SENATE COMMITTEE HEARINGS ON THE JUDICIAL NOMINATION PROCESS*

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* The Editors would like to thank all the witnesses and the Senators for making their statements available and granting permission to publish them here as part of our Symposium, *Judicious Choices: Nominating and Confirming Supreme Court Justices.*

HEARING BEFORE THE SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS ON SHOULD IDEOLOGY MATTER?: JUDICIAL NOMINATIONS 2001

JUNE 26, 2001

STATEMENT BY LLOYD N. CUTLER*

I have served on two national commissions dealing with how to improve the process of nominating and confirming federal judges. Both have taken up the ideological issues that are the subject of your hearing today. The first commission, created by The Miller Center of Public Affairs at the University of Virginia, filed its report in 1996. The second, created by the Century Foundation and called Citizens for Independent Courts, filed its report in 1999.

My views on the role of ideology in the nominating and confirming process are set forth in these reports. They are incorporated in my statement. I will read a few key paragraphs from each:

First, The Miller Center report in 1996:

> It is most important to appoint judges who are learned in the law, who are conscientious in their work ethic, and who possess what lawyers describe as "judicial temperament." That term, though difficult to define, essentially describes a personality that is evenhanded, unbiased, impartial, courteous yet firm, and dedicated to a process, not a result. The law should be fairly read and applied, irrespective of the judge's personal views as to its wisdom. Where the judge is the finder of fact, the facts will be fairly found.
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> As this Report recognizes, throughout our history the judicial appointment process has been built on politics. The danger of purely

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* Constitutional Project Courts Initiative, Co-Chair; Former White House Counsel.

political appointees lacking the necessary competence led Attorney General Brownell to introduce the American Bar Association's participation. At that time—and for some years thereafter—relatively few persons in the executive branch and the Senate or its staff worked on judicial appointments, and rarely were any of them experienced in court practices and procedures. The ABA Committee was designed to fill that shortcoming and insure [sic], insofar as the political process permitted, the high quality of those selected.

. . . .

In addition to the growing number of appointments, the changing political process has affected who the candidates for judicial office are and whether they will be nominated and confirmed. The increasingly ideological nature of political campaigns, the need for huge sums of money, the growing dependence on contributions from various ideological groups, and the willingness of these groups to launch personal attacks on candidates they ideologically oppose, has the potential to affect the appointment process in unfortunate ways. Even putting aside the cases of Supreme Court nominees such as Robert Bork and Clarence Thomas, where this problem was obvious, there have been some signs of similar ideological controversy creeping into the process of nominating and confirming lower court candidates. While it appears that the present administration has been conscious of the problem and relatively successful in avoiding such ideological controversies, we have learned of occasional episodes where qualified candidates have refused to be considered or have withdrawn from fear of being "Borked."

The Commission believes that it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science, it also serves to weaken public confidence in the courts. Just as candidates should put aside their partisan political views when appointed to the bench, so too should they put aside ideology. To retain either is to betray dedication to the process of impartial judging. Men and women qualified by training and experience to be judges generally do not wish to and do not indulge in partisan or ideological approaches to their work. The rare exception should not be taken as the norm.

In any case, it is our view that the important process of appointing federal judges need not be as difficult as it now seems. The ultimate question is simply whether or not potential candidates have integrity, good judgment, and the experience necessary to become judicial officers of the United States. Occasional mistakes will be made. But no amount of bureaucratic vetting or ideology testing will achieve perfection, and too complex a process can do more harm than good.

Second, the Century Foundation Report in 1999:

RECOMMENDATIONS FOR EXECUTIVE AND LEGISLATIVE BRANCH REVIEWERS ON IDEOLOGY IN FEDERAL JUDICIAL SELECTION

1. Candidates for judgeships should be committed to deciding cases based on the law and facts of particular cases, without the intrusion of any rigid ideological precommitments to certain results or approaches to the law.

2. Reviewers should investigate a candidate's experience, qualifications, temperament, character, and general views of the law and of the judicial role. Selecting a federal judge is not just a matter of picking a legal technician, for a person's judgments may well reflect one's broad values and commitments.

3. Reviewers must refrain from asking candidates for particular pre-commitments about unresolved cases or issues that may come before them as judges.

4. The limit on questions seeking precommitments should be applied by reviewers in a common-sense fashion. In particular, this limit should not be allowed to prevent a fully deliberative investigation into the backgrounds, qualifications, and judicial philosophies of candidates for judgeships.

5. The limit on questions seeking precommitments should be respected equally by the president and other executive branch reviewers as well as by senators and other legislative branch reviewers, despite differences in the roles played by the two branches in the appointment process.

6. The limit on questions seeking precommitments should apply with respect to candidates for courts at all levels of the federal judiciary.

7. Reviewers seeking to assess a candidate's views should exercise caution when evaluating a person's current or former clients, memberships, and writings or speeches.

8. The value of judicial independence is consistent with pursuing diversity on the federal bench.

9. The value of judicial independence is consistent with active involvement by bar associations in the selection process.

Rather than read these extracts from the two reports, I will file them for the record. After making a few personal observations of my own, I will be pleased to answer your questions.

STATEMENT BY C. BOYDEN GRAY*

Good morning, Mr. Chairman. Thank you for this opportunity to appear today. If the goal of today's hearing is to answer the question, "What is the proper role of ideology in the judicial selection process?," I can answer in one word: None. The only legitimate question—from the White House, the Senate, the Judiciary Committee, or an individual Senator—pertains to the proper constitutional role of a federal judge. The question is very simple: "What is the proper role of a federal judge, or of the federal judiciary?" If the nominee's answer is "to interpret and apply the law," or words to that effect, then you have a nominee who understands the limited role of a judge. If, on the other hand, a nominee views the judiciary as a vehicle for favoring particular interest groups or particular outcomes, then the nominee is unfit to be a judge and should consider running for legislative office instead.

Historically, judicial nominees have not been asked about their views. There simply were no hearings on judicial nominees until 1925. Even then, the hearings were perfunctory affairs for decades. When Byron White was nominated to the Supreme Court in 1962, the Judiciary Committee asked him eight questions and the hearing lasted fifteen minutes.

In 1981, Senator Kennedy defended Sandra Day O'Connor's refusal to answer questions about her views on abortion. He said, "It is offensive to suggest that a potential justice of the Supreme Court must pass some presumed test of judicial philosophy."

As I said earlier, I think there is one legitimate test of judicial philosophy. But if the Senate—or the White House—asks overly specific questions, they threaten the independence of the federal judiciary by seeking advance commitments to rule certain ways in particular cases. In fact, the questionnaire that the Judiciary Committee sends to judicial nominees before its hearings makes clear that this is an unacceptable practice. The questionnaire asks:

> Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking or seeking a commitment as to how you would rule on such case, issue or question? If so, please explain fully.

Very early in the first Bush administration, when I was White House Counsel, I met with Judiciary Committee Chairman Biden and Senators

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* Former White House Counsel; Member, Wilmer, Cutler & Pickering, Washington, D.C.

Kennedy, Hatch and Thurmond. Senators Biden and Kennedy made it very clear, with Senators Hatch and Thurmond nodding in agreement, that a nominee would not be confirmed if the White House were caught asking questions about specific issues or cases.

Both Republicans and Democrats have been accused of using unfair, politically driven litmus tests in nominating or confirming judges. The criterion I have outlined is the closest thing to a *proper* litmus test because it only considers whether the nominee understands the proper constitutional role of an unelected federal judge, which in turn indicates whether he or she understands the American system of self-government. In our democracy, decisions on major political issues should be made by the people and their elected representatives, not by unelected judges. This has been the prevailing and respectable point of view since our nation's founding. The alternative view—that judges can make decisions freely without being constrained by the language of the Constitution or statutes—is an extreme position shared by almost no one. That's the view that should be described as extremist because it lets judges do whatever they want regardless of what the law says, and that should frighten Americans on both ends of the political spectrum. As Thomas Jefferson cautioned, if judges were allowed to interpret the law to be what they wish, the Constitution would be "a mere thing of wax in the hands of the Judiciary, which they may twist and shape into any form they please."

