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Justice Talking Radio Transcript

On the Docket: A Supreme Court Preview—Air Date: 10/15/07

The Supreme Court opened its doors for new cases on October 1st. The Justices will tackle voter identification, lethal injection, sentencing laws and age discrimination. And the debate over the rights of detainees at Guantanamo Bay returns to the high court. Join us for this edition of Justice Talking as we take a look at the coming term--the cases on the docket, the climate in the courtroom, and what it will all mean for you.

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. It's October and that means the Supreme Court is back in session. We'll talk about some of the most important cases coming up, including the rights of detainees at Guantanamo Bay. We'll look at some of the Court's past decisions.

UNIDENTIFIED MALE: You know, I'm not going to kid you. I think *Bush v. Gore* was a disaster, and I think reflected very poorly on probably eight of the nine Justices, all except John Paul Stevens, who I thought got it right from the start.

MARGOT ADLER: And a conversation about Justice Clarence Thomas.

UNIDENTIFIED MALE: You know, you go into schools during Black History Month and you won't see any pictures of Justice Thomas.

MARGOT ADLER: After the news.

MARGOT ADLER: This is Justice Talking, from the University of Pennsylvania's Annenberg Public Policy Center. I'm Margot Adler. On today's show it's all about the Supreme Court, the

upcoming cases, and a chance to learn more about the people sitting on the bench of the highest court in the land.

UNIDENTIFIED FEMALE: I think this term could be as interesting and provocative as last term was and that was the first time we saw the full Roberts Court in place.

MARGOT ADLER: That's Joan Biskupic, Supreme Court reporter for USA Today.

JOAN BISKUPIC: With two new Bush appointments on the Court, many people predicted that we would have a new approach to the law of the land. And I think with this round of cases, these very provocative cases, we might just see some rulings that do change things out there.

MARGOT ADLER: Last year's Supreme Court term began with Chief Justice John Roberts calling for more unanimity, saying that he hoped for 9-0 decisions. The term ended with more divisiveness, more 5-4 decisions than in recent memory. What was the mood in the courtroom at the beginning of this term?

JOAN BISKUPIC: It was much more easygoing. You're right to recall that on the last days of the term in June there was such bitterness and such tension between the liberal wing of the Court and the conservative wing, led by Chief Justice Roberts. But when they came back on the first Monday in October there was a--there was even levity. There was an easygoing tone to the early arguments. And Chief Justice Roberts himself I think wanted to show that we all do get along here. And the more liberal Justices, John Paul Stevens and David Souter, were also easygoing. And, Margot, I think summer does that to the Justices.

MARGOT ADLER: So how long do you expect the honeymoon to last?

JOAN BISKUPIC: Not long, because we have a very contentious slate of cases coming up. As you know they're going to revisit the dispute over the Guantanamo Bay detainees. They have good voter-rights cases. They're going to weigh the lethal injection death penalty method.

MARGOT ADLER: So it's going to be an interesting year.

JOAN BISKUPIC: Correct.

MARGOT ADLER: Let's talk about some of the cases the Supreme Court has taken this term. One of the more contentious ones is the voter ID case. Republicans say IDs are necessary to prevent fraud. Democrats say requiring IDs will prevent many poor people from voting in the same way it would be like a poll tax. What do you think is going to happen here?

JOAN BISKUPIC: I think this is a case that's going to be very closely watched and could end up changing some of the rules at polling places right before the 2008 general election. The Court took this case and I think in part because there are some very strong arguments to be made about whether this actually keeps people from the polls rather than addresses any kind of real fraud. As you probably know, there isn't good data from either side on whether voter fraud is rampant. In fact, I don't think there is any data at all that it is. And when this case was in the lower court

before the U.S. Court of Appeals for the 7th Circuit, the majority upheld the law as a valid attempt to control fraud. But even the majority acknowledged that people who lack photo IDs are low on the economic ladder and tend to vote Democratic rather than Republican. And the dissenting judge in that ruling from the 7th Circuit called this law from Indiana a not-too-thinly-veiled attempt to discourage Election Day turnout by people who skewed toward the Democratic side.

MARGOT ADLER: There are now five Catholics on the bench. The Court has taken a big death penalty case in which the Justices will decide the constitutionality of lethal injection as a means of execution. The Catholic Church has long been against the death penalty. Is religion going to play a part in this decision?

