

Cynthia Koch: I hope you all had an enjoyable evening and I am looking forward to another day of really wonderful exchange with our panelists and all of the distinguished guests who have come to be with us today. I know that this is going to be a fantastic day, so thank you for being with us again and I'm going to kick this off by introducing to you someone who's extremely important to Presidential Libraries. We had a lot of talk about presidential libraries, which I was so delighted to see yesterday and there is one person in this country for whom Presidential Libraries as a group has been her life. Her name is Sharon Fawcett. She is the Assistant Archivist for Presidential Libraries, which means she's in charge of those 12 libraries in terms of our oversight, our operations and all of the day to day activities as well as the policy decisions that govern the 12 libraries that are part of a National Archives. She worked previously as the Deputy in charge of Presidential Libraries and was in that capacity for seven years and so for the past decade, it really is to Sharon that we have looked for all of the kinds of cooperation's and collaborations that made conferences such as this possible. She's been a lifelong archivist, starting her career in 1969 at the LBJ Presidential Library and has been with us ever since. She's lectured and written on presidential libraries, on access to presidential records, archival reference, research room design and security. These are the important things that we all have to know about: product management, genealogy and family history and managing human resources. She has a BA in History and a Master's in Library Science from the University of Texas at Austin. And so, without any further ado, I'd like to invite my boss, Sharon Fawcett up to the podium. Sharon.

Sharon Fawcett: Thank you very much, Cynthia and good morning to all of you. In March of 2006, we held our first ever joint conference sponsored by all the presidential libraries. The subject was Vietnam, the place, the Kennedy library. The mood after the conference was contagious; there was this wave of enthusiasm. It was a lot like the feeling that I felt in this room yesterday, and as we all know, Ambassador Bill vanden Heuvel who had a great idea, and fortunately for all of us; Ambassador vanden Heuvel and Cynthia Koch are as good as their word and they brought us here today. I want to thank the staff of the Roosevelt Library and particularly Cynthia Koch, Bob Clark, Lynn Bassanese, and Cliff Laube for all the work they've done to make the logistics of this conference to run smoothly, to bring together all the speakers, to make sure that you're all fed and comfortable, have a room to stay in, et cetera. We also have a lot of wonderful volunteers out there and I hope you have an opportunity to say hello to them and thank them for their service to the National Archives and the Roosevelt Library. We're also indebted to the Franklin and Eleanor Institute, The Foundation of the National Archives, and The Foundations of the Truman, Eisenhower, Kennedy, Ford, Reagan, and Bush libraries; that's a lot of foundations. Also, the Hoover, Johnson, Nixon, Carter, and Clinton presidential libraries themselves contributed money for this conference from their

trust funds. The generous support of all these people made this conference possible because it's not appropriated funds that are paying for this; this is very much a project of our private foundations and our generous partners. The most important experiences, events, and themes of American history have not stopped and started with the transition of presidential administrations every four or eight years. They stretch across administrations and even generations, war and conflict, the major efforts to bring about and maintain peace, the enunciation and protection of our civil and individual rights, the debate about and the defining of the federal role in healthcare, education, the protection of our environment, and immigration and the changing face of America. These are enduring themes of our history that have shaped our country and helped each of us form our own political views. Presidential libraries, along with the National Archives, hold this continuing story of American history and the presidency for all to examine. The libraries themselves are uniquely positioned to sponsor conferences such as this one that bring together historians, journalists, the decision makers, and often the ordinary and extraordinary citizens who live through and participated in the events we chronicle. The examination of issues over several presidencies and a multi-library format is a new endeavor for us, but it broadens and enlightens the discussion. The list of potential topics is endless. The men and women who lead the presidential libraries of this nation do so with great energy and dedication and the hope of providing programs that examine the lessons of the past to inspire leaders of the future. In September, the Eisenhower Library and the Clinton Libraries sponsored an experiential learning activity for high school students in Abilene, Kansas and Little Rock, Arkansas. These students came together and participated in a decision center, playing the roles of the president, Herbert Brunell, the segregationist, the students, the local government and military commanders as they made the decision and worked through the crisis at Central High School in Little Rock. It was an amazing discussion; the students were fabulous and I think the constitutional scholars that are here today would be very impressed with their discussion of the equal protection clause of the Fourteenth Amendment. I know I was very impressed. Today, our panelists will be examining the relationship between the President and the Supreme Court and how that dynamic has shaped our government and our society. We have a stellar group of panelists with us today and a moderator who's reports and commentary on NPR have given me many a driveway moment where I sat in my car with the engine running to hear the rest and I wish he'd been around when I was taking Constitutional Law; I think I would have made a much better grade. So I hope you enjoy the day and that you take advantage of our panelists who have been the chroniclers and the participants in the events that have shaped the interpretation of that living document housed in the Rotunda of the National Archives, The Constitution of the United States. It's also my great pleasure today to introduce Judith Kaye. Judith is the first Chief Judge, the first woman Chief Judge of the State of New York and prior to that, she was the first woman appointed to the State's highest court. This has been like a day of first women. We had the first woman Justice of the Supreme Court, Cynthia Koch is

the first woman Director of a presidential library in modern time, I'm the first woman to direct the presidential library system, so it's a great pleasure to be able to introduce her. She also chairs the permanent Judicial Commission on Justice for Children. She's a founding member and honorary chair of The Judges and Lawyers Breast Cancer Alert. She has numerous awards and one in particular I want to cite because this is after all a conference on the Supreme Court. She received the National Center for State Courts' William H. Rehnquist Award for Judicial Excellence. So, I am really pleased and proud to have a Judge Judith Kaye with us today and I turn the podium over to her. Thank you so much.

Judith Kaye: Thank you so much. Good morning Sharon, I'm delighted to be among so many first and wonderful women and non-women I must say. Now, surely the simplest is not the most superfluous task falls to me, and that is to deliver welcoming remarks on day two of a really extraordinary gathering when already we feel most welcome if not downright privileged to be here, don't we? By today, I suspect every single one of us is fully engaged and immensely grateful to the presidential libraries, to the sponsors, to the archivist, to the planners for making us part of this very, very special and very timely collaboration to echo Justice O'Connor. What a great idea and I might add, what a even greater reality this is. No one, no one feels more privileged than the Chief Judge of the State of New York to be here in that I am at this moment literally in transit from New York City chambers to Albany chambers where our court, the Court of Appeals is in session. Honest, if I had thought ahead I would have prepared and circulated a petition demanding that I be retained here among all of you for the entire day. But I am leaving in New York City the very vexing chief judgely state and federal chief judgely issues like judicial pay increases and court house construction delays, and have I mentioned judicial pay increases? And in Albany chambers, in addition, which I will face very shortly, there are the dazzling constitutional and statutory and common law issues that will be argued all during the week. So I have to tell you, and believe me this is the pause that refreshes. It is, of course, even somewhat relevant to our subject that we gather on Veterans Day, the actual day yesterday as well as the official observance, and that is today, both days to thank those who have served honorably in the military. Though you all know Veterans Day and its significance, perhaps not all of you know that in the state of New York our constitution, our constitution specifically provides both for Veterans preference credits on civil service examinations and bonuses, cash bonuses for certain World War II veterans; I don't know if any of you are here today and your next of kin. Respect for Veterans in fact is among the values that New York State has chosen to enshrine in our state's fundamental charter. I add this tidbit to the enumerable new facts and ideas that you all will take away from the conference as part of my official New York State judicial welcome and as a bridge to the topic at hand. Now recently, I had the pleasure of listening to the distinctive voice of President Roosevelt in a radio broadcast that he had suggested be prepared for the 150th anniversary of the ratification of the Bill of Rights, December 15,

1791 -- another great day in American history. As it turns out, by the time the program was actually aired -- December 15, 1941 -- America was at war. I'm sure this broadcast is archived, is it not? Yes. The program is called We Hold These Truths, and it was narrated by then Corporal Jimmy Stewart, who begins by describing the Bill of Rights as the document we are fighting for. He asks "Is not our Bill of Rights stronger now and cherished more now than when it was enacted? After all," he continues, "the Bill of Rights is not a document of dusty legal phrases, and when it was written it had yet to be tested by actual trial and experience." When toward the end of the broadcast the voice of the President of the people comes on the air from the White House, it is to speak of what he calls the American Bill of Human Rights, the mother charter of liberty for liberty loving people everywhere, its principals, its teaching, and its glorious results, fundamental to a great upsurge in human rights. President Roosevelt related the Bill of Rights to the war and the battle of ideas that had just begun eight days earlier expressing the determination of the American people to preserve liberty for themselves and others all over the world by prevailing over Hitler's evil ideas and forces. So now I put to you Corporal Jimmy Stewart's question in a time that there's an eerie parallel to December 15, 1941 and I ask all of you is not our Bill of Rights stronger now and cherished more now than when it was enacted? Is it? Does our own trial and experience continue to assure a great upsurge in human rights throughout the world? Thankfully, I have only to pose these questions, not answer them, confident that the wonderful people -- and I'm looking out at them -- who follow me on the panel of the presidency, the Supreme Court and civil rights as well as the panelists thereafter, will indeed have all of the answers to these questions. You will, won't you? Those questions, of course, are right at the core of much of our discussion, for it is in the end that the Justices of the United States Supreme Court when federal constitutional issues are pressed, who have the awesome last word on what the Bill of Rights means today, the last word for us, and as we know a powerful example for courts of other nations throughout the world. And of course, it is the President of the United States who's subject to the advice and consent of the United States Senate has the awesome responsibility to say who should be a Justice of the United States Supreme Court. Though with a single exception, none of us here has ever held the presidential or the judicial responsibility. All of us, of course are very, very deeply affected in our own lives by the decisions that they make, and for me, the impact is even a bit more personal. I have in mind the incredible life I have enjoyed these 14-plus years of Chief Judge of The State of New York. In fact, these past 24-plus years I have served as a member of New York State's highest court, the Court of Appeals, Benjamin Nathan Cardoza's court at whose desk I sit, I might add. And I should tell you that when my predecessor Chief Judge took that seat he told his wife "Can you believe it, this is Benjamin Nathan Cardoza's desk," and she said "Fifty years from now it still will be Benjamin Nathan Cardoza's desk." And indeed it is 75 years since by acclamation that Benjamin Nathan Cardoza went from that desk most reluctantly to Washington D.C. in a desk at the Supreme Court of the United States and have no doubt it still is Benjamin