Some organizations and individuals have urged the Senate to just say no to judges nominated by a President of the other party. Before President George W. Bush was even inaugurated, before a single judge had been named or nominated, one group said it would fight so hard against his judicial nominees that "it will be scorched earth. We won't give one lousy inch." That hasn't been the historical approach, and I urge you to reject this political warfare. It threatens judicial independence at its most vulnerable and fundamental core.

During the twelve years of the Reagan-Bush era, Democrats controlled the Senate half the time. Yet the Senate confirmed 382 of President Reagan's judicial nominees and 191 of President Bush's nominees. During Clinton's presidency, Republicans controlled the Senate for six out of eight years, but they confirmed 377 of President Clinton's judicial nominees. It's safe to say that Republicans disagreed with the political preferences of many of these judges, but they voted down only one judge. And that is appropriate; rejections should be rare. Alexander Hamilton said in *The Federalist Papers* that judicial nominees should be rejected only for "special and strong reasons."

Ideology and party identification have never been very good benchmarks for ascertaining how a judge will decide future cases in controversial areas. There are seven Republican appointees on the current Supreme Court. Two of them are among the most liberal justices of the century, and most of them have supported the Court's decisions upholding *Roe* and striking down state partial

birth abortion statutes. One such appointee—Chief Justice Rehnquist—supported the *Miranda* decision, and at least two conservative members of the bench render broad definitions of the procedural protections under the Fourth Amendment and are inclined to support greater judicial scrutiny of administrative agency action. Presidents, no doubt, try to identify nominees who will defend the White House's prerogatives, but history proves that such efforts are often pointless. Justice Oliver Wendell Holmes, for example, ended up thwarting the antitrust policies of the president who nominated him—Theodore Roosevelt. And, finally, Justices do not always live up to the "liberal" label they receive. Toward the end of his career, the Justice for whom I clerked—Chief Justice Earl Warren—invoked federalism principles that might be considered "conservative" today.

But even if you reject the proposition that ideology is not a good gauge, ideological inquiries are perilous because of the message they send to the public at large. If Senators focus on the results or outcomes in particular, people will simply view the judiciary as another political institution. Under this setting, law is just politics by other means.

One commentator recently has suggested that the Senate needs some activist judges on the bench to maintain some balance. After all, the last election was close, so the courts should "reflect the nation's profound ambivalence." Well, I don't know if we want to appoint profoundly ambivalent judges. After all, it's not uncommon for the White House and the Senate to be in the hands of different political parties, and we've never apportioned judicial seats on the breakdown of the vote in the last election. The Constitution assigns the appointment power to the President, and I think it's clear that the advice and consent role of the Senate does not include a pre-nomination function.

In conclusion, Mr. Chairman, the key criterion for judging a potential judge is not ideological, but philosophical and constitutional: does the nominee have the integrity to recognize the limited role of a judge and leave legislating to the legislators?

STATEMENT BY PROFESSOR LAURENCE H. TRIBE*

I am honored to have been invited to appear before this Subcommittee of the Senate Judiciary Committee to shed whatever light I can on the extremely important, and hopefully not too timely, topic of the Senate's role in the consideration of presidential nominations to the Supreme Court of the United States. I say "hopefully not too timely" because I think it wise of the Senate, with such guidance as the Senate Judiciary Committee through the agency of this Subcommittee can provide, to focus its attention *now*—not when a vacancy arises or a name is put forward—on the criteria to be applied in the confirmation process, and particularly on the role of ideology in that process.

There is a difficult trade-off here, to be sure. In Washington, as elsewhere, the squeaky wheel gets the grease. Focusing meaningful attention on an issue before it becomes a problem, much less a crisis, is difficult in the best of circumstances. Doing so when the issue is as abstract and complex as that of confirmation criteria for Supreme Court Justices is more difficult still. Yet waiting until the matter is upon us, complete with a name or a short list of names, with interest groups and spinmeisters formidably arrayed on both sides, assures that the discussion will resemble a shouting match more than a civil conversation, and that every remark will be filtered through agenda-detectors tuned to the highest pitch. On balance, I believe that addressing the question of the Senate's proper role under a veil of ignorance—ignorance as to precisely when a vacancy will first arise, which of the sitting Justices will be the first to depart, and which name or names will be brought forth by the White House—seems likeliest to lead to fruitful reflection on how to proceed when the veil is lifted and we are all confronted with the stark reality of specific names and all that they might portend for the Republic.

It is understandable that, partly because of the seemingly abstract and speculative character of such a discussion in the absence of any actual nominee, and partly because the more immediate question actually facing the Senate Judiciary Committee is how best to evaluate a group of nominees already put forward by the President to fill various vacancies in the federal courts of appeals, this Subcommittee has chosen to cast its inquiry more broadly than a focus on Supreme Court nominations would indicate and has decided to include in its charge the question of what role ideology should play in considering federal judicial nominations generally. For that reason, at the conclusion of my observations about my principal topic—that of Supreme Court nominations—I will offer a few thoughts about the broader question that is of interest to the

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* Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School.

Subcommittee. But because I want to preserve to the degree possible the distinct advantages of separating the general question of criteria from any particular nominee or set of nominees, I will carefully avoid saying anything about any pending nomination and will, until the end of my remarks, discuss only the matter of nominations to the Supreme Court.

When my book, *God Save this Honorable Court*, was published in 1985 defending an active role for the Senate in the appointment of Supreme Court Justices, the Court was delicately balanced, with liberals like William Brennan and Thurgood Marshall offsetting conservatives like William Rehnquist and Antonin Scalia. Yet, on the inevitable book tour, I found quite a few otherwise well-informed people wondering why the composition of the Supreme Court was all that big of a deal, and why it shouldn't suffice for the Senate simply to make sure that the President wasn't packing the Court with cronies and with mediocrities. Having satisfied itself of the professional qualifications and character of the President's nominee, some people wondered, why should the Senate be concerned with that nominee's philosophical leanings or ideological predispositions?

People seemed to view things differently when they were exposed to the historical background showing that the Framers contemplated a much more central role for the Senate in this process, and when they learned that it was mostly the unwieldiness of having a collective body like the Senate make the initial nomination that led the Framers, at the last minute in the drafting process, to entrust the nomination to the President and to leave the Senate with the task of deciding whether to confirm or reject; that, even in the final version of the Constitution as ratified in 1789, the Senate's task was not left wholly passive—deciding between a thumbs-up and a thumbs-down—but was cast as the role of giving its "advice and consent;" and that, with the exception of an uncharacteristic lull in the last century, the Senate has traditionally exercised its advice and consent function with respect to the Supreme Court in a lively and engaged manner, concerning itself not simply with the intellect and integrity of the nominee but with the nominee's overall approach to the task of judging, and often with the nominee's substantive views on the burning legal and constitutional issues of the day. Those who initially assumed the Senate need not concern itself with a nominee's ideology tended to view the matter in a new light when reminded that, both in the formative days of our nation's history, under Presidents as early as George Washington, and in recent decades, there has been a venerable tradition in which the Senate has played anything but a deferential role on Supreme Court nominations.