JOAN BISKUPIC: Interestingly, the most senior Catholic on the court, Antonin Scalia, has always voted for capital punishment. And it--he has said that any jurist on the federal bench, state bench, wherever, who feels he cannot uphold capital punishment, really shouldn't be on a bench. So two things I should mention: Back in the days when we had Justices Thurgood Marshall and William Brennan on the bench, there were individual Justices who as a matter of principle would vote against capital punishment. Out of all nine of these Justices -- liberal, conservative -- none of them vote against capital punishment on a matter of principle. Now one other thing I want to mention about the lethal injection case, this case does not test the constitutionality of capital punishment. It also actually does not test the constitutionality of lethal injection as a method. It tests the standard for deciding whether a particular method, here lethal injection, carries a risk of unconstitutional suffering. So the issue here is the kind of drugs used, and whether what the suffering might be, and how lower court judges should actually assess these cases. So in the end, Margot, the Justices will not be voting on whether capital punishment is good or bad, or even whether lethal injection is good or bad. It's a little more nuanced. And I think in this case given the five Catholics we have, their Catholicism probably will not enter the mix.

MARGOT ADLER: The Court has taken a lot of business cases this term and frankly reading about some of them made my eyes glaze over. Looking at all of them, is there some major pattern or theme that we should be looking at to explain what's important about these cases and what we might be seeing this term?

JOAN BISKUPIC: Well I think what we should do is start with where we ended last term, where business had a banner year. The Supreme Court in many cases ruled on the side of business at the expense of employees in the work force and at the expense of consumers in some cases. I think the way to look at these upcoming cases is to see where they go on discrimination issues. And we've got a couple cases testing, for example, age discrimination, this year. For example, one that looks at whether the federal law against age discrimination prohibits retaliation against workers who file age discrimination claims. So I would say the way to look at these upcoming cases is to look and see what are the dueling interests? Is it employer/employee, and who ends up winning out, and are these the kind of cases that Congress can come back and rewrite legislation to make clear what its interest was the first time around?

MARGOT ADLER: I noticed that there are several cases about juries. One raises the question of whether you can eliminate a potential juror because of his or her race. Another asks whether you can eliminate a potential juror because he or she is against capital punishment. What's significant about these cases?

JOAN BISKUPIC: Well, you know, jury trials are where it really happens. That's the most basic way that most people experience the legal system, on the trial level. And the Supreme Court has constantly sort of tried to iron out how juries are chosen in terms of looking for bias on the part of prosecutors or the defense lawyers. And one of the key cases that you happen to refer to, *Snyder v. Louisiana*, tests the potentially discriminatory intentions of a prosecutor who eliminates black jurors from the jury pools. You don't have a right to a perfect jury. But you do have a right to a jury that hasn't faced race discrimination or sex discrimination and in this case the Court is going to look at how to actually assess that. The prosecutor here ended up eliminating all the African-Americans who were in the jury pool, and also during closing arguments in the case, which happened to involve a black defendant, made a veiled reference to the O.J. Simpson trial. And that is being used by defense lawyers challenging what the prosecutor did to say look at where he was already coming from on the race issue and then look at how he eliminated all these blacks from the jury. Can't that be evidence toward that? The Court has said, has long said, that you can't have discrimination in jury selection but you also have the Court acknowledging that lawyers for both sides should have some leeway on who they get rid of on a jury pool. But if race, religion, sex enters the picture, then you have a constitutional violation.

MARGOT ADLER: What other cases are you particularly watching and why?

JOAN BISKUPIC: There's one case we didn't talk about because it's not quite on their calendar yet, but it's one that's drawn a lot of national interest and we'll know in a couple of weeks whether the Supreme Court takes it, and this one revolves around a Washington, D.C. gun ban that a lower court struck down in March. This law bars residents of the District of Columbia from keeping handguns in their homes. Both sides in this case have asked the Supreme Court to take it up -- the side that won, with the side that challenged the handgun-in-the-home ban -- and got the U.S. Court of Appeals for the D.C. Circuit to rule that the Second Amendment actually has a right for individual gun ownership and not just a state militia right. So if the Supreme Court takes up this case we could actually for the first time ever get a ruling on just what the Second Amendment right to bear arms protects.

MARGOT ADLER: Last year the most controversial cases were decided in a 5-4 split. Do you think we're going to see the same kinds of divisions this year? Some people have said that Kennedy will go slightly more left this year given the types of cases coming before the Court. What's your own view?

JOAN BISKUPIC: I think there's a real possibility that Justice Kennedy would go slightly more to the left. Consider for a moment the key cases that defined last term: the racial integration plans from Seattle and Louisville, the midterm abortion procedure known as partial-birth abortion. In both of those areas Justice Kennedy had been consistently to the right. He has always been more conservative on those issues. So those were somewhat predictable. In this

new round of cases he has actually been a touch more to the left. For example, on the Guantanamo Bay detainees it was his key vote in 2006 that struck down the Bush administration's first plan for military commissions. So I think, Margot, we have a new slate of cases that actually play more to Justice Kennedy's leanings to the left. Also, we haven't talked about one case involving Congress' effort to regulate Internet communications on the topic of child pornography. And he has been the author of and a very strong vote in the First Amendment area, saying to Congress you can't write overly broad or vague laws attempting to crack down on communications, whether they be advertised or otherwise, related to pornography. You have to be very specific in terms of the free speech issues.

