

添付資料

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- 資料 2 2009.10 月号「eJournal USA」（米国国防省国際情報プログラム局発行）
「The U.S.Supreme Court : Equal Justice Under Law」
- 資料 3 The Kalb Report、2014/4/17
- 資料 4 2016/7/1 付日経新聞（ウェブ）記事
- 資料 5 2017/5/22 付 CNN（ウェブ）記事（資料 5の抄訳）

2015.7.11 日付日本経済新聞（朝刊）



最高裁の寺田長官⑤と共同記者会見する米連邦最高裁のロバーツ長官（10日、最高裁）

日米最高裁長官 司法交流を強化

34年ぶり来日

来日中のジョン・ロバーツ米連邦最高裁長官が10日、最高裁で寺田逸郎

長官と会談し、国境を超えて起こる問題への法的な対応や、途上国への司法支援などについても意見を交わした。米連邦最高裁長官の来日はウォーレン・バーガー長官以来

34年ぶり。

終了後に共同で記者会見し、ロバーツ長官は「日米の司法交流を今後も続けていく」と述べ、最高裁や下級裁判所、司法研修所などの多分野で緊密に連携していく方針を示した。寺田長官は「協力していく土台がさらに固まった」と成果を強調した。

ロバーツ長官は米連邦最高裁について「他の政治機構に影響する問題も時に判決しなくてはならないが、憲法の下で独立し、最善の努力をしている」と説明。日本の最高裁について「廉潔性や公明正大さ、独立した健全な判断をすることを確信している」と述べた。



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ABSTRACT

U.S. Supreme Court: Equal Justice Under Law [open pdf - 3MB]

"In Washington, D.C., stands the building that best represents the rule of law in the United States. That structure is not the United States Capitol building, where Congress makes the laws, but rather the Supreme Court building one block to the east. For the first century and a half of its existence, the High Court had met at the Capitol, a guest of the legislative branch. But in 1935 the Supreme Court at last moved to a home 'designed on a scale in keeping with the importance and dignity of the Court and the Judiciary as a coequal, independent branch of the United States Government.' The Supreme Court had grown immensely in respect, legitimacy, and prestige. Few recall that the genius of its first great constitutional decision, Marbury v. Madison (1803), lies in Chief Justice John Marshall's ability to craft a decision that avoided ordering Secretary of State James Madison to take any particular action. Had the Court done so, Marshall understood, Madison would likely have ignored its decision. By the time the justices moved to their new home, no one ignored decisions of the Supreme Court. Not President Franklin D. Roosevelt (FDR), who fumed as the Court ruled unconstitutional key parts of his New Deal economic recovery program. [...] And so it remains today. This edition of eJournal USA focuses on how the High Court functions. Implicit in each essay is a understanding that the way in which the Supreme Court conducts its affairs adds to its legitimacy, to its prestige at home and abroad, to its stature as guarantor of the rule of law."

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THE U.S. SUPREME COURT

連邦最高裁判所



米国国務省 2009年10月

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表紙カバー：米連邦最高裁判所ビル北側入り口にある、彫刻家ジェームス・アール・フレーザーによる「正義の熟慮」像

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本号について



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2009年9月29日、新しい集合写真を撮る連邦最高裁判所判事団。前列左から、アンソニー・M・ケネディ、ジョン・ポール・スティーブンス両陪席判事、ジョン・G・ロバーツ・ジュニア長官、アントニン・スカリア、クラレンス・トーマス両陪席判事。後列左から、サミュエル・A・アリト・ジュニア、ルース・ペーダー・ギンズバーグ、スティーブン・G・ブライヤー、ソニア・ソトマイヨール各陪席判事

ワシントンDCに、米国の法の支配を最もよく表している建物がある。それは、連邦議会が法律を制定する米国連邦議会議事堂ではなく、そこから1ブロック東にある連邦最高裁判所の建物である。米国の最高裁判所は、創設後1世紀半の間、立法府に間借りをして議事堂内で裁判を行っていた。しかし1935年に最高裁判所は、ようやく「米国政府の平等かつ独立した部門のひとつとしての法廷および司法制度の重要性と尊厳にふさわしい規模に設計された」建物に移転した。

そのころには、最高裁は広く尊敬を集め、その正当性と威信は大きく高まっていた。もはや知る人は少ないかもしれないが、違憲立法審査権に関する最高裁の最初の重要な判決となったマーベリー対マディソン事件の判決は、ジェームズ・マディソン国務長官に特定の行動を取るよう命じることを回避したジョン・マーシャル最高裁長官の巧妙な手腕によるところが大きかった。最高裁がマディソン国務長官の行動を命じる判決を下したならば、マディソンはおそらく判決を無視したであろうことをマーシャル長官は理解していたのである。しかし、最高裁が新しい建物に移転したころには、最高裁の判決を無視する者はいなかった。最高裁が、フランクリン・D・ルーズベルト大統領のニューディール経済復興計画の重要な部分について違憲の判決を下したときも、ルーズベルト大統領は憤慨しながらもこれに従った。ルーズベルトは、1936年の大統領選で大勝した後、最高裁判事の人数を増やすことを提案し、自らの政治目標にもっと好意的な最高裁をつくる機会にしようとした。しかし、ルーズベルト大統領の絶大な個人的な人気にもかかわらず、米国民はこの「裁判所抱き込み計画」に断固反対した。フェアプレーを保証し法の支配を支持するという最高裁の役割は、米国民の生活の中で確固たるものとなり、どんなに人気のある強力な政治指導者もそれを制限することはできなくなっていたのである。

そして、こうした状況は現在も変わっていない。『eJournal USA』本号では、連邦最高裁判所がどのように機能しているのかという点に焦点を当てる。どの記事でも暗黙の前提となっているのは、最高裁がどのように活動するかが、最高裁自体の

正当性、国内外における威信、そして法の支配を保証する存在としての地位を高めるという理解である。

本号では、最高裁の機能を説明する記事を集めた。これらの記事は、最高裁がいかに米国民の尊敬を集め、憲法制度に不可欠な役割を果たしているかということも説明している。ジョン・G・ロバーツ最高裁長官とエレナ・ケイガン訴務長官に序文を執筆していただいたほか、数々の法学者、ジャーナリストの寄稿をいただく光栄を得た。

『ロサンゼルス・タイムズ』紙の最高裁担当記者デービッド・サベージは、今期、最高裁で審理されるさまざまな訴訟について、また最高裁の判決の基盤を成す歴史的な判決例について述べる。パンダビルト大学のスザナ・シェリー法学教授は、裁判所の判決の各種要因について説明する。エール大学法科大学院教授で元『ニューヨーク・タイムズ』紙記者のリンダ・グリーンハウスは、多くの最高裁判事が自らの当初のイデオロギーから離れていくのはなぜか、という興味深い疑問を提示する。

9人の最高裁判事は、各自の法務事務官や大勢の裁判所職員の援助なしには義務を遂行することができない。元最高裁法務事務官で現在は弁護士として活動しているフィリッパ・スカーレットとのインタビューでは、法務事務官の役割、そして最高裁の内部事情を知ることができる。また、法廷書記官、執行官、判例編纂官、および広報官という4人の最高裁職員が、それぞれの仕事や経歴について、また最高裁に勤務するに至った過程について述べる。

最高裁は単独で活動するものではない。ミラ・グル・エリーは、連邦司法制度の人々と、世界各地の法律専門家との数々の交流について説明する。

また本号では、現職最高裁判事9人と退官した最高裁判事2人の略歴を紹介し、巻末には文献とインターネットの参考サイト一覧を載せた。私たちは、この米国の本質を体現する機関のポートレートを提供できることをうれしく思っている。

編集部



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連邦最高裁判所 — 法の下の平等な正義

序文

4 連邦最高裁判所

ジョン・G・ロバーツ・ジュニア連邦最高裁判所長官
合衆国憲法は、米国の政治制度における最高裁判所の
中心的な役割を規定している。

5 訴務長官の役割

エレナ・ケーガン米国訴務長官
政府に関連するあらゆる訴訟における米国政府の代
表として、訴務長官室は最高裁が取り上げる訴訟の
4分の3にかかわっている。

最高裁判事とその判決、および最高裁の機能

6 「法とは何か」の決定

デービッド・G・サベージ
最高裁担当ジャーナリストが、最高裁の権限の基盤に
ついて、また2009～10年の会期に審理されるいくつか
の訴訟について述べる。

9 サイドバー(補足説明) — 連邦最高裁判所に 関する基本的事実

10 図解 — 米国の裁判制度

11 影響力と独立性 — 最高裁判決における 政治の役割

スザンナ・シェリー

法学教授で著述家でもある著者が、法的見解に影響を
及ぼす可能性のある諸要因について概説する。

15 判事の変容

リンダ・グリーンハウス

ジャーナリスト兼法科大学院講師の著者が、時と共に
思想を変えていった判事の例を紹介する。

19 最高裁法務事務官の役割 — フィリッパ・ スカーレットとのインタビュー

元最高裁法務事務官が、その職務について説明する。

23 連邦最高裁判所判事団

現職および退官した最高裁判事の略歴。

29 舞台裏の仕事

最高裁職員4人がそれぞれの職務について述べる。

最高裁判所と世界

33 裁判官の協力関係 — 国際交流と米国の司法 制度

ミラ・ゲル・エリー

連邦司法センター国際司法関係局長が、世界各地の裁
判官のための交流プログラムについて説明する。

36 参考資料

序文

連邦最高裁判所

ジョン・G・ロバーツ・ジュニア
連邦最高裁判所長官



ジョン・G・ロバーツ・ジュニア最高裁長官

を明言していた。

戦場での戦いが終わった後、革命のきっかけとなった原則は憲法として文書化された。合衆国憲法は、個人の自由を保証するとともに、法律を作成・執行・解釈する人々も法律に従わなければならない民主的な政府を確立することによってそうした保証を実行する、米国民の間の盟約である。

合衆国憲法は、米国の政治制度における最高裁判所の中心的な役割を規定している。憲法によると、連邦最高裁判所は独立した司法機関であり、その判決は、世論や政府内の同位の部門の影響を受けない。最高裁は、法律そのものへの忠誠の原則によって制約されている。憲法により、最高裁は、当事者が誰であるかにかかわらず、合衆国憲法および正当に制定された法律の要求するところに従って、紛争に対する判決を下すことを要求されている。

連邦最高裁判所の判事を務めるという極めて大きな特権を与えられた者は、最高裁が、米国独立宣言を推進した諸原則、そして合衆国憲法によって体现され、現在も米国民を結び付けている諸原則に従うことによって米国民の尊敬を勝ち得てきたことを理解している。米国の不朽の民主主義の基盤となる、そうした革命的な諸原則が、世界中の諸国に刺激を与えることを、私は願っている。

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1776年、アメリカにおける英国の13の植民地が、英国の支配からの独立を宣言した。この新しい13州は、その力と統一を、いくつかの確固たる原則に求めた。彼らの「独立宣言」は、政府は人民に奉仕するために存在すること、人民には不可分の権利があること、そして政府は法の支配に従うことによってそうした権利を確保すること、

影響力と独立性 — 最高裁判決における政治の役割

スザンナ・シェリー



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最高裁の「同僚」判事。右からロバーツ長官とスティーブンズ、トーマス、ギンズバーグ、ブライヤーの各陪席判事

スザンナ・シェリーは、テネシー州ナッシュビル市のバンダビルト大学法科大学院のハーマン・O・ローウェンスタイン記念法学教授。『Judgment Calls: Separating Law From Politics in Constitutional Cases』(2008年)、『Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations』(2002年)、『Beyond All Reason: The Radical Assault on Truth in American Law』(1997年)という、憲法学および憲法理論に関する共著3冊があるほか、多数の論文および教科書(共著)3冊を執筆している。

シェリー教授は、最高裁判事の判決が、判事自身の政治的見解に左右されるのではないかという懸念が存在することを認めているが、そうした懸念は大きく誇張されている、と結論付けている。判事の判決を説明するには、判事の政治的傾向より、多くの個人・制度的な要因の方が重要である。