Nathan Cardoza's desk. But for me, it was for him, it is lawyer heaven to serve on the state's high court. And I've said only in this highly federalized constitutional system of ours greater attention isn't paid to the workings of our state high courts which also contribute enormously to the fabric of American life. The process for naming judges to New York State's high court as you know is similar to appointments to the United States Supreme Court. We have for the past 30 years had an appointive system here as in Washington D.C.'s appointment by the state's Chief Executive Officer subject to the consent of the New York State Senate. And I might say having observed United States Senate confirmations and having myself recently endure another senate confirmation preceding, here I am thankful that more attention is not paid to the state Courts. Without comment of any sort on the issue of politics in Supreme Court appointments, I can say only that in the state judicial appointments -- I'm thinking of Massachusetts and New Jersey most particularly -- that appointments are most definitely based solely on merit, solely, completely, absolutely, no political or ideological considerations whatever, and what I really mean by this facetious remark is that I have no comment on the prerogative of a chief executive to make his or her preferred choice among superbly qualified candidates. Hopefully for all of us, chief executives will always make the very best choices from among the most intelligent and wise and able and superbly qualified candidates. Looking toward Albany later this morning, I would just touch on the heavy responsibility that all judges face especially in deciding constitutional issues. Although the United States Supreme Court has the last word on the federal constitution, each state high court has an ultimate responsibility to interpret its own constitution which may recognize greater but never lesser rights than the floor set nationwide by the Supreme Court. Although every case chosen to be heard by the high court by definition taxes our talents to the fullest, the constitutional issues I might say are particularly so. After all, if the words of our charters were clear and the meaning obvious if the exercise were merely mechanical, obviously the case wouldn't be before as these cases, by definition are extraordinarily hard. In resolving them, we have to consult every conceivable internal and external source looking back into history and even more challenging, looking ahead, looking forward to imagine where a decision one way or the other might take the law because courts simply cannot decide an issue one way one day and another way the next. In order to maintain legitimacy and the respect of the public, courts must resolve the breathtaking new issues presented by modern society in the context of the framework of existing law. Each of the advocates, of course, and all of the amicae are absolutely convinced of the correct definition of the issue that's before us. They know exactly what the right answer is but each one of them has a completely different view of what the outcome should be. Then there are the colleagues, oh yes the colleagues, six in my case, eight in Justice O'Connor's, and I might tell you that is its own unique experience in family relationships, isn't it? I mentioned this, not in any sense to complain, as I have told you, I consider my own life to be lawyer heaven, and I mention this not to deviate in any way from the subject matter of the conference. I mention it only to underscore that

however hard it may be to be the “Judge”, the appointee, just imagine the difficulty of the President in selecting Supreme Court justices; the appointees generally outlast the CEO who appointed them. In fact, they may indeed have the good fortune to serve fearlessly and independently and hopefully responsibly for many, many decades. Now, the words “good fortune” bring me back full circle to my own good fortune in being here today, and so I close simply by again expressing my own thanks for allowing me, for inviting me to be part of this really, really great gathering. Thank you so much.

Cynthia Koch: We are the ones who should thank you, Judge Kaye for coming and being with us. We know how busy your schedule is and the idea that you would stay with us, even for a portion of today and all of the time that you were with us yesterday, is indeed a high honor. Thank you. And now, we are moving into the part of our day that is going to begin with a series of discussions of different issues related things. Nina Totenberg is chomping at the bit ready to get to work. But before Nina comes, I want to call on the man who has been working behind the scenes to organize this conference. His name is John Q. Barrett; he is a Professor of Law at St. John’s University teaching Constitutional Law: Criminal Procedure in Legal History. He was also previously the counselor to the Inspector General in the US Department of Justice, associate counsel in the Office of Independent Counsel Lawrence E. Walsh working on Iran Contra, and a Law Clerk to Judge A. Leon Higginbotham in Philadelphia’s Third Circuit. We at the Roosevelt Library met him a few years ago as he was working on the previously undiscovered, unpublished biography of FDR that Justice Robert H. Jackson had written many, many years ago and which had been locked away in a closet for 45 or 50 years and as our friend John Barrett was working on his biography of Justice Jackson, he discovered this manuscript, published it under the title “That Man: An Insiders Account of FDR,” and it has been a wonderful view from the early 21st century into the eyes, through the eyes and ears of a man who knew FDR 50 years before, so it’s a wonderful contribution to history and to legal studies and of course, to our understanding of Judge Jackson. And it is because of that deep knowledge of Judge Jackson and a wonderful list that John Q. Barrett circulates on Jackson and on Nuremburg and on the Supreme Court, that he has a wonderful network of people that he can call upon. He is called on that network of his friends, his associates, his colleagues, and he’s indefatigable in searching them down and bringing them together and that’s how today came to be. I want to thank John for all of his hard work in bringing this conference together and ask him to introduce our Moderator for the day. John.

John Barrett: Thank you, Cynthia, Justice O’Connor, Chief Judge Kaye and all the participants, teachers, leaders and friends, citizens who are part of this. It is really just another day in the classroom, but a very special classroom to be part of this conference. I was honored to play a small role in helping assemble this gathering but many more

powerful magnets beginning with Franklin and Eleanor Roosevelt really helped pull this event together. My privilege this morning is to introduce Nina Totenberg who will take the lead and labor mightily and I think teach brilliantly across today's three panels. Nina Totenberg, as you all know, is the award winning revered National Legal Correspondent at National Public Radio. She is frankly one of my revered teachers in the driveway on the Grand Central Parkway, on the web, through the iPod and I know that so many of you enjoy that classroom. What I want to do is simply give two pieces of credit and clarification as part of introducing Nina. Nina's presence here today really I think traces back to the cooking skills of one of two much maligned American cooks, Henrietta Nesbitt and/or Eleanor Roosevelt. If you were listening to National Public Radio during the past week or if you go the website -- I strongly encourage you to do this -- you heard a lovely piece that Nina aired about two senior figures, great parts of our heritage in this country. One is Judge Louis Oberdorfer of the United States District Court and The District of Columbia, and the other is the great violinist, her own father, Roman Totenberg. Roman Totenberg came to this country in the 1930s and performed in Washington for the select elite audience of Franklin and Eleanor Roosevelt and then was invited to dinner in the White House with the Roosevelt's. As Nina accounts in that report, Eleanor Roosevelt literally sat on the floor and served him dinner in the White House quarters on that occasion and that was part of what convinced Roman Totenberg that this was the country for him. So the food, whether it was Eleanor's own cooking or White House Cook, Ms. Nesbitt could not have been so awful. The second clarification I want to add to this program connects to Justice Robert Jackson. There was a question raised yesterday about Nina's own educational credentials and pedigree. I simply want to put these two great, great Americans side by side and let you know the accurate score. Robert H. Jackson, days of college education: zero. Nina Totenberg: many, many more. So you decide for yourself who's got the right educational pedigree for the heights to be attained. Now I turn it over to Nina and today's panel. I'm delighted that she's here and to all of you, thank you very much.

Nina Totenberg: Okay troops, we're a little behind schedule, get up here.

Nina Totenberg: If I said the real thing I would have meant it would not have been quite that polite. Get your you know what's up here. I'm going to briefly introduce the panelists, I mean briefly because one day this may be shown on C-Span and they don't have the little books that tell you everything you wanted to know about these folks. To my immediate left is Professor David Nichols whose book is "A Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution." Sitting next to him is Judge Shirley Hufstедler who served for 11 years on the ninth circuit court of appeals and then became Secretary of Education in the Carter Administration. Sitting next to her is Juan Williams, my colleague. He's a Senior Correspondent with National Public Radio

and a commentator on Fox. And, sitting next to him, is Norman Dorsen, formerly President of the American Civil Liberties Union and a very distinguished professor at New York University Law School. So, having started that way, I'm just going to try to do this in somewhat chronological order about what we more traditionally call the Civil Rights Revolution and then move onto what those of us who are women here call the other civil rights revolution that involved some of the non-women also. I love that; I'm just going to adopt that. I once had an editor who said if it's good, steal it, so I'm stealing it. I want to start though, I think the only way to do this is chronologically with President Truman who probably was the first president who simply had to deal with Civil Rights issues. He most famously desegregated the military after World War II, but he became President in an era when the NAACP Legal Defense Fund started litigating, when the Supreme Court starting issuing decisions in the white primary cases in the graduate school desegregation cases involving a restrictive covenant and even some grand jury cases involving all white grand juries. So my question for the panel to start this is who gets the credit here, the Court or the president. The president after all did desegregate the military but was this a symbiotic relationship in terms of civil rights, was it a adversarial relationship in civil rights, was it a grudging relationship? Maybe I should ask Juan to start because he's written a number of books that look at the whole panoply of civil rights material.