MARGOT ADLER: Joan Biskupic is the Supreme Court reporter for USA Today. She's the author of a biography on Sandra Day O'Connor and she's working on a book about Justice Antonin Scalia. Thank you so much for coming on Justice Talking.

JOAN BISKUPIC: Thank you Margot.

MARGOT ADLER: Coming up on Justice Talking: the Supreme Court again takes up the fight over the rights of detainees at Guantanamo Bay, Cuba. Some are calling Guantanamo a legal black hole.

UNIDENTIFIED MALE: What the American government has done is pick the one place on earth where they say the United States Constitution doesn't protect you. Oh, and by the way, neither does the Cuban constitution.

MARGOT ADLER: But not everyone agrees.

UNIDENTIFIED MALE: Well, if Guantanamo Bay is a legal black hole then it is the brightest, lightest legal black hole I've ever seen. After all, these detainees are on their third trip to the United States Supreme Court.

MARGOT ADLER: Stay with us.

MARGOT ADLER: This is Justice Talking, the public radio show about law and American life. I'm Margot Adler. This year the Supreme Court will tackle many provocative issues, but perhaps two of the most anticipated cases involve the rights of detainees at Guantanamo Bay. This is the third time this issue has come before the Supreme Court. And this time around the Justices will be asked to decide whether the detainees at Guantanamo have a right to habeas corpus, the time-honored constitutional right that allows those in prison to challenge their detention in federal court, and whether the Bush administration's current system of identifying and trying detainees using "combatant status review tribunals" is constitutional.

Neal Katyal and Bradford Berenson join me to discuss the Guantanamo detainee cases. Neal Katyal is a professor at Georgetown University Law School. He recently argued and won *Hamdan v. Rumsfeld* in the United States Supreme Court, a case that challenges the use of military trials at Guantanamo Bay. Bradford Berenson is an attorney in Washington, D.C. He served as associate counsel to President Bush from 2001 to 2003 and worked on many legal and policy issues including the military order authorizing the use of military commissions. Welcome both of you to Justice Talking.

NEAL KATYAL: Thank you.

BRADFORD BERENSON: Thank you.

MARGOT ADLER: Neal, let's talk about the combatant status review tribunals, or CSRTs. This is a process by which the military determines whether someone should be detained at Guantanamo. Why in your view are CSRTs so problematic?

NEAL KATYAL: There are a couple things that I think are really problematic about it that I'd isolate. One is that these detainees, many of whom have been locked up at Guantanamo for years, are hauled before this tribunal and asked to defend themselves. It is an inordinately difficult thing to do when they're not trained in the American legal system. Many of these people have a fourth grade education or something like that. So it's not really quite reasonable to expect that these folks can defend themselves against the charges, particularly when the charges themselves are really are on, you know, the most extreme forms of hearsay. I mean in the Boumediene case itself that the Supreme Court is hearing this is what happened, in one of the detainee's cases, CSRTs. The detainee says the following--this is from the transcript: "I asked you to tell me who this person was. Then I could tell you if I'd known this person (the person who was accusing him) and if this person was a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was person on my team. But I don't know if this person is a Bosnian, Indian, or whatever. If you tell me the name then I can respond and defend myself against this accusation." And then the tribunal president says: "We're asking you the questions." And so they don't give him the person's name. So in this, you know, in this proceeding like this, where they say, well, someone said that you were a terrorist. And then they don't tell you who the terror--who that person is. It becomes really difficult to defend yourself. And so that's really quite unlike the historic and cherished right of habeas corpus, which is really a searching procedure to make sure that you have the right person before you take away their essence of liberty.

MARGOT ADLER: Brad, your view of about the combatant status review tribunals.

