"Umpire" or "Empathy": What Do We Want in a Supreme Court Justice? | Transcript

A Debate Hosted by The Brennan Center for Justice at NYU School of Law | June 15, 2009

With John Payton, Director-Counsel and President of the NAACP Legal Defense Fund
Burt Neuborne, NYU Law Professor and Brennan Center Legal Director
Stanley Fish, Distinguished Professor of Law and New York Times Online columnist
Moderated by Dahlia Lithwick, *Slate* Legal Affairs columnist

Michael Waldman, Executive Director, Brennan Center for Justice: Hello and welcome. This is an important conversation given the stakes for the country and the Constitution. We see the stakes for the country and the Constitution unfolding both in the waning days of this session of the Supreme Court, and in the early days of the nomination debate over the nomination of Judge Sonia Sotomayor.

For those of you who don't know, the Brennan Center for Justice is a think tank and public interest law firm and advocacy group. We focus on democracy and justice. We're proud to be affiliated with the law school.

We are named after, and seek to take our spirit from, Justice Brennan -- one of the great productive and influential justices in American history. The core of his understanding was animated by a sense of what he called "simple human decency" that we try to follow in our work.

"Umpire?" "Empathy?" What Do We Want in a Supreme Court Justice?" The topic we asked our discussants to take up today is a little mischievous. We should make it clear that both the topic and this event were chosen before we knew who was going to be nominated by President Obama. We knew somebody would be nominated and so this is not, and ought not, be a debate about Judge Sotomayor or her qualifications for the Court. Several people have said, "Well, that's a bad framing. Why do you pick those topics?"

To give you the Cliff Notes on this, it was Chief Justice Roberts who said that a Justice of the Supreme Court should be an "umpire." Back when he was a Senator, President Obama said that a Justice should be someone with "empathy." There are, of course, many other ways to look at the broad question of who is best to serve us on the Supreme Court.

We are very lucky to have some of the best people in the country to discuss this. Our moderator this evening is Dalia Lithwick, Senior Editor of Slate.com and the legal columnist for Newsweek. Burt Neuborne is to her right, or left, depending on how you look at it, and is the Legal Director of the Brennan Center, and was one of the founders of the organization, and is a professor here at NYU School of Law and former Legal Director of the ACLU. Stanley Fish is a Professor of Law at Florida International University and a New York Times on-line columnist, on law, the Constitution and public policy. Professor Fish tells me that he taught in Chicago and in Providence, Rhode Island, but, that until he saw Albany this week, he had not seen incompetent corruption of the kind that we're all getting to see here. John Payton, Director Counsel and President of the NAACP Legal Defense Fund, is a sister organization, is a tremendous leader in the fight for Civil Rights. We're thrilled to have all of you here.

Dahlia Lithwick: Let me start with a story that involves two famous jurists, Learned Hand and Oliver Wendell Holmes, who was one, if not *the* giant, of Constitutional Law. They were dining together. As Oliver Wendell Holmes' carriage was rolling away, Learned Hand said, in the way that one greeted one another in those days, "Do justice, Sir! Do justice!" Oliver Wendell Holmes stopped his carriage and looked out, and said, "That is not my job, Sir. My job is to apply the law."

It's a good story to frame this conversation. There is a perceived - or real - tension (we're about to find out which,) between judges who do justice, and judges who just apply the law. This nicely frames the question: "Empathy" or "Umpire:" What is the job of a Supreme Court Justice?

Without further ado, it's my pleasure to introduce John Payton for opening remarks.

John Payton: Thank you, Dahlia. I'm going to talk about Justice Holmes, and will try to place my remarks in the context you provided in your opening remarks. Let me start by saying a little bit about who I am, who I am up here. The NAACP Legal Defense Fund was founded in 1940. Our jurisprudence then condoned racial discrimination, premised on white supremacy. This is a very harsh reality that we dismiss as though it's just a fantasy. There were laws that actually required discrimination against black people and other minorities, and those laws were upheld, despite the 14th and 15th amendments, by revered Supreme Court Justices including Justice Oliver Wendell Holmes.

Those Supreme Court decisions are no longer included in most of our Constitutional Law case books and they're not discussed in law schools. In part, because they are simply too embarrassing and too indefensible in today's reality. LDF was formed to challenge that older jurisprudence and to replace it with one predicated on democracy, inclusion, and a sense of justice that proceeds from both.

We have come a long way from that older jurisprudence. The concept of law as "neutral" and judges as "umpires," springs from that earlier period and is used to justify decisions that are embarrassing and indefensible today.

A lot of you know who Herbert Wechsler was. He wrote one of the most influential law review pieces ever written, "Toward Neutral Principles of Constitutional Law." Published in 1959 in

The Harvard Law Review and based on a lecture Wechsler delivered, the piece talks about and reviews a number of cases, but gives special attention to three of the Legal Defense Fund's -- most famous cases: *Smith v. Allwright*, in which the Supreme Court found that the all white primary was unconstitutional, *Shelley v. Kraemer*, which found that racially segregated housing unconstitutional, and, *Brown v. Board of Education*, which found racially segregated public education unconstitutional.

In the article Wechsler said he was sympathetic to the outcomes in all three cases, but lamented that he could find no neutral principle that justified any of them. You really have to ponder that. No Constitutional principle that justified the outcomes in any one of those cases? These cases would have relegated black people to the margins of society, essentially disenfranchised them, cast them out of political life, and relegated them inferior housing and inferior schools. Wechsler said this was simply beyond Constitutional challenge. It's a harrowing concept of a democracy. If a democracy is supposed to be "We the people" and everybody's in, the idea that the majority could, in fact, Constitutionally exclude some of its citizens, is harrowing.

I'm going to read you from "Toward Neutral Principles of Constitutional Law." If you listen to Wechsler's core argument, on the next to last page, you'll hear a reference to Charles H. Houston who founded LDF, and may be one of the greatest legal minds of the 20th Century. That's who got us to *Brown*.

Here is Herbert Wechsler, commenting on the cases I just mentioned:

"For me, assuming equal facilities, the question posed by State enforced segregation is not one of discrimination at all. Its human and its Constitutional dimensions lie entirely elsewhere. In the denial by the State of freedom to associate. A denial that impinges in the same way on any groups or races that may be involved. I think and I hope not without foundation, that the Southern white also pays heavily for segregation. Not only in the sense of guilt that he must carry, but also in the benefits he is denied. In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court, before the present building was constructed ... "

I'm going to stop. Wechsler must be referring to days prior to 1935 because that is when the Supreme Court building was constructed. He invited Charles Houston to have lunch in the Capitol where the Supreme Court sat. And the Capitol dining room was for white people only. There's no separate dining hall.