Juan Williams: Well thanks Nina, good morning to all of you. It's a pleasure to be here at the library, it's a real honor for me. I start with the idea that impartiality, I think the famous thing is limited to baby carriages and judges chambers. So with that thought in mind I think it's key as to whom the president picks to put on the Court, quite determinative of outcomes and Nina was speaking about President Truman and his choices, but I think that this is a story that goes much farther back. I think if you were to look as far back in terms of civil rights, and here I'm speaking of race relations in the United States, to Dred Scott, 1857 and you see a 7 to 2 vote that says that in the famous words of Chief Justice Tawny that a black person is inferior and has no rights than a white person is bound to respect, you see that a mostly southern court is enforcing a very racist view of American society and of the Constitution and it's very much a function of their world view and their perspective. And, you see that even in terms of dissents at that time, people who were saying blacks had been treated as citizens before and after ratification of the Constitution. And then you come forward in time and I think most famously skipping past what are known as the Civil Rights cases largely having to do with transportation segregation on transportation. Skip forward in time to 1896 and Plessey v. Ferguson which is also in a way another transportation case but here you have the idea of separate but equal being affirmed in American life by the high court. And even Justice Harlan in dissent saying that whites are the dominant race and will continue to be the dominant race in American society. The big shift in terms of this world view that's being endorsed by the high court, a reflection of the society, I suspect, is

when you come to FDR, you come to Truman, that Nina was focusing on, of course and you come to Eisenhower that my colleague David Nichols will focus on in just a moment - I think it's a shift in terms of the men put on the high court and their view. In '44 you have the all white primary case that Nina referred to, *Smith v. Allwright*, and then in '48 you have the restrictive covenant case, *Shelley v. Kraemer*; and then you come in my opinion to really the key case, which would be *Brown* in the last century and you have a Warren Court that's focused on the idea of expansive view if you will of remedying discrimination in American society and the legacy of discrimination. That is the tricky business because it takes the court down the path of trying to assert what is right and what is wrong, what is permissible and what is not permissible with regard to remedies for that long and torturous and awful history of racial discrimination in the face of the Constitution. And obviously, we're doing this with Justice O'Connor here who has had so much to say on this very tricky issue. I would add that in my area, and the one that really stands out in my mind, is that there were two people selected for the court who sort of stand apart and of course those are the two African-Americans who have served on the court. That would be Thurgood Marshall and Clarence Thomas. I'm reminded of that, I think it was the French actor, Alain Dulan was in some play with Richard Burton and Dulan had to swing an axe near Burton's head, and Burton's response was "Be careful with that axe, they're lots of French actors, but if you kill me you'll have killed half of all the Welsh actors in the world." Well, it's like that with Marshall and Thomas. We've had lots of Supreme Court justices but only two African Americans, and they bring a very distinctive world view to the court, and again in large part it's a function of the people who appointed them to the court. In Marshall's case, we are 40 years out, it was just 40 years ago this year that he came onto the court after President Johnson nominated him to the court and he comes out of a tradition that's just so unique having to do with people who were struggling, going back to the time of the Civil War, where grandfathers who were at the encouragement of Frederick Douglas, fighting to get into the Union uniform so they could fight for their freedom. It comes out of a tradition in the city of Baltimore, Maryland, sort of American middle ground as historians tend to describe it, a place where you could see the forces of abolition fighting the forces of slavery and in terms of the black community, places people such as the Baltimore Association for the Moral and Education Improvement of Colored People, the Brotherhood of Liberty are fighting for the idea that there should be public funding for schools for blacks, that black people should be allowed to teach in public schools, that black teachers should have equal pay. This is all of a part of their struggle against the retrenchments that took place after reconstruction, and it's in keeping with the idea that black people are fighting to be a part of the American mainstream, and again, fighting against the political majority that was reinforcing segregationist attitudes in American life. In my mind I think of Clarence Thomas, who is clearly not rooted in that black history. Thomas, appointed by the first President Bush, really comes out of different experience. He builds to some extent on Justice Marshall's insistence on integration as a reality of American life under the Constitution; but Justice

Thomas is someone who was an abandoned child, someone whose grandfather as he is told so wonderfully in his recent book insisted that he focus on his individual work and skills to distinguish himself and that he proved that a black man could be as good as a white man on the basis of his grades. He once said to me that one of his favorite quotes was Richard Wright's, which said "A black man wants to be as free in the way that white men want to be free", and I think that is evidence of his attitudes, his focus on individualism and individual rights in his jurisprudence. So in my mind, Thomas isn't keeping with the Booker T. Washingtons, the Marcus Garveys, the Malcolm X in terms of traditions of approach to black life in the white majority while Justice Marshall would be in keeping with the Frederick Douglas's, with the W.E.B Dubois, with the Doctor King's in terms of his focus on the integrationist attitude towards participation in American life. Both of these men overcame tremendous odds to make that vision a reality, but to my mind, the key here is how the president's select them and it's the way that they interact in their visions of racial equality, interact with American society because both have very clear visions, both have a common end which is racial equality, but both have distinct approaches to how you reach that end and I think it's a function again of their times and the presidents that selected them.

Nina Totenberg: But do you think, any of you, maybe I should ask this to Judge Hufstedler or Professor Dorsen, I'm not sure. Do you think that when Truman selected Fred Vinson, his old friend, to be Chief Justice, or for that matter any other members of the court, he was really thinking at all of civil rights as an issue that was a burgeoning issue that was starting to move American society in a way almost not seen since the Civil War? What do you think Norman?

Norman Dorsen: I'm not sure it was behind his agenda, but I was going to do something a little obstructed and that is I prepared some remarks that cover the range of presidents from Roosevelt to the present and I would like to be able to state those remarks, but if you feel as the manager of this panel that I should--

Nina Totenberg: Guess what, I will give you exactly what I told Professor Nichols, I will give him no more, and I mean no more than five minutes.

Norman Dorsen: Well I'm not going be able to do it, but I'll step at the end of five minutes--

Nina Totenberg: I would suggest then that you don't do it.

Norman Dorsen: No? Well I think that's a very reasonable position, but I'm going to accept your first--

Nina Totenberg: You want my first offer? Then I'm going to give you your few minutes in a few minutes. I'm going to move on here to Eisenhower because Professor Nichols has studied him in particular, has a new book about Eisenhower and the civil rights revolution and I'm cutting him off at five minutes as if he were sitting in front of me in front of the lectern with a white and a red light Justice O'Connor. So I'm going to turn to Professor Nichols.

David Nichols: Thank you Nina. It's an honor to be here with this distinguished panel. My contribution is about Eisenhower, I will defer to my colleagues on many other issues. I'm indebted to the wonderful Eisenhower museum, staff and documents that made my book possible. On September 24th, 1957, President Dwight D. Eisenhower sent troops into Little Rock, Arkansas to uphold the federal court order based on Brown, the Brown School desegregation decision. That evening he told the nation with troops on the ground "The very basis of our individual rights and freedom rests upon the certainty that the president and executive branch of government will support and ensure the carrying out of the decisions of the federal courts even when necessary with all the means at the president's command." In 1958, he repeated those words verbatim, effectively threatening military action again if Arkansas violently resisted another court order. So please consider what Eisenhower did, not just what he said. Contrary to legend, he appointed Earl Warren as Chief Justice fully aware of Warren's attitude on race. Eisenhower appointed five men to the court, none of whom were southerners or segregationist sympathizers, men like John Marshall Harlan and William Brennan. Ike complained to his brother, Edgar "That even the lawyers of this country have not come to understand that I do not consider federal judgeships as included in the list of appointments subject to patronage." He removed the judicial candidate screening process from The White House, assigned it to his attorney general, Herbert Brownell and insisted that the American Bar Association review potential candidates. Ike and Brownell denied Senators the traditional veto, consistently appointing program judges in the South. Eisenhower desegregated federally controlled schools for military dependence in the South before Brown. He concurred after discussion with Brownell's plan to present a brief for Brown that declared segregated schools unconstitutional that he personally edited the Brown II brief, which purposed school districts be required to submit desegregation plans within 90 days. Now the Supreme Court found that proposal too radical and instead ordered desegregation as you know with all deliberate speed. Thurgood Marshall rightly concluded that meant S-L-O-W. Eisenhower has been criticized for not passionately endorsing Brown, but the day after the decision, he ordered the desegregation of the Washington DC schools. Ike believed that the separation of powers prohibited his

expressing a personal opinion on a court ruling. So on May 19th, 1954, Eisenhower offered a soldierly statement of duty, a rhetorical click of the heels, "The Supreme Court has spoken," he said "and I am sworn to uphold the constitutional process in this country and I will obey." The Supreme Court, including four Eisenhower appointees, ruled unanimously in September 1958 in *Cooper v. Aaron*, a case almost as important as *Brown*, to further block delay in desegregation in Central High School in Little Rock. On September 29th, the day that opinion was published, Eisenhower nominated his fifth justice, Potter Stewart. Then he endorsed the *Cooper* decision with these words: "We must never forget that the rights of all of us depend upon respect for the lawfully determined rights of each of us. As one nation, we must assure to all people, whatever their color or creed, the enjoyment of their constitutional rights and the full measure of the law's protection." Ike might have agreed with Justice Frankfurter's dictum that the ugly practices of racial discrimination should be dealt with by the eloquence of action, but with the austerity of speech. Who a President appoints to the Supreme Court is even more important than what he says. While Warren and Eisenhower had a complex relationship, let us not forget who appointed Warren and four more progressive justices to the court, then let us consider the court's latest appointees last June 28th led in striking down diversity programs in Louisville and Seattle. *Brown*, with all its flaws, has been a beacon light for justice, and that legacy, I personally believe, is now under threat.