All of that registered with people back in 1985, but it wasn't until the 1987 resignation of Lewis Powell and the confirmation battle later that year over Robert Bork, that the concrete stakes in this otherwise abstract controversy came to life for the great majority of the American public. In retrospect, although one

can lament the ways in which some interest groups and politicians—on both sides of the question, frankly—exaggerated the record bearing on Judge Bork's views and bearing on what kind of Supreme Court Justice he would have made, the fact is that his confirmation hearings represented an important education for large segments of the public on such fundamental matters as the meaning of the due process and liberty guarantees of the Fifth and Fourteenth Amendments to the Constitution, the relevance and limits of the Ninth Amendment's reference to unenumerated rights, the connection between various ways of approaching the Constitution's text and history, and such particular unenumerated rights as personal privacy and reproductive freedom, the relationship between a tightly constrained and literalist reading of the Constitution in matters of personal rights and a more open-textured and fluid reading of the Constitution in matters bearing on state's rights, and a host of other topics of enduring significance.

For my own part, as one of the expert witnesses called to testify about Judge Bork's constitutional philosophy and about the consequences for the nation were he to gain an opportunity to implement that philosophy as a Supreme Court Justice, I make no apology for anything I said at the time. Knowing full well that my testimony would put me on the enemies' lists of some extremely powerful people with very long memories, I felt it my duty to testify to the truth as I understood it. I would do the same thing again today. When the Senate finally rejected the nomination of Robert Bork, many of his allies cried "foul" and have since practiced decades of payback politics. Indeed, they have even succeeded, with the aid of some revisionist history, in adding to the vocabulary the highly misleading new verb, "to Bork"—meaning, "to smear a nominee with distorted accusations about his or her record and views"—as though the predictions of the sort of Justice that Robert Bork would have become were in some way misleading or otherwise unfair. But the truth, as Judge Bork's postrejection writings made amply clear, was just as his critics had indicated. Unless being confirmed would have caused him to undergo a radical conversion—something on which the nation has a right not to gamble—his rejection, and the subsequent confirmation of Justice Kennedy in his stead, meant one less member on the far right wing of the Court and left Justice Scalia, later with Justice Thomas, holding down the starboard alone. The nation had held a referendum on the Borkian approach to reading the Constitution of the United States, and the Borkian approach had decisively lost. And, lest it be supposed that I review this history simply to reprise a political episode that was painful for all concerned, I should make plain that my purpose is altogether different. It is to remove the fangs from the verb "to Bork" and to restore some perspective, lest anyone be misled into beginning the debate over the Senate's proper role with the erroneous premise that the Senate should be less than proud of the last instance in which it rejected a Supreme Court nominee on ideological grounds.

Today, it takes very little effort to persuade any informed citizen that the identity of who serves on the Supreme Court of the United States matters enormously—matters not simply to the resolution of these large questions of how the Constitution is to be approached and how its multiple ambiguities are to be addressed, but as well in the disposition of the most mundane, and yet basic, questions of how we lead our lives as Americans. Whether laws enacted for the benefit of the elderly or the disabled are to be rendered virtually unenforceable in circumstances where the violator is a state agency and the victim cannot obtain meaningful redress without going to federal court; whether people stopped in their cars for minor offenses like failing to have a seatbelt properly attached to a child's car seat may be handcuffed and taken by force to the police station where they are arrested and booked and held overnight; whether police may use sense-enhancing technologies like special heat detectors to peer through the walls of our homes in order to detect the details of what we do there; whether, having recognized that everything we do in the privacy of our homes counts as an intimate detail when it comes to protecting us from various kinds of search and surveillance, judges will nonetheless continue to let state legislatures regulate the most intimate sexual details of what we do behind closed doors with those we love; whether government may forbid the kind of research that might prove essential to the prevention and cure of devastating degenerative diseases whenever that research uses stem cells or other tissues from embryos created in clinics for infertile couples—embryos that would otherwise be discarded without making such life-generating new knowledge possible; what kinds of campaign finance restrictions are to be permitted when the broad values of democracy seem pitted against the specific rights of individuals and corporations to use their wealth to purchase as much media time as money can buy; who is to be the next President of the United States—these are just some of the questions whose answers have come to turn on a single vote of a single Supreme Court Justice.

The battle that was fought over the nomination of Judge Bork to become Justice Bork was fought because the general approach to constitutional interpretation that he seemed to represent attracted him to some but frightened an even larger number. Most dramatic among the anticipated consequences of his confirmation would have been the addition of his vote and voice to the far right wing of the Court on such issues as reproductive freedom, which the Constitution of course never mentions in so many words. His confirmation, people came to recognize despite his avowals of open-mindedness on all such matters, would have meant the certain demise of *Roe v. Wade*, a decision whose most recent application, in last year's partial birth abortion case from Nebraska, was, after all these years, still 5-4—as are a large number of crucial decisions about personal privacy, gender discrimination, sexual orientation, race-based affirmative action, legislative apportionment, church-state separation, police behavior, and a host of other basic issues.

After the Supreme Court's highly controversial and I believe profoundly misguided performance last December in the case of *Bush v. Gore*—in which I should acknowledge I played a role as author of the briefs for Vice President Gore and as oral advocate in the first of the two Supreme Court arguments in the case—it's difficult to find anyone who any longer questions why it matters so much who serves on the Court. The significance of *Bush v. Gore* in this setting doesn't depend on anybody's prediction of who would have won the vote count in Florida had the counting gone on without the Supreme Court's dramatic and sudden interruption on December 9, 2000, or of who would have been chosen the next President by Congress this January 6 if the Supreme Court had let the constitutional processes operate as designed and if competing electoral slates had been sent from Tallahassee, Florida to Washington, D.C. The great significance of the case is to underscore that, by a margin of a single vote, the branch of our government that is least politically accountable—wisely and designedly so, when matters of individual and minority rights or of basic government structure are at stake—treated the American electorate and the electoral process with a disdain that a differently composed Court would have found unthinkable. So it was that, when push came to shove, and the Supreme Court's faith in democracy was tested, the Supreme Court blinked. It distrusted the people who were doing the counting, it distrusted the state judges, it distrusted the members of Congress to whom the dispute might have been thrown if it hadn't pulled down the curtain. And the Court could get away with it, partly because nobody in the House or Senate, to be brutally honest, relished the thought of discharging the constitutional responsibility of deciding which electoral votes to count and then facing his or her own constituents—and because the people were growing weary of the no longer very sexy or novel topic of dimpled ballots and hanging chads, and Christmas was just around the corner, and, after all, everyone knew that the election was basically too close to call anyway. Lost for some in all of that realism, I fear, was the high price our democracy paid for the convenience of a Court that was willing—no, not just willing, positively *eager*—to take those burdens from our shoulders and simply decree a result. Among the results is an unprecedented degree of political polarization in the Court's favorability rating with the public—a rating that now stands roughly twice as high among Republicans as among Democrats, surely an ominous gap for the one institution to which we look for action transcending politics.

This isn't the time or place to debate the details of *Bush v. Gore*, a subject about which I have written elsewhere; I stress the case because it shows at least as dramatically as any case possibly could just how much may depend on the composition of the Court; how basic are the questions that the Court at times decides by the closest possible margins; and how absurd are the pretensions and slogans of those who have for years gotten away with saying, and perhaps have deceived even themselves by saying, that the kinds of judges they want on the

Court, the "restrained" rather than "activist" kinds of judges, the kinds of judges who don't "legislate from the bench," are the kinds exemplified by today's supposedly "conservative" wing of the Court, led by Chief Justice Rehnquist and supported in area after area by Justices O'Connor, Scalia, Kennedy, and Thomas. Those are, of course, the five Justices who decided the presidential election of 2000. They are, as well, the five Justices who have struck down one act of Congress after another—invalidating federal legislation at a faster clip than has any other Supreme Court since before the New Deal—on the basis that the Court and the Court alone is entitled to decide what kinds of state action might threaten religious liberty, might discriminate invidiously against the elderly or the disabled, or might otherwise warrant action by Congress in the discharge of its solemn constitutional power under Section Five of the Fourteenth Amendment to determine what legislation is necessary and appropriate to protect liberty and equality in America.