"In the days when I was joined with Charles H. Houston in a litigation in the Supreme Court before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during recess. But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Given a situation where the State must practically choose between denying the association to those individuals who wish it, or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school segregation cases."

He couldn't find a neutral principle.

LDF has a different view. In our view, Constitutional jurisprudence must conform to the demands of democracy. And democracy should have as its guiding principle democracy confidently embraced. Democracy, as a value, clearly animated the Court's decision in *Brown*.

As for umpires, I'm not really sure what that's supposed to mean. It seems to suggest that judges should have no interest in the democracy in which they play a role, and imagines they should, instead, somehow be strangers to our democracy and to our society. This is a bizarre view.

In *Greuter*, the Michigan Affirmative Action cases, Justice O'Connor was not advocating neutrality. This is the sentence that I think sums up what *Greuter* is about; it certainly sums up what I argued. "Nothing less than the nation's future depends on leaders trained through wide exposure to the ideas and morays of students as diverse as this nation of many peoples." That's clearly about democracy. And it's about the requirements of inclusion. I believe that judges and Justices of the Supreme Court benefit from the kind of wide exposure to which Justice O'Connor refers. They are, in fact, better judges and better justices for that wide exposure to the ideas and morays of people as diverse as this nation has.

Wechsler's sense of neutrality is antithetical to this concept of exposure. In the section I read, Wechsler seems proud of his insularity. And arrogant in his assumption that he doesn't have to know or care if Charles Houston, or anybody else, has a different view of the issues. It's breathtaking.

"In the days when I joined with Charles H. Houston in a litigation in the Supreme Court before the present building was constructed, he did not suffer more than I in knowing that we had to go to Union Station to lunch together during recess."

That's an astonishing statement. One of the things that haunted Charles Houston -- and almost every black person -- was the indignity of not being able to go into a restaurant like that. That's certainly not what an inclusive democracy should want in its judges, and it's not what it should want in its Supreme Court Justices. The concept of neutrality, of the umpire, is in fact antithetical to how I understand -- and how the LDF understands -- what a democracy must require of its judges, which is a wide exposure to the ideas and morays as diverse as this nation of many peoples.

DL: I want to thank John Payton and turn it over to Stanley Fish for his opening remarks.

Stanley Fish: Thank you. I want to make a few points in a way that will, I hope, invite discussion. First, I will hazard an answer to the question that we are here to discuss. "What kind of Supreme Court Justices do we want?" Well, I want what everyone wants. I want justices whose views mirror mine, and who will likely rule as I would have ruled were I in their place. But, were I a member of the Judiciary Committee ... no fear of that... I would not approve or disapprove nominees on that basis. I would instead ask myself, whether a given nominee was qualified in the sense that he or she had the requisite knowledge and experience to take on the job.

That is why, unlike President Obama, I would have voted for John Roberts, and against Clarence Thomas. Because the former, Roberts, was obviously knowledgeable in the ways of the law and the latter, at least on the basis of his first set of hearings, was not. (I should add that in over the years I have come to admire Justice Thomas.) As a citizen it is perfectly appropriate for me to make a political judgment on this matter. I want this kind of guy, or woman. And it is also appropriate for the President to do the same, within limits, as represented, for example, by Harriet Myers. But as a Judiciary Committee member, I should be making a craft judgment.

That brings me to my second point. The craft involved in doing judging ... in doing judging! ... is a more significant constraint or influence than any theory a judge may have of that task. In fact I would go as far as to say that the theory of interpretation a judge may proclaim is absolutely irrelevant to his or her performance. Well, actually because the interpretive theory a judge professes is likely to be incapable of being put into practice. And if your theory can't generate a practice, the fact that you have it is of no consequence whatsoever.

Textuists ... text- ... since I dislike it so much, I can't even say it ... Textualists like Justice Scalia, say that they decode the meaning of text by attending strictly to the well established dictionary definitions in force at the time of the text production. But if, as I would argue, if it is not possible to derive meaning that way, because words to not have meaning, and are not even words, apart from some purpose of design, they cannot announce and do not contain, if that is the case, as I am sure it is, then a textualist theory cannot possibly generate an interpretation. Whatever she was doing while interpreting, it would not be what she thought she was doing.

It follows that the announcement by a judge that she would be a strict textualist, would be of no interpretive or predictive significance. Although it would very likely have a political or public relations significant. This argument holds also with a variation for those who announce that they are proponents of the living, or dynamic Constitution. Not because such a stance could not yield a reading of the text, but because any reading generated under the assumption that the Constitution is not a fixed object, but a living, changing organism, would not be an interpretation. It would instead be a product of the decision to abandon interpretation in favor of something else, by forming policy, or doing social justice.

Point three. A shorter way to say what I have just said is simply that when judges decide cases, they don't do theory. Even in those instances when they invoke theory. What they do do, and what we expect them to do, is proceed according to the protocols and obligatory routines of this job, and not of another. Of course even if judges resolve to do that, there's more than one understanding of those professional protocols. And two judges whose understandings differ may well reach different conclusions. It would not, however, be accurate to say of either judge that he or she is "winging it" or making it up. Because both would be proceeding within the appropriate job specific guidelines of which they're opposing yet legitimate accounts.

This brings me to my fourth point and to the vexed notion of neutrality, to which John has already referred. Neutrality is a virtue that some say Judge Sotomayor will not have. Neutrality properly conceived does not mean leaning in no direction whatsoever, or being influenced by anything you have ever read, thought, or experienced. Neutrality rather means leaning in one of the directions that are available within the established confines of the task, as professionally

specified. Now leaning in directions that do not belong properly to the task are out of the ballpark. Leaning in the direction of a particular party, or church or interest group, is a violation of neutrality, because it leaves the task of judging behind and begins to prosecute another task.

My fifth and final point: the Sotomayor nomination raises the question of whether reasons connected to one's background or ethnicity are legitimate reasons. Does what is usually called "identity politics" have any place in judging? My answer is, "it depends." If a judge were to incline this way or that, because one or the other party looked or sounded like her, that would be a dereliction of judicial duty. But if a judge faced with a fact situation, calls on experiences and knowledge her brethren may not have ... If the case, for example concerns a young girl or a woman of color, and she has been one, and is the other, she is not exceeding the boundaries of the practice, but bringing relevant information to it and thereby improving it.