今から2世紀近く前に、米国の生活や慣習を研究した有名な学者アレクシス・ド・トックビルは、「米国においては、政治的な問題はほぼ例外なく、遅かれ早かれ司法的な問題となる」と書いた。この記述は、今日の状況にも当てはまるものであり、米国の裁判所にとって独特なジレンマとなっている。その性質上、法的というより政治的である問題を、判事たちはどのように解決するのだろうか。その答えは、司法府の構造と、判事による意思決定の過程に求めることができる。

他の多くの諸国の裁判官と異なり、米国の裁判官は一般の弁護士出身であり、裁判官となるための専門的な訓練を受けているわけではない。最高裁判事でさえも、その多くは他の裁判所の判事としての経験はあっても、米国のすべての弁護士が受ける法学教育以外に特殊な訓練を受けては

いない。また、(将来の最高裁判事も含め)弁護士を目指して学んでいる学生は、例えば雇用法、反トラスト法など特定の分野に重点を置くかもしれないが、裁判官となるための課程というものはない。

従って、最高裁判事のキャリアの出発点は弁護士である。最高裁判事の経歴、政治的見解、そして知性の傾向などは、理論的には、一般の弁護士の世界と同様の多様性があるはずである。こうした多様性(特に政治的な多様性)は、最高裁判事の選定のプロセスによって、ある程度制限される。最高裁判事は、大統領によって指名され、上院の過半数によって承認されなければならない。いったん任命された最高裁判事は、死亡するまで、あるいは自ら引退するまで、任期を務める。特定の任期は定められておらず、定年制もない。従って、最高裁判事職が空席となるのは、散発的かつ予測不可能な出来事であり、また特定の最高裁判事の政治的見解は、その判事が任命された時の政治情勢に依存する。大統領に人気があり、大統領の属する政党が上院の多数党を占めている場合と、大統領の力が弱く、対立政党が上院の多数党である場合とでは、大統領の選択肢が大きく異なる可能性が高い。

いかなる時点においても、最高裁判事団は、異なる大統領に指名され、異なる上院の承認を得た判事によって構成される。例えば、2009年10月に始まった会期における9人の現役最高裁判事は、合計5人の大統領(共和党3人、民主党2人)によって指名された人たちである。最高裁判事の政治的見解が多様であること、そして時々新しい判事が任命されることから、特定の政治的党派が長期にわたって優勢を維持することはないようになっている。

このような違いはあっても、最高裁判事は全員、合衆国憲法を支持することを確約している。彼らがそのような目標に忠実であるため、米国は人間の支配する国ではなく、法の支配する国となっているのである。最高裁判事たちは、合衆国憲法および法律を解釈し適用する際に、自らを、不完全な社会を統治しようとする観念的な守護者ではなく、法律そのものの忠実な代理人と見なす。最高裁は、政治的な問題に判決を下すことが可能であり、実際にそのような判決を下しているが、その際には、他のあらゆる法律問題の場合と同様の法律上の手段を採用する。そうしなければ、最高裁は自らの正当性を損なう可能性があ

る。そして、国民が最高裁を尊敬に値する機関と見なさなくなるかもしれない。

個人的見解と政治的見解

とはいえ、最高裁判事にも個人的見解はある。そして彼らは、政治的なプロセスによって任命される。従って、判事自身の政治的見解がどの程度大きな役割を果たすのか、という疑問が出るのは当然のことである。最高裁判事の政治的見解が果たす役割は大きく、多くの訴訟において事実上判事の判断を左右する、と主張する学者もいる。これらの学者は、保守派の大統領が任命した判事は、保守的な判断を下す傾向が強く、リベラルな大統領が任命した判事は逆の判断を下すという事実を指摘する。最近指名された何人かの判事の承認をめぐる闘いを見ると、確かに多くの人たちが、判事の個人的な政治的見解を裁判における意思決定の重要な要因と考えているように思われる。

しかし、最高裁判事は、政治家のように、単に自らの政治的見解を実行に移そうとしているだけである、との結論を急ぐべきではない。この分析を複雑なものにしている多くの要因がある。第1の要因として、判事の政治的な見解と司法上の信条・考え方を明確に分けることは難しい。判事の中には、憲法の意味を解釈する際には、憲法採用当時の意味に従うべきであると考える人もいれば、法律の文章のみに基づいて解釈すべきであると主張する人もいる。一方、憲法の意味は時と共に変化するという意見や、法律の解釈



共和党のドワイト・アイゼンハワー大統領(左)が任命したウィリアム・J・ブレナン最高裁判事。ブレナン判事は、20世紀有数のリベラルな判事となった

にはその法律制定をめぐる証拠書類が有用であるという意見もある。

州議会や連邦議会が制定した法律を覆すことを極端に避けようとする判事もいれば、立法機関を慎重に監視することが、合衆国憲法の守護者としての彼らの本質的な役割であるとする判事もいる。憲法は当初の意味に沿って解釈されるべきであるという信念を持ち、法律を無効とすることに消極的な判事は、各種の法律が個人の憲法上の権利を侵害しているという申し立てに共感しないであろうと思われる。そして、たまたまその判事が保守派であれば、そうした共感の欠如が、司法上の信条によるものではなく政治的な考え方によるものである、と誤って判断される可能性がある。

判事の個人的な経験と経歴が、訴訟に対するアプローチに影響を及ぼすこともあり得るが、それは必ずしも予想通りの影響とは限らない。貧しい環境で育った判事は、貧しい人たちに共感を示すこともあれば、貧困を乗り越えた自らの能力に照らして、貧しい人々は自らの状況に責任を持つべきであるとも考えることもあろう。また、例えば企業や軍隊、政府機関に属した経験を持つ判事は、その長所と短所を、より深く理解しているかもしれない。

結局、判事自身の政治的見解が判断に影響を及ぼす唯一の(あるいは第1の)要因である、という結論を支持することは難しいようである。判事を任命した大統領の政治信条に沿わない判断を下す判事、自らの政治的見解に反する判断を下す判事、あるいは対立政党の大統領に任命された判事たちにくみする判事、といった実例があまりにも多いのである。20世紀有数の著名なリベラル派の判事であったアール・ウォーレン最高裁長官とウィリアム・ブレンナン判事の2人は、共和党の大統領ドワイト・アイゼンハワーによって任命され、しかもウォーレン長官の場合は、共和党議員が過半数を占める上院によって承認されていた。最高裁による判決のうち4分の1から3分の1は、全員一致で決定されている。すなわち、個々の判事の政治的見解にかかわらず全員が同意したのである。ある研究によると、全員一致ではなかった判決のうち半数近くにおいて、個々の判事の判断は、それぞれの個人的な政治的見解に沿ったものとはなっていない。また、極めて重要な法律問題の中には、政治的な面から予想ができないものもある。例えば、対立



デービッド・スーター判事(左)は、必ずしもジョージ・H・W・ブッシュ大統領の政治的見解に沿った判断を下さなかった

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する憲法上の権利や複雑な規制法などをめぐる訴訟では、「保守的」または「リベラル」な立場を必ずしも特定できるとは限らない。

意思決定のその他の要因

司法制度の構造と機能も、個々の判事が個人的な政治的見解を前面に出すことを抑制している。中でも最も重要な要因として、最高裁はその決定を公に説明し正当化しなければならない。どの訴訟においても、最高裁の判決には、その判決の論拠を述べた、ひとつ以上の判決理由書が伴わなければならない。希望する者は誰でもこうした判決理由書入手することができる。判決理由の内容は広くマスコミ(そしてインターネット)で論議され、往々にして、弁護士、判事、学者による詳細な批評の対象となる。こうした透明性により、最高裁判事は無差別に法を曲げることはできない。判事の自由裁量は、公開性の力によって制限されているのである。そして、どの判事も、愚者あるいは悪者の烙印(らくいん)を押されないようにするために、自らの結論が妥当であることを証明する説得力のある判決理由書を慎重に作成する。

審理の過程も、判事の意思決定における政治的見解の影響力を抑制する役割を果たしている。判決に至る前に、各判事は当事者双方の訴訟事件摘要書を読み、口頭弁論において当事者双方の弁護士の弁論を聞き(そして多くの場合質問をし)、他の判事たちと協議をする。また判事は、それぞれの法務事務官と協議をすることもある。法務事務官は、

最近法科大学院を卒業した人たちで、若干異なった視点をもたらすことができる場合もある。訴訟における第1回の票決の後に、判事たちは判決理由書の草案を交換する。この長い評議期間中に、各判事は説得されて意見を変える可能性がある。判事が訴訟に対する考え方を考えるのは珍しいことではない。判事、弁護士、訴訟当事者、そして法務事務官といった人たちは、多様な政治的見解を持っているため、このプロセスは、判事が政治的要因よりも法律上の要因に焦点を絞ることを促す効果がある。

最後に、最高裁の自由裁量の範囲を制限する要因として、先例拘束の原則がある。すなわち、最高裁は、非常に特殊な状況がない限り、過去に最高裁が判決を下した先例に従う。その判例に同意しない判事がいたとしても（それが、その先例当時に反対意見を述べた判事であったとしても）、判事たちはほぼ例外なく、先例に従わなければならないと考える。特定の争点に関する判決の数が増えるに従って、最高裁はそのドクトリンを明確化あるいは修正することもあるが、初期の先例がその出発点となる。歴史を振り返ると、新たに選出された大統領が最高裁の先例を覆すことを宣言する例が多く見られるが、大統領が新しい判事を任命した場合でも、そうした試みは失敗に終わることが多い。先例拘束の原則により、ドクトリンの変化は急激にではなく徐々に起きること、また深く定着した判決が覆される可能性は低いことが保証されている。そして、このようにドクトリンが徐々に進化していくことによって、安定性と予測可能性が促進される。安定も予測可能性も、法の支配を確約する国家では必要なものである。

もちろん、いかなる制度も完璧ではない。少数の訴訟においては、特定の判事が自らの政治的見解に基づいて票を投じたと思われる場合もある。これらは通常、最も論議を呼んだ訴訟であり、政治的見解に基づいて国民を二分してきた政治論争にかかわるものであることが多い。こうした論争が最高裁判事たちを同じように二分するのも驚くに当たらないことである。しかしながら、そうした訴訟が存在するからといって、最高裁の訴訟のほとんどにおいて政治的見解が有力な要因となっているとの結論を出すべきではない。

このように、最高裁の判決には数々の要因が影響を及ぼしている。判事自身の政治的見解は、その中で小さな役割を果たすにすぎない。もしそうでなかったならば、最高裁は、各政治的部門に対する独立した抑制力としての機能も、個人の権利を守る能力も、そして最高裁自身の正当性を確保する力も弱まってしまう。最高裁が、独立した法的意思決定機関としてではなく、単なる政治的機関と見なされるならば、最高裁に対する国民の信頼も低下する。最高裁判事（そしてその他の判事たち）は、このことを認識しており、判断を下す際には政治的見解の果たす役割を最小限に抑えることによって、最高裁の信用を守っているのである。

本稿に示された意見は、米国政府の見解または政策を必ずしも反映するものではない。

判事の変容

リンダ・グリーンハウス



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就任式を終えて、ジョン・ロバート最高裁長官に伴われて歩く、最も新しい最高裁判事ソニア・ソトマイヨール

リンダ・グリーンハウスは、コネティカット州ニューヘーヴン市にあるエル大学法科大学院のナイト優秀客員ジャーナリストおよびジョセフ・ゴールドスタイン記念講師。1978年から2008年まで『ニューヨーク・タイムズ』紙の最高裁担当記者。

最高裁の見解は、9人の個人の固定した意見だけから成るものではなく、はるかに広範なものである。判事の世界観は、時の経過と共に、また世界の出来事に触れ、他の判事たちと緊密な個人的・知的交流を深めるにつれて、変化していくものである。そして、その結果は予測不可能な場合もある。

最 高裁判事に指名されたソニア・ソトマイヨールの承認公聴会が最近連邦議会上院で行われたが、その焦点は、当然のことながら、彼女がどのような最高裁判事になるか、という点であった。ソトマイヨールは、判事としての自分のモットーは「法への忠誠」であり、判事の職務は、訴訟における事実を関連法に照らして検討することである、と述べた。この言葉は、上院議員の大半を満足させた。

