFORD GREENBURG: You know, some people have said the Court is like a big oil tanker, you know, and once it's going out there it's very hard to turn it very quickly. And so even when we think about this term, they've changed the law in some areas but not very dramatically. And they didn't extend some cases but not in a big sweeping way. So even this term as dramatic as it seemed, at the end when you stand back and look at it, a lot of those cases that we've been talking about, they didn't really throw out or re-write. Those things take time. And in this Court as long as we've got Justice Kennedy there, I don't think that we're going to see those big, you know, sharp, sweeping, speedboat kind of changes anytime soon.

MARGOT ADLER: It's been a great discussion. Thank you all so much for joining us on our annual Supreme Court wrap-up show. Rick Garnett is a law professor at Notre Dame University. Geoff Stone is a law professor at the University of Chicago. And Jan Crawford Greenburg is legal correspondent for ABC News. Thank you all for joining me today at the National Constitution Center. [APPLAUSE]

MARGOT ADLER: As you can tell from the applause we recorded our discussion in front of a live audience. At the close of our show one of our audience members asked our guests to comment on Justice Clarence Thomas' opinion in the controversial race in schools case. Here is what Notre Dame law professor Rick Garnett said.

RICHARD GARNETT: It's a good thing for constitutional law. It's a good thing for the country that his voice is there and that it's being taken seriously. I mean, he is a man who is a product of segregated schools. His views on desegregation need to be heard.

MARGOT ADLER: You can hear more of his thoughts on Justice Thomas as well as other questions from our audience on our website, justicetalking.org. While there, post on our message boards, learn more about our guests, and sign up for our free podcasts. And check out

our blog, where many of the nation's leading commentators give their views on law and American life. Thanks for listening. I hope you'll tune in next week. I'm Margot Adler.