Some might be tempted, after watching the Court perform so poorly in the pit of presidential politics, and after witnessing it substitute its policy judgments for those of Congress in one legislative arena after another, to imagine that, if we could only wave a magic wand and remove all ideological considerations from judicial selection—both on the part of the President in making nominations and on the part of the Senate in the confirmation process—somehow the Olympian ideal of a federal judiciary once again above politics and beyond partisan reproach could be restored. For several reasons, that is a dangerous illusion. First, there's no way for the Senate to prevent the President from doing what Presidents from the beginning of the Republic have asserted the right to do, and what some Presidents have done more successfully than others: pick nominees who will mirror the President's preferred approach to the Constitution's vast areas of ambiguity. Second, in dealing with those areas of ambiguity, there may or may not be any right answers, but there most assuredly are no unique or uncontroversial answers; invariably, in choosing one Supreme Court nominee rather than another, one is making a choice among those answers, and among the approaches that generate them. And third, with a Supreme Court that is already so dramatically tilted in a rightward direction, anything less than a concerted effort to set the balance straight would mean perpetuating the imbalance that gave us not only *Bush v. Gore* but the myriad decisions in the preceding half-dozen years in which the Court thumbed its nose at Congress and thus at the American people.

In an accompanying memorandum that I prepared for distribution this April to a number of members of the Senate, I explore in greater detail how these recent Supreme Court encroachments on congressional authority have come about and what they signify. For purposes of my statement today, suffice it to say that such encroachments are the antithesis of judicial restraint or modesty; that the Justices who have engineered them are the most activist in our history;

that holding them up as exemplars of jurists who would never dream of "legislating from the bench" is, to put it mildly, an exercise in dramatic license; and that the judgments the Senate will have to make about the inclinations and proclivities of prospective members of the Supreme Court must be considerably more nuanced than the stereotypical slogans and bumper stickers about activism versus restraint, and even liberalism versus conservatism, can possibly accommodate.

Some scholars, including most prominently University of Chicago Law Professor Cass Sunstein, who will also be testifying before you at this hearing, have powerfully argued that an active, nondeferential role for the Senate in evaluating Supreme Court nominees is called for, quite independent of *Bush v. Gore*, by the way in which the federal judiciary in general, and the Supreme Court in particular, have been systematically stacked over the past few decades in a particular ideological direction—a direction hostile, for example, to the enactment of protective congressional legislation under Section Five of the Fourteenth Amendment, and hostile as well to other ostensibly "liberal" or "progressive" judicial positions, on topics ranging from privacy to affirmative action, from states' rights to law enforcement. For Professor Sunstein, who will of course speak most accurately and fully for himself, the active role the Senate ought to play is exactly as it would have been had *Bush v. Gore* never been decided.

Other scholars, most prominently Yale University Law Professor Bruce Ackerman, argue that *Bush v. Gore* has thrown the process of judicial appointment into what Professor Ackerman calls "constitutional disequilibrium," so that, instead of two independent structural checks on a necessarily unrepresentative and politically unaccountable Supreme Court, we are now down to just one. Because, in his view, the current Court must be acknowledged to have "mediated" the "President's relationship to the citizenry"—by helping put him in office by a 5-4 vote—"only the Senate retains a normal connection to the electorate," and this demands of that body, as Professor Ackerman sees it, that it shoulder an unusually heavy share of the burden of democratic control, by the people acting through the political branches, of the judicial branch to which we ordinarily look to hold the balance true. Translated into an operational prescription, the Ackerman position would recommend that the Senate simply refuse to confirm any new Justices to the Court before President Bush, as Professor Ackerman puts it, "win[s] the 2004 election fair and square, without the Court's help." As a fallback, Professor Ackerman would urge the Senate to consider any nominations President Bush might make to the Court during his current term on their own merits, but without what Ackerman describes as "the deference accorded ordinary presidents."

Although I am intrigued by Professor Ackerman's suggestion, it seems to me the wrong way to go, either in its strongest form or in its fallback version.

The strongest form would make sense, I think, only if we were convinced that the Justices who voted with the majority in *Bush v. Gore* acted in a manner so corrupt and illegitimate, so devoid of legal justification, that one could say they essentially installed George W. Bush as President in a bloodless but lawless coup. But if we believed that, then the remedy of not letting the leaders of that coup profit from their own wrong—of denying them the solace of like-minded successors as they depart the scene—would be far too mild. If we thought the *Bush* majority guilty of a coup, we should have to conclude that they were guilty of treason to the Constitution, and that they should be impeached, convicted, and removed from office.

Believing that what the *Bush v. Gore* majority did was gravely wrong but not that it amounted to a coup or indeed anything like it—believing that the majority Justices acted not to install their favorite candidate but out of a misguided sense that the Nation was in grave and imminent peril unless they stopped the election at once—one would have to look to the Ackerman fallback position. But all it tells us is something that I argued was the case anyway as early as 1985—that the Senate should not accord any special deference to nominations made by *any* President to the Supreme Court. Indeed, I go further than does Professor Sunstein in this respect. As I understand his position, he would have the Senate withhold such deference for reasons peculiar to the recent history of the nation and of appointments to the federal bench and especially to the Supreme Court over the past few decades. Had we not lived through a time of Republican Presidents insistent on, and adept at, naming Justices who would carry on their ideological program in judicial form, sandwiching Democratic Presidents uninterested in, or inept at, naming Justices similarly attuned to their substantive missions, Professor Sunstein would apparently urge that the Senate give the President his head in these matters and serve only in a backseat capacity, to prevent rogues and fools, more or less, from being elevated to the High Court.

In a world in which each position on the Supreme Court might be given to some idealized version of the wisest lawyer in the land—the most far-sighted and scholarly, the most capable of clearly explaining the Constitution's language and mission, the most adept at generating consensus in support of originally unpopular positions that come to be seen as crucial to the defense of human rights—perhaps we could afford in normal times to accept a posture of senatorial deference, with exceptions made in special historical periods of the sort some believe we have been living through. But if we ever lived in a world where such a universal paragon of justice could be imagined, and in which the kinds of issues resolved by Supreme Court Justices were not invariably contested, often bitterly so, between competing visions of the right, that day has long since passed.

Today, regardless of whether past Presidents have acted or failed to act so as to produce a Supreme Court bench leaning lopsidedly in a rightward direction, and regardless of whether a majority of the current Court has acted in such a way

as to render the President whom it helped to elect less entitled to deference than usual in naming the successors of the Court's current members, the inescapable fact is that the President will name prospective Justices about whom he knows a great deal more than the Senate can hope to learn—Justices whose paper trail, if the President is skillful about it, will reveal much less to the Senate than the President thinks he knows. Given his allies and those to whom he owes his political victory, as well as those on whom he will need to depend for his re-election, the incumbent President, if those constituencies expect him to leave his mark and therefore theirs upon the Court, will try to name Justices who will fulfill the agenda of those constituencies—in the case of President Bush, the agenda of the right—without seeming by their published statements or their records as jurists to be as committed to that agenda as the President will privately believe them to be. Presumably, the incumbent President will look for such nominees among the ranks of Hispanic jurists, or women, or both, in order to distract the opposition and make resistance more painful. And certainly this President, like any other in modern times, will select nominees who have already mastered or can be coached in the none too difficult game of answering questions thoughtfully and without overt deception but in ways calculated to offend no one and reveal nothing.