BRADFORD BERENSON: Well, there's a couple of critical things to understand in thinking about the CSRTs and indeed thinking about the entire habeas corpus issue in front of the Supreme Court. The first is that as cherished and ingrained in our fundamental law as the right to habeas corpus is and has been for centuries, it has never, ever extended to alien enemy combatants held outside sovereign territory. You can survey hundreds of years of Anglo-American legal history and find literally no examples where alien soldiers or enemies who are fighting against the sovereign are afforded the right of habeas corpus, where they are captured

and detained outside of sovereign territory. You would imagine, uh, that just through mistake or accident there would be a few such examples and there really aren't. So it's important not to confuse the scope of the habeas corpus right and the habeas corpus writ that U.S. citizens enjoy, either here in the United States or abroad, with the extent of habeas corpus rights traditionally enjoyed by our enemies at arms, which are essentially zero. No one argues that the CSRTs look anything like the kind of process that you or I would be entitled to if we were arrested or captured in the course of a law enforcement operation. But the fact is that the Military Commissions Act affords a literally unprecedented and generous suite of rights to alien enemy combatants in the course of war including review in our Article III civilian court systems. So the CSRT process, for all its faults and deficiencies, it still far exceeds the baseline for people in the detainees' positions, which are established by international law like the Geneva Conventions, and are established in the decisions of our own Supreme Court.

MARGOT ADLER: Neal, I'm going to assume that you're going to say that Guantanamo Bay is part of the U.S.

NEAL KATYAL: Well, yeah. I mean, I think Brad does a really wonderful job defending I think what is a very difficult position, a position that I think is not going to prevail in the Supreme Court. And let me isolate a couple of reasons why. The first is that, and Brad says that, uh, that we have never had habeas corpus rights outside the United States, in United States territory. And that is correct. And I don't think the detainees at Guantanamo arguing -- and certainly I'm not arguing that if you're in Afghanistan or Iraq or something like that you have a right to habeas corpus -- the claim in the case is that you have a right if you are at Guantanamo, and Guantanamo as the Supreme Court said in 2004 for all practical purposes is United States territory. The reason why we have not in past conflicts extended habeas corpus when people are detained in other places is because the law of that other country protects them. Here what the American government has done is pick the one place on earth where they say the United States Constitution doesn't protect you. Oh, and by the way, neither does the Cuban constitution. And so that's the real problem. That's what causes the international outrage at Guantanamo and why even conservative English jurists like the Law Lords say this is a legal black hole. The reason is because they've picked one place and that's unlike other conflicts in which there is some legal regime that protects them. Here they've picked a place in which there is no legal regime.

MARGOT ADLER: You've brought up a lot of issues. But I first want to ask Brad if you think that Guantanamo is a legal black hole.

BRADFORD BERENSON: Well, if Guantanamo Bay is a legal black hole then it is the brightest, lightest legal black hole I've ever seen. After all, these detainees are on their third trip to the United States Supreme Court. They have the kind of legal representation in the person of people like Neal Katyal and others that most ordinary Americans could only dream of. And they have had the most aggressive, creative, and thorough lawyering done on their behalf of any group of people that I've seen in my career. So it is not a legal black hole. There are lawyers going down there literally every week to meet with their clients. They are not protected by the United States Constitution. At least that is certainly our government's position. But they are protected under international law. They're unlawful combatants so they have the lowest level of protection of the categories known to the international law of armed conflict. But that doesn't

mean that they are without rights. They have rights under preemptory norms of international law and indeed hundreds of them have in fact been released through a variety of different processes including the traditional state-to-state negotiations. And the process -- the CSRT process, that the detainees and their advocates say is so inadequate -- indeed the release rate in the CSRT process actually exceeds the acquittal rate in the United States Federal Courts in criminal cases. So the CSRT process certainly isn't perfect, but it's also not right at all in my view to say that Guantanamo Bay is a legal black hole.

MARGOT ADLER: Neal, why should the Guantanamo detainees have the same constitutional protections as criminal defendants in the United States?

NEAL KATYAL: Well, first let me just say on Brad's point, which is very kind of him to say that, you know, that detainees get lawyers like me and so on, but a lawyer like me and a nickel will get the detainees just about a nickel. The whole point is that it's not the lawyers, it's what the rules are. And the rules set out by the Congress now in this Military Commissions Act strip the detainees of the ability to present those very claims that Brad is talking about, claims under international law, the Geneva Conventions, and the like. They can't, according to this law, attempt to present them in federal court. I don't think, to answer your most immediate question, I don't think anyone is saying that every jot and tittle by the United States Constitution should apply to enemy combatants at Guantanamo Bay. But when we're--you know, the issue before the Supreme Court right now is does this, the most cherished of all rights, the right of habeas corpus, apply?

MARGOT ADLER: Brad, one of the bottom-line questions for me is this: Suppose we can suspend habeas corpus in war, and some say of course, that we're in this whole new territory since 9/11. But if since 9/11 is a war that's different than other wars and is in fact an endless war, how do we preserve our democracy?