There are two kinds of reasons that might flow from identity. Tribal reasons: he comes from my neighborhood and therefore I'm on his side. And rational reasons: I've been there, and let me tell you what it's like. And while the first tribal kind of reason should be shunned, the second is both unavoidable and honorable.

DL: I want to thank Stanley Fish for his remarks, and call on Burt Neuborne for his opening remarks.

Burt Neuborne: Thank you and welcome. And, a particular welcome on the eve of what I am confident will be the confirmation of Judge and soon to be Justice Sotomayor. There's a very special reason for the Brennan Center's involvement in this discussion: Judge Sotomayor will assume Justice Brennan's seat on the Supreme Court. Justice Brennan was on the Supreme Court for 37 years. He was replaced by Justice Souter, and Justice Sotomayor will replace Justice Souter, and will, I'm sure, continue in the great tradition of that seat.

I think I'm somewhere in the middle in the conversation so far. I begin my Federal Courts course every year by reminding the students that there are three times in a democracy when you exercise choice: once, when you go into the voting booth and vote for whoever you want in secret; when you're a legislator, and you have to choose to vote for or against some statute; or, when you're a judge and you have to decide for or against in a particular case. As I tell my students, if I believed that all three of those choices were equal, were equivalent, I would believe that American democracy is in a moral crisis.

A judge doesn't do the same things a voter does, and shouldn't do the same thing that a legislator does. There are ascending levels of constraint. When I go into the voting booth, if I want to be a bigot, and I want to cast a purely selfish, or an utterly irresponsible vote, I can do so. It's secret. I don't have to tell anybody. I don't have to justify it. If I'm a legislator, and I have to cast some sort of vote in public, for or against a bill, that's significantly more constrained. I have to do in public. I have to worry about re-election. And I have all of the constraints and assumptions of the society in which I live, that I have to deal with. If I'm a judge, my choice is the most constrained choice of all. There is something to be said for judicial neutrality. There is something to be said for having a person who is somehow above the fray functioning like an umpire, and functioning in a way that gives the litigants before the judge some confidence that

the judge is at least approaching it with as open a mind as possible, and trying to decide it on grounds that we would find consistent with the rule of law.

I want to suggest, as both Stanley and John did, that judging is extraordinarily complicated. It consists of both highly constrained principle activities, and value formation. After thirty years of argument and debate about judging, we've now come to what I can call the standard model of mainstream American judging. We have a standard model. It is the standard model that the judiciary committee should be looking for. It's a mixture of constraint and freedom. It says to the judge, "Judge, do you believe that your first duty is to seek out and see whether there are constraining rules that really tell you from external perspective how to decide the case? Is there a governing precedent that absolutely governs? If so, are you prepared to abide by it?" That's a question somebody should ask Clarence Thomas. Because he believes that any governing precedent that wasn't decided in accordance with his methodology is not worthy of support. So he has a vision of stare decisis that is so far out of the mainstream as to be extraordinary.

But the first question is: are you prepared to be bound by precedent? Second, are you prepared to take a good hard look at the text, recognizing as Stanley says, that there's no such thing as intrinsic meaning in words, but also recognizing that when the text says that you shouldn't quarter soldiers, that doesn't mean the same thing as not quartering chickens. That the word "quartering" has a contextual meaning, and that you know what it means when you're talking about soldiers, and you know what it means when you're talking about chickens. And so are you prepared, as a judge, to really try to live with text, and to apply it in a way that is consistent with both the people who write statutes, and the people who write constitutions.

Third, if the text is ambiguous, are you prepared to try to figure out what the purpose of the statute or Constitutional provision is, and do your best as a judge to choose the construction that advances that purpose? Now I say that those are constraining factors. Recognize that all three of those activities, deciding whether a precedent is binding, deciding how to read a text, and deciding what legislative purpose are, are intellectual exercises that are extraordinarily difficult, and that good people who disagree with each other will reasonably disagree about. So that it's not an automatic button pushing thing, but it is an intellectual process which we expect our judges to go through.

If a judge doesn't want to be bound by precedent, refuses to be bound by text, and doesn't really want to look for legislative purpose then maybe that person shouldn't be a judge in this system. Now it turns out that lots of cases ... and there's a debate about how many cases ... I actually think not as many as people think ... but lots of cases, when you look at precedent, and you look at text, and you look at purpose, they don't give you seriously constraining judgments. You're left on your own after those three things are up. Then you have to choose the meaning based on consequences. Based on what's the best meaning for this society. Judge Posner calls that pragmatism. Somebody else calls it consequentialism. But what it really says is, after you've exhausted all of the efforts to be constrained, trying to search out a constraint that makes you decide it one way or the other, you are then free as a judge to choose the consequence that is most important for the society. That's where empathy and experience become so important.

No black man could have written what Wechsler wrote about Charles Houston. Because Wechsler didn't have that experience. He had the insular experience of a privileged white male, living in American society in 1950, and he lacked the empathy to be able to imagine what it was like to live as a black man during that period. That's where empathy is hugely important. When you make your consequentialist decision, after you've tried to be a constrained judge, and you've run out of controlling things, empathy at that point and the ability to put yourself in the shoes, not just of who you are, but of other people in this society.

I have no doubt that Sonia Sotomayor will be empathetic, but not just empathetic to Latinos. She will be empathetic to people who are before her, because she knows what it's like to be an outsider. Someone who's lived his whole life as an insider can still be empathetic. Bill Brennan was empathetic. He lived as a Catholic, and somewhat as an outsider, but he was fairly privileged. Yet one of the extraordinary things about him was how he could imagine what it was like to live in other people's shoes. Judge Sotomayer will understand what it's like to live in other people's shoes.

Justice Roberts is a brilliant technical judge who can tell you whether a precedent binds, and can go through all the standard tropes about what text means, and is brilliant in figuring out what purpose means. But I wonder whether he has the capacity to stand in somebody else's shoes when all three of those are exhausted, and when he has to make a consequentialist judgement based upon more than just his own experience. My hope is that we get good umpires who do whatever they can to be constrained judges, and that we get empathetic consequentialists, who judge things on the basis of us all when they have to go beyond that model.