ソトマイヨール判事の指名は68対31で承認され、同判事は2009年8月8日に就任した。

しかしながら、最高裁判事の職務を一種の機械的な作業

とした彼女の説明は、いくつかの興味深い疑問を呼び起こすものである。判事の職務が本当にそのように単純なものであるならば、最高裁の昨年度の会期で審理された訴訟のうち3分の1(74件中23件)もが、5対4の票決で判決が下された事実を、どのように説明すればよいのだろうか。そうした判決を支持した判事たちも反対した判事たちも、法に忠実に従っていると考えていたものと思われる。しかし、さまざまな理由によって、彼らの法律に対する見方が異なっていたのである。

これは、明白かつ予測可能なことである。判事たちがそれぞれ異なる意見を持っていなければ、最高裁判事の空席を補充する過程が、米国の政治において今日見られるような活発な論議を呼ぶ行事とはならないと思われる。

しかし、判事の役割を機械的なものとする説明は、判事の行動について、もうひとつ、よりとらえにくい疑問を提起した。それは、最高裁判事の大半ではないにしても、多くの最高裁判事が、その在任中に変容する事実をどう説明するか、という疑問である。判事の見解が、時にはかなり大きく変化することは珍しくない。判事が事実を法律に照らしていることには変わりがないとしても、どれが本当に重要な事実であるか、そして判決を下すに際してどの判例が適切な枠



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ロバート・H・ジャクソン最高裁判事は、就任から11年後に大統領の権限に対する見解を変えた

組みとなるか、という点についての結論が変化するかもしれない。大統領が、自分の優先課題と法律に対する見方を支持すると思われる人物を最高裁判事に指名し、当初は大統領のそうした予測が正しくても、何年も後に、おそらくその大統領の任期がすでに終了してだいぶたったところに、その判事が、終身任期に守られて、当初とは大きく異なる判事となることもあり得る。そうした例は枚挙にいとまがない。以下にその一部を紹介する。

大統領の権限から差別是正措置まで

フランクリン・D・ルーズベルト政権の司法長官であったロバート・H・ジャクソンが1941年に最高裁判事に就任したとき、彼は大統領が大きな権限を持つことを強く支持していた。ジャクソン判事の就任後間もなく、米国が第2次世界大戦に参戦した直後、最高裁は、戦時における大統領の権限の範囲に関する重要な判決を下した。この事件(クイリン査定判決)は、入国しようとして捕まったナチスの工作員8人を裁判にかけ死刑判決を下した軍法委員会の有効性を争点とするものであった。

最高裁は、軍法委員会の手続きと判決結果を支持したが、ジャクソンは、何年も後まで公表されなかった判決理由書で、さらに強硬な意見を表明した。彼は、この工作員らは、

「憲法で定められた軍隊の長としての大統領の地位に照らし、大統領の囚人」であると述べ、最高裁はルーズベルト大統領が行使した権限を検討する審理を取り上げることすらすべきではなかった、と示唆した。

しかし、それからわずか11年後にジャクソンが、大統領の権限を制限する最も有名な最高裁の判決のひとつで、これとは大きく異なる見解を示すことを予想できた人はほとんどいないと思われる。朝鮮戦争中に、米国の製鉄所がストライキで閉鎖され、武器をはじめとする重要な製品の生産が中断された。ハリー・S・トルーマン大統領は、政府が製鉄所を没収することを命じたが、最高裁は、この大統領の行為は違憲であるとの判決を下した(ヤングスタウン・シート・アンド・チューブ社対ソーヤー事件)。ジャクソン判事は、この判決を支持する判決理由書を書いた。この判決理由書は、近年、キューバのグアンタナモベイ米軍刑務所の拘置者に権利を与える判決で引用されている。ジャクソンは、大統領は行政権の一方的な行使に依存することはできないとし、最高裁は、連邦議会の承認なしに大統領が実行した措置を安易に承認することはなく、大統領の主張する権限が正当なものであるかどうかを判断するために、状況に基づいた評価を行う、と述べた。

最高裁判事としての10年ほどの間に、ロバート・ジャクソン判事は、大統領権限の強力な擁護者から、大統領権限の制限の強力な支持者へと変身したのである。

ドワイト・D・アイゼンハワー大統領は、政治的なライバルであったアール・ウォーレン・カリフォルニア州知事を最高裁長官に任命した。ウォーレンは、地方検事および州司法長官として23年の経験があり、最高裁長官としての最初の会期(1953~54年)には、ほとんどの訴訟において、刑事被告人や公民権の侵害を訴えた原告に不利な判断を下した。しかし、その後の15年間に彼は、刑事被告人および公民権訴訟の原告の強力な味方となり、ウォーレン長官の下での最高裁は、そうした人々の権利を極めて幅広く解釈することで知られるようになった。

1962年にジョン・F・ケネディ大統領に任命されたバイロン・R・ホワイト最高裁判事は、近年において、時と共に保守化していった最高裁判事の例である。彼は、ウォーレン長官の最高裁による、被告に有利な判決に幻滅し、有名なミランダ判決の適用範囲を制限する努力をした。ミランダ判決とは、警察による取調べを受ける前に自らの権利を通告されなかった被告人の有罪判決を無効としたものである。ホワイト判事が1984年に書いた多数意見(合衆国対リオン)は、長年にわたり、警察が不当に入手した有罪証拠を排除することを定めていた「違法収集証拠排除の原則」に、初めて重

要な制限を加えたものであった。

ハリー・A・ブラックマン判事は、1970年にリチャード・M・ニクソン大統領によって最高裁判事に任命された。ニクソン大統領は、1968年の大統領選挙運動中に、ウォーレン長官の最高裁による判決を覆すことのできる「法と秩序」派の最高裁判事を任命することを公約していた。当初、ブラックマン判事は、そうした役割を完ぺきに果たしているように見えた。彼は1972年に米国内のすべての死刑法を無効とする最高裁の判決に反対し、その4年後に最高裁が、死刑を復活させる新しい法律を過半数で支持したときには、ブラックマン判事も支持派の一人であった。1973年に、ブラックマン判事は、過半数判決の判決理由書で、破産申告の申請料金50ドルを課することは貧しい人々の権利の侵害にはならない、と述べた。最もリベラルな判事の一人であったウィリアム・O・ダグラス判事は、この合衆国対クラス判決に憤慨し、「あまりに貧しい者は破産申告の恩恵さえ受けられないという判決を裁判所が下す日が、私の生きている間に訪れるとは夢にも思わなかった」と抗議した。

しかし、それからわずか4年後に、ブラックマン判事は、反対意見の中で、人工妊娠中絶の費用を支払えない貧しい女性のために政府が中絶費用を負担すべきであると強く主張した。ブラックマン判事は、1994年に引退するころには公然と死刑制度に反対し、最高裁判事の中で最もリベラルな判事として定評があった。

1981年にロナルド・レーガン大統領に指名され、女性初の最高裁判事となったサンドラ・デイ・オコナー判事も、就任当初は一貫して保守的であった。彼女は、1973年に最高裁が人工妊娠中絶について憲法上の権利を認めたロー対ウェード判決を強く批判していた。またオコナー判事は、雇用や公共事業契約において恵まれない少数派グループの人々を優遇する政府プログラムにも懐疑的であった。

にもかかわらず、1992年にオコナー判事は、ロー対ウェード判決が覆されることを防ぐために不可欠な5人目の1票を投じた(家族計画連盟ペンシルバニア州南東部支部対ケーシー)。また2003年には、公立のエリート法科大学院であるミシガン大学法科大学院の入学審査で黒人の入学志願者を優遇するアファーマティブ・アクション(差別是正措置)・プログラムを支持する最高裁の多数派意見を、オコナー判事が執筆した(グラター対ボリンジャー)。

変容をもたらす体験

このような大きな変化はよくあることなのだろうか。それは、米国民の大半が想像するよりも頻繁に見られる現象



サンドラ・デイ・オコナー最高裁判事は、ロナルド・レーガン大統領に指名された

である。シカゴ市のノースウェスタン大学法科大学院のリー・エプスタイン教授は、これを最高裁判事の「イデオロギー的漂流」と呼び、こうした現象の歴史を研究している。同教授は、その研究結果を発表した2007年の論文で、次のように述べている。「一般の認識に反し、1930年代以降の最高裁判事は、ほぼ全員が、左寄りか右寄りへ意見を変えており、中には、数回にわたって変えている例も見られる」
[<http://www.law.northwestern.edu/journals/lawreview/colloquy/2007/8>]

そこで興味深い問題は、なぜそのような変化が起きるのかということである。最高裁判事になる人たちは、その時点ですでに成熟した大人であり、その多くは公人としてかなり知名度も高い。すなわち、まだ自分の進む道を模索しているような人たちではないのである。

ロバート・ジャクソンは、最高裁判事に指名される少し前に出版した著書で、同様の疑問を呈している。最高裁を研究する学者として彼は『The Struggle for Judicial Supremacy』の中で、「最高裁が判事に任命された者に影響を及ぼすことの方が、任命された判事が最高裁に影響を及ぼすことより一貫性が高いのはなぜだろうか」と問うている。すなわち、ジャクソン判事は、自らの観察に基づき、最高裁の判事を務めていること自体が、変化をもたらす影響力のある体験となることを認識していたのである。ジャクソン判事自身の体験は特殊なものとなった。彼は、最高裁判事としての職務から1年間離れて、ニュールンベルグ戦犯裁判の主任検察官を務めた。ナチス・ドイツのとどまることを知らない行政権の拡大がもたらしたものをつぶさに検討した経験が、大統領権限を制限する必要性に関するジャクソン判事の考え方に影響を与えたと考えるのは、飛躍しすぎだろうか。

ハリー・ブラックマン判事も、変化につながる独自の体験をした。彼はロー対ウェード訴訟で7対2の多数意見を書

いたが、それは彼自身の意志ではなく、ウォーレン・E・バーガー長官の指示によるものであった。しかし国民はすぐに、妊娠中絶に関するこの判決をブラックマン個人に結び付けた。ブラックマン判事のところには、この判決に反対する国民から憎悪に満ちた手紙が殺到し、一方、判決を支持する人々はブラックマン判事を英雄視した。その結果として、ブラックマン判事自身の自己イメージがロー対ウェード判決、およびその後ますます同判決に対する敵意の高まる状況と密接に結び付くようになった。彼が中絶の権利擁護を代表する者としての役割を自らに課したことが、リベラル派への変容の一因であると考えることができる。

最近のいくつかの研究によると、当初のイデオロギーから離れる可能性が最も高い判事は、ワシントンの内情に詳しい「事情通」ではなく、よそからワシントンに來たばかりの判事であるという。これは常識的にも納得できる。中年になってからワシントンに移り、全国的なスポットライトに照られることは、恐ろしい体験に違いなく、その結果として世界に対する見方が変わることもあり得る。コロンビア大学法科大学院のマイケル・ドルフ教授は、共和党大統領によって指名された最近の最高裁判事12人を研究し、結論として、過去に連邦政府の行政府での経験を持たない判事は、左寄りへ変化する可能性が最も高く、行政府での経験を持つ判事は思想的見解を変える可能性が低い、と述べている。

これも納得のできる結論である。行政府体験のある判事は、通常ホワイトハウスまたは司法省で重要な司法職にあった人たちであり、経験豊富であるとともに、「既知数」である。過去2代の最高裁長官ウォーレン・バーガーおよびウィリアム・H・レンクイストの2人がこれに当てはまる。この2人はいずれも司法次官補を務めたことがあった。ジョン・G・ロバーツ・ジュニア現最高裁長官も、青年時代にホワイトハウスの弁護士を務め、後に司法省訴務長官室の上級弁護士を務めたことがあり、このタイプに当てはまる可能性が非常に高い。ロバーツ長官は就任して4年たつが依然として確固たる保守派であり、「漂流」する気配は全くない。