Nina Totenberg: Professor Nichols, before we move onto anybody else, I have a couple of follow up questions to ask you. These are not just for the hell of it questions; these are questions that I'm extremely curious about. Knowing that I was going to be moderating this panel, I called Lawrence Walsh who was Deputy Attorney General in the latter part of the '50s and was in charge of school desegregation in Little Rock for example, and as he put it, this is what he said: "Well, I wouldn't call Eisenhower a leader on this but he was a tough supporter once the decision was made," and as to whether Ike actually got involved in carrying out day to day desegregation questions, Walsh said, "Oh no, he just told Bill Rogers to do it and Rogers told me to do it." But there is this story, and it's not just an apocryphal story because it's a story that Warren tells in his memoirs. He says in his memoirs, he describes a White House dinner where he was first of all placed next to John W. Davis who has argued the school cases for the South and then President Eisenhower took Chief Justice Warren by the arm as they were walking into coffee, and according to Warren speaking of the Southerners, Ike said to Warren, "These are not bad people. All they're concerned about is to see that their sweet little girls are not required to sit alongside with some big overgrown bucks." And as Warren tells it, he never went back to the White House and he was appalled and felt that Eisenhower did not adequately or fully support the school desegregation decisions. Was Warren being unfair?

David Nichols: Well, that's a complicated question. That story, how many of you have heard that story before? It's all over, isn't it? Almost every book you pickup, that apocryphal story is in there and scholars have generally assumed that if that's what Eisenhower said and that's who he was, we don't need to know anything else. That's a problem. I can't disprove the story although we don't know the context of the conversation. Actually Warren, in his memoirs, didn't use the term bucks, he used Negros.

Nina Totenberg: He used Negros and there's an asterisk at the bottom.

David Nichols: It's an asterisk at the bottom. Warren's memoirs are posthumous and that presents some problem, too. But anyway, it's an awful story, its awful to my ears, makes me cringe. Although those kind of racial stereotypes I have to tell you were uttered by many, many white men in the '50s including lots of people that we totally respect. The only source for that story is Warren's posthumous memoirs. Clearly, Warren's purpose in telling the story is to paint Eisenhower as a racist who is against Brown. Now, this happened by the way on February 8, 1954 so Brown, the decision, came on May 17th 1954. If you read all of Warren's memoirs, you have to ask why would he tell this story and ignore Eisenhower's appointments to his own bench like Harlan and Brennan and Stewart? Why would he ignore Eisenhower's desegregation in the military schools and his desegregation of the District of Columbia schools? Why would he really in effect deprecate his own appointment? I have an answer to that; I'm not sure you want to get into it yet Nina, but I think it was presidential politics, not Civil Rights politics, that these guys were presidential rivals always and I have reason for thinking so. But even if we say for the sake of argument the story is true, I have to tell you it's not all there is. It's not all the evidence. And again, as I said earlier, you have to look at what Eisenhower did, not what he said and it just is not appropriate scholarship to say well if he said this we don't need to look at his appointments, we don't need to look at Little Rock, we don't need to look at Cooper v. Aaron, we don't need to look at any of those things. These are flawed human beings, but these two guys were rivals in ways that I don't have time to explain here, but I invite you to read the book.

Nina Totenberg: Let me ask Judge Hufstedler here, you were Secretary of Education in the 1970s, which was a period that although 20 years after Brown, really the Supreme Court really didn't say to the South "Do it now, no more monekying around." They really didn't say that until 1969. So you were dealing with the immediate aftermath of the actual implementation, real implementation across the South of Brown. There's a lot of scholarly debate about whether Eisenhower did as much as anybody reasonably could who was President of the United States without causing a civil war, that this was simply not something that was doable instantly or could he have done more?

Shirley Hufstedler: He undoubtedly could have done more retrospectively but these issues cannot be dealt with solely retrospectively. It would have to deal with things as they are on the ground. I simply add that the notion was extent in the far west and sometimes in the North that segregation was a moral problem of the South that it had nothing to do with the North or the West. People did not find out otherwise until busing came along because then it was necessary for people to face the reality that the discrimination had been practiced throughout the United States had come to roost in the effect on economics on all people all of color and the effect therefore upon where people could live, what kind of jobs they could have. So you have to look at what the whole picture was and part of the efforts that were made to desegregate in the South had a great impact upon the rest of the country when at first people didn't realize there was any impact on the rest of the country. Others who had better sense knew that was not true, but other presidents have had to deal with the reality that when you begin to tell people what is the real truth about what was happening, you get a lot of resistance. Those who'd been subject to such discrimination have to give some comfort to the idea that it wasn't only people of color against whom discrimination was practiced; it was against half the population in the United States, that's female. It didn't turn out that people understood that there was any connection between the kind of discrimination practice against people of color and females because it had to be true; it was just too close for people to see it. So one has to understand it's taken a lot of education to begin to have people recognize not only in the general population but in the political figures on the nation, that we have to understand what the history really was, not what we pretend like it is, so it's taken time. It just goes to show that education is a process; it is not an instantaneous event. I think it's been a lot of time for people to understand all the kinds of roots of these particularly noxious weeds that have affected the society.

Nina Totenberg: Okay, Professor Dorsen, five minutes.

Norman Dorsen: Thank you very much. I'm not going to finish the whole thing, but I will say this, that the thesis I present in this paper is that least in the civil rights area progress will not occur at least for the presidency without both a favorable political context and a decision maker committed to Civil Rights. I don't want to go into the detail because I don't have the time. As far as Eisenhower is concerned, there are two stories. But I am forced to say that the overriding fact in my opinion is that he did not give moral support to Brown v. Board of Education when it was decided. He said, as Mr. Nichols well points out, personally desegregated Washington, and he said the courts must enforce the law. But he did not say it was "just" and he did not repeat that on many occasions when he had the opportunity. As far as Little Rock is concerned, he deserved great credit, but nevertheless, when he was asked why he did it, he did not say to the best of my knowledge -- again, Mr. Nichols may correct me -- that was on behalf of civil rights

integration but rather it was to avoid anarchy, a very important value but a different value. When one deals with as many as Presidents as I can, in the oar it would have been clear if I could have expressed them thoroughly. Ronald Reagan's administration aggressively opposed, and he moves to increase diversity and racial matters both in strong public statements, namely in an irony by his Assistant Attorney General for civil rights, Brad Reynolds, and by the filing of numerous briefs in the Supreme Court against Civil Rights claims, it is true that Reagan supported the compensation to Japanese Americans who had been confined during World War II, making reference to the same position he took when he was in Hollywood many years before. The case of Richard Nixon is more ambiguous. His administration opposed effective remedies; busing of students was most well known for implementing Brown and equally opposed the early stirrings of affirmative action and employment for African Americans. These decisions were consistent with Nixon's successful Southern strategy for the Republican Party in the 1968 election, which tied Nixon's fortunes to conservative Southern democrats. On the other hand, Nixon issues three executive orders to help establish and promote minority business, and there's less evidence on his part of a concerted effort against civil rights as distinguished, say, from his permanent campaign against expanding the rights of defendants in criminal cases. A fourth president who might be mentioned here, the first President Bush, did not assert a strong civil rights position and then the high profile act, vetoed the congressional bill to undo a series of Supreme Court anti-Civil Rights decisions. On the other hand, Bush later signed a somewhat tailored version of the statute. He avoided anti-Civil Rights rhetoric and he supported diversity through affirmative action in the Working Broadcasting Channels for TV and radio. At the other end of the spectrum, the president who unqualifiedly had both the personal commitment and the favorable political context to further the cause of racial equality was Lyndon Johnson. With everyone's view of LBJ as a person or his calamitous involvement with Vietnam, he conclusively proved his devotion to Civil Rights by aggressively promoting the Historic Civil Rights Act of '64, the Voting Right's Act of '65, other legislation and though executive action designed to help African Americans, and more generally, the poor. The context of the mid '60s was favorable and the aftermath of President Kennedy's assassination soon after his dramatic pro-civil rights speech at Howard University put racial issues on the map. I note in passing as evidence of a different sort of the age we're in, that more Republican Senators than Democratic Senators voted for the Civil Rights Act of 1964. President Jimmy Carter may be included in this category, although the record is somewhat sparser. As a native Southerner, he grew up in the world where black and white were divided, and like President Clinton, he emerged with strong anti-discrimination feelings. The Congress was controlled by Democrats during his term; although his relations with the legislative branch were often difficult, he sometimes was inept and the Iranian hostage crisis preoccupied him and the country the last year in office. But Carter nevertheless took several strong affiliates on behalf of civil rights. I'll just finish Carter, Nina. He supported affirmative action for both race and

gender equality, including minority student representation in tax exempt private schools, preferences to minority broadcasters, minority business enterprises, and in addition, in the celebrated Bakke case, he resolved sharp differences within his administration by authorizing the Supreme Court brief that was sympathetic to affirmative action in medical school admissions. And as Bill vanden Heuvel noted yesterday, "President Carter effected a transformative change in the role of women in federal courts, and in politics, generally." So I got half-way through. Thank you very much.

Nina Totenberg: I think the question that you raise, and let me put it in rather blunt terms, and I'll just put it to the panel, unfortunately, there's no member here from the Reagan or Bush administrations, so in some ways it's not fair, but I think the question you raise, you are postulating that Republicans, as a party have generally, in the last 20 to 25 years or so bailed on the civil rights revolution. So Juan, what do you think?