BRADFORD BERENSON: Denying alien enemy combatants fuller access to the U.S. court system than has been provided in the Military Commissions Act doesn't pose even the slightest threat to our democracy. The fact of the matter is that the procedures that have been afforded to our enemies in this war -- in part because of the differences between this war and past wars -- are more generous than those afforded to enemy combatants by any nation in the history of the world, including ours. When these alien enemy combatants are brought to Guantanamo, they are brought in front of a panel of three military officers and given a combatant status review. And then in addition these detainees get something that lawful POWs in others wars don't get and never have gotten. Each and every one of these Guantanamo detainees has the opportunity under the Military Commissions Act to go to the D.C. Circuit and say my detention is unlawful. Here are the reasons why. That is unprecedented generosity to enemies in time of war.

MARGOT ADLER: Neal, how would you answer that?

NEAL KATYAL: Well, if--I think it's quite clear in the Court of Appeals, decisions that have interpreted that scope of review under the Military Commission Act made quite clear that this is not the kind of very generous review that Brad is talking about. It is a review only to make sure that that CSRT proceeding is itself following the rules that it has set out to establish for itself.

The problem is not with the Federal Courts review of the CSRT. It's with the CSRT itself. And if the underlying proceeding is flawed and the federal court lacks the tools, lacks the resources in investigatory power to make sure that they've got the right person, you're going to have a problem. And that's what the detainees are saying. And it is, I think, a very compelling claim when you consider the panoply of flaws with the CSRTs. I mean, let me just give you one from this Boumediene case itself. The CSRT, in the proceeding, the detainees wanted to say: Hey, we have a court opinion that says--that cleared us from Bosnia and Herzegovina. The Supreme Court said there wasn't enough evidence to hold us. And the CSRT said: Well, that evidence is not reasonably made available, that court decision. That court decision was on the website of the D.C. court, federal court. And they said it wasn't available. With things like that, with just a process so riddled with errors it's not something that really quite honestly looks like the right of habeas corpus.

BRADFORD BERENSON: All wartime detentions carry with them some risk of error. Certainly in World War II there were plenty of people that we held who claim that they had been captured, were being detained in error, that they were part of a forced labor battalion, that they hated the Nazis and had no enmity toward the United States at all. The problem is that in wartime we necessarily have to tolerate higher risks of error that innocent people are going to be hurt in all kinds of ways, whether through bombing, or combat, or through detentions, than we would ever tolerate in more normal, more peaceful times. That isn't to say that the erroneous detentions that occur aren't a tragedy. Obviously each one is. And the government does everything it can to avoid them. But it cannot afford trial-type proceedings to everyone it captures in these wars or the whole process of trying to wage war and reduce to submission an enemy would grind to a halt.

MARGOT ADLER: We're almost out of time and I want to ask you this one quick, last question. I'd like both of you to weigh in here. What does the Supreme Court need to say in its coming decision in order to bring some resolution to this issue or is that resolution even possible? I'll start with you Neal.

NEAL KATYAL: I think that the Supreme Court took this case that's going to be heard in December to make a larger statement about Guantanamo being United States territory where fundamental rights apply. And, you know, that doesn't sit well with me in one sense. Like Brad said, the Supreme Court generally defers to presidents in a time of armed conflict. But it hasn't done so with respect to this administration and I think for good reason. And my strong hunch is that this case was granted for yet a further and a more solid rebuke to the president that this is really not what America is about. We do not treat people this way. Our historic tradition is about the right of habeas corpus and giving people an opportunity to be heard and have their claims fairly tested and promptly tested. Not years and years after the fact.

MARGOT ADLER: Brad?

BRADFORD BERENSON: My wish is that the Supreme Court would say that Congress and the president came together, developed legislation which is quite innovative and quite generous by historical standards and the standards of military detention, and that the system created by the Military Commissions Act does not work in unconstitutional suspension of habeas corpus. It

instead affords something in excess of the minimum procedural rights that alien, enemies in a time of war are thought to have, and that it allows the Military Commissions Act to function and allows the administration, whoever's administration it may be in the future, and the Congress to continue to experiment and work together and devise solutions to this problem. My prediction is not very different from Neal's. I agree that a betting person would probably have to bet that the Supreme Court will once more reject what the political branches have done and insert itself into these issues of war and national security. The reasons why the Judiciary has not shown its traditional lack of deference to the president and to the political branches in this war really is a subject that could occupy us for an entire other program. Um, I don't agree that it's because the Bush administration has overreached in some unprecedented fashion. I think it has much more to do with changes in our society than changes in White House policy. But nevertheless I think that, um, predicting what the Court will do here probably does take you to the conclusion that the administration will suffer another reversal.

MARGOT ADLER: Bradford Berenson is an attorney in Washington, D.C. Neal Katyal is a professor at Georgetown University Law School. Thank you both for joining me.