DL: I want to thank Burt, and I want to take up exactly where he left off, which is the question of empathy. I want to ask the panel two questions. One is, is ‘empathy' a useful term? When Obama said it the first time, I thought maybe it was a Freudian slip. But he said it a lot more times. And then he said it when Justice Souter stepped down. My first reaction was, empathy is not a Constitutional term; it is something I try to teach my children. I think he was responding to a failure in the conversation, in what Burt called this 30-year conversation about judging. The term "empathy' was, I think, an effort to inject into that conversation something other than the tired old trope of originalism and strict construction on one side, and living Constitutionalism on the other.

My question is, is this helpful? Does it lead to the assumption that empathy means you empathize with someone who looks like you, or who shares your history? That's been a common criticism. Does anyone want to respond to the term itself? Is empathy useful term? Or is it essentially a semantic trap in which judges are understood to act tribally and to side with people who look like they do?

JP: Normally, I don't use the term at all. You have to really explain what it means, or you're stuck with what everybody else brings to the term, and it may have a tribal meaning to folks. Some people hear the term "empathy" and think, "Gee, she will vote for her tribe" and "Let's put her tribe on the Supreme Court." That's a toxic version of it. That's why I used the sentence from Justice O'Connor which articulates the idea that it really matters that we have people who in fact are educated through broad exposure.

When I was trying to figure out how best to defend Michigan and its policy for diversity, I interviewed the senior faculty on the Michigan Law School. There are some members who have been there for a long period of time. Who taught when there were no women in their classes, and who now teach, or then taught, when there were very substantial numbers of women.

I asked them about that, because it's easier to talk about gender than it is about race. I asked, "What happened in your classrooms when significant numbers of women came in?" I talked to someone who was quite well known. He teaches property type courses, secure transactions, and he said, "Something remarkable happened and I didn't actually expect it. I'm very conservative. But when women came into my property class things we never used to talk about came up. I didn't fully appreciate how much of property is about gender. I didn't understand that some things that routinely used to come up no longer came up. And we had a much better class discussion for all of the students than we had before."

I asked "Well, what happened when you had a group of black students and Latino students in your class?" He said, "Something very similar, but I wasn't in as much doubt about that as I was about women and what it would do in my class." My point is he came out of his own class and his students came out of that class with a very different appreciation for what they now knew, or even what they knew they didn't fully appreciate. That's what Justice O'Connor is talking about when she speaks about the value of that classroom for our leaders, for our judges, for our justices. I wouldn't use the term "empathy" because it can be hijacked so easily. So the anecdote encompasses what I'm talking about, and the sentence I use from Justice O'Connor encompasses it.

BN: I think we will soon be able to use it, or use a term like it. Over the past 30 years, each side has been guilty of a kind of reductionism. Judicial minimalists have argued that law is essentially a syllogism machine, and what you need to do is find the external legal rule, plug in the external facts, and the machine takes care of itself. And anything beyond that is illegitimate judging. And they therefore would say that empathy is terrible, because it doesn't matter who it is that's running the machine. The machine is fundamentally mechanical. And the only way empathy could work in a situation like that is to cheat in using the machine. That would be terrible. That's been one side of the debate. The other side consists of people who have argued that law is essentially a kind of thing that the judge can make up as the judge goes along, simply postulating retrospective explanations for a decision that essentially gets made in the judge's political gut. And that law is essentially no different than any other kind of politics, It's just carried on by men and women wearing black robes. For them, empathy would be hugely important, because empathy was all there was.

The good thing that's happened in the last couple of years has been the recognition -- by both sides -- that the other side adds something to the argument. And that a good judge does both. A good judge suppresses empathy if it means that they can't really find the external sources that binds them, but lets the empathy go once they're beyond that machine. Once we come to an understanding that that's the model we're using, people won't be ashamed to acknowledge that their life experience plays a role in their judgments about what the consequences of particular decisions are.

SF: I'm afraid I have to disagree. If empathy is to play a role, and I think the introduction of the term was politically disastrous, advice should have been given at some point. I was available ... if empathy means something positive, that is, in the sense that you aggressively exercise it, I'm against it for precisely the reasons that have already been given. Because it cannot be exercised without moving in the direction of one party or interest or the other.

If empathy means something like a set of interests and commitments within which you begin, and a set of interests and commitments that guide your understanding of what Burt has referred to as the constraints, then it's fine, and it's also harmless. All it means is that you, and I, and everyone else, come to any activity with a set of assumptions about the way the world is, and a set of desires about the way the world *should* be, and that although these are not explicitly invoked, and should not be, they are nevertheless guiding the way in which we see our task. Even as I've already said, a task that is chock full of constraints.

By bringing empathy into the conversation in a political context, it's almost inevitable that people are going to be thinking about empathy as something that you add on at the end of a process. Or I believe it's simply the name for the interest you come in with, and I don't believe there are any of us who come into any situation without interests.

DL: Yes?

BN: Stanley and I are in virtual total agreement on a lot of that. Which should make all the rest of you very nervous.

Most of you have heard about the Lilly Ledbetter case, which was a case decided by the Roberts court. It dealt with the statute of limitations and a claim for gender discrimination in pay. Lily Ledbetter worked for this company for many, many, many years, and had been disgracefully underpaid during the whole period because of a policy of paying women less than men for doing the same job.

She didn't learn about this policy until just before she retired. I forget exactly how many years she worked there, let's assume it was about 25 years, and she didn't learn about this policy until just before she retired. She filed a lawsuit. Now the text of the statute is terribly, badly written. It's a horrible exercise in draftsmanship, but it indicates that you're supposed to bring the lawsuit within a year of the discrimination, which makes good sense. You don't want to let these things hang out forever. The question is, from what point do you measure the year? Did you measure from the time that she learned about the discrimination? Or did you measure from the time that the discrimination started. Here's where empathy plays a role.

If you've never lived in the shoes of a woman working in a male company, then you don't know that one of the worst things that she can do is appear to be looking at what other people make or trying to figure out whether she's getting her fair share, or, trying to be a troublemaker. There was no sure way of ending a career for a woman in a male job than to appear to be a trouble maker over compensation. Lilly Ledbetter didn't look. The Supreme Court held that she should have looked and that there was a one year statute of limitations and it had run out by the time she brought her lawsuit.

In deciding this case, a judge could have gone either way. The text was inconclusive, the legislative history was everywhere; the decision simply involved a judgment about how people should and are likely to behave. To put onto the shoulders of a woman in that kind of a world the duty to find out what her colleagues were making, involves a lack of empathy and is exactly the wrong way to have decided this.

DL: Burt and John, it sounds as if you're talking about empathy and imagination as similar. Empathy doesn't have to mean 'I was a woman and I was discriminated against.' Empathy can mean, 'I'm listening to Ruth Bader Ginsberg losing her mind here at oral argument, and I'm hearing what she's saying, and there's something that I don't know.'