In this circumstance, to say that the burden is on those who hold the power of advice and consent to show that there is something disqualifying about the nominee, that there is a smoking gun in the record or a wildly intemperate publication in the bibliography or some other fatal flaw that can justify a rallying cry of opposition, is to guarantee that the President will have the Court of his dreams without the Senate playing any meaningful role whatsoever. Therefore, if the Senate's role is to be what the Framers contemplated, what history confirms, and what a sound appreciation for the realities of American politics demands, the burden must instead be on the nominee and, indeed, on the President. That burden must be to persuade each Senator—for, in the end, this is a duty each Senator must discharge in accord with his or her own conscience—that the nominee's experience, writings, speeches, decisions, and actions affirmatively demonstrate not only the exceptional intellect and wisdom and integrity that greatness as a judge demands, but also the understanding of and commitment to those constitutional rights and values and ideals that the Senator regards as important for the Republic to uphold.

On this standard, stealth nominees should have a particularly hard time winning confirmation, for proving on the basis of a blank slate the kinds of qualities that the Senate ought to demand, with a record that is unblemished because it is without content, ought to be exceedingly difficult. Testimony alone, however eloquent and reassuring, ought rarely to suffice where its genuineness is not confirmed by a history of action in accord with the beliefs professed. And testimony, in any event, is bound to be clouded by understandable reservations

about compromising judicial independence by asking the nominee to commit himself or herself too specifically in advance to how he or she would vote on particular cases that might, in one variant or another, come before the Court. Interestingly, we do not regard sitting Justices as having compromised their independence by having written about, and voted on, many of the issues they must confront year in and year out; the talk about compromising judicial independence by asking about such issues sometimes reflects unthinking reflex more than considered judgment. But on the assumption that old habits die hard, and that members of the Senate Judiciary Committee will continue to be rather easily cowed into backing away from asking probing questions about specific issues that might arise during the nominee's service on the Court, it should still be possible to formulate questions for any nominee, including tough follow-up questions, at a level of generality just high enough so that the easy retreat into "I'm sorry, Senator, I can't answer that question because the matter might come before me," will be unavailing. And, to the extent such slightly more general questions yield information too meager for informed judgment, the burden must be on the nominee to satisfy his or her interlocutors that the concern underlying the thwarted line of questioning is one that ought not to disturb the Senator. That satisfaction can be provided only from a life lived in the law that exemplifies, rather than eschewing, a real engagement with problems of justice, with challenges of human rights, and with the practical realities of making law relevant to people's needs. When a nominee cannot provide that satisfaction—when the nominee is but a fancy résumé in an empty suit or a vacant dress, perhaps adorned with a touching story of a hard luck background or of ethnic roots—any Senator who takes his or her oath of office as seriously as I know, deep down, all of you do, should simply say, "No thanks, Mr. President. Send us another nominee."

What this adds up to is, of course, a substantial role for ideology in the consideration of any Supreme Court nominee. It would be naive to the point of foolhardiness to imagine that the President will be tone-deaf to signals of ideological compatibility or incompatibility with his view of the ideal Supreme Court Justice; ideology will invariably matter to any President and must therefore matter to any Senator who is not willing simply to hand over to the White House his or her proxy for the discharge of the solemn duty to offer advice and consent.

As a postscript on the distinct subject of circuit court nominees, it seems worth noting that, although such nominees are of course strictly bound by Supreme Court precedents and remain subject to correction by that Court, and although there might therefore seem to be much less reason for the Senate to be ideologically vigilant than in the case of the Supreme Court, three factors militate in favor of at least a degree of ideological oversight even at the circuit court level.

First, well under one percent of the decisions of the circuit courts are actually reviewed by the Supreme Court, which avowedly declines to review even clearly erroneous decisions unless they present some special circumstance such as a circuit conflict. Especially if the circuit courts tend toward a homogeneity that mirrors the ideological complexion of the Supreme Court, that tribunal is exceedingly unlikely to use its discretionary power of review on certiorari to police lower federal courts that stray from the reservation in one direction or another; it will instead focus its firepower on bringing the state courts into line and resolving intolerable conflicts among the lower courts, state and federal.

Second, there are a great many gray areas in which Supreme Court precedents leave the circuit courts a wide berth within which to maneuver without straying into a danger zone wherein further review becomes a likely prospect. Even though no individual circuit court judge is very likely to use that elbow room in order to move the law significantly in one direction or another without a check from the Supreme Court, the overall balance and composition of the circuit court bench can have a considerable effect, in momentum if nothing else, on the options realistically open to the Supreme Court and thus to the country.

Third, in the past few decades, the circuit courts have increasingly served as a kind of "farm team" for Supreme Court nominations. On the Court that decided *Brown v. Board of Education* in 1954 there sat not a single Justice who, prior to his appointment to the Supreme Court, had ever served in a judicial capacity—governors, Senators, distinguished members of the bar, but no former judges. Today, however, rare is the nominee who has not previously served in a judicial capacity, most frequently on a federal circuit court. On the current Court, only the Chief Justice lacked prior judicial experience when he was first named a Justice; and, of the other eight Justices, all except Justice O'Connor, who had served as a state court judge, were serving on federal circuit courts when appointed to the Court. The reasons for this change are many; they include, most prominently, the growing recognition that ideology matters and that service on a lower court may be one way of detecting a prospective nominee's particular ideological leanings. Whatever the reasons, the reality has independent significance, for it means that any time the Senate confirms someone to serve on a circuit court, it may be making a record that, in the event the judge should later be nominated to the Supreme Court, will come back to haunt it. "But you had no trouble confirming Judge X to the court of appeals for the Y circuit," supporters of Supreme Court nominee X are likely to intone. Keeping that in mind will require the Senate to give fuller consideration to matters of ideology at the circuit court level than it otherwise might.

The primary ideological issue at the circuit court level, however, should probably remain the overall tilt of the federal bench rather than the particular

leanings of any given nominee viewed in isolation. In a bench already tilted overwhelmingly in one direction—today, the right—a group of nominees whose ideological center of gravity is such as to exacerbate rather than correct that tilt should be a matter of concern to any Senator who does not regard the existing tilt as altogether healthy.

And one needn't be particularly liberal to have concerns about the existing tilt. Just as a liberal who recognizes that people who share his views might not have all the right answers ought to be distressed by a federal bench composed overwhelmingly of jurists reminiscent of William J. Brennan, Jr. or William O. Douglas—or even by a federal bench composed almost entirely of liberals and moderates and few conservatives—and just as such a liberal should doubt the wisdom, in confronting such a bench, of adding a group of judges who would essentially replicate that slant, so too a conservative who is humble enough to recognize that people who share her views might not have a lock on the truth should feel dismayed by a federal bench composed overwhelmingly of jurists in the mold of Antonin Scalia or Clarence Thomas—or even by a federal bench composed almost entirely of conservatives and moderates and few liberals—and ought to doubt the wisdom, in dealing with such a bench, of adding many more judges cut from that same cloth. The fundamental truth that ought to unite people across the ideological spectrum, and that only those who are far too sure of themselves to be comfortable in a democracy should find difficult to accept, is that the federal judiciary in general, and the Supreme Court in particular, ought in principle to reflect and represent a wide range of viewpoints and perspectives rather than being clustered toward any single point on the ideological spectrum.

Indeed, even those who feel utterly persuaded of the rightness of their own particular point of view should, in the end, recognize that their arguments can only be sharpened and strengthened by being tested against the strongest of opposing views. Liberals and conservatives alike can be lulled into sloppy and slothful smugness and self-satisfaction unless they are fairly matched on the bench by the worthiest of opponents. It may even be that the astonishing weakness and vulnerability of the Court's majority opinion in *Bush v. Gore*, and of the majority opinions in a number of the other democracy-defying decisions in whose mold it was cast, are functions in part of the uniquely narrow spectrum of views—narrower, I think, than at any other time in our history—covered by the membership of the current Court—a spectrum which, on most issues, essentially runs the gamut from A through C. On a Court with four Justices distinctly on the right, two moderate conservatives, a conservative moderate, two moderates, and no liberals, it's easy for the dominant faction to grow lazy and to issue opinions that, preaching solely to the converted, ring hollow to a degree that ill serves both the Court as an institution and the legal system it is supposed to lead. It is thus in the vital interest of the nation as a whole, and not simply in the interest of those values that liberals and progressives hold dear, that the ideological imbalance of

the current Supreme Court and of the federal bench as a whole not be permitted to persist, and that the Senate take ideology intelligently into account throughout the judicial confirmation process with a view to gradually redressing what all should come to see as a genuinely dangerous disequilibrium.