しかし今日、最高裁判事の在職期間は平均18年となっており、変化の余地は大きい。エプスタイン教授がサンドラ・デイ・オコナー判事の24年に及ぶ在職中の投票パターンを分析した結果によると、オコナー判事が2003年に支持したミシガン大学のアフーマティブ・アクション・プログラムに関する訴訟が、そのわずか1年前の2002年に行われていたならば、オコナー判事は同プログラムを無効とする判決に投票していたであろうと予想される、という。オコナー判事自身が、最高裁判事としての最初の10年間の同僚であったサーグッド・マーシャル判事から影響を受けたことを、温



リンدون・ジョンソン大統領はサーグッド・マーシャルを黒人初の最高裁判事に指名した

かく振り返っている。公民権運動の偉大な活動家であり、黒人初の最高裁判事となったマーシャル判事は、自らの人生経験に即して法的争点を説明することが多かったという。マーシャル判事が1991年に引退した後、オコナー判事はマーシャル判事を称える文章で、そうした人生経験の話が「おそらく私の世界観を変えていった」と書いている。

ソニア・ソトマイヨール判事は、17年間ニューヨーク州で連邦裁判所判事を務めたが、ワシントンにはなじみがない。彼女も上記のパターンに従って、当初の予想からそれていくのだろうか。もちろん、まだ判断を下すには早すぎる。しかし、マーシャル判事に関するオコナー判事のコメントからは、もうひとつの可能性が考えられる。ソトマイヨール判事は、ラテン系女性として初めての最高裁判事であり、公営団地でシングルマザーに育てられた体験を持つ。そうした人生経験を、彼女が8人の同僚に伝えることができるかもしれない。彼女が他の判事たちから影響を受けるといふより、むしろ、彼女が彼らの世界観を変える可能性が考えられるのである。

本稿に示された意見は、米政府の見解または政策を必ずしも反映するものではない。

JUSTICE ANTONIN SCALIA AND JUSTICE RUTH BADER GINSBURG
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MARVIN KALB: Hello, and welcome to the National Press Club and to another edition of the Kalb Report. I'm Marvin Kalb. And our program tonight, 45 Words: A Conversation about the First Amendment with Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg. It would be an honor, obviously, to have one Supreme Court Justice as my guest. But to have two is, indeed, a very special privilege, especially these two, who generally represent contrasting opinions on the Court, one liberal the other conservative. And yet, they are great friends who dine together, travel together, love going to the opera together. In fact, they inspired a new opera called, of all things, *Scalia Ginsburg*. [laughter]

They are like the old days in this capital, when political differences would not stop a good friendship from flourishing. Justice Scalia is the longest serving Justice on today's Supreme Court, appointed by President Ronald Reagan in 1986. He's called an originalist, meaning he believes that the Constitution ought to be interpreted, more or less, as the founding fathers meant for it to be interpreted. "You want change?" he says, "Change the legislature, change the law." His job is to interpret the law.

Justice Ginsburg was appointed to the Supreme Court by President Bill Clinton in 1993. Her view is that the Constitution is what has been called a living document. Meaning, it changes as society changes, one linked to the other. Tradition and precedent matter, of course. But they do not necessarily determine her legal judgment. Both Justices, despite this difference between them, have devoted their lives to the law, to teaching, to democracy, and to freedom.

We're going to discuss freedom of the press. But let's start with what the concept of freedom means, its origin, its meaning at the time of the American Revolution, and its meaning in today's America. I've always been fascinated by the fact that the First Commandment of the Ten Commandments in the Bible, and the First Amendment in the Constitution, both stress the central importance of freedom, the First Commandment

saying, "I am the Lord thy God who brought thee forth out of Egypt, out of the house of bondage. And thou shalt have no other god before me." Out of bondage to what, if not freedom? The First Amendment guarantees us freedom of religion, of speech or of the press, of the right peaceably to assemble, to petition our government for a redress of grievances.

Justice Scalia, in your view, is there a link between the First Commandment and the First Amendment? Did one possibly inspire the other?

ANTONIN SCALIA: Oh, I doubt it. [laughter]

MARVIN KALB: Okay.

ANTONIN SCALIA: I think our Constitution was inspired by the traditions of the common law. And I think what our framers meant by "the freedom of speech," for example, was that freedom of speech which was the birthright of Englishmen, at the time. I don't think it had anything to do with Moses. [laughter] There is-- I think what freedom meant, at the time, was the absence of constraint, the absence of coercion. So freedom of religion, for example, meant that you could not be constrained to contribute to the support of a church that you didn't believe in. You could not be disabled from holding certain public offices because of your religion. The absence of coercion. And I think it was the same for freedom of speech.

MARVIN KALB: And Justice Ginsburg, your view?

RUTH BADER GINSBURG: Marvin, this is the one question you told us you might ask us. I was puzzled by it, because as I read the Ten Commandments, the first four of them are not about freedom, they're about humans' obligations to God. So "Thou shalt

have no other god before me, no graven images, keep the Sabbath holy," everything, obligations that people owe to the Almighty.

But I also mentioned to you that your question comes at just the right season, because this is Passover. And the Passover is, indeed, a celebration of the liberation of a people. And there are many words in the Haggadah that celebrate freedom. So I would pick the Passover service rather than the stern first four Commandments advancing the idea of freedom.

MARVIN KALB: Well I knew I'd be wrong. [laughter] But, I mean, I knew that to start with.

ANTONIN SCALIA: You thought you'd be wrong on the law, not on theology.
[laughter]

MARVIN KALB: No. But what I would like to get at is really, what your sense is that the people who wrote the Constitution had in their minds, when they talked about freedom. Now you mentioned common law. Common law was not explicit about freedom. Many different interpretations were there. And, what I'm trying to get at is, before we get into the specifics of freedom of the press, I would like to know what the concept meant, in your understanding.

ANTONIN SCALIA: Well, I don't think the common law was that diverse, as far as what every aspect of freedom consisted of. The freedom of speech, for example, it was very clear that that did not include the freedom to libel. That you could be subject to a lawsuit for libel. And that-- that type of coercion was not considered incompatible with the freedom of speech. Now some aspects of it, I suppose, were more vague. But some things were pretty clear.

MARVIN KALB: And Justice Ginsburg, the concept of freedom is very prominently featured in the Constitution. It's right there in the First Amendment. And the writer Tom Paine had a simple explanation. He wrote, "It would be strange, indeed, if so celestial an article as freedom should not be highly rated." So it does seem, to me-- and I'll get back to this again and again, I think, that if you're going to feature the concept of freedom right up there at the top, you had to have had something in your head about the importance of freedom to what it is that you were doing at that time, which was beginning to build a democracy.

RUTH BADER GINSBURG: There's a point Justice Scalia made in his opening remark. He said he sees this First Amendment as protection against constraint, government constraint. And there, I think, our expression of the First Amendment is quite different from, for example, the expression in the Declaration of the Rights of Man, the great French document[?]. This First Amendment is saying, "Hands off, government." It doesn't say, "Everyone shall have the right to speak freely." That's what the Declaration of the Rights of Man says, "Everyone shall have the right to speak freely."

Not at all. This says, "Congress shall make no law abridging the freedom of speech or of the press." So it's directed to government. And it says, "Government, hands off. These rights already exist. And you must not touch them."

MARVIN KALB: Jon Stewart-- I'm sorry, please.

ANTONIN SCALIA: It should not be painted as the foundation of the American democracy, this concept of freedom. Don't forget that the Bill of Rights was an afterthought. It was not what they debated about in Philadelphia in 1787. Now a couple of the states that ratified the Constitution made it clear that they expected there to be a Bill of Rights added. But it was added in 1791 on the proposal of the first Congress. What they thought would preserve a free society was the structure of the government.

That's what they debated about in 1787. And, if you think that's false, just look around the world. Every tinhorn dictator in the world today has a Bill of Right. [laughter] It isn't the Bill of Rights that produces freedom. It's the structure of government that prevents anybody from seizing all the power. Once that happens, you ignore the Bill of Rights. So, you know, keep your eye on the ball. Structure is destiny.

MARVIN KALB: The eye on the ball being to keep your eye on the structure of the government.

ANTONIN SCALIA: Well, our structure is so different from that of most of the world. There are very few countries, for example, that have a bicameral legislature-- a genuine one, even, including England. They don't have a real bicameral. The House of Lords can't do anything. [laughter] They can make the Commons pass the bill a second time. And, when they pass it a second time, it becomes law. There are very few countries-- None of the parliamentary countries that have a separately elected President, the Chief Executive in all the countries of Europe is the tool of the parliament. There is never any serious disagreement between them. When there is, they kick them you. They have a no-confidence vote and have an election and appoint a new tool.

I mean we are so different from the rest of the world. And it is that that has, more than anything else, preserved our liberties. And you wouldn't want to live in most of the countries of the world that have a Bill of Rights which guarantees freedom of speech and of the press. You wouldn't want to live there.

RUTH BADER GINSBURG: I have to disagree with my colleague, in that respect.

MARVIN KALB: I'm glad that you can do it. I can't.

[laughter]

RUTH BADER GINSBURG: First, I don't think that the rest of the world is regarding our legislature at the current moment as a model to be followed. [laughter] [applause] And second, however it was understood in the beginning, yes, the structure of government was to protect our liberties. But there was always the idea of rights. Think of our first great document, the Declaration of Independence.

Also, it is true that the great protections that the press now has came rather late. The First Amendment was developed in a serious way around the time of the First World War it began. So the freedom that's enjoyed today, the freedom to speak and to write, was not a big ticket item in the Supreme Court until rather late.

ANTONIN SCALIA: Well, it was a big ticket item, mostly because, until the middle of the 20th century, believe it, the middle of the 20th century, it was not thought that the Bill of Rights applied to the states. It was only a limitation on what the federal government could do, not a limitation on what the states could do. That's why we never had, until the middle of the 20th century, these cases about whether you can have a crèche in the city square. Is it okay if you have a menorah next to it? Maybe Santa Claus on top? [laughter] We didn't have any of those silly cases. It was only when the Bill of Rights was imposed upon the states that we began to have it.

And so, a lot of the restrictions on speech that would be imposed by states would not have been thought to violate our Bill of Rights. Maybe the states' Bill of Rights, but not ours.

MARVIN KALB: But I'm wondering, at the time that the structure of government was set up, plus-200 years ago, what is it that the founding fathers had in mind when they thought about freedom? And one definition advanced by John Stewart Mill, I found very compelling. But I don't know whether that's what they had in mind. He spoke about

absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological. And I'm wondering if that is what Madison and Monroe had in mind at that time, or whether they had a more narrow vision of freedom. Justice Ginsburg?

RUTH BADER GINSBURG: I wouldn't call the vision narrow. But there are no absolute rights, even though, if you read the First Amendment, it does sound that way. It says, "Congress shall pass no law." But, of course, there are laws that Congress can pass. So the idea of an absolute right, I don't know any right that doesn't have limitations.

MARVIN KALB: Even at that time, in the minds of the founding fathers?

RUTH BADER GINSBURG: Yes, I think so.

MARVIN KALB: Explain why, in the First Amendment, after listing the phrase "freedom of speech," the founding fathers found it necessary or wanted to add four crucially important words, "or of the press." Freedom of the press is what they were talking about. But why did they add that phrase? Why was it necessary, Justice Scalia?

ANTONIN SCALIA: I think it's a natural addition. All it means is the freedom to speak and to write. It wasn't referring to the institutional press, the guys that run around with a fedora hat, with a sticker in it that says "Press." That was-- I'm not sure that they even referred to the institutional press in those days. It meant the freedom to speak and to publish. And that clause has been interpreted not to give any prerogatives to the institutional press, it gives prerogatives to anybody who has a Xerox machine.

MARVIN KALB: What do you mean "institutional press"? Forgive me. What does that mean?

ANTONIN SCALIA: I mean those organizations whose business is writing and publishing, NBC, CBS, you.

MARVIN KALB: I like that.

[laughter]

RUTH BADER GINSBURG: One idea that we didn't take from England was the Office of the Censor who censored books before they were published. And that, I think, is part of putting in this protection of the press. And we have never had, in the United States government, an Office of the Censor, which plagued people in England, and on the continent-- think of Verdi and having to put his opera plots.

ANTONIN SCALIA: Oh you have to bring opera into it, don't you? [laughter] I knew you were going to do that.