I'm thinking now of the Redding case, the strip search case that the Court heard earlier this term, where Ruth Bader Ginsberg was losing her mind. She could not believe that some of her male colleagues were describing a strip search as analogous to "ha-ha-ha" *Animal House* antics, the kinds of stuff that happens to guys in locker rooms. She was visibly frustrated. At the time, I thought, she's forgetting John Paul Stevens, who as an 89 year old male, has never I don't think been strip searched, and certainly was never a 13 year old girl, but who, at oral argument, was as sensitive as she was to the experience of this 13 year old girl.

I wonder if we're missing a nuance here, the idea that empathy doesn't have to mean *only girls get what it's like to be discriminated against.* It can also mean having the ability to understand or to listen when someone describes an experience you haven't actually had yourself. Am I making this complicated?

BN: No, that's exactly right. That's why Brennan was a great Justice. He was empathetic. He had never been a woman. He had never been a black person. He had never been a poor person. But he was astonishingly empathetic to people who had walked in different shoes. I think that's all Obama means. It isn't that you should be good to your tribe. It's that you should be willing to try to understand how an opinion plays out in the lives of people who've just lived differently than you have.

JP: That's why I used the quote from Justice O'Connor, which goes to that understanding. It describes the difference between knowing from your own experience and learning from listening to, or empathizing, with someone else. In talking about the different roles legislators and voters and judges each have in making decision, we left out another category, that of jurors. Jurors are told they have an obligation to do something. They're not just supposed to vote however they feel. Anyone who served on a jury knows that jurors have to listen to each other if they're going to reach a unanimous decision. They have to listen to others, or the system breaks down.

What you said, Dahlia, about the importance of not being a girl, but taking responsibility for thinking about and trying to understand what it might be like to be a girl. That's actually important. In my example of Herbert Wechsler, he did not acknowledge this responsibility, nor do I think he could have done have. I think that is very important ability for those we want to be justices on our Supreme Court.

The idea that the Court can act as an umpire, misses the point on some of the big cases. On some of the big cases before the Court, it is more experienced than the litigants. It has decided these cases. They have been working together for awhile. They know these cases inside out. So they know a lot of contours of this. The question about whether they can appreciate all of the nuances and all of the things that ought to go in there is a different decision. It requires them to acknowledge it as a responsibility, and then be able to do it.

SF: Let me say that it's a bad idea to use a term that you have to explain five times a day. It should have never been used. Even in the context of the cases pertinently described by Burt and John, I would prefer, as I always do, a theological vocabulary. I would get off of empathy, and go to letter and spirit. You can talk about judges who will, in fact, follow what they at least take to be the letter of the law, an impossible category in my view, and then about judges who are looking to the spirit within which the law was first conceived, and then passed. That's why I'm an intentionalist. I'm a hardcore intentionalist originalist. There are about six of us in the world. It seems to me that what you always want to be looking for in doing judging is the spirit or intention within which the act was performed.

I've taught the Herbert Wechsler article enumerable times in my law school classes. One of the extraordinary things about the Wechsler article is that when he gets to the passage John quoted, in which Wechsler distinguishes between the "wish to associate" and the "wish not to associate" and declares them equivalent, what he's done is remove the facts from history. Instead, they've become facts in what I've called a "moral algebra." One party wishes to associate, the other party wishes not to associate; there is no acknowledgement of the very dark history that has brought the people involved in this case to the Court. That is a failure. It is a failure to interrogate and be faithful to the spirit, as opposed to the letter.

I would say there's no spirit in the Wechsler view, because he wants to reduce everything to the kinds of abstractions that I'm afraid mainstream liberalism loves. Abstractions stripped of everything that makes them what they are. I think we all can agree, this is the wrong way to go.

BN: I just say empathy is the way you get out of that.

DL: I think we're at the part of the show where we would like to open the conversation up to those of you in the audience.

Audience member: Can I ask you each to provide a substitute for empathy, and get it into the vocabulary as quickly as possible? I would offer this, we are talking about the ability to fully appreciate the situation at hand. This is what the majority in Ledbetter failed to do and the measure of their opacity is that even after they had Ginsberg's dissent in circulation, they still didn't get it!

BN: They got it. They were looking at the case through the eyes of the employer. And, from the employer's point of view, it would be very dangerous to have these things floating out there for many, many years, it creates liabilities that the employee can't predict. It has unpredictable effects on the capital markets, on being able to borrow money. They were just looking at it from one side. If you look at it from one side of the equation, it's an easy case. And so the challenge

is a semantic one. You want us to come up with a different phrase. How about understanding? Is that good? Is understanding better than empathy? I don't know why it should be? But I'll use understanding from now on if that's all right.

DL: I'm going to stand by imagination.

SF: I like understanding too. A kind of understanding that is neither crabbed nor narrow. But there's a long tradition in Supreme Court judging which, in fact exalts, crabbed and narrow understanding. It's a kind of minimalist tradition which perhaps had its greatest spokesman in Justice Frankfurter, who advised, "Decide all cases on the lowest technical level possible." Which means decide all cases in the absence of understanding, spirit and empathy. Making judging not the craft I spoke of in my remarks, but a kind of technical exercise; many people think this is the way to go.

BN: Can I speak for Justice Frankfurter for a second? Just a fast story on *Brown*. Many of you may have heard this. *Brown* was argued twice. It was argued in 1952, before a Supreme Court with Chief Justice Vincent as the Chief Justice. The Justices were unable to reach a decision, and rumors are that they were badly split. On one ballot there was actually a five to four vote to uphold segregation. Those were the years when William Rehnquist was clerking, and was alleged to have written a memorandum urging that *Brown* be decided the other way.

The Court put the case down for re-argument. During the interim period, Vincent died. Chief Justice Vincent was a very amiable Kentucky politician who was not known for his progressive racial views. Earl Warren is appointed as Chief Justice in '54, and Warren brings the Court together in a unanimous nine vote decision in *Brown*. Frankfurter is alleged to have said that Vincent's death during the interim between the two arguments was the only sign of God's existence that he had ever seen.

JP: I want to bring us back to sort of the larger point here. LDF and others brought cases, 50 years ago, before judges that were quite insulated. On issues of racial justice, it was often white men who had no peer relationship with a black person in their life. Thurgood Marshall may be the only Black peer the Justices had any contact with during the 1960's. They had no contact with a woman who was their peer. You can see in their biographies they way some of them got to the understanding or empathy or whatever the term is, was almost accidental. Someone took Chief Justice Warren on a trip and his driver couldn't stay in a motel; he had no idea that that's what segregation did, and, the discovery had an effect on him.