STATEMENT BY PROFESSOR STEPHEN B. PRESSER*

My name is Stephen Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I hold a joint appointment with the Kellogg Graduate School of Management at Northwestern University, and I also teach in Northwestern's Weinberg College of Arts and Sciences in the history department. I have been teaching and writing about American legal history for the last twenty-seven years; I am the senior author of a casebook on American legal history and the coauthor of a casebook on constitutional law, as well as a book on Supreme Court Justice Samuel Chase and one on constitutional law theory. I have been privileged to testify before many committees of the House and Senate on constitutional issues. I appear before you today, at the invitation of the Committee, to help you consider the role of ideology in the judicial selection process.

I. IDEOLOGY AND JUDICIAL PHILOSOPHY

We should first try to understand what is meant by "ideology" in the context of these hearings. The word has a variety of definitions, but I will adopt one simple one from the dictionary, "a systematic body of concepts especially about human life or culture."[1] It might also be helpful, initially, to draw a distinction between what we might describe as an ideology of *substance* or *results*, and an ideology of *process*. An ideology of results might be an appropriate means of evaluating the elected officials in a government, particularly those in the executive and the legislature, but an ideology of process would be a more important means of evaluating the behavior of the judiciary. We speak about such an ideology of process when we discuss what we more commonly refer to as "judicial philosophy," and it is *that* we are really concerned with in these hearings.

The question of the appropriate judicial philosophy for our country is one of the most crucial concerns for determining the fate of our Republic, and thus I regard this hearing as among the most important I have been invited to attend. You have heard and will be hearing from a variety of witnesses from the academy, from practice, and from the political arena, and perhaps I can best serve you by sticking primarily with the perspective of the Framers, which is what I know best.

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* Raoul Berger Professor of Legal History, Northwestern University School of Law.

1. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 575 (9th ed. 1985).

The Framers believed that it was important, from time to time, to return to first principles, and that is what we are doing this morning. The two basic principles of the American political system are the sovereignty of the people and the rule of law, and both figure intimately in the question of judicial philosophy. As I understand it, there is only one judicial philosophy of which the Framers approved, and that is to be found in *Federalist 78*, the famous justification for judicial review written by Alexander Hamilton in 1788.[2]

II. THE JUDICIAL PHILOSOPHY SUGGESTED IN *THE FEDERALIST*

Hamilton had to respond to critics of the proposed federal Constitution who were concerned that it gave too powerful a role to federal judges, and that, in particular, federal judges might use their great power to impose their own view of what the law should be on the American people. The critics of the Constitution were particularly worried that federal judges might obliterate the authority of the state courts and the state governments, and replace the recently achieved independent role of the states as primary domestic lawmakers with an all-powerful central government.[3]

Hamilton responded to this criticism by emphasizing that it was not the job of judges to make law, that their role under the Constitution was simply to enforce the Constitution and laws as they were written, according to their original understanding. By doing so, Hamilton explained, federal judges would be acting as agents of the sovereign people themselves, and would do their part in implementing the rule of law. It was true that judges might sometimes be called upon to declare statutes invalid because of the dictates of the Constitution, that is, to declare, in the words we use today, that particular laws were "unconstitutional," but their role in implementing the will of the people as set forth in the Constitution required no less. The Constitution itself set certain limits on what legislatures could do, Hamilton explained, and when the legislatures exceeded those limits they ceased to act pursuant to the will of the people. Instead of being the agents of the people, as the Constitution dictated, in such circumstances the legislature would wrongly be exercising greater power than was authorized. It was then the job of the people's other agents, the courts, to reign in the legislatures.[4]

When that kind of judicial review was done, Hamilton explained, the courts would not be exercising will, but merely judgment.[5] The only will that

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2. THE FEDERALIST NO. 78 (Alexander Hamilton).

3. For a collection of the contemporary arguments for and against the Constitution, see THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., 1993).

4. THE FEDERALIST NO. 78, at 398-99 (Alexander Hamilton) (Max Beloff ed., 1987).

5. *Id.* at 399.

was important was the will of the sovereign people themselves, as set forth in the Constitution, or laws passed pursuant to the Constitution, and the only job of judges was to enforce that expression of the will of the people. Hamilton's justification for judicial review, based on the sovereignty of the people, also implemented another important political ideal of the Constitution's Framers, the separation of powers. It was well understood, pursuant to the theories of the Baron de Montesquieu, as valid then as they are today, that liberty could not be preserved unless judges were barred from legislating, law making was left to the legislature and the people themselves, and the executive did no more than carry out the directives of the legislature and the Constitution. As Hamilton wrote in *Federalist 78*, quoting Montesquieu's *Spirit of Laws*, "'[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.'"[6]

III. PRESIDENT BUSH'S PROPOSED JUDICIAL PHILOSOPHY

Considering what Hamilton had to say in *Federalist 78*, and considering what Montesquieu wrote, we are in a better position to understand the questions that are before this Subcommittee today. We are here, basically, because of certain campaign promises that then-Governor Bush made when he was running for the office he now holds. He explained that he wanted to appoint judges who would interpret the law rather than make it, and he further explained that his models for the type of judge he would appoint were the current Supreme Court Justices Antonin Scalia and Clarence Thomas.[7] These two are the Justices on the Court who have been most closely associated with the interpretive philosophy of effectuating the original understanding of the meaning of the Constitution, and these two, it would seem, are those who come closest to most consistently demonstrating the judicial philosophy Hamilton limned in *Federalist 78*.[8]

There have been suggestions in the press, and it is likely that there will be testimony offered to you, that more judges like Scalia and Thomas would somehow represent a danger to our Republic, that they have some sort of "far right-wing" agenda, that they are dangerous judicial activists who would, if multiplied, pose a fundamental danger to our civil rights as Americans. Nothing could be further from the truth. There can be no danger posed by men and women who conceive of the judicial role as Hamilton conceived it, as

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6. *Id.* at 397.

7. *See, e.g.*, David L. Greene & Thomas Healy, *Bush Sends Judge List to Senate*, BALT. SUN, May 10, 2001, at 1A (indicating that the judges the President "admires most" are Antonin Scalia and Clarence Thomas).

8. For Justice Scalia's statement of judicial philosophy, see ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). For Justice Thomas' judicial philosophy, see SCOTT DOUGLASS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1999).

implementing the will of the sovereign people. George W. Bush summed up his perspective on judicial appointments when he indicated, "Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench." Paraphrasing from *The Federalist*, Bush stated that "the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference."[9]

If this is the judicial philosophy, or the ideology of President Bush's likely appointments, surely there is no terror in it. This is the traditional manner of interpreting the Constitution and laws, and it is all that Scalia and Thomas, and, indeed, many other federal judges past and present have had as a judicial philosophy. In this philosophy or ideology there is no danger, unless one fears fidelity to the rule of law itself. And, it should be emphasized, in our Republic the rule of law is nothing more than the demonstrated will of the people. Hamilton stressed that it took a person of "fit character" to be a federal judge, and that such people could not be found in great numbers. They had to possess not only great knowledge of the law but also to possess the courage of their convictions and the ability to resist popular pressures that might lead them to ignore their constitutional duties. Indeed, it is important for us to remember here that the Framers were well aware that judging in a manner consistent with the rights guaranteed by the Constitution could be an unpopular course when passions were aroused, and thus Hamilton believed that steps were necessary to make federal judges as independent as possible. That's what lifetime good behavior tenure was designed to ensure, and that's why the provision against reducing judicial salaries was placed in the Constitution.