MARVIN KALB: Was it understood that there were limitations on the press back then? Was it understood that there were limitations?

ANTONIN SCALIA: Well, yes, yes, on speech and on oral speech and written speech, both. I told you, libel, libel laws were one thing.

MARVIN KALB: Yes. But what about the press at that time? What were they thinking about at that time?

ANTONIN SCALIA: I don't know that there were any special rules applicable to the press. The press did not have to get permission of a censor to publish. But neither did anybody else.

RUTH BADER GINSBURG: And the press anointed some very important figures in our history, like Thomas Jefferson.

MARVIN KALB: Yes, indeed. And it's interesting that Jefferson, before he became President, spoke very highly of the press. But, while he was President, spoke about it as a polluted area. And you couldn't believe a thing in any newspaper.

RUTH BADER GINSBURG: But how it survived, one thing that epitomizes, for me, the importance of freedom of speech, is in the *Ballad for America*. "The right to speak my mind out, that's America to me."

ANTONIN SCALIA: I think, if you had to pick-- and you probably shouldn't have to-- but, if you had to pick one freedom that was-- that is the most essential to the functioning of a democracy, it has to be freedom of speech. Because democracy means persuading one another. And then, ultimately, voting. And the majority-- the majority rules. You can't run such a system if there is a muzzling of one point of view. So it's a fundamental freedom in a democracy, much more necessary in a democracy than in any other system of government. I guess you can run an effective monarchy without freedom of speech. I don't think you can run an effective democracy without it.

MARVIN KALB: But, on this matter of press freedom, John Adams wrote that, "Mankind cannot now be governed without it, nor present with it." And it seems that the idea of a free press has always been a problem for a succession of American Presidents. But, in a broader sense, do you feel we could have endured as a democracy, from then to now, without a free press? What do you think, Justice Ginsburg?

RUTH BADER GINSBURG: I don't think so. I think the press has played a tremendously important role as watchdog over what the government is doing. And that keeps the government from getting too far out of line, because they will be in the

limelight. So yes, there are all kinds of excesses in the press, too. But we have to put up with that, I think, given the alternative.

MARVIN KALB: Justice Scalia, you want to comment on that issue?

ANTONIN SCALIA: No, I agree with that, of course.

RUTH BADER GINSBURG: It's hard to keep the freedom of the press, because there are many people who don't like what the press is publishing. And there was a cartoon around the time-- just after the Revolutionary War. And it shows a Tory being carted off by the police. And the caption is, "Liberty of speech to those who speak the speech of liberty." So the right to speak against government, against what is the prevailing view of society, is tremendously important.

MARVIN KALB: That's interesting.

ANTONIN SCALIA: Well, including the right to speak against democracy. I mean don't forget that. Some of the biggest fights were whether free speech includes freedom to speak against freedom of speech, or against democracy. And it's plausible that it doesn't. But, of course, we have rejected that view. Communists were entitled to say, "This Democratic system does not work. Let's get rid of it."

RUTH BADER GINSBURG: Yeah, it took a while for that idea to take hold, because there were laws against--

ANTONIN SCALIA: -- did indeed.

RUTH BADER GINSBURG: -- anarchy and sedition, syndicalism.

MARVIN KALB: It takes us, perhaps, I think, to the 1964 ruling of the Supreme Court on The New York Times v. Sullivan, which is certainly called a landmark decision. And you spoke earlier about the importance of libel at that time. And in this particular ruling, very specific regulations-- that's the wrong word-- but concepts are written into this ruling. And I'd like to just read what Justice Brennan has said, because I think it deserves to be quoted as often as possible.

"Public discussion is a political duty. And it must be 'uninhibited, robust, and wide open,' and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." And you were mentioning this, in a sense, a moment ago. And I'm wondering, Justice Scalia, if this kind of an issue were brought before the court today, at that time, in 1964, I believe the court's ruling was a 9-nothing, was a unanimous vote. What would happen today?

ANTONIN SCALIA: I don't recall whether it was unanimous. I'm not sure it was.

MARVIN KALB: It was. It was 9-nothing. [laughter] But I stand to be corrected.

ANTONIN SCALIA: Even so, it was wrong. [laughter]

MARVIN KALB: It was wrong?

ANTONIN SCALIA: The issue is not whether it's a good idea to let the institutional-- I'm sorry, to let anybody-- What New York Times v. Sullivan holds is that, if you are a public figure, and it's been a matter of some doubt what it takes to become a public figure, but it's certainly any politicians is a public figure, if you are a public figure, you cannot sue somebody for libel unless you can prove effectively that the person knew it was a lie.

MARVIN KALB: Right.

ANTONIN SCALIA: So long as he heard from somebody, you know, it makes it very difficult for a public figure to win a libel suit. I think George Washington, I think Thomas Jefferson, I think the framers would have been appalled at the notion that they could be libeled with impunity. And, when the Supreme Court came out with that decision, it was revising the Constitution. Now, it may be a very good idea to set up a system that way. And New York State could have revised its libel laws by popular vote to say, if you libel a public figure, it's okay unless it's malicious. But New York State didn't do that. It was nine lawyers who decided that that's what the Constitution ought to mean, even though it had never meant that. And that's essentially the difference between Ruth and me concerning a living Constitution. She thinks that's all right, and I don't think it's all right.

RUTH BADER GINSBURG: The situation didn't exist in 1787 or 1791 that the court confronted in *Times* against Sullivan. The history of *Times* against Sullivan, it was a sheriff who said he was libel in an advertisement in the *New York Times*. It was in the midst of the Civil Rights era, where libel laws could be used as a way of squelching the people who were asserting their freedom. So I think that *Times* against Sullivan is a decision of major significance.

Now I will say, the lawyer who argued that case for the *New York Times*, Herbert Wexler, a great Constitutional law scholar, when its story is told, when he told Salzburg, "We won. We won unanimously," Salzburg's response was a little hesitant. He said, "It's great for the *New York Times*. But what about all those other papers that don't have our high, high status?" But I think that *Times* against Sullivan is now well accepted. And I quite disagree with my colleague. I suspect that, if the founding fathers were around to see what life was like in America in the 1960s, they would have agreed with that.

MARVIN KALB: So you would have voted for it?

ANTONIN SCALIA: Oh God yes, she would have voted for it. [laughter]

RUTH BADER GINSBURG: Yeah.

ANTONIN SCALIA: Come on, Mr. Kalb. [laughter]

RUTH BADER GINSBURG: I would mention, but I won't say anything more about it, because this is case we're going to hear next week, I think. A state has passed a law that says, "Thou shalt not make false statements in a political campaign against any candidate, any ballot initiative, no false statements in elections." The question that the court will face is, is that statute prohibiting false statements in political campaigns, is that Constitutional?

MARVIN KALB: What are we going to expect on that? [laughter]

RUTH BADER GINSBURG: Well--

ANTONIN SCALIA: A decision by the end of June.

MARVIN KALB: Okay. [laughter]

RUTH BADER GINSBURG: But it was another decision, and I don't remember where Justice Scalia was, but it was the Alvarez case. The man who lied about having the Medal of Honor.

ANTONIN SCALIA: Oh yes, yes, yes.

RUTH BADER GINSBURG: What was it called? Something Valor.

ANTONIN SCALIA: Stolen Valor Act. Stolen Valor Act.

MARVIN KALB: Before we get into that and the subject of digital democracy, which I want to spend a few minutes on, I'd like to take a moment, now, to remind our radio, television and internet viewers and listeners that this is The Kalb Report. I'm Marvin Kalb. And I'm discussing freedom of the press with Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg.

I want to point out that there is a new report out by an organization called Reporters Without Borders, very highly regarded, that the U.S. has experienced what it called "A profound erosion of press freedom" in 2013, dropping 14 points to number 46 in global ranks. Now reporters are a little nervous these days. And they like to feel that they have friends. And I want to know, in your judgment, whether reporters are right in considering the Supreme Court today as a friend of the concept of freedom of the press.

ANTONIN SCALIA: You want me to say no to that? [laughter]

MARVIN KALB: No, I want--

ANTONIN SCALIA: Of course. Everybody on the court believes in freedom of the press. Now there is some difference as to what that means, okay. As to whether it means, for example, that a member of the press, no matter what the national emergency may be, need not disclose his or her source. That's, you know, that's a question that hasn't come up before us. And I think it's very-- a very interesting and not necessarily, not a question with a clear answer. So, you know, you can believe in freedom of the press and still have fun disagreeing, okay.

RUTH BADER GINSBURG: I'd like to know how it was determined that that was the-- the 46 was the right view. As I'm just thinking of the tradition in England, which holds to this very day, that the press can't report about trials, about ongoing trials.

ANTONIN SCALIA: And they can libel public figures in this, you know.

MARVIN KALB: Well, since 1964, and the Sullivan-*New York Times* case, as you were pointing out before, it's extremely difficult, now, for anybody to libel a reporter on this issue. What I would like to get to here is something that is current and very important to an awful lot of people in this country. And I suspect that the court is going to face a number of major decisions in the area of government surveillance. The National Security Agency, the NSA, its newly disclosed activity, then all of the problems of whistle-blowing journalism. And it's worth noting that the *Washington Post*, just this week, won its Pulitzer Prize for its reporting on Edward Snowden and the NSA thing.

So I'd like to start by asking you, do you think *The Post* deserved the prize? Justice Ginsburg.

RUTH BADER GINSBURG: That's a question that the journalists in this audience are much better equipped to answer than I am.

ANTONIN SCALIA: I don't read *The Post* so I have no idea what they-- [laughter] I have no idea what they got the prize for. [laughter]

RUTH BADER GINSBURG: I do, including the announcement-- Was it the bottom of the first page, when it says what's coming up this week. And this evening was announced as an event.

MARVIN KALB: Yes it was. We're very proud of that. So tell me. I didn't get terribly far on that. [laughter] Do you believe that Snowden is a whistle-blower or a traitor?

ANTONIN SCALIA: Oh I don't-- You know, that's not part of what I worry about, really. That's a policy-- a policy question, not a legal question. And I stay on that stuff.

RUTH BADER GINSBURG: And it's also possible, is it not, that the question you raise could come before the court.

MARVIN KALB: That is possible.

RUTH BADER GINSBURG: Yes. And we are not at liberty to preview.

MARVIN KALB: No, I appreciate that. Let me ask the question from another angle.
[laughter]

ANTONIN SCALIA: If it's the same question, you're going to get the same answer.
[laughter]

MARVIN KALB: That may be. That may be. But I'm going to try it anyway.

ANTONIN SCALIA: All right.

MARVIN KALB: If somebody were to say to you that, "What I am doing, you may disagree with."-- I don't mean you personally, "You all may disagree with. But I am doing this because I feel a moral obligation to do this. I feel, deep in my heart, that my country is doing something wrong. And I have an opportunity to change that. And I want to change it."

ANTONIN SCALIA: So did the Germans who killed Jews. I mean is that the criterion, whether you honestly believe what you're doing is good? You have an obligation to form your conscience according to what is right. And you know, that's the issue. The issue is whether it's right, not whether you believe in it. I'm sure Hitler was very sincere.

MARVIN KALB: But the idea of it being right, you mean right according to the law as established?

ANTONIN SCALIA: Well, in the context you put it, right according to--

MARVIN KALB: -- some moral judgment.

ANTONIN SCALIA: Right, to the Ten Commandments. [laughter]

RUTH BADER GINSBURG: But we should note that the point that was brought up before about hateful speech, there was a case, oh some many years ago, involving the Town of Skokie, Illinois, where many Holocaust survivors lived. And the American Nazi Party decided they would pick that town for their demonstration. The case never came to the U.S. Supreme Court. But other federal courts said that the demonstration is going to be peaceful. There will be police protection. We don't anticipate any violence. This group wants to march. We hate what they say. But we believe in their freedom to say it.

ANTONIN SCALIA: But that doesn't mean that it was good for them to say it, or right for them to say it. And it sometimes annoys me that, when somebody has made outrageous statements that are hateful, somebody says-- Sometimes the press will say, "Well, he was just exercising his First Amendment rights," you know, as though First Amendment rights are like muscles. The more you use them, the better. [laughter] And it doesn't matter what purpose you're using them for. I mean you can be using your First Amendment rights, and it can be abominable that you are using your First Amendment

rights. I'll defend your right to use it, your right to use it. But I will not defend the appropriateness of the manner in which you're using it now. That can be very wrong.