Juan Williams: I didn't hear that. I mean it's interesting. I mean I didn't hear that at all. What I thought he said was that when it comes down to things like the Eisenhower Administration, for example, that you saw enforcement of the law if not statements of moral authority in support of the idea ...

Nina Totenberg: We're talking about post-Eisenhower.

Juan Williams: Well, even in post-Eisenhower, if you come forward to Nixon, I think that what the Professor said was that Nixon authorized, I think you said three, I can think of several steps that he took in addition, that required affirmative action area, federal contracts and the like. And, then if you come forward, again, under the first President Bush he reauthorized civil rights legislation...

Nina Totenberg: Well, let me just ask Norman. Norman, were you saying Republicans have bailed on the civil rights revolution?

Professor Norman Dorsen: I think essentially Juan Williams summarized my position accurately. I didn't take a negative position on Bush. I pointed out first President Bush- I know it's good to have controversy when you're a moderator.

Nina Totenberg: No, but I want to know, what are you saying?

Professor Norman Dorsen: Well, I said what I had to say that Bush did not do what he could have done initially in signing a bill. He signed a different bill. He was not anti-civil rights in rhetoric and he did positions in favor of some civil rights initiatives. So, I regard that as a mixed position.

Nina Totenberg: Well, if we look at any big civil initiative in Congress today, it certainly would not be that Republicans are out voting the Democrats in favor of them. When I came to Washington, these many years ago, I would say that the leadership of Democrats and Republicans really agreed on most civil rights proposals. That's really not true today. There are very sharp differences in approach, whether it's affirmative action or, I bet you my guess is you're going to see some of that in the proposals to undue the Supreme Court's decision this last term in Ledbetter, a case involving when, how much money and what period of time women can sue and other minorities can sue for, a decision the Supreme Court issued. I think you're going to see very sharp differences. And I'm wondering if, on this panel, what you think the explanation for that, those differences are. Is it sheer politics? And of course, politics represents real ideas. Is it a realignment of the parties, where the Dixiecrats having disappeared and morphed into something very different but now a part of the Republican party, the southern block is a part of the Republican party. What is the reason for this difference in approach today?

Juan Williams: Let me just try to offer what, in my mind, is a real sort of definitive break in time and that would go from the period of the Warren Court, Nina, which, I think is defined by Brown, but also by an attempt to have an expansive view of what the Court can do under the limits of the Constitution, to repair the damage done by the history of rank segregation, legal segregation. And then, you come forward, and you get the Berger and Rehnquist courts and their interacting, again, with a society that I think is saying, "You know what, we'll only go so far, we're not comfortable." And, I think you saw this in the most recent decision with Seattle and Louisville, where you come down with a more conservative court saying, "It would be a violation of individual rights. And that individual rights must trump this effort to somehow engineer or steer the society towards some pre conceived notion of racial balance in the schools."

Nina Totenberg: Anybody else?

Professor Norman Dorsen: Well, I'd say one more thing, I think whoever mentioned this maybe Mr. Nichols, it is true that Eisenhower appointed justices every one of whom supported Brown. I was a law clerk to Justice Harlan and he felt very strongly in favor of Brown v. Board of Education. On Nina's more general comment, I purposely didn't want

to discuss President Clinton and the second President Bush because it's too close. I wanted to some perspective, since I regard this as a historical conference.

Nina Totenberg: Professor Nichols.

Professor David A. Nichols: Yes, first Professor Dorsen, it's an honor to be on the panel with one of the great civil liberties champions of our time. I'm grateful for your comments. And I'd like to supplement them a little bit, if I could. You mentioned Justice Harlan, that's a particularly interesting case. That was the first appointment that Eisenhower made after Brown. So, John Marshall Harlan II, from New York, not from the South, from New York, was the namesake and the grandson of the lone dissenting justice in Plessy v. Ferguson in 1896. You cannot tell me that the segregationists did not understand that symbolism. And I assure you, Mr. Eisenhower was deeply involved in these appointments. He didn't just delegate them. I mentioned Bill Rogers, earlier, we could talk about that later, if you like, but I can actually share with you reprimands that Eisenhower gave to Rogers about not involving him adequately in some of the appointments after Herbert Brown <inaudible> because <inaudible> were hand in glove about that. But the question of what Eisenhower said Little Rock, can I give you his most full statement on that, which is May 14, 1958, he says, "I did not send troops anywhere because of an argument or a statement by a governor about segregation. There was a court order and there was not only mob interference with the execution of that order, but there was a statement by the governor that he would not intervene to see that the court order would be exercised." Now, to understand Eisenhower, you have to understand that court order was from Judge Ronald Davies a pro-Brown Eisenhower appointee. And you have to say, ask yourself, what law was Eisenhower enforcing? Was it Plessy? No. It was Brown. And this is where Eisenhower, frankly, is a bit devious. But the question of moral support, you're right sir, he didn't provide the kind of moral support, and I regret particularly that would have inspired blacks who were suffering under the system. He did not. But, I have spent the last few weeks since- after the book was done, looking in vain for enthusiastic endorsements of Brown by Harry Truman, Lyndon Johnson, John F. Kennedy, finally said something about two years later. Right afterwards, southerners spoke out, black leaders spoke out that the politicians that we come to associate with great civil rights progress and they deserve it in the '60s did not speak out on that moral issue right after Brown decision.

Nina Totenberg: Do you think that presidents, in general, up until when the Court really sort of got of this school desegregation business, do you think that presidents viewed this, even though they may have 100 percent agreed with the Court, as something of an albatross around their necks? And I'm talking about all of them, Nixon, Kennedy, Truman, Eisenhower, even Carter? I mean these were such enormously politically

difficult issues, whether it involved bussing in Boston or desegregation in Charlotte-Mecklenburg. These were the kind of issues where people were so angry about where their children were going to go to school. It moved from a period of rank racism to a period in which people said, "What do you mean? I worked hard to get this house, to live here and you're telling me my child has to be bussed across town for some theoretical clap trap so you can feel good?" I mean was this issue in the last analysis just trouble for presidents?

Professor Norman Dorsen: I would say it was more trouble for the Supreme Court after the decision, because then it became the Court's responsibility to enforce the decision and all sorts of issues came up that the Court had to deal with. For presidents, there were issues of which person to put on the Supreme Court and the lower courts, and that of course, is a - this was a complicating factor. But once Brown was decided and Brown II, the ball was, in a way, moved to the Supreme Court which, over decades, has grappled as you're suggesting with some difficulty over these highly contentious issues.

Juan Williams: But, I think it's key to say, enforce, I think, is the wrong word. They were able to justify it, but the enforcement did lie with Eisenhower. And Eisenhower did act to enforce the law by sending the 101st Airborne to Little Rock which was a- it's not just a gesture, it risked a second civil war. And, you must remember of his combative meetings with Governor Faubus that he was insistent that he abide by the law of the land as set by the Supreme Court.

Professor Norman Dorsen: I stand corrected. I should have used the word implement. I think your point is very well taken.

Professor David A. Nichols: And, I'd like to make- balancing off what you said Juan, I'd like to make the point that Eisenhower did not have to send the troops. Because if keeping the peace, keeping violence down was the issue, then Faubus and the Arkansas National Guard would have kept the peace.

Juan Williams: Wait, no. The National Guard was keeping those nine children out of school.

Professor David A. Nichols: Well, they would have put down violence. They just wouldn't have integrated the ...

Juan Williams: They were inciting violence, in my opinion.

Professor David A. Nichols: No, I basically agree with you, because I think Faubus was wrong. But I'm just saying Eisenhower sent the troops, as he said, "To enforce the federal court order for school desegregation, not just to put down a riot."

Hon. Shirley Hufstedler: Well there's a significant difference, of course, between the president deciding to obey the law, and on the other hand, a decision to implement the law in a way that makes a difference. You have to see that those are different concepts. And, it's true that Eisenhower obeyed the law specifically. The question in my mind has always been, was that a legitimate reason or was it an excuse for not doing better? I don't know.

Nina Totenberg: Before I start asking some of the questions from the audience, I want to turn to the subject of the revolution for women. For want of a better expression the Ruth Ginsberg Equality Revolution because she, certainly, in a legal sense led it, was framed in terms of men's rights too. Women, of course, never got the strict scrutiny test that they wanted. I've always wondered whether maybe the Court and the White House was waiting for the Equal Rights Amendment to pass, which of course, it never did. But, in the last analysis, I think, it's fair to say that women's rights advocates really won the day in any real sense in the '70s and '80s. My first question is, did they win because the Bill Rehnquist's of the world, the Chief Justice who had descended from most of those opinions that attorney Ginsberg won, had daughters who grew up and they saw that they wanted a chance for them to be the same kind of chance as their sons? Or did women win because presidents and congresses realized that there are more women who vote than men? What was the impetus here? Because you can't say there wasn't a change. I knew Chief Justice Rehnquist when he was an Assistant Attorney General, and I distinctly remember, as a young woman in my 20s sitting in his office and talking about women litigators and him saying to me, "Nina, I don't really like seeing women in court. It's just not very feminine." And I bet he doesn't- if I had told him that when he was, 30 years later, 20 years later, I'm sure he would have said, "I didn't say that," because he didn't believe that any more. He absolutely didn't believe that any more. He changed. The country changed. Fathers changed. Husbands changed. But was is the Court? Was is the President and Congress? What was it?