NEAL KATYAL: Thank you.

BRADFORD BERENSON: Thank you.

MARGOT ADLER: Coming up on Justice Talking: Does life tenure for Supreme Court Justices still make sense?

UNIDENTIFIED MALE: Justices are more likely to die in the office of a president of the opposing party. They're hanging on if they can possibly till the next term. You know, it's sort of if you want this robe you'll have to pry it from my cold, dead hands kind of attitude.

MARGOT ADLER: And how unbiased can judges really be?

UNIDENTIFIED MALE: But in the cases we all care about, in the cases that matter most in the larger body politic, about sex, about abortion, about race, the Justices are as political as anyone. And they all have agendas.

MARGOT ADLER: The people and politics of the nation's highest court: stay with us.

MARGOT ADLER: This is Justice Talking, where we make the connection between the law and American life. I'm Margot Adler. So far on today's show we've been talking about the cases coming before the Supreme Court this term. But now we're going to shift gears and take a closer look at the composition of the Court: nine Justices once appointed have life tenure. But some people are saying it's time for that to change. James Lindgren is a law professor at Northwestern University who along with fellow professor Steven Calabresi authored a study on the effects of

life tenure on the Supreme Court. I asked him to tell me what he thinks the implications are of life tenure for Supreme Court Justices.

JAMES LINDGREN: One of the issues is that the Court tends to move very slowly in terms of changeover, and that is partly a good thing and can potentially be a bad thing. There has been some research by political scientists that have suggested Justices who have been on the Court for a very long time tend to be less in touch with the will of the people in terms of their decisionmaking. But you also have to ask whether it's good to have in the last year or two of a Justice's term on the Court, to have them in such a condition that they're really not able to do their job, and estimates vary widely. The best studies have been done by David Garrow in the University of Chicago Law Review a few years ago, and it looks like somewhere between a quarter and a half of recent Justices when they left the bench were either physically or mentally unable to do their job in the last term. Things like falling asleep on the bench during argument, having problems with being confused, not knowing what the case was about, or who was speaking in front of them. And while in most jobs the stakes aren't so high that that's a major concern, this is really an extremely important job, and it makes sense to have people who are if not in their prime, at least not so far past their prime that it's a major problem for litigants.

MARGOT ADLER: When you say that I'm sort of surprised because I immediately think, for example, of Justice Stevens being a very, you know, vital 87-year-old. And I'm wondering, have these things been kept quiet from us?

JAMES LINDGREN: There's a bit of a report, and I don't recall whether it was in Garrow's piece or not, that after some of the Justices -- and I prefer not to name names in this -- retired, that the press actually discussed whether they should have been more open about the problems that the Justices were having during their last years, or whether it was really right not to speak to the public about the problem. Part of the problem here is that when you say, well, what's the proper time for a person to retire, they really should take into account their own interest primarily. That's normal for all of us. But the stakes are very high in this. And you're talking about someone who's already had a career as a lawyer, as a judge, before they reach the Supreme Court. And the average for Supreme Court Justices was about 15 years, before 1970, on those who retired or died. And the average since then has been 26 years and that's a very long time.

MARGOT ADLER: You also say that in our current system Justices have the option of timing their departure strategically, retiring to give a president they like the next nomination, and that they even die at politically convenient times. Really?

JAMES LINDGREN: Justices are more likely to die in the office of a president of the opposing party. They're hanging on if they can possibly till the next term. You know, it's sort of if you want this robe you'll have to pry it from my cold, dead hands kind of attitude. On the other side it turns out that Justices are more likely to retire in the first two years of a term in which--of a president of their own party, the party that appointed them.

MARGOT ADLER: You advocate for a new constitutional amendment that would apply term limits. How would the system work? And how long would a Justice serve?

JAMES LINDGREN: We propose 18-year term limits and the way it would work is that in the first year of a four-year presidential term and in the third year, a president would get to appoint a Justice. And they would serve for 18 years, at which time they were still a member of the federal bench. So they still had life tenure nominally but, uh, and they could sit on lower court cases if they wished. But they would no longer sit on Supreme Court cases. And then they would be replaced. And if someone should die in the interim, or resign in the interim, then someone would be able to be appointed just for the rest of that slot.

MARGOT ADLER: James Lindgren is a law professor at Northwestern University. Thanks for coming on Justice Talking.

JAMES LINDGREN: Thanks, Margot. It was a lot of fun.

MARGOT ADLER: If James Lindgren had his way and Supreme Court Justices were limited to an 18-year term, Clarence Thomas would be getting close to the end of his time on the Court. In Justice Thomas' recently published memoir "My Grandfather's Son," he takes us through his life including the contentious confirmation hearings 16 years ago.