RUTH BADER GINSBURG: But I'm sure that Justice Scalia was praised by some, criticized by others, for his decision in the flag burning case. Now I imagine that you thought the act itself was reprehensible.

ANTONIN SCALIA: I would have sent that guy to jail if I was king. [laughter] Yeah.

MARVIN KALB: But, by your ruling, he'd have the right to burn the flag.

ANTONIN SCALIA: Yes, that's what the First Amendment means. You have the right to express your contempt for the government. That doesn't mean it was a good thing for him to do that, in that manner, by burning a symbol that meant so much to so many other people. But he had the right to do it.

MARVIN KALB: Justice Scalia, a recent event in Brooklyn, you were quoted as saying that basically, the Supreme Court should not be deciding matters of national security. And you're quoted as saying, "The Supreme Court does not know diddly about the nature and extent of the threat"--

ANTONIN SCALIA: Diddly? Did I say diddly? [laughter]

MARVIN KALB: That's what you're quoted as saying. "It's truly stupid," you went on, "that my court is going to be the last word on it." First of all, did you say that?

ANTONIN SCALIA: No. I think I probably did. I certainly believe it. [laughter]

MARVIN KALB: What did you mean? Justice Ginsburg, please?

RUTH BADER GINSBURG: I don't think we have a choice. The court decide, we're going to pick this one and straighten it out today. There are petitions for review. And if there is a law that the government says was violated, and the other side says, "No, the government can't do this, can't engage in that kind of surveillance," that case comes to us, we can't run away and say, "Well, we don't know much about that subject, so we won't decide it."

ANTONIN SCALIA: You know what I was talking about, this related to the Fourth Amendment, not the Fifth Amendment, the Fourth Amendment, which prohibits unreasonable searches and seizures, all right. The first time my court had a case involving wiretapping, it held that the way the Fourth Amendment reads is, "The people shall be secure in their persons, houses, papers and effects, possessions, against unreasonable searches and seizures." And the court said, quite properly, "Hey, conversations are not persons, houses, papers and effects." Wiretapping may be a very bad thing. States had laws against it. But it does not violate the federal Constitution, all right.

About 20 years later, during the Warren Court, we did a 180 degree turn. And we said, "There are penumbras, and emanations and conversations are covered by this vague right of privacy that's contained in the Constitution." Now, that is the living Constitution, okay, changing what the text says, and what it originally meant.

The consequence of that, I was pointing out in Brooklyn-- I like Brooklyn. The consequence of that is that now, the institution of the government that is going to decide this highly significant NSA question about, you know, what information can you get by wiretapping, the institution that will decide that is, without a doubt, the institution least qualified to decide it. It will be my court. You know, it's a questioning the emergency against the intrusion. When the emergency is high enough, you can have a higher

intrusion. It's why we all get searched when we board an airplane. That's a terrible intrusion upon-- Well, just let me finish.

We know nothing about the degree of the risk, nothing at all. The Executive knows. The Congress knows. We don't know anything. And we are going to be the one to decide that question.

RUTH BADER GINSBURG: So what do we do when the case comes to us? Before you answer that, I would like to remind everyone that, in the wiretapping case, the argument that wiretapping was not an unreasonable search or seizure, there was a very strong opinion the other way by Justice Brandeis. So, and if I were on that court, I would have voted the way he did. I'd like to know how Justice Scalia distinguishes that kind of intrusion by the government from the decision you made in the heat emissions case. Now the helicopter that was flying over roofs to see-- to test the level of heat, because if it was of a certain heat, then maybe marijuana plants were growing. That the helicopter never touched the roof, and yet you said that was a violation of the Fourth Amendment. That was an unreasonable search.

ANTONIN SCALIA: Because the people were not being secure in their houses from unreasonable-- I mean that's a clear example of one of the facilities that is protected by the Fourth Amendment.

RUTH BADER GINSBURG: So to wiretap someone in their house?

ANTONIN SCALIA: Yeah, if you have to break into their house to wiretap, yes. But, if you listen in to conversations, you know, when they're in the phone booth, oh, intruding upon their generalized right of privacy? It was never covered by the Fourth--

RUTH BADER GINSBURG: You don't have to worry about that anymore. There are no phone booths. [laughter]

ANTONIN SCALIA: You're right about that. You're right about that.

MARVIN KALB: Let me ask you this.

ANTONIN SCALIA: But anyway, we've gotten away from the Fifth Amendment, haven't we?

MARVIN KALB: No, no, I wanted--

RUTH BADER GINSBURG: The First Amendment.

ANTONIN SCALIA: The First Amendment, I'm sorry.

[laughter]

MARVIN KALB: Yeah, but stick with the Fourth Amendment for just a sec. And I don't know terribly much about it. And I can always add up front. But my question is could data that is considered terribly important, either by the media or by the government, stored in a computer or stored in a cloud up there somewhere, be considered effects, one of the four words you used?

ANTONIN SCALIA: Could be. That's very perceptive. I've thought about that. I've thought about that.

MARVIN KALB: Thank you. But, if you thought about that, doesn't it follow that the U.S. government would not be able to justify its NSA surveillance program. And that therefore, conceivably could be in violation of the Constitution?

ANTONIN SCALIA: No, because it's not absolute. As Ruth said, there are very few freedoms that are absolute. I mean your person is protected by the Fourth Amendment. But, as I pointed out, when you board a plane, somebody can pass his hands all over your body. That's a terrible intrusion. But, given the danger that it's guarding against, it's not an unreasonable intrusion. And it can be the same thing with acquiring this data that is regarded as effects. Depends on how-- And that's why I say it's foolish to have us make the decision, because I don't know how serious the danger is in this NSA stuff. I really don't.

MARVIN KALB: But don't you, in the Supreme Court, have the ability to pick up the phone and call somebody at the White House and say, "I have a question"?

ANTONIN SCALIA: No.

RUTH BADER GINSBURG: Absolutely not.

ANTONIN SCALIA: Absolutely not. [laughter] We are at the mercy of whatever people happen to bring to us. If they don't bring it to us, we don't know it.

RUTH BADER GINSBURG: And we can't make a decision based on something outside the record of the case. The parties and their lawyers have to know everything, have access to everything that we will factor into our decision. I don't know how many times I would have loved to call law professor so and so who is the biggest expert in the area.

ANTONIN SCALIA: Call your husband in a tax case, for example.

RUTH BADER GINSBURG: Right. Right.

ANTONIN SCALIA: Marty was one of the best tax lawyers in the country.

RUTH BADER GINSBURG: But we can't do that, because the other sides, the parties aren't there and don't have access to the same information. So we are hemmed in by the record of the case. And the court cannot resort to information that the parties do not have.

MARVIN KALB: Justice Ginsburg, I want to ask you the same question that I asked Justice Scalia about the data, the storage in computers, and linking that to the word "effects." And if that justifiably is linked to the word "effects," doesn't it follow logically that the case could be made that the government is in violation of the Constitution by this government surveillance program?

RUTH BADER GINSBURG: An argument could be made, certainly. But it's not an argument that either of us could answer. Well I think Justice Scalia suggested we can't answer at all. I don't think that's so. If we have to answer it, we will. But we don't get questions in the form you posed them, Marvin. We get a concrete case and not abstract question. The effects are up there, what can the government do?

ANTONIN SCALIA: I would answer that one, Ruth. You know, that is a person's houses, papers and effects. It's not conversations.

MARVIN KALB: What are you saying?

RUTH BADER GINSBURG: But you couldn't answer it in the abstract.

ANTONIN SCALIA: Oh, certainly. Certainly.

MARVIN KALB: Can we expect the Supreme Court to rule on the NSA issue?

RUTH BADER GINSBURG: It depends if there is a case that will begin, not in the Supreme Court, but in a federal district court, and then go to a court of appeals, we do have the luxury of not having to decide things until they have been decided by other good minds, by judges in the federal trial courts and courts of appeals.

ANTONIN SCALIA: And it's not our responsibility to shape up the Executive and make sure they're doing what they're supposed to, or shaping up the Congress. That's not our job. Our job is to prevent people from being harmed. If nobody is being harmed, we don't get into the matter. And, even if somebody is harmed, unless he comes to us, we don't have any self-starting powers. We're at the mercy of whoever wants to bring a case, or whoever doesn't want to bring a case.

Ruth and I visited India one time, a long time ago. And the Indian Supreme Court, India has a Bill of Rights which says that the Apex Court, their Supreme Court, will assure the preservation of the liberties set forth in the Bill of Rights. And that court interpreted that to mean that if they're sitting around on a Sunday reading the *Bombay Times*, and they see that the police commissioner--

RUTH BADER GINSBURG: Mumbai.

ANTONIN SCALIA: Look. [laughter] [applause] I don't say *Paree*. And I don't say *Veen*. And I will not say Mumbai. It's Bombay. We have an English word for it. Anyway-- [laughter] They're sitting around, reading the *Bombay Times*. And they see that the police commissioner in Punjab is holding people without charge, which violates the Constitution. That court will, on its own, summon the police commissioner to give an

account of himself. Our court can't do that. We can't do that. It's only when people bring problems to us.

MARVIN KALB: You can't do that because that's the way it's always been done? Or there's a rule that says you can't do it?

RUTH BADER GINSBURG: We can't because the Constitution limits us to actual cases or controversies. There are many courts in the world that do operate by answering abstract general questions. Constitutional courts have been set up-- There's a Constitutional Council in France that will preview a law if a certain number of deputies question the consistency of the bill with the Constitution, the Council will look at the bill, no actual case before them, just look at the words of the bill, decide whether it's compatible with the Constitution. And, if the Council holds it isn't compatible with the Constitution, then the bill never gets enacted. But that kind of judicial preview is foreign to us.

MARVIN KALB: Right. Let's talk for a minute or so about televising hearings of the Supreme Court.

ANTONIN SCALIA: Ooh. [laughter]

MARVIN KALB: Other courts do permit television. Why not the Supreme Court? Justice Scalia?

ANTONIN SCALIA: You know, when I first came on the court, I was-- I was in favor of it. I have long since changed my view on that. Those who want to do it say that they want to educate the American people. Now, if I really thought that it would educate the American people, I would be in favor of it. And indeed, if the American people watched our proceedings from gavel to gavel, they would be educated. They would come to

realize that a low-- You know, now and then we do these sexy cases. Should there be a right to abortion? Should there be a right to suicide? Should there be a right to this or that? Most of the time, we are not contemplating our navel. We are not engaging in this broad philosophical, ethical search. Most of the time, we are doing real law. We are doing the Internal Revenue Code, the Bankruptcy Code, ERISA, really dull stuff. [laughter] And nobody would ever again come up to me and say, "Justice Scalia, why do you have to be a lawyer to be on the Supreme Court?" Because they think what we're doing is, you know, looking up at the sky and saying, "Should this right or that right exist?" Well, they can guess that as well as I can.

Now, the problem is, for every person who watches us from gavel to gavel, there will be 10,000 who will watch a 15 or 30 second takeout on the nightly news. And I guarantee you, that will not be characteristic of what we do. It will be "man bites dog." So why should I participate in the miseducation of the American people?

MARVIN KALB: What about your feelings, Justice?

RUTH BADER GINSBURG: There's another factor. If you are televising a trial, everything that's unfolding is before the camera. If you're dealing with an appellate argument, well if you would come to our chambers at the moment, because we're starting sitting on Monday, you will see carts with briefs and briefs and briefs. The oral argument in court is fleeting. It is only 30 minutes a side. I don't know how many hours we have spent preparing, reading what had gone on in the case before it got to the Supreme Court. Reading the briefs that the parties filed, and the many friends of court who want to be heard on questions of importance to them.

So the notion that an appellate argument is a contest between lawyers, and the better one will win, is really a false picture of what the appellate process is.

MARVIN KALB: So you would be, as Justice Scalia, opposed to televising it?