We paid a huge price, as a country, for a Supreme Court that was that limited in its ability to appreciate these core issues. In *Gaines v. Missouri* in 1938, Justice McReynolds turned his chair around because he refused to face a black man in the Supreme Court -- a fact that warranted no comment from The New York Times because it wasn't news! We know what you get when you have a Court that lacks all of the things we're talking about. No peer who is a woman, no peer who is black, no peer who is Hispanic, no peer who is Asian, limits your ability to have an imagination to actually see what a democracy has to be. Litigating before those courts that was the enormous challenge of LDF. We are changing in ways that require even more imagination,

and even more understanding, as things change. It is an important quality that you want a justice to acknowledge and then be able to actually comply with.

Sidney Rosdeitcher: I was wondering if there really are cases in which justices get beyond the constraints of the system. In almost every case that is difficult, there is a way of building on the past and building from principles. That's our common law method of adjudicating. When judges find no comfort in the text, and no comfort in original meaning, they are doing what common law judges do, are they not? They're looking back at the precedent, and seeing what the principle is. There may not be a case in point. But could you describe a case in which there was absolutely no way of attributing what the judge was doing to within the constraints of the judicial process, and would that be a good idea for an opinion of the Supreme Court?

BN: First, you know, Sidney's a ringer. He's just finished writing a terrific paper on judicial decision-making for the Brennan Center and I told them not to let him in. The question is a great one. But I think the answer, Sidney, is not that there are no cases where there is none, is there are most cases where there is two. Or maybe three. In other words, you can take the past and craft from the past a credible sounding opinion that purports to be consistent with precedent, purports to be consistent with text, and purports to be consistent with purpose. And you'll have nine justices and they'll go five-four. And they'll each write opinions, each one claiming that they have tapped into the correct reading of the past.

The question is, what is it that's actually causing them to break ties at that point? It can't be because one knows how to read text, and the other one doesn't. Or one knows how to read cases and the other one doesn't. They're perfectly credible. I mean we could take case after case, very recently. *Caperton* was just decided this term. *Caperton* said if you give a $5 million contribution to a judge, and then want to litigate before the judge, your opponent might have some concerns. And, therefore that the judge, as a matter of due process and fairness, should step aside in favor of a judge that doesn't have a $3 million debt to you.

Now believe it or not that was five-four opinion. Kennedy swung the right way this time. Kennedy said "No, you can't have a fair hearing under those circumstances." Four of the judges made a principled argument that said no, this is not something that we should decide. The due process clause doesn't give us guidance.

Neither side was wrong. At least not wrong in the sense that one should be made to go stand in the corner, because they misread the text, or misread the cases. They differ, because they took a different vision of the consequences of the decision. Kennedy thought the consequence of this decision could involve forcing somebody to have a lawsuit in front of somebody with a $3 million debt to his opponent. How could you possibly think that would be fair? Roberts, and, in a separate opinion, Scalia, say the consequence of this opinion is a standard-less recusal rule which is going to be all over the courts, and it's going to be impossible to live with. They were both focusing on two different risks. One was the risk that the system would be roiled; the other one was a risk that there would be an unfair decision in this particular case. To me, the difference between being a good judge or a bad judge, is which risk dominates you. If you're dominated constantly by risks to the system, you're going to tolerate huge amounts of injustice! That's what happened to Lilly Ledbetter. That's what would have happened in Caperton.

The question is, how did you manage risk as a judge? And at the risk ... at the risk! ... of coming back to this, I think you can't manage risk without empathy. Without stepping into the shoes of the litigants and deciding it as something other than, or understanding, other than an abstract interpretation of the rules. My answer, Sidney, is that I think in too many cases, there are too many ways to lock into the past. In no case do I think you can't lock into the past. The question is, can you lock into the past for just one outcome?

Audience Member: I just think it's important that when you choose the consequence, that that consequence has to be supported by something within the constraints of the process. If it was a complete break from tradition and history, and you just chose it, I think that would be very difficult to defend. On the other hand, take Ledbetter. Justice Ginsberg certainly had empathy, because she was a lawyer who litigated many of these gender discrimination cases, but she also recognized, in her opinion, that the interpretation that the Court was giving would render Title 7 nugatory. That's perfectly within the constraints. She also chose a line of cases which Justice Alito completely ignored, the hostile environment cases, in which there was a kind of cumulative build-up. So chose the consequence, but she chose it and she wrote and opinion that satisfied the purposes of the judicial process. Maybe we're saying the same thing.

SF: I think ‘consequences' is as dangerous a word as ‘empathy.' And, for somewhat the same reasons. We're talking about two different kinds of consequences. There's the kind of consequentialism that people object to, which means that you figure out the way you want the world to be, either maintained in its present status quo state, or altered in some way, and then work the process until you come up with you know, an opinion that achieves what Ronald Dworkin calls "articulate consistency." But the kinds of consequences that you were speaking of in the Caperton case and in other cases, are consequences contemplated by the judges in relation to the system. How that's going to work? That's quite different from the consequentialism that everybody finds disturbing. One judge is thinking ‘well, if we do that, we're going to have a parade of cases before us in the next two years, and the whole calendar will be occupied by them.' And another judge says, ‘well, if we do that, then a whole set of litigants will be discouraged from bringing worthy causes of action.'

Those are consequences that contemplate future conditions within the legal system. And that's perfectly acceptable, and I think indeed appropriate, and so I'm afraid that you and I agree once again.

BN: I promise I'll use pragmatism. Pragmatism is a less loaded word for that.

JP: Let me give you the example of a case, Sidney, that I think can't be seen as saying the justices were acting in good faith. I'll use a case from the past so it doesn't seem we're slandering someone who is currently on the Court. Justice Holmes decided a case called *Giles v. Harris*. It involved the State of Alabama and raised the question, what if an all white legislature took an action that disenfranchised all black people? Holmes decided there are no cases he has to cite here. He just said, "What would we do if it were true? Let's assume it's true. Then nothing that we would give you would actually help you. Because you claim all the white people hate you. And, if all the white people hate you, nothing that a court in equity could do, could help.

Therefore, we don't have jurisdiction to help you. Case dismissed." Okay? That's *Giles v. Harris*. It's not in the case books.

DL: 1903.