Hon. Shirley Hufstedler: It makes a big difference when one has children of one's own to whom these issues definitely effect. Somehow, love makes a difference doesn't it? I think it has a great deal more to do with love than politics. I think people change their minds when they find out up close and personal what education really means and how

your own children educate you. And of course, the women's revolution was not exactly without its casualties. But, there has been a significant difference, I believe, in the acceptance of people in the United States with a racial revolution after the revolution was, at least, mostly accomplished with respect to females, and it made a big difference. And of course, that female population includes daughters too. I think people change their mind on the basis of what they eventually learn. They may not learn very fast, but there's some lessons that become, really quite indelible and that's one of them.

Professor David A. Nichols: Judge, would you agree that we can't say the Supreme Court has done much to move that forward?

Hon. Shirley Hufstedler: It hasn't moved it back either. It could have been more forthcoming on the issues, but remember there's still plenty of this sets of being unnerved by how much has been accomplished all ready, you know, not everyone of these changes has been totally welcomed. We have to understand that. People, particularly where a man has lost out to a woman, the enthusiasm about the women's movement, as well as anyone who has lost out to a person of color, makes a difference on whether they think it's a good idea or not.

Professor Norman Dorsen: Yes, you mentioned Ruth Ginsberg. Ruth was the architect of the plan that established the rights of women under the Constitution. She was a staff member of the American Civil Liberties Union, when she created and developed a plan. And there's one point you made, Nina, that's particularly important, she chose cases as much as she could to advance the rights of women by having men as plaintiffs. Men who were being discriminated in certain situations and by establishing the principle of sexual or gender equality, and I want to tell you that plenty of people on the ACLU board gave her plenty of grief for doing that, who felt that why are you representing all of these men, but she was absolutely right. She knew her courts. And there's much more to be said about that, but it was one of the defining aspects of her plan that, in general, as Judge Hufstedler said, worked.

Nina Totenberg: So, I have a sort of a snotty question, here, is it a win for women when the first female nominee for the presidency may be the wife of a former president? And how much of a win is it when the first female justice is replaced 25 years later in a generation of new women lawyers, and judges later, not by a woman, but by a man?

Juan Williams: This is going to sound like namedropping or something, but it's not intended to be that. So I was talking to President Bush about three weeks ago and I was

asking him about his commitment to diversity and the fact that despite all of Bill Clinton's claims to have a cabinet that looks like America, in fact, Bush's cabinet has been a more diverse cabinet. And said, but when it comes to the issue of Supreme Court nominations you have put two men on the Court. And he said, "Wait a minute, hold on, I tried to put a woman on the Court," and of course, he's talking about Harriet Miers. And said that, "He ran into opposition and he thought that she would have been a great Supreme Court justice but was denied." And what was interesting to me is that, obviously, we have only one woman on the court now that Justice O'Connor has stepped down. Justice O'Connor said that she was hopeful that there might be a woman. I think that Laura Bush was putting pressure for there to be a woman. I think, lots of people were hopeful and thought that it would be progressive for the Court. But, again, reflective of the politics of the time, and in this case the politics of a highly polarized American people, and a conservative base that wanted to be sure of exactly what they were getting not risk someone who, as some of the conservatives might say would grow during their time on the Court, that was pressured to have someone who was more doctrinaire and I think that's what you ended up with.

Nina Totenberg: Do you think President Bush would have named a close advisor who had that little experience and that little support within his own body politic?

Juan Williams: You're asking do, I think President Bush would have named a male...

Nina Totenberg: A male with that little experience and that little internal support, would he have done that?

Juan Williams: I think that Albert Gonzales was being groomed for the job, Nina.

Nina Totenberg: But he didn't name him.

Juan Williams: Because even before- because it was so well known that, I think, Gonzales was, you know, the trial balloon was exploded. I don't think that was the case with Miers.

Nina Totenberg: This brings us, in some ways to the question of Affirmative Action in terms of race on the Supreme Court or not Affirmative Action, just representation. Thomas replaced Marshall. And there are those who argued that in putting somebody on the Supreme Court who does not, by and large represent the views of the vast majority of

African Americans, not on every single issue but on the great issues, civil rights issues of our time that that was a disservice, what do you think Juan?

Juan Williams: Well, I don't think that a Supreme Court justice should be a poll take and should necessarily represent the attitudes of women, as a woman, necessarily or the majority opinion of American women was represented in the rulings of Justice O'Connor or anybody else who's a woman, and I don't think that should be the case for a black or a Jew or anybody else. I think you should be justice of the United States. But, I think this has political consequences, and this is where we come to the presidency. When it was a matter of putting Thurgood Marshall on the Court, President Johnson hesitated because he realized that the Dixiecrats who were on the judiciary committee were going to oppose this man who had been their opponent for so long and had been the leading counsel in *Brown v. Board of Education*. And he really insisted he be the Solicitor General, gain the experience and prove that he had the intellectual capacity to do that job. That, to me, is understanding where you are and who you are in history going forward, so that's the way that I would view it.

Nina Totenberg: I don't think anybody would argue that a justice is supposed to be like a Congressman just representing some viewpoint. But the argument, to press it for a moment, is that it was a disservice to name somebody who is really in many ways on issues of civil rights has a contrarian view. Now it is the view of a substantial number of minorities, but it is a very small substantial number, I guess I'd have to say. And if you have only, does that- are you having a Court that looks like America that has one black, one woman, and the black member of the Court really is very different than his community on a large number of the big issues that are the big issues of the day.

Juan Williams: Well, I don't know that he's different than Bill Hastings [ph?] and so many other prominent black lawyers that were involved in that cause, Bill Coleman [ph?], a Republican, just to mention one for you Nina. But, when you come forward with Justice Thomas, I think it's not the question that he would say, "You know what I'm for segregation." No, I think that he has a different view of how you achieve social and racial justice in a society and he's trying to adhere to that but he's outside on issues like affirmative action. He's outside on issues like preference, and certainly if you saw, we just talked about those recent school cases, he's opposed even to voluntary school integration. That would put him outside of the public opinion mainstream in black America, but it's not the case that it would mean that he is someone who is opposed to equal rights or justice across racial lines.

Nina Totenberg: Norman, do you have any thoughts on this?

Professor Norman Dorsen: Well, I would defer to Juan. That was a very good thumbnail analysis. From my perspective, there are so many other issues on which I feel strongly that Justice Thomas has been a disappointment, that it's hard for someone with my views to greet him favorably. The biography of Justice Thomas discusses some of the points that Juan made. And of course, he presents a justification for his philosophy and it's certainly a very individualistic philosophy. But, taken as a whole Justice Thomas has been, to me, a big disappointment in terms of the full range of civil liberties and civil rights issues.

Nina Totenberg: One of our questioners has a very interesting question about a subject I have not raised, and then I'll come back to some other ones that are follow ups to what we have talked about. On the question of civil rights, the questioner asks about the decision regarding the rights of the mentally ill, particularly evolve the death penalty, civil commitment, and sex offenders. Now, those are very different subjects. But, certainly, when you see a lot of Supreme Court cases, you realize how many of them involve people who are very, very mentally disturbed. In the death penalty cases there are many cases in which people are not technically insane, but you would in any rational sense call them crazy. So, in the sex offender area, we now are, the Court has allowed registration of sex offenders without distinguishing, really between somebody who had a consensual relationship, for example, with a 17 year-old girl, is a sex offender, technically and somebody who is, what we more traditional think of as a sex offender, they all have to register in most states. And we now having had a lot of experience with repeat serious sex offenders, allow them to be civilly committed after they serve their terms. So, this is a rather big bunch of stuff to comment on, but, I think it does probably fall into the category of a civil rights discussion and I'm wondering whether anybody has any thoughts?

Hon. Shirley Hufstedler: I guess most of us don't think about that as a civil rights issue, but rather as an issue of when criminal responsibility should begin and end in terms of mental disabilities of various kinds. I don't think people put it in the same category as racial discrimination, for example. There are many, many issues in criminal justice that, I think, most people acute uncomfortable if they think about it very much and whether one should be held to the standards of people of normal capacity when they are not of normal capacity is not only a legal dilemma, it's a moral dilemma. I don't think people have really understood to make up their minds what they think about it. What should be the moral responsibility of someone who has mental illness for some kind of offense, it's rather like saying, should one be responsible for a number of issues if a youngster of yours decides to go do drugs, what does the parent do about it? Do you want to have them committed? Do you want to have them excused from responsibility at all? I think these are issues upon which there is no public consensus at all. I think they are issues upon which each

of us really struggles, because we strongly feel in the country, and the Courts certainly feel that you have to have some basis for mental responsibility before one can commit a whole series of a varieties of crimes. But in many instances, the public generally has not come to grips on what ought to be done about it, and I don't think the courts have either.

Nina Totenberg: Now, you know why she was such a good judge. She's such a thoughtful person. One of our questioners asks, "Where will the Robert's Court draw the line in reversing affirmative action decisions and reversing the expansion of civil rights?" Any takers?

Professor Norman Dorsen: Well, so much depends on what issues come up. I just want to say a word on behalf of one justice who's name was mentioned yesterday briefly, but Justice Powell's opinion in the Bakke case turned out to be a very wise and prescient opinion when it was decided - it was the deciding vote in the 5-4 case, saying no to quotas, but yet, yes to some consideration of that special for African Americans. A lot of people on both sides, attacked him, but his opinion, which has survived, to a large extent to the present day in part due to an excellent opinion by Justice O'Connor, showed a sophistication that was greater than many of the people who, at the time, opposed him including some civil libertarians.