UNIDENTIFIED MALE: I think that it's a very unusual experience to have a Justice with a memoir that is this turbulent.

MARGOT ADLER: That's Kevin Merida. He is an associate editor at The Washington Post and co-author of "Supreme Discomfort: The Divided Soul of Clarence Thomas."

KEVIN MERIDA: I think judges generally don't want to be in the political eye. It reminds you kind of stepping back into a confirmation fight all over again, something that was, uh, really fought on his side and won 16 years ago.

MARGOT ADLER: Kevin, you tried numerous times to interview Thomas for your book. Now that he has written his memoir, have you begun to question any of your own conclusions or did his book confirm what you had written?

KEVIN MERIDA: You know, as a biographer you're always worried when someone doesn't cooperate and he is a contemporary figure whether you miss some important turn. But in fact I think, uh, in many ways, I don't mean this in ego terms, but I think that we went deeper in some of the areas of his life than he went himself. You know, you see in his book a lot of sense of persecution, a lot of anger, bitterness, and you also see a very strong sense of class- and color-consciousness, which is one of the themes that we explored greatly in our book.

MARGOT ADLER: Race is a huge theme in Thomas' life as he writes about it in his new memoir. Were you surprised in any way by the way he talks about race in the book?

KEVIN MERIDA: I was struck by the literary references and they are very powerful literary references. He likens himself to Bigger Thomas, the tortured figure who ended up being

sentenced to death, in the central character in Richard Wright's "Native Son," who gets sentenced to death for really accidentally suffocating a white woman. And he also says that he was Tom Robinson, the character in Harper Lee's "To Kill A Mockingbird," who was falsely accused of raping a white woman in the Deep South. And I thought that these were very racially charged figures and to really see himself that way -- a guy who has risen to, you know, the most prestigious tenured job in America and is the product of, you know, great education, and has achieved a lot -- those are striking references and ways to compare yourself.

MARGOT ADLER: He paints himself as a victim but he attacks the victim mentality.

KEVIN MERIDA: Yes. Another contradiction which is, you know, something that runs through our book, that at every turn you see these contradictions. He's someone who would not describe himself as a victim, but at every turn he's often saying that whites did this to me, big city northerners did this to me. Uh, I thought it was striking, Margot, that he is, talks about not wanting to be put in boxes. And I think that many African-Americans don't want to be put in those boxes. When he was at Yale Law School he says that a lot of his white classmates, they would always talk to him--they only wanted to talk to him about quote-unquote "black issues." And yet he is constantly drawing boxes himself. I mean, he describes there is a box of big city northerners. There is a box for white liberals. And he's drawing a lot of boxes in his own life.

MARGOT ADLER: You've written your book. Justice Thomas has written his memoir. I'm wondering what questions you think remain unanswered about Justice Thomas and what you think is the least understood thing about Justice Thomas.

KEVIN MERIDA: Well, you really would like to know why he still is so angry. There is a lot going on. I wonder if he's really happy on the Court. He's talked a lot about getting his anonymity back. He seems to feel like someone who is constantly under a looking glass and has been scrutinized and has even confided to friends: Why is there this fascination with me? So you wonder if he's really happy with where he is. You also wonder--it must be very difficult to become really an historic figure by virtue of being the second African-American Justice. And so 50 years from now when people are looking at the history books and looking at, you know, the pioneers and see him, you wonder if there will ever be a time when he'll become closer to African-Americans and somehow bridge the gulf that exists now. You know, you go into schools during Black History Month and you won't see any pictures of Justice Thomas up. And so you just kind of wonder if there is anything that he can do or anything that anybody can do that can change that circumstance.

MARGOT ADLER: That was Kevin Merida, an associate editor at The Washington Post and co-author of "Supreme Discomfort: The Divided Soul of Clarence Thomas." You can hear more of our conversation at justicetalking.org. Armstrong Williams threw a book party for Clarence Thomas. Kevin was there and tells us about it.

MARGOT ADLER: While Clarence Thomas' memoir gives us a new understanding of Thomas,

Jeffrey Toobin, staff writer at The New Yorker and senior legal analyst for CNN, gives us a fascinating look at the makeup of the Court in his new book "The Nine: Inside the Secret World of the Supreme Court." As a Supreme Court reporter Jeffrey Toobin already knows the Justices better than most of us.

Jeffery, what was the most surprising thing you learned while researching this book?