JP: 1903. It's a disgusting case. An absolutely disgusting case. We have a 15th Amendment. The next case was the damages case, and the Court dismissed that one too. And the point here is that in my view, the Justice didn't appreciate his role in the face of a fundamental injustice; this is a particular example of the disability of a Court that is completely unaware of how insulated it is, has no peers whatsoever, and finds it easy to say, "Well, that's them, who cares about them! The black people? The Negroes you're talking about? Who cares about them?"

DL: I have a follow up on Professor Fish's recent comments on consequentialism. If we borrow Professor Neuborne's framework, and we ask, in those cases in which precedent, text, or purpose/spirit, don't govern, don't handcuff a judge, what is the character of consequences that is fitting or appropriate for a judge to take into consideration? In particular, I would like to know whether it is fitting for judges to consider the character of moral beliefs that citizens cultivate, that they have in a society that we live in where the kind of racism evidence in the Herbert Wecsher example, and the kind of lack of empathy, where segregation was prevalent, is different than the kind of world we live in now, where the prevailing flavor of racial prejudice is implicit. And to fight that, if a judge were to embody in the decision a justification based on desire to change, to alter, the moral beliefs of the citizenry, in a way that for example they would wish to associate with those barbers, neighbors, in their schools, with those unlike them, would that be fitting, would that be appropriate, or would that be going too far?

SF: Going too far.

BN: I think going too far also. I think what we think of when we think of whether we like a judge or don't like a judge, or think a judge is what we would call a good judge, or a judge we wish was substituted by someone else, depends upon the kind of consequence the judge uses. I completely agree with Stanley. I'm calling about consequence here with a small "c". Systemic consequence inside the system. But I think there's a choice, a whole range of choices. For example, if I were a judge, one of the consequences I might think about would include the effect on democracy. I would think that if I had to read a text one way or the other, I would tilt towards the way I think the legislature reads it. There are some judges who do that. I might think "gee, what I really want to do is maximize individual liberty?" and therefore the consequence I consider is the consequence to individual liberty if we go this way, versus that way. That's the way I think a lot of free speech judges operate. I might even get sucked into a Rawlsian notion about economic justice, and wonder about consequences of various decisions on the economic system? There are any number of legitimate pragmatic systemic consequences that a judge should think of. The only thing that a judge shouldn't do, and every one of the members, I think, of the current Supreme Court is guilty of doing this, is they can't tailor their consequences from case to case. You know, not have a principled view of what consequences count, and what consequences don't count, depending on whether they want to uphold or strike down an exercise of governmental power.

For example, Justice Scalia, in the Habeas Corpus case, *Boumediene*, said he believed under the circumstances the inmates in Guantanamo had no habeas corpus, in large part because Congress had made a judgment about the relative weight of the risks involved. But then the very next case, in *Heller*, the 2nd Amendment case, he said he believes that the 2nd Amendment should be read broadly as a guarantee of individual liberty, despite the legislative determination that the guns posed a very serious problem within the District of Columbia.

From one case to another, he essentially flipped his consequences. In one case it was a consequence that deferred to the legislature. Another it was a consequence that maximized individual liberty. Now there might be a principled reason for doing that. And if he explained what that principled reason was, I would be interested to hear it. But an unprincipled moving from one consequence to another, is the strongest argument I know against my position. Because it allows judges to tailor make their decisions in ways that are inconsistent with any notion of constraint. I get nervous about judges who aren't honest about the consequences that they deploy.

DL: Yes?

Audience Member: Getting back to the question of empathy. In an adversarial system in which there are always going parties on both sides of the "v" doesn't the issue really come down to the party with whom the judge wants to or does empathize with? The case that comes to my mind is a case like *Kelo*, where it seems like the dissent would be characterized as more empathic than the majority opinion.

BN: Somebody else want to do that? I mean Stevens has spoken to that. Stevens has said that if he were a legislator, he would have voted against his position in *Kelo*. *Kelo* is the case that talks about whether the government can come in and take your house, as part of eminent domain, because it's part of an industrial development area; they take your house, and they give it essentially to a private individual, who is engaged in building a factory and the town says ‘well it's more important that we have this factory than that you have your house.' So they take the house away, pay the guy a reasonable value of the house, which of course doesn't include the sentimental notion of living in your own house. And the question is: can the government take private property for public use, when the public use consists of giving it to another private person to make a profit, which will benefit the community? That's a hard question. Stevens said he thought the precedents indicated that the Court had already decided that, and he was following the precedents. But, he said he would have no difficulty at all with a legislature who said this is wrong, and you shouldn't do it. *Kelo* was a hard case.

JP: But I think the overall answer is I don't think it comes down to which side does the judge or the justice have more empathy with. That would be a disaster. The reason the word empathy is a difficult word is that it can be misunderstood in just this way. When I say I think it is really important that the justices not be so deprived of, the knowledge of peers, it's not about "who do you know better?" It's that you have to know enough to be able to assess the situation that comes before you. But it's not a vote on empathy grounds. And that's the problem with the term for me. I hear the point. And I think the example of the eminent domain case is helpful. I think there's understanding all around there and I don't think that's the problem. I think there's

understanding all around. I think there is a problem when in fact the issues involved address parts of our society that aren't known, or, in our everyday world we ignore or have an uninformed negative image of. Then it really does matter how well someone has been exposed and has knowledge of the real issues involved. That's not a battle for America's most empathetic. That's not what I'm asking for.

SF: In a way what John has just said takes us back to a quarrel that has been going on in jurisprudence since at least the beginning of the 20th century. Many of you know the writings of the great legal realists. I'm thinking especially of Felix Cohen's enormously entertaining essay, "Transcendental Nonsense" in which Cohen complains that the law continually trans-substantiates the facts of real life into its own circular and stipulated vocabulary. Then on the other side, there are people ... and I'm probably one of them ... who would say, "Yeah, that's right! That's what you're supposed to do." So the question here is: is law autonomous? Is law an autonomous system in the sense that it operates largely within its own set of definitions and within its own history rather than the history which it impacts when decisions are delivered.

If the law is an autonomous system, this does not mean that the facts of experience never enter into the law's decision. But it does mean, and this was what Felix Cohen was complaining about, that when the facts of experience do enter into the law's proceedings, they enter as legal facts, rather than as facts that would be recognized by persons who are not legal academics or lawyers. I am not a lawyer myself, but I know that often when clients come to consult with lawyers, clients tell a story about what has happened to them, or about what they desire. Clients always have a sense of what the important, key moment in the story is, and, often lawyers have a sense, also of what is key, but it is not one that matches the client's. Because the lawyer is thinking, "Under what legal rubric can I bring this set of facts?