IV. ADVISING AND CONSENTING WITH REGARD TO JUDICIAL NOMINEES

This hallowed legislative body, the United States Senate, exercising its constitutional advice and consent function, must constantly be on guard against those who would seek to influence the judiciary for particular partisan purposes, and who would seek to move the judiciary from its constitutional role as a neutral arbiter of the laws and the Constitution. Unfortunately, many comments, even some made in these hearings, seem calculated politically to manipulate the judicial selection process, and seem designed to frustrate the appointment of judges who might refuse to follow a politically popular course when the Constitution and laws might provide otherwise.

It is important to understand just how the Framers conceived of the senatorial role in advising and consenting on judicial nominees. This is discussed by Alexander Hamilton in *Federalist 76*, where he indicates that the

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9. Volume 37, Number 19, PUB. PAPERS (Remarks of President George W. Bush Announcing Nominations for the Federal Judiciary, May 14, 2001).

scheme of delegated power under the Constitution rests upon the implication "that there is a portion of virtue and honor among mankind which may be a reasonable foundation of confidence" in public officials.[10] Making even clearer that in the appointments process the Senate should be concerned primarily with the virtue and honor of candidates, Hamilton explicitly indicates that the concurrence of the Senate is required for appointments under the Constitution in order to be "an excellent check upon a spirit of favouritism in the president, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connexion, from personal attachment, or from a view to popularity."[11]

Hamilton also notes that the scheme of Senate approval will reduce the chance that appointments will be made by the President simply on the basis of "his private inclinations and interests."[12] As far as I know, no one has suggested that these are President Bush's motives, and I find it impossible to understand how a pledge to appoint judges who will operate pursuant to a judicial philosophy that implements popular sovereignty and the rule of law could be the abuse of presidential power Hamilton had in mind. Indeed, judges faithful to the Constitution and laws, of a kind that President Bush proposes, are the possessors of the kind of wisdom, honor, and integrity Hamilton thought crucial in nominees.

The Senate has a role to play in ascertaining that those appointed to the judiciary are "fit characters," and persons of integrity, honor, and virtue. But if Hamilton's comments in *Federalists 76* and *78* mean anything, they mean that the Senate should not use its own partisan political preferences for the production of particular results in the courts, as opposed to the following of proper procedures for determining the law, as a litmus test for judicial appointments. The Senate should not use partisan political ideology to select judges. Instead, the Senate should insist on proper judicial philosophy for nominees. Indeed, the genius of the separation of powers in America, I have come to understand over three decades of practicing and teaching law, is that law is supposed to be different from politics, and liberty and rights in this country are best protected by maintaining that separation.

It worries me, then, when I read, in the press, suggestions that the Senate should be on its guard against Bush's judicial nominees because they are "right-wing ideologues" or "judicial activists" who would present a danger to the enforcement of our precious constitutional heritage or our civil rights.[13] It is

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10. THE FEDERALIST NO. 76, at 389-90 (Alexander Hamilton) (Max Beloff ed., 1987).
11. *Id.* at 389.
12. *Id.*
13. Even my friend and fellow witness at this hearing, University of Chicago Law Professor Cass Sunstein, has been quoted as stating, "There is a danger the federal judiciary could

common for Democrats to accuse Republicans of being tools of the "far right," and for Republicans to regard Democrats as "left-wing" extremists, but these political terms of excoriation obscure rather than illuminate what is at stake when judicial appointments are being discussed.

Alas, even though some Senators have tried to suggest that what they want to see is "moderates" appointed as judges, I don't think even that term is useful here.[14] The idea of judicial moderates is not merely obfuscatory because in politics the moderates are always you or the people you agree with, while your opponents are always "extremists." The real problem is that judicial moderation in implementing the will of the people may not be a virtue. The issue here is not left or right, radical or reactionary, or even liberal or conservative, the issue is the separation of powers under the Constitution, and whether a nominee adheres to it or not. One who believes in adherence to the Constitution, is of course, in a sense a conservative, since he or she is conserving constitutional values. Still, one who conserves constitutional values and the separation of powers, as Montesquieu pointed out, is also a liberal because he or she is preserving the liberty that can only exist where judges do not legislate.

V. THERE IS NOTHING TO FEAR FROM THE PRESIDENT'S JUDICIAL PHILOSOPHY

It cannot be denied that there are substantive elements involved in the current struggle over judicial appointments. We all understand, I think, that there is a partisan divide over issues that could well be described as ideological, even if the proper judicial philosophy should not be a subject of partisan rancor. The fear of those who now seek to block President Bush's appointments is that if he is permitted to nominate judges of a philosophical bent close to those of Thomas and Scalia, they will participate in decisions that will bar affirmative action, interfere with the separation of church and state, and outlaw abortion. I understand those fears, but I do not share them for two reasons. First, I think that Thomas and Scalia's perspective on these issues is in accord with the original understanding of the Constitution, and, second, I think that any new judicial appointments on the lower federal courts, or even on the United States Supreme Court, would be unlikely to significantly alter the law regarding these topics.

With regard to the first point, Thomas and Scalia have indicated what appears to be a belief in a color-blind Constitution, an understanding that any governmental discrimination on the basis of race ought to be prohibited. This, I

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be dominated by right-wing ideologues." M.E. Sprengelmeyer, *Judge Nominee Called Extremist*, ROCKY MOUNTAIN NEWS, May 10, 2001, at 24A.

14. For example, the Chair of this Subcommittee, Senator Schumer, has been quoted as stating, "Judges [nominated by the President] will have to be moderate." Ron Fourier, *Switch Tarnishes Bush's Image*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, May 25, 2001, at A1.

think, is the perspective of Dr. Martin Luther King, who believed that we should judge persons by the "content of their character," and not "the color of their skin,"[15] and, indeed, that was the goal of the Fourteenth Amendment itself. The Fourteenth Amendment, after all, is couched in terms of "equal protection of the laws" not special advantage. This is not a radical or reactionary perspective, it is simple equality, or, perhaps, "Simple Justice."[16]

Thomas and Scalia have been reluctant to follow some of their brethren in broadly construing the Establishment Clause to bar all official involvement with religion, as they did, for example, when they dissented from a 1992 ruling that barred nonsectarian prayer at a middle school graduation[17] and from a more recent ruling regarding student prayer at a high school football game.[18] In doing so, of course, Thomas and Scalia were merely following centuries of American tradition, which emphasized the role of the sacred in undergirding American government and life. More importantly, they were emphasizing that in matters of religion, the constitutional scheme barred the federal government from establishing a national sect, but left the state and local governments free to promote the policies they deemed proper.

This was the same perspective that animated and animates Scalia and Thomas' positions on the issue of abortion. They believe that this is not a question that the federal Constitution addresses, and that the matter is best left in the hands of state governments, where the Constitution originally placed it.[19]

This last set of concerns may also help us understand what causes the anxiety over the President's potential nominees. For most of the past sixty-four years there has been a tendency on the part of the federal government to extend its regulatory reach, and for the federal courts to support such expanded federal power. We have seen, in recent years, some signs of willingness on the part of the Supreme Court to once again remind us that the powers of the federal government are limited and enumerated, and to manifest this willingness by declaring some federal statutes unconstitutional on the grounds that they exercise powers not granted to Congress.[20] Because I believe that the original

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15. Dr. Martin Luther King, Jr., Speech at the Lincoln Memorial (Aug. 28, 1963); *see, e.g.*, DEBORAH GILLAN STRAUB, AFRICAN AMERICAN VOICES 211 (1996).

16. *See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1977).