RUTH BADER GINSBURG: I think it's probably inevitable, because there's going to be so much pressure for it, and because other courts do it. But I would be very much concerned with misportraying what an appeal is. The written part is ever so much more important than the-- than the hour total in court.

MARVIN KALB: In the couple of minutes that we have left, I want to just ask a question. You've both been great buddies for a long time, now. But when did you meet? And what were the circumstances?

RUTH BADER GINSBURG: He doesn't know. [laughter]

ANTONIN SCALIA: Go ahead Ruth.

MARVIN KALB: When did you meet?

RUTH BADER GINSBURG: Well, we were buddies on the D.C. Circuit.

MARVIN KALB: And that is when you met, at that time?

RUTH BADER GINSBURG: I met Nino for the first time when he was giving a speech to some unit of the ABA. It must have been administrative law section.

ANTONIN SCALIA: Law section probably, yeah.

RUTH BADER GINSBURG: And it was on a case that had recently been decided by the D.C. Circuit. It was before either of us got there. And it was about--

ANTONIN SCALIA: We were both academics.

RUTH BADER GINSBURG: Yeah. It was about the Vermont Yankee case.

MARVIN KALB: Vermont Yankee.

RUTH BADER GINSBURG: And you were inveighing against it. And I was listening to him, and disagreeing with a good part of what he said, but thought he said it in an absolutely captivating way. [laughter]

MARVIN KALB: I think we should leave it at that. Great point. I mean as you know, as you know, Composer Derrick Wang, who is with us tonight, has produced this opera called *Scalia-Ginsburg*. And in it, to beautiful music, you are both locked in a room, I understand, unable to get out unless you agree on a compromise consistent with the Constitution. And at one point, Scalia roars in despair, "Oh Ruth, can you read? You're aware of the text yet so proudly you have failed to derive its true meaning. The Constitution says absolutely nothing about this." To which Ginsburg replies, "How many times must I tell you, Dear Mr. Justice Scalia, you are searching in vain for a bright line solution. But the beautiful thing about our Constitution is that, like our society, it can evolve."

So we've got only about a minute or so left. Are you two ever going to agree on big issues and still maintain the friendship?

ANTONIN SCALIA: We agree on a whole lot of stuff, we do. Ruth is really bad only on the knee-jerk stuff. [laughter] She is a really good textualist. You know, in those things where the text is what she's got in mind, she's terrific. She's obviously very smart. And, you know, most cases, I think, we are together. I think we're together in a lot of criminal defense cases, upholding the rights of the criminal defendant. Ruth and I are

quite frequently in dissent from the court's decision. So no, we agree on a whole lot. You have it wrong.

MARVIN KALB: I keep seeing these five-four decisions where you're on one side and she's on the other.

RUTH BADER GINSBURG: Well, that's because the press focuses on what the 20-25 percent of the heady cases, the Constitutional cases. Most of what we're doing is trying to interpret dense statutes that Congress passed that are very difficult to parse. And on those cases, there isn't the usual lineup that the press expects to see in the most watched cases. So we agree on many procedure cases, not always. You got one wrong last year.
[laughter]

But-- And also, I have to say something else. We both care about the way opinions are crafted. And it's not easy to write an opinion. And I think you care very much about how it's said, and so do I. Of course, the way we say it is quite, quite different.

ANTONIN SCALIA: And one reason we became such good friends on the D.C. circuit was that we were both former academics. I guess Harry Edwards was another academic on the court. But in academia, at a law school, when you wrote a Law Review article, you would circulate it to your colleagues. And they would make comments, helpful comments, not just, "This is wrong." But, you know, there's an additional point you could make.

Well, Ruth and I did that with one another's opinions. We wouldn't do it to anybody else's. But, you know, she'd suggest some additional stuff that I could put in. And I would for her as well.

MARVIN KALB: I would like us to go on, but our time is up. I'm sorry about that. I want to thank our wonderful, attentive audience. I want to thank the many who watched and listened all over the nation and the world. But, most important, I want to thank our remarkable guests, two sitting Justices of the Supreme Court of the United States, Antonin Scalia and Ruth Bader Ginsburg. Thank you both so much.

[applause]

MARVIN KALB: And, as we now close 20 years of doing these Kalb Reports, I want to say thank you to all of the people who have made this kind of civilized conversation possible. And they know who they are. But that is all we can do for now. I'm Marvin Kalb. And, as Ed Murrow used to say, many, many years ago, good night and good luck.

[applause]

[side remarks]

MARVIN KALB: This is still being seen on C-SPAN. And the first question in front of me is to Justice Scalia. Why are you the way that you are? [laughter] You could hit a homerun on that.

ANTONIN SCALIA: The devil makes me do it. [laughter]

MARVIN KALB: Justice Ginsburg, the next question from Josh Gibson, who is a student at the Kennedy School. The First Amendment is a bit of a grab bag of free expression rights. Did the founders consider then decide against including others? Are there others that they or you would wish that had been included?

RUTH BADER GINSBURG: Well, that was a concern about having a Bill of Rights, that if you wrote down what the rights were, maybe there were some you left out. And we do have this statement in the Ninth Amendment that says, "The enumeration of certain rights shall not be construed to deny or disparage others." But one thing that we didn't bring out before is, the First Amendment is the First Amendment. But the first thing that was on the mind of the framers was not freedom of speech or of the press, it was about not having an established church. The first thing is, "No law respecting the establishment of religion." And then the freedom side of it, "or prohibiting the free exercise thereof." So the first thing that they didn't want to have was a Church of England.

MARVIN KALB: But that's kind of a negative. I mean it's something you cannot do.

RUTH BADER GINSBURG: Yes.

MARVIN KALB: But what's the positive side of that, would be freedom of religion, that you can--

RUTH BADER GINSBURG: Yes.

ANTONIN SCALIA: It's all negative. I mean it's all saying what the government cannot do. It is all limitations upon the government. That's what the whole Bill of Rights is. The government can't do this. The government can't do that. Government can't do the other thing. They're all negative.

MARVIN KALB: And that, except for the government, everybody else can do what they want?

ANTONIN SCALIA: Absolutely.

MARVIN KALB: Yes?

ANTONIN SCALIA: Absolutely. Yes.

RUTH BADER GINSBURG: But to take an example, we have an antidiscrimination law, Title VII of the Civil Rights Act of 1964. Until then, discrimination in the private sector was okay, because the Constitution restricts what government can do. A private employer could say, "I don't want any women in this job," and that would be perfectly okay as it was until 1964.

ANTONIN SCALIA: Did you have something to do with that?

[laughter]

RUTH BADER GINSBURG: Well I'd say President Johnson and the Congress did pass the Civil Rights Act of 1964 that had everything to do with that.

MARVIN KALB: I have a question here from Catherine Cosin of *The Newsian*. [?] To whom does the First Amendment apply? Do undocumented immigrants have the five freedoms?

ANTONIN SCALIA: Well I think so. I think anybody who is present in the United States has protections under the United States Constitution. Americans abroad have that protection. Other people abroad do not. They don't have the protections of our Constitution.

RUTH BADER GINSBURG: When we get to the Fourteenth Amendment it doesn't speak of citizens, as some Constitutions grant rights to citizens. But our Constitution says person. And the person is every person who is here, documented or undocumented.

MARVIN KALB: I see. Thank you. I have a question from David Dorson, whom you know, prominent lawyer who is here with us. Where do you look to decide whether freedom of the press is or is not identical with freedom of speech? I have a feeling that's a loaded question. [laughter]

ANTONIN SCALIA: I have never thought that it was anything except identical. I can't imagine that you can limit some things that can be spoken but cannot limit things that can be printed. I think it's the same, same criteria as to whether the limitation is unconstitutional.

RUTH BADER GINSBURG: I think David must have a case in mind. [laughter]

MARVIN KALB: A question here from Nicky Schnabb of *U.S. News and World Report*. Was there any case that rattled your friendship? Justice Ginsburg.

RUTH BADER GINSBURG: Well, Nino, I think we were most at loggerheads over the VMI case.

ANTONIN SCALIA: Yes.

RUTH BADER GINSBURG: Remember that?

ANTONIN SCALIA: Yes I do.

RUTH BADER GINSBURG: And you had a stirring dissent.

ANTONIN SCALIA: It was a great dissent. [laughter]

RUTH BADER GINSBURG: Yeah. You were the only dissenter. [laughter]

ANTONIN SCALIA: Well that's only because Clarence was recused because he had a son there, didn't he?

RUTH BADER GINSBURG: That's true. But remember that the chief voted for my judgment.

ANTONIN SCALIA: I know.

RUTH BADER GINSBURG: Not your dissenting opinion. [laughter] And we went-- I don't know how many rounds we went.

ANTONIN SCALIA: We did, back and forth.

RUTH BADER GINSBURG: Yeah. And one time I had a footnote that referred to the University of Virginia at Charlottesville.

ANTONIN SCALIA: Oh yes.

RUTH BADER GINSBURG: That you had a footnote back saying, "Well, you have to forgive this ignorant person because she doesn't know that there is no University of Virginia at Charlottesville. There is only a University of Virginia."

ANTONIN SCALIA: And she even talked about the campus of the University of Virginia, my goodness.

RUTH BADER GINSBURG: But you know what he did do, he wasn't finished writing the dissent. It was getting rather late. We were into June already. He gave me

what was the pen ultimate copy of his dissent. He wasn't ready to circulate it yet. But he came to my chambers and gave it to me and said, "I want to give you as much time as I can to answer this." So I went off to my Circuit Judicial conference, read the thing on the plane, and it ruined my whole weekend. [laughter] But that he gave me the extra days to respond, I really appreciated that.

ANTONIN SCALIA: I have never gotten angry at Ruth or at any of my colleagues because of the way they voted in an opinion. I mean if you cannot disagree with your colleagues on the law without taking it personally, you ought to get another day job. I mean it's just not the kind of a job that will allow you to behave that way. So Ruth and I disagree on the law all the time. But it's never had anything to do with our friendship.

RUTH BADER GINSBURG: And we do also have a difference in style. I'd say people might regard my opinions as rather dull, boring. Yours are really jazzy sometimes. [laughter]

ANTONIN SCALIA: Jazzy?

MARVIN KALB: Here is a question from Seth Dawson of the Office of Congressman Denny Hecht. Justice Stevens recently suggested a Constitutional Amendment to modify the Second Amendment. If you could amend the Constitution in one way, what would it be, and why? Justice Scalia.

ANTONIN SCALIA: I certainly would not want a Constitutional Convention. I mean whoa. [laughter] Who knows what would come out of that? But, if there were a targeted amendment that were adopted by the states, I think the only provision I would amend is the Amendment Provision. I figured out, at one time, what percentage of the populace could prevent an Amendment to the Constitution. And, if you take a bare majority in the

smallest states by population, I think something less than two percent of the people can prevent a Constitutional Amendment. It ought to be hard, but it shouldn't be that hard.

MARVIN KALB: Justice Ginsburg?

RUTH BADER GINSBURG: If I could choose an Amendment to add to this Constitution, it would be the Equal Rights Amendment. [applause] And that's--

MARVIN KALB: What do you mean by that? How would you define that?

RUTH BADER GINSBURG: It means that women are people equal in stature before the law. And that's fundamental Constitutional principle. I think we have achieved that through legislation. But legislation can be repealed. It can be altered. I mean we have, I mentioned Title VII of the Civil Rights Act. And the first one was the Equal Pay Act. But that principle belongs in our Constitution. It is in every Constitution written since the Second World War. So I would like my granddaughters, when they pick up the Constitution, to see that that notion that women and men are persons of equal stature. I'd like them to see that that is a basic principle of our society.

MARVIN KALB: Any doubt in your mind that that would pass the judgment of the American people?

RUTH BADER GINSBURG: Well, it didn't. Came pretty close. And I think that's an illustration of how powerfully hard it is--

MARVIN KALB: -- to get an Amendment?

RUTH BADER GINSBURG: Yeah.

ANTONIN SCALIA: You don't want me to comment on that, do you?

RUTH BADER GINSBURG: No I don't. [laughter]

MARVIN KALB: A question here, but no ID on who wrote it. To what extent do social media platforms, such as Twitter, where speech can be broadcast to millions instantly, challenge traditional concepts of free speech? Interesting question. What is your thought on that, Justice Scalia?