JEFFREY TOOBIN: I think it was the interplay of the personal and the political in Sandra Day O'Connor's life. Her odyssey through the courts, you know, arriving in 1981 as a judge not even on the highest court in Arizona. And then in the part I focus on in "The Nine," in 2000 the decisive vote for George W. Bush in *Bush v. Gore*, and then her progressive alienation from the Bush administration and how she came to dislike John Ashcroft, the war on terror as it was waged--but at the same time her husband falling into the grip of Alzheimer's disease and ultimately she has to give up her seat to the president she had come to disdain. And almost at that moment her husband slips off into the permanent loss of Alzheimer's, so she loses both the Court and her husband at virtually the same time.

MARGOT ADLER: Do you think ultimately her retirement is a decision she regrets?

JEFFREY TOOBIN: One of the great things about O'Connor is regret is not a word in her vocabulary. I don't think she expresses much regret even if she feels it.

MARGOT ADLER: You say in "The Nine," -- and when I read this I went Whoa! -- there are two kinds of cases, abortion cases and all others, that abortion was and remains the central legal issue before the Court. Talk about that.

JEFFREY TOOBIN: Well, you know, *Roe v. Wade* is now 34 years old and is really the defining legal controversy of my lifetime I think. You know, the difference between the Democratic and Republican parties in this country, it's pretty much can be summed up by one party's for *Roe*, the other party's against *Roe*. And every time abortion comes up in the Court you can feel it in the courtroom. The barometer drops. It is the most contentious subject. I see no reason to believe that's going to change at all.

MARGOT ADLER: A point of contention among the Justices appeared to be their interpretation of stare decisis, the law of set precedence. At the end of the book you say that neither liberal or conservative Justices really believed in stare decisis, that there are decisions to prove it, like abortion for the conservatives and sodomy for the liberals. Do any of the Justices really believe in stare decisis, in precedent?

JEFFREY TOOBIN: Well, I think all things being equal they would rather follow precedent and in the everyday routine cases before the Court I think they are very serious about precedent. But in the cases we all care about, in the cases that matter most in the larger body politic about sex, about abortion, about race, the Justices are as political as anyone and they all have agendas that they want to push. And if it means pushing stare decisis aside they will do it.

MARGOT ADLER: A key case outline in your book focuses on the Supreme Court's involvement in the 2000 presidential election. And you make no bones about it. You say the Justices messed up. You say the Justices did almost everything wrong. They embarrassed themselves and the Supreme Court.

JEFFREY TOOBIN: I do. No, I think "The Nine" is not an especially polemical book. It is mostly a work of reporting and analysis but, you know, I'm not going to kid you. I think *Bush v. Gore* was a disaster and I think reflected very poorly on probably eight of the nine Justices, all except John Paul Stevens, who I thought got it right from the start. But the story of how *Bush v. Gore* worked and how it worked its way through the system so fast--I think the speed is one factor in why the Court did so poorly.

MARGOT ADLER: One of the most provocative revelations in your book is Justice Souter's reaction to *Bush v. Gore* and the fact that he almost resigned.

JEFFREY TOOBIN: David Souter is to me one of the most compelling figures on the Court because he is so quirky and idiosyncratic. You know, this is a guy who had never heard of Diet Coke when he moved to Washington. He had never heard of the singing group The Supremes. You know, he just lives this 19th-century style life, writing with a fountain pen, no computer, no television, no fax. And he's not cynical. Souter is a more sensitive soul. And he took *Bush v. Gore* very hard because he thought it was a very bad decision and really showed a political side of the Court that he wished wasn't there. And he did almost resign.

MARGOT ADLER: Another issue I'd like to talk about, which is another theme in your book, is the whole issue of executive power, the relationship between the Supreme Court and the Bush administration, the fierce battle for judicial independence led by Justice O'Connor. Tell me about that struggle and how it played out, and how it will play out in the future, too.

JEFFREY TOOBIN: I think when we look back on this period of the Bush presidency one of the signal events is the Terri Schiavo case. The Terri Schiavo case terrified the Supreme Court because they saw what they thought was Congress overreaching its power to such a degree and instructing judges to rule a certain way in a case that just really alienated and offended them. And O'Connor in particular said this has to stop. And she started giving very outspoken speeches about judicial independence. And she and Ann Kennedy really led the fight back against the Bush administration on Guantanamo Bay and these war on terror cases, which is really the first time in American history that in wartime the Supreme Court had ruled against an executive.

MARGOT ADLER: Jeffrey Toobin is a staff writer at The New Yorker and CNN senior legal analyst. Thanks for joining me on Justice Talking.

JEFFREY TOOBIN: Great to be with you, Margot.

MARGOT ADLER: To find out more about the goings-on at the Supreme Court go to our website, justicetalking.org. While there, post on our message boards, learn more about our guests, and sign up for our free podcast, 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.