Professor David A. Nichols: I'd like to comment on the Seattle case, the June 28 case that the current Supreme Court ruled on, that Justice Roberts wrote, at least the plurality decision, because, I do think, it is a pretty calculated attempt to roll back Brown. Now, Brown had a lot of flaws, we know that. And it wasn't very enforceable in many ways, but, I still think, as I said to you before, with all of its flaws it was a beacon light for justice. That the intent of Brown was to begin to set the principle, at least, that justice needed to be implemented. And the famous phrase from Chief Justice Warren is, "That separate educational facilities are inherently unequal." That Justice Roberts said in his opinion, that the central premise of Brown was, "Not inequality of the facilities, but the fact of separating of children on the basis of race." To Robert's any racial reference is unconstitutional. Curiously, enough, that was kind of basically the conclusion in Plessy v. Ferguson that race could not be considered. And so, in a subtle sort of way in very modern dress it reinvokes that spirit, now the issue, and I don't want to get too complicated about this, it's between de jure, that is legal segregation that we had with Brown and de facto segregation that we have now. But to me, it's a travesty to equate the voluntary diversity programs in Seattle and Louisville somehow constitutional with the repressive violent Jim Crow system, I just don't know how you can do that. And, I think, ultimately the issue is Affirmative Action, the issue is what we came to know over the years as reverse discrimination. And I'm very concerned that your questioner asked, "Where are they going to draw the line?" I don't know. It will be interesting to see what

they do on some of the issues that come up on voting identification this year, whether it has implications that way. But, Justice Robert's famous line now is, "That the only way to end discrimination by race is to end discrimination by race," oh, if the world were only that simple.

Hon. Shirley Hufstedler: Well, I profoundly disagree with that decision for the reasons you have commented about because it doesn't address reality. And, I think, that there's little doubt in my mind that you're quite correct, so I have no dissenting opinion from your views.

Juan Williams: Let me just add that we're sitting here with Justice O'Connor who said, "That affirmative action had maybe 25 years to go," this is several years ago. And, I think, that what we've seen with this latest ruling and with the body politic in terms of what know from opinions of the American people is that Affirmative Action has even less time in terms of support. And given the world view of the people who have not advanced to the court, the new majority on the court, I just don't see that it's going to have much prospect, at all. You have Justice Kennedy sitting there saying, "Well there may be ways in which you could seek to achieve something like racial diversity in schools." And now, every civil rights school desegregation lawyer in America is looking for just that way. Is it a matter of how you place schools in communities and the like. But, on the larger issue of Affirmative Action in admissions or in jobs and the like I think that support is now gone. We have gone from the point where you had the Warren Court that was expansive in terms of looking for ways to say that we can repair the damage done by segregation. When Professor Dorsen mentioned the Civil Rights Act of '64, the Voting Rights Act of '65, when they were challenged as being unconstitutional, the Courts reached in order to justify them and to say, for example, when they challenged the Civil Rights Act, I believe it was under Title II public accommodations and such, said, "You know, this is a matter of privacy and we can choose who we want to associate with," it was a very aggressive Supreme Court at that time that said, "Wait a second, intrastate transportation could be infringed upon by this. And we will go to all ends to justify the idea and the end of racial equality." And then, you come forward in time and you to something like school integration in North Carolina, and they say, "Yes, you can do that across lines because you must be aware of racial diversity in order to deal with the fact and history of racial discrimination and the oppression that is spawned by it. And then you come forward to this Court that says, "No, we're not taking it into consideration at all." And, I think you have a clear trend line in terms of where we're going, in terms of schools and in terms of affirmative action and that is that we are fast approaching the end.

Nina Totenberg: So, you agree with Justice Thomas, in other words, in terms of predictability here, anyway, that race is sort of a like a shoe size, a fact, but an irrelevant fact.

Juan Williams: You're asking if I agree?

Nina Totenberg: I'm asking if you agree that that is where we are - that is Justice Thomas's expressed view that it's like a shoe size, a fact, but an irrelevant fact. Is that where we are going? I guess the follow up question to that is, is that realistically where you can go in an American society?

Professor Norman Dorsen: Juan has asked me or ceded some time. I agree with the comments of my colleagues here. But, I will state a personal anecdote. I clerked at the United States Supreme Court in 1957 and '58. We had the practice, which exists to this day, of having the law clerks meet with each Justice, you don't always get all of them, the schedules are busy and just have a private informal conversation. One of the justices in my day was Harold Burton of Ohio, who had been a Republican, and if I remember correctly, had been a member of the NAACP in Ohio. And one of my fellow clerk's asked Justice Burton, "Well when Brown v. Board of Education was decided," and he was one of the justices on the Court, "How long did you think it would be before the problems presented by Brown v. Board of Education would be resolved." He thought a moment, and he said, "Well about 20 years." And then the clerk asked him, "Well how do you feel now?" And he smiled ruefully and said, "A lot longer." And predicting how these things are going to go and what is needed is very difficult. I don't disagree with the trajectory that Juan described, but it's a complicated world, things can change. And I don't think the issue of racial justice, putting aside any particular legal doctrine is going to resolve very quickly.

Professor David A. Nichols: Juan is certainly correct on the way things are going, your assessment of the political reality is quite real. But, I do worry that we now celebrate Justice Kennedy's separate opinion which really says, "You can use race if you do it as a subversive activity." And, I would say, again, that Brown, originally was aimed at justice, not a racial abstraction. If I can borrow the Eisenhower phrase that titles my book, "They were turning a matter of justice into just a matter of color."

Juan Williams: You know, at the end of his time on the Court, I had written a piece about Justice Marshall for a magazine. And he was a cantankerous guy, a very difficult person, especially towards the end of his life. And I had been very gentle in the way that

I questioned him because I wanted the opportunity to come back for the next interview. So, at the end, I said, "When it comes to Brown, I'm seeing there's lots of static in the air," at that point it was almost 40 years after Brown. For example, I said, "I just read a piece in the Howard University Law Review that said you made a mistake by focusing on integration in the Brown case, and focusing on sociology." Those of you who are law professors will know of the criticism of Brown that it was too sociological and the like. "And the contrary view as expressed in the law review article was, you should have focused on the idea of quality schools for all children without regard to their race. That you should have made sure that schools were good for a child, no matter where that child might be, no matter what that child's race and we shouldn't have focused on who's sitting next to whom in the classroom." And I also added that I had been to Oklahoma City where you had black parents saying, "They were tired of having their children bussed across town to be greeted by low expectations and hostility by whites who felt that their schools were being invaded and the like, and they wanted neighborhood schools where they could participate in the PTA and get involved, and all of this." And so, I said, "This was in some sense a repudiation of what you had done in Brown. And when you look at the reality of increasing segregation, the fact of segregation in America's public schools today, do you feel defeated?" And Justice Marshall who could be impatient with me looked up and basically said he, "Wasn't after any Norman Rockwell picture of America with black and whites and Hispanics and Asians, all seated next to each other. That it was because you had segregationist political structure, school boards and politicians who were denying funds to schools for minority kids. And if they didn't have the threat that minority kids go to the same schools their children were going to, they were going to be slow, reluctant, they were going to be obstructionist in making sure that there were equal funding available to schools for minority kids." And that was his bottom line. By the way, I just want to mention here, the person that wrote that Howard University Law Review article, unknown to Justice Marshall and I, at the time we were discussing it was Clarence Thomas. And, I think, it's representative of the shift in the way that you get perceptions not only in the black community, we were talking about polling earlier and attitudes, but you get shifts in the black community, you get shifts in perceptions. You know, when I started out, I said, I thought that Marshall was in long lines of Fredrick Douglas and Dubois, and I think, Thomas is much more the Booker T. Washington character that he has the painting of Booker T. Washington in his chambers, much more Booker T. Washington and Marcus Garvey, if you will.

Nina Totenberg: And Malcolm X.

Juan Williams: And Malcolm X.

Nina Totenberg: You know, it's very hard to look back at these very turbulent times, the civil rights times and figure out and then try to overlay them on to current times and current views. But in the aftermath of Brown, there was a huge raft of federal legislation that was passed, the Voting Rights Act, the Civil Rights Act barring discrimination, public accommodations act, all kinds of laws. Women only got thrown in because they thought it was a joke, ha-ha, last laugh for us. And, in fact, they thought, putting gender in, I think, it was, as I recall, somebody put gender in because they thought it might be a poison pill and kill the bill. But, I keep wondering whether - and that, the Court upheld all of that legislation and it was very oppressive to States, that legislation because the federal government and said, "You can't do this. And the state government can't do this. You can't act like this anymore." And it invalidated, not only practices but state laws, I'm wondering whether the Court today would uphold that kind of legislation?

Hon. Shirley Hufstedler: It seems to me that the temperature that the Court is running suggests that the answer is not exactly three cheers for civil rights, I think there's a definite retreat. And that depends upon the composition of the Court. Of course, Justice O'Connor's resignation from the Court has made that a much more acute problem in the United States because she was a champion of what is, to me, the right answer. The question is not whether the answer is comforting. The question, is it right, is it just? There's no question in mind about how Justice O'Connor would come out on that issue, none at all.

Professor David A. Nichols: A little historic perspective that you'd expect from me. On Eisenhower it was that there was no statutory basis for the federal government intervening in the states for the '50s. People are mentioning in this legislation that you were talking about Nina, that we're so used to that being that the federal government can, in fact, withhold funds and have all kinds of penalties, those did not exist in the '50s. Strangely enough, the one thing that Herbert Brown and Alan [ph?] and Ike thought that they could do was send troops because there were precedence going back to the Whiskey Rebellion. They didn't mention Lincoln and the Civil War. With precedence going back to the Whiskey Rebellion where, to preserve order and enforce the law, they could use troops that no statutory authority and that's one of the reasons people haven't understood what was happening in the '50s was that legally there was very little that could be done. Now the wonderful legislation in '64 and the Voting Rights Act in '65 changed all of that. I'm certainly glad women got included in that. It still makes cringe every time I mention those five men that Ike has appointed to the Supreme Court. That was really awful and we still have a long way to go. But, that legislation, I would point out to you, I think, Norman mentioned that more Republican votes...