ANTONIN SCALIA: Well, I don't know that it challenges traditional concepts of free speech. It certainly challenges traditional manners of finding out who said what, where certain people say things that are unlawful, or that are punishable by law. But I don't think it-- I don't think it changes what the First Amendment means.

RUTH BADER GINSBURG: There's also the great danger for people who use those devices, is you can't take it back. You know, once you let it out, it's there for everybody to see.

MARVIN KALB: But you don't feel that it changes the concept of freedom of speech or of the press?

RUTH BADER GINSBURG: You'd have to give me an example.

MARVIN KALB: Okay. Sumdan[?] Newman asked this question. As it becomes easier to share opinions and events, should social media, i.e. Twitter, Facebook, etcetera, be required to limit what is shared? Is that a legal question?

ANTONIN SCALIA: No, that's a policy question. I don't do policy. [laughter]

RUTH BADER GINSBURG: I would agree with my colleague.

MARVIN KALB: Okay. Joshua Kurd[?] of the *Washington Center*. Do you feel the separation of church and state has been misunderstood with Congress and the Supreme Court taking a proactive stand on the establishment portion, but not on the prohibition part?

ANTONIN SCALIA: I don't understand what he means by the last part. Proactive stand?

MARVIN KALB: Well, I was hoping that you would understand it because I didn't. [laughter] I'm sorry, I'm not there.

ANTONIN SCALIA: Okay.

MARVIN KALB: Our last question. When you were a youngster, what did you want to be when you grew up? [laughter]

ANTONIN SCALIA: Oh Lord. Maybe I'm an unusual person. I don't ever recall wanting to be anything. I mean a baseball player, or a hockey player, or a lawyer, or-- Certainly never a judge. I never set my cap on being-- on being a judge. I didn't even want to be a lawyer when I was in college. When I graduated from college, I didn't know what I was going to do. I had an uncle who was a lawyer, Uncle Vince. Every Italian has an Uncle Vince. [laughter] Vince had an office in Trenton, and I used to go out there and hang out there now and then.

It seemed like a good life. So I went into the law. But no, I can't say I ever wanted to do anything, except to do well, what I was assigned to do. And, if I have any, what, quality that accounts for my making it this far, it's my ability to interest myself in whatever was

shoved under my nose, no matter how-- no matter how dull it was. I took pleasure in doing it to the extent I could perfectly. But I never set my cap on being even a federal judge, much less a Supreme Court Justice.

MARVIN KALB: Justice Ginsburg?

RUTH BADER GINSBURG: In my growing up years, there were so many limits on what a girl could aspire to be. She could not be a police officer. She could not be a firefighter. She could not be a coalminer. She could not work at night. There were all these restrictions. There were very few women lawyers, maybe three percent of the Bar. And there were even fewer judges. So I never aspired to be a lawyer, certainly not a judge, because if I had to make a living, I better be a teacher. That was a secure job for women.

And the exhilarating thing for me, when I think of my daughter and my granddaughters, is the opportunities open to them that didn't exist. I'll give you my favorite example of this is my granddaughter, who is now 23, when she was eight, was with me. And I was being interviewed. And she said, "Well I wanted to be part of this show, too." [laughter] So the reporter said, "All right, Clara. What would you like to be when you grow up?" And Clara's response was, "I would like to be President of the United States of the World." [laughter] And that, to me, the change in what girls can aspire to do, and can achieve, has been just exhilarating.

MARVIN KALB: Well unfortunately, we've come to the end of the line. I just want to share with you the essence of a conversation that was repeated over and over again with me and the producers of this program, especially the executive producer, Mike Freedman, whom you have met. And that is the thought that we live in a time in Washington when the idea that two people who have strongly different opinions on very important issues

can actually be good friends, and can actually respect one another. And that kind of mutual respect is so terribly important today.

And I hope, I truly hope, that this program, televised as it's been, can set an example and serve as a model for people all over the country who might have different opinions, but do recognize that, in this country, there's plenty of room for the different opinions. And we ought to have more room for mutual friendships. So thank you both so very much for being here.

[applause]

END

オーストリア大統領選、やり直し 極右の伸び焦点

2016/7/1 22:26 | 日本経済新聞 電子版

【ベルリン＝赤川省吾】オーストリアの憲法裁判所は1日、5月に行われた大統領選の結果を無効とする異例の判断を下した。開票の手続きに不備があったとして、大統領選をやり直すように命じた。再選挙では欧州統合に懐疑的な極右政党の候補者がどこまで票を伸ばすのかが焦点となる。英国の欧州連合（EU）からの離脱交渉にも影響を与えそうだ。

オーストリアでは5月の大統領選でリベラル系の緑の党が推すファン・デア・ベレン前党首が、反難民・反EUを掲げた極右・自由党の候補者を僅差で下した。今月8日に新大統領に就任する予定だった。

大統領は政治的な実権は小さいが、国家元首として国を代表する。極右政党が国家の中樞を握るという異常事態はかろうじて避けられたはずだったが、負けた自由党が「選挙に不正があった」と憲法裁判所に異議を申し立てていた。



1日、オーストリアの憲法裁判所は大統領選の無効を認めた（ウィーン）＝ロイター

それを受理した憲法裁は、郵便投票が所定の手続きに沿って開票されていなかったと結論付けた。立会人が全員そろっていないのに作業に取りかかりたり、決められた時間よりも早く票の集計を始めたりした事例があったという。投票結果の改ざんはなかったと判断したが、再選挙を命じた。

「選挙に不正があった」という印象が少しでも残れば民主主義への信認が揺らぐ。今回の司法判断には、それを防ぐ効果がある半面、極右にチャンスをもたらした。

再選挙は5月と同じリベラル系と極右の一騎打ちとなり、9～10月に行われる見通し。難民を制限するか、欧州統合を深めるかが争点だ。

極右の候補者ホーファー氏は、EUから離脱すべきか国民投票で問うべきだとの考えを披露したことがある。右派系の大衆紙で「1年以内の実施」を提案した。オーストリア全体でEU離脱を望む人は3割に満たないが、極右支持層に限れば7割が国民投票を望む。

迎え撃つリベラル系のファン・デア・ベレン氏は1日、「再び勝つ自信がある」と語った。だが選挙戦は再び接戦になるとの見方が強い。

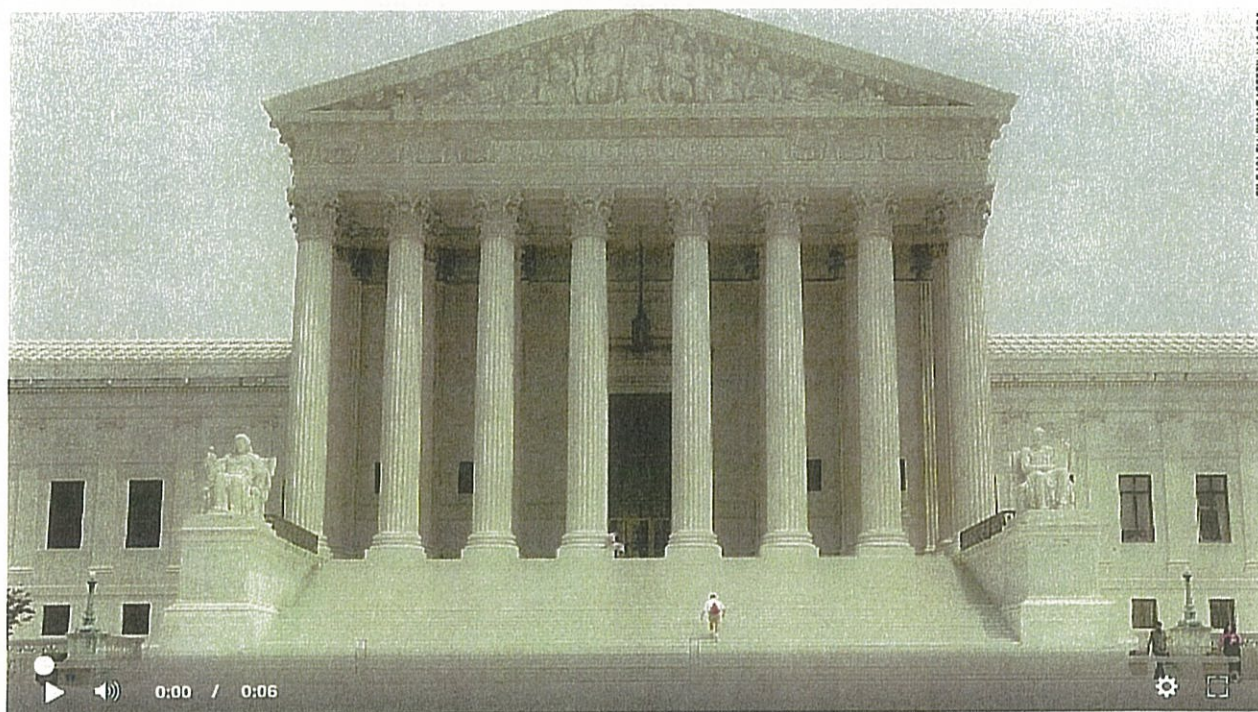
反EU機運を封じ込めようとオーストリアだけでなく、英国を除く27カ国のEU加盟国は「結束」を最優先させることになる。この結果、当面は対英交渉にも強硬路線で臨まざるを得ない。

CNN Supreme Court strikes down North Carolina congressional district maps



By Ariane de Vogue, CNN Supreme Court Reporter

Updated 1915 GMT (0315 HKT) May 22, 2017



Supreme Court throws out NC redistricting maps 01:05

Story highlights

Supreme Court held North Carolina illegally drew two congressional districts to pack them with African-American voters

Republicans control 10 US House seats; Democrats three

(CNN) — The Supreme Court struck down two congressional district maps in North Carolina Monday, holding that the state had engaged in an unconstitutional racial gerrymander.

The ruling is a victory for the black North Carolina voters who had argued the plans packed African-Americans in districts that already had a high percentage of African-Americans, thus diluting their presence in other districts.

As a result, the ruling sends the North Carolina legislature back to the drawing board -- with significant potential implications for the 2018 midterm elections. The state has been nearly split along partisan lines in recent statewide elections -- such as for governor and president -- but Republicans control 10 US House seats compared to only three for Democrats.

"The Constitution entrusts states with the job of designing congressional districts," Justice Elena Kagan wrote for the majority. "But it also imposes an important constraint: A state may not use race as the predominant factor in drawing district lines unless it has a compelling reason."

RELATED: Supreme Court tackles racial gerrymander cases

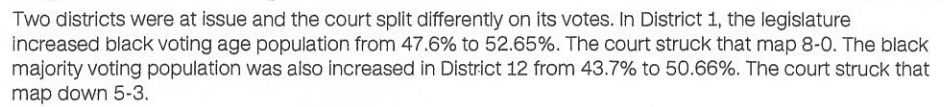
"North Carolina voters deserve a level playing field and fair elections, and I'm glad the Supreme Court agrees," said Gov. Roy Cooper, a Democrat elected last November.

"The North Carolina Republican legislature tried to rig congressional elections by drawing unconstitutional districts that discriminated against African-Americans and that's wrong," he added.

2017 Redistricting Map Shows Seats by Congressional District



The case was heard before Cooper took office, and attorneys for North Carolina argued that the state finds itself in a bind. The Voting Rights Act requires that the legislature take race into consideration when drawing district lines.



Steve Vladeck, CNN legal analyst and professor of law at the University of Texas School of Law, contributed to this report.

A portrait of a woman with short, dark, wavy hair. She is wearing a dark blazer over a white top. She is standing in front of a wooden panel wall with a window in the background.



Rubio: Trump firing Mueller 'not going to happen'

(CNN) The Supreme Court struck down two congressional district in North Carolina on Monday, holding that the state had engaged in an unconstitutional racial gerrymander.

(訳)

連邦最高裁判所は、月曜日、州が憲法に反し、人種による恣意的な選挙区の調整 (gerrymander) を行ったと認定し、ノースカロライナの 2 つの連邦下院選挙区を無効とした。