DL: One more question.

[Audience member]: How can ideas of empathy and related terms be rehabilitated especially in the minds of non-law-fluent audiences? It seems to me that in the last 25 years, the school of thought that leans towards strict textualism has had several very articulate and several very convincing spokespeople, especially for those invested in Supreme Court nominees and legal jurisprudence, but who don't necessarily know many of the cases behind them. What you seem to have, especially in a non-lawyer audience, is the idea of "the stricter the better." When you're being more strict, you're being more honest. The instant you bring in elements of empathy and related terms, you might achieve an outcome you want, but you're somehow doing something unseemly. I was wondering if you had any ideas as to how you might change that dynamic and perhaps bring the idea of a more consequentialist jurisprudence into vogue, instead of merely having that syllogistic machine that you referenced before?

BN: Well, you ask maybe the hardest question I know as a test case lawyer. For me, the way I deal with the textualist, first you hit them over the ... no, you deal with a textualist by I pointing out the limits of textualism. Textualism purports to be some kind of constraint that really controls a very substantial number of cases. I have lots of fun asking textualists what does process of law mean? What cruel and unusual punishment mean? If they could just write it

down on a piece of paper, I promise I will live by that. But of course you can't. Textualism doesn't deal with the kind of opened textured phrases that we use in Constitutions.

My favorite way of dealing with a textualist is the great HLA Hart hypothetical. Somebody passes a statute making it a felony to introduce a wheeled vehicle into the park. How many years does the ambulance driver do? When the ambulance driver drives into the park to try to rescue somebody who's had a heart attack? Has he violated the statute? The statute that says "wheeled vehicles from the park?" It can't be that way. So textualism can't solve so many hard questions. The more specific you get with a textualist, the more you show that there has to be something else.

Stanley, over the years, has been brilliant in arguing that it's intentionalism. Why'd they pass this thing? To get a little peace in the park. They didn't pass it so that people would die of heart attacks in the park. So = it's clear that you exempt that person, and once you admit that you exempt that person, then you have to ask whether a motor scooter or a bicycle, or a racing bicycle, or a tricycle, are all wheeled vehicles. Textualism doesn't solve that. You've got to go beyond that. The moment you go beyond that, then you say to the textualist, well, then you don't think your knowledge of the world, your knowledge is relevant to the decision-making process? If it's an honest person, the person will retreat. Textualism has retreated. Retreated immensely. Modern textualism is not a hell of a lot different than purpose-ism these days. The intellectual tyranny of the textualists is over. It's absolutely over. They themselves admit that their argument can't answer too many, too many questions.

SF: I certainly agree with that as a conclusion in the philosophy of language. But I took your question to be part a question about public relations. And as a public relations matter, arguments against textualism are going to lose every time. Unless you can assign everyone in a country to read the brilliant essays of mine, for example = that Burt was referring to, there's a certain common sense, rough, ready, Anglo-American knock-down empiricist appeal about textualism, and no matter how many of us demolish it, no matter how many times Scalia demolishes it himself in the unfolding of one of his opinions, it will rise again, and it will triumph.

JP: Look, if the President nominated an on-paper sensationally well qualified graduate of NYU Law School who had come here on a special scholarship, and then returned to her country, let's say, Bulgaria, and had spent 20 years being a sensational judge in Bulgaria, whatever their law is, and he said, "But she's just absolutely brilliant! I understand she applies the law in Bulgaria it's just unbelievable how good she is ... "You know, there's just not a chance. It just doesn't add up to enough. You want someone who can appreciate who we are. And who we are requires you to do more than just know how to do textual analysis, or go to law school; you really need to know who we are to appreciate what this dispute is really about, what those words mean to people in the street, how this would work if you actually ruled this way or that way, and I'm saying that in order to really appreciate that in our very complex democracy, you actually have to be able to appreciate all the elements of our democracy. If you just take the brilliant Bulgarian jurist, not a soul would think that would be good enough, but that's why. It's because whatever that is, it doesn't attach itself to who we are. The "we" is what is important, for the sake of our democracy, for justices to consider and understand.

Audience Member: I want to bring this back to the question which Mr. Fish raised at the beginning about Barack Obama's vote against John Roberts. How would you advise a Senator who he has foresight as Obama did, that Roberts was very predictable. He would vote for business in almost every case where there was a business issue, against a woman who lost her arm in an accident, against affirmative action, he would read opinions like *Brown v. Board of Education* as justification for attack on school integration. And so forth. How would you vote and how would you be exercising your obligations to give advice and consent as well as your obligations to your constituents and the people who elected you, that don't want a judge who is brilliant, a graduate of the Harvard Law School, just like you are, but who will come out in every policy issue precisely against everything you believe in.

SF: For me that's all too easy to answer. That means my answer, because it comes readily, is suspect. But I'll give it anyway. Everything that I write, not only about these matters, but recently about higher education, and what professors should and should not be doing in the classroom, depends on the idea of the distinctiveness of tasks. It seems to me that when you are in a position to be exercising some authority, whether it's in the judicial area, or educational or any other, the first question you have to ask is what is it that I'm being paid to do here? What is it, what obligation, what charge have I received? It seems to me in that situation, given the scenario, or hypothetical that you sketched out, if there were a nominee in front of me, and I was persuaded that that judge would in subsequent years deliver opinions that I found antithetical to everything I believed in, but on the other hand I believed that he was well qualified in the appropriate ways, I would vote for him because, and this is my bottom line, at that moment, that's my job. I believe that you do the job that is appropriate to the task you are then engaged in. Which means, you compartmentalize your life. I'm a big, big, big fan of compartmentalization, even though I can't pronounce it.

JP: I would add something. Certainly we want justices who are extremely well qualified in technical aspects of the law. But what was missing from the Bulgarian judge is something I think is required to be a justice of the United States Supreme Court. If that were lacking, that would be a failure of qualifications.

BN: I would do all I could to win the next Presidential election, and then hope that Stanley and me and the rest of the Senate Judiciary Committee would recognize that they had a duty to vote in favor of my candidates just like I would have voted in favor of theirs.

DL: Thank you John Payton, Stanley Fish and Burt Neuborne for what really has been one of the most interesting conversations I've heard about this. Thanks to the Brennan Center for putting it together, and thank all of you for your good questions and your very patient listening.