Professor Norman Dorsen: More Republican senators.

Professor David A. Nichols: Sir, that's the Eisenhower coalition, which first is put together for the Civil Rights Act of 1957. Prior to that, that conservative rRepublicans joined the southern Democrats to block all civil rights legislation. And when they got done with it, although Lyndon Johnson and his cronies diluted the legislation beyond belief, that the act they finally passed with 60 positive votes, 37 were Republican because I twisted enough arms behind the scenes to get that new coalition put together. And he went to bat, and helped Kennedy solicit votes for the 60- before Kennedy died votes for that legislation that eventually became the '64 act.

Nina Totenberg: Anybody else? Let me ask a couple of other questions that have come up here. Somebody asks a question about immigration policy and whether that's going to become one of the civil rights issues of our times, and how do our panelists see the presidency and the Supreme Court dealing with that question?

Professor Norman Dorsen: Well, the rights of aliens has been taken up the Supreme Court for many, many years. And until the recent events I'll call them the post 9/11 events, the Court had come to a fair consensus that discrimination against aliens was unconstitutional except when it related to a government function that aliens didn't have the right to be members of the state government, to the federal government. Of course, 9/11 has changed the world in so many ways and it's really complicated things. And I wouldn't want to be the one to say how this is going to play out over the next five or 10 years, but it obviously, puts more pressure on aliens and especially foreigners from countries that are regarded as, possibly, unfriendly, to the United States.

Hon. Shirley Hufstedler: I agree with the comment, but I'd simply say that sometimes I'd look around and talk to people and I really believe they've completely forgotten that this is a nation of immigrants. It just depends upon on where you immigrated from that makes a big difference in what the attitudes are. And, I would like to find someway to educate people to see that they ought to look through that façade and find out and realize how much each of those immigrants can continue to the country because all of them have. So, I can't say it's a panacea but boy it's a real big help if we can figure out how we can educate the electorate on the things that really matter, what makes the country go? You see. Every time you get a bunch of fussing about this, you find out that people want to edit out aliens who really help them in obvious ways. I talked to one of my friends, one day, about these issues, who was expressing some horror about being overrun by immigrants. And then I turned the subject, I said, "Who does your housework?" "I have a wonderful Guatemalan woman." Okay, that tells you where the attitude is and where it comes to roost. But this isn't translated beyond what is helping at the moment. I wish we could help people understand that the issues go far beyond who is helping me with the housework.

Professor David A. Nichols: Go ahead, Norman.

Professor Norman Dorsen: I was just going to supplement that since we're in the Franklin Delano Roosevelt library that Roosevelt, President Roosevelt once gave a speech to the Daughters of the American Revolution who were not exactly sympathetic to Roosevelt. And he started this speech by saying, "Fellow immigrants."

Professor David A. Nichols: I would just add Judge Hufstedler is so correct. Folks, we have a labor shortage in this country and the immigration issue is not going to go away. And just as we had to pass civil rights legislation in the '50s, and '60s to correct that situation, in some way we're going to have to have legislation, which will end up, eventually before the courts for the immigration situation. And we have not done our governance job. And sometimes, some of us get pessimistic about whether we're capable of doing it. But, I think, people thought we're not capable of doing some of the civil rights things in the '50s and '60s and later, that we did. But it's not going to go away. Building fences and deporting people and locking the doors, is not going to solve the problem. And we're enduring an anti immigration hysteria, which is not new in American history. We've had one about every generation, but we just need to get realistic. I appreciated your comments, Judge.

Juan Williams: And, I would add that I think one of the key differences that you were saying to pick up on what you were saying is that the current set of immigrants are people of color in large part, and that adds a key difference that plays into the way that the society is dealing with immigration or failing to deal with immigration. And with regard to the courts, that the key here, especially post 9/11 is that the courts not lose their place in this discussion and not be said that, "Well, we're going to have to take extra legal steps here in order to protect the country and somehow then short circuit it so that the courts don't have any role or say by the way that, not only detainees are treated, but that people who are here illegally are treated in our midst.

Hon. Shirley Hufstedler: I agree.

Nina Totenberg: Being here at this wonderful presidential library and wit this conference sponsored by all of the presidential libraries and we tend to take these for granted, they should not be. If you go into them, the enormous amount of work and resources that have gone into creating and maintaining those libraries. And, I would urge everybody who ever hears our voice to go to the one closest to you, it's a wonderful experience. But, we tend to view our presidents, our justices, our chief justices, we give to them in

retrospect, some attributes that are, perhaps, a little too godly because we love them. We love what they did. They saved us at very important times. They made enormous strides. But, as you read history, you realize that nobody is perfect. And, so, it was that I was once read the memoirs of Frances Biddle, for example, and found that President Roosevelt thought that perhaps we should not just intern the Japanese but the Italians and the Germans too, and Biddle thought that was really too much of an administrative problem. And, several of our people in the audience have reminded me, and Professor Nichols that President Eisenhower testified against desegregation of the military. And of course, Chief Justice Warren was one of the leading go get them guys for the internment of the Japanese, which all, of course, goes to prove that, I guess, nobody is perfect. And that maybe, I don't know what we should take from that, but that people do change. And that they learn from their mistakes.

Professor David A. Nichols: That's important, it is.

Hon. Shirley Hufstedler: Well, I think that people learn from their past mistakes. But, we must also recognize in one of the issue you mentioned, that changes can come about because the jobs are different. Each time, with respect to the internment of the Japanese, at that time, he was Attorney General of California, he had to obey what he considered to be the then law. That didn't mean he agreed with it. And, when he had an opportunity to take a different view, he did. So the idea that one does the job you've been given does not necessarily give you a prediction that's because that's what you really want to do.

Professor David A. Nichols: Nina, your point about growth is so important. And with Eisenhower, you mentioned the testimony, Eisenhower did that testimony in April of 1948 before the Senate Arms Services Committee. And, you've got to remember that segregation was the policy of United States government at that point. And I've yet to see a soldier go before Congress and testify against current government policy. But, anyway, then three months later or it was almost four months later, Truman issued his executive order desegregating the armed forces. And, I just have to point, since you started there, Nina, that while Truman issued the executive order he didn't enforce it worth a hoot. And Eisenhower did most of the work of desegregating the armed forces after he came into office, and he did not have to do that. He did not always election the blacks. And according to somebody as reputable as Adam Clayton Powell, Jr. that two-thirds of the combat units were still segregated in January 1953. And by October 1, 1954, there was not a single segregated combat unit left in the United States Armed Forces. But, back where I started, Eisenhower desegregated the federally controlled military schools for military dependence, too. But he grew. And, I think, part of my issue with the Stag dinner story and all of that is people tend to take one or two things that happened in 1954

and say that's all that Eisenhower was about. And one reason I shared the quotations from 1958 was he was in a very different point. And when he didn't have to he proposed comprehensive civil rights legislation in February of 1959 when he could have floated through the rest of his term and just done foreign affairs.

Nina Totenberg: I'm inspired by a question about women that is on the subject of change and societal change and individual change. Our questioner says, "Isn't it interesting that nobody even mentions that women are currently in combat and are casualties." And when we look at that, first the Supreme Court ruled that women didn't have to be drafted and has upheld restrictions on military service. But, the realities are that there isn't the same kind of front line today. And when you contrast that with the decision of the Warren Court, excusing women from jury duty because they had duties of hearth and home, they couldn't be soiled by going on a jury, you realize how different the world is today. And how many changes have become part of our life.

Professor David A. Nichols: Yes, that's when we had stag dinners. That tells you how different it was.

Nina Totenberg: And I'm going to conclude with one observation that anybody- I invite anybody to make any closing remarks, and we'll actually live up to our time restraints. And that is, there really was no more controversial decision of the Warren Court other than Brown and one person, one vote. And, we're still fighting over the implementation of Brown in many ways, the role of race in our society, Affirmative Action, et cetera. But, one person, one vote is like motherhood and apple pie. It is completely uncontroversial in America today. It is, if you went back and looked at the comments in the years following Baker versus Carr and Reynolds versus Simms you would have thought that it was the end of the earth and nobody would give that up today. It's just an interesting observation. Anybody else?

Professor Norman Dorsen: I'll make a comment on that, when the one person, one vote was decided the two strongest opponents of that principle were Justice Frankfurter and Justice Harlan. Justice Frankfurter was a great a great networker to put it mildly, and all of his former law clerks and friends were enlisted in the fight opposing the one person, one vote principle because it was getting the Court meddling into politics. One of the people who spoke very strongly against the decision of the Supreme Court was Henry Friendly who became a judge of the second circuit, chief judge, and one of the great court of appeals judges in the 20th century, at least. And underscoring a point that Nina was making, I was on a panel at Harvard Law School with Friendly, Judge Friendly on the centennial of Justice Frankfurter's birth. And in the course of his remarks, he said,

unprompted that, "I opposed Baker v. Carr, but I was wrong." And as Nina was suggesting, there's now a consensus. And I always felt there was a very generous thing and unnecessary for friendly to remind people that he had opposed the principle in 1964 but he did say that. And, as you say Nina, that sort of issue is, there's still many Gerrymandering issues floating around so it's not as if everything is solved, but that basic principle has been accepted, I think, throughout the country.

Hon. Shirley Hufstedler: All that goes to show is that education helps.

End of Session 3