17. Lee v. Weisman, 505 U.S. 577 (1992).

18. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

19. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

20. *See, e.g.*, United States. v. Morrison, 529 U.S. 598 (2000) (holding, inter alia, that portions of the federal Violence Against Women Act failed to pass constitutional muster under the Commerce Clause); United States v. Lopez, 514 U.S. 549 (1994) (holding unconstitutional the

constitutional scheme was to make the state and local governments the primary exercisers of legislative power I don't find this worrisome, but those who believe that the federal government ought to be the exclusive guarantor of our rights might disagree. I can't sympathize with that view, because I believe, as the Framers did, that the most important right of the people is to legislate for themselves, and I believe that this is best done by the governments closest to the people, except in matters of clearly national concern.

This right of the people to legislate for themselves, is, of course, the same thing that is involved in the Constitution's mandating of the separation of powers, and in the wish of President Bush that judges not legislate. But to return to the reasons not to fear the Bush nominees. Even if the President were to be successful in getting through the Senate precisely those nominees of his choosing, and the nominees most committed to the original understanding and the belief that judges should not legislate, it is by no means clear that any, much less all, of the constitutional principles said to be endangered would be overturned.

The first point that needs to be made in this regard is that predictions of what people will do when they ascend the bench are notoriously inaccurate. President Madison appointed Joseph Story, thought to be a firm Jeffersonian, who turned out to be Marshall's staunchest ally on the Supreme Court bench, and, for all practical purposes, a committed nationalist.[21] President Eisenhower was frequently quoted as saying that he only made two mistakes as President and that they were both sitting on the United States Supreme Court. He was referring to his appointments to the Court of William Brennan and Earl Warren because they proceeded to decide cases in a manner with which he apparently thoroughly disagreed.[22] Most recently Justice Souter seems to have evolved a constitutional jurisprudence clearly at odds with the first President Bush's asserted preferences for judges who would interpret the Constitution according to the original understanding. It is for this reason—the unpredictability of judicial performance—that the safest course is probably to focus on the competence, integrity, virtue, and honor of nominees, since these seem to be qualities least subject to change over time, and least affected by becoming judges.

The second point regarding the lack of danger posed by Bush nominees to current constitutional doctrines is related somewhat to the first, and is the difficulty of judges of any stripe in overruling established law. It is perhaps significant that the Supreme Court's 1992 ruling in *Planned Parenthood v.*

Federal Gun-Free School Zones Act, on the grounds that it was unauthorized by the Constitution's Commerce Clause).

21. For Story's career, see, for example, R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

22. *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 41 (3d ed. 1989).

Casey,[23] which upheld *Roe v. Wade*,[24] the case finding in the Fourteenth Amendment an unenumerated right under some circumstances for termination of pregnancies, was made by a Court that included eight Republican appointments, and the five person majority in that case were all Republican nominees. Indeed, most recently, the Supreme Court, which, at this writing, has seven Republican nominees and two Justices nominated by a Democratic President, found that a state statute banning partial birth abortion failed to pass constitutional muster.[25] The empirical case that Republican appointees are a danger to the legality of abortion simply has not been made. Similarly composed Supreme Court majorities have upheld decisions involving affirmative action and applying the First Amendment strictly to separate state and local government from religion, though narrow majorities have also sought to give religious organizations the same free exercise of speech rights as secular organizations, but this should hardly be cause for worry by the friends of free expression.

A final point to be made about the limited power of potential Bush nominees is that judges adhering to the original understanding, or those committed to exercising judgment rather than will, or those who know that it is the job of a judge to interpret rather than to make law, if placed on lower federal courts, will follow the dictates of the United States Supreme Court. There is no more basic principle of our federal judicial system than that which binds the courts of appeals and the district courts to follow the interpretations laid down by the Supreme Court. As long as that Court adheres to current doctrines regarding abortion, race, or religion, Bush nominees to the lower courts will follow them.

VI. CONCLUSION: PRESERVING LEARNED HAND'S "COMMON VENTURE"

I do not suggest that the law or even the Constitution should not change over time, as the needs of the American people shift with economic, political, or social development. Such change, however, in our system, is supposed to come from legislatures or from constitutional amendment, and not through judges acting as legislators. As Justice Learned Hand, perhaps the greatest judge never to sit on the Supreme Court, remarked, inveighing against the notion that members of that Court should make law:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined

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23. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
24. Roe v. Wade, 410 U.S. 113 (1973).
25. *See* Stenberg v. Carhart, 530 U.S. 914 (2000).

> anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[26]

I urge this Subcommittee and the Senate as a whole to preserve that "common venture," the exercise of sovereignty by the American people and their right to make their own laws and Constitutions. The philosophy of judging outlined by President Bush is no danger to that popular sovereignty. It is the only means of implementing it and the rule of law itself.

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26. LEARNED HAND, THE BILL OF RIGHTS 73-74 (1958).

STATEMENT BY PROFESSOR CASS R. SUNSTEIN*

I am grateful to have the opportunity to appear before you today to discuss the issue whether "ideology" should matter in the process of appointing and confirming federal judges.

My basic conclusion is simple. Ideology should certainly matter, both for the President and for the Senate. At least this is so if ideology means the expected approach, and general patterns of votes, of a potential judge. Almost everyone would agree that the President should not nominate, and the Senate should not confirm, someone who thinks that the Constitution does not protect private property, or permits schools to be segregated on the basis of race, or allows government to suppress political dissent. Because of his unique constitutional position, the President's choices are certainly due a large measure of deference. But it is perfectly appropriate for the Senate to ask whether a nominee's general approach, or likely pattern of votes, fits within the acceptable range of views, given the current nature of the federal judiciary, and existing trends within the federal courts as a whole.

To offer somewhat more detail: In an era in which the federal judiciary is dominated by left-wing judges, interpreting the Constitution to fit with their own views of public policy, it would be perfectly appropriate for Senators to insist that the President appoint people who will have a more modest view of the judges' role in the constitutional order. In an era in which the federal judiciary has a good deal of diversity, is respectful of its own limitations, and has no particular "tilt," it would be appropriate for the Senate to allow the President to appoint the judges he prefers, so long as they are competent and have views that do not go beyond the pale. But in an era, like our own, in which the federal judiciary is showing too little respect for the prerogatives of Congress, an excessive willingness to intrude into democratic processes, and a tendency toward conservative judicial activism, it is fully appropriate for the Senate to try to ensure more balance, and more moderation, within the federal courts.

My testimony will come in three parts. Part I briefly discusses the constitutional background. Part II discusses the nature of the federal judiciary. Part III discusses the appropriate posture, from the Senate, toward nominees by President Bush.

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* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago Law School.

I. THE CONSTITUTIONAL BACKGROUND[1]

The Constitution fully contemplates an independent role for the Senate in the selection of Supreme Court Justices. That independent role certainly authorizes the Senate to consider the general approach, and likely pattern of votes, of potential judges.

Article II, Section Two provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court." At first glance, these words assign two distinct roles to the Senate—an advisory role before the nomination has occurred and a reviewing function after the fact. The consent requirement, if the Senate takes it seriously, places pressure on the President to give weight to senatorial advice as well. At the same time, the advisory function makes consent more likely. The clause seems to envision a genuinely consultative relationship between the Senate and the President. It seems to create a deliberative process, jointly conducted, concerning the composition of the Court.

In the particular context of judicial appointments, there is an additional and highly compelling concern, one that stems from constitutional structure. It may be granted that the Senate ought generally to be deferential to presidential nominations involving the operation of the Executive Branch. For the most part, Executive Branch nominees must work closely with or under the President. The President is entitled to insist that those nominees are people with whom he is comfortable, both personally and in terms of basic commitments and values. It is for this reason, among others, that the Senate's decisions to confirm Attorney General John Ashcroft and Solicitor General Theodore Olson seem to be entirely correct.

The case is quite different, however, when the President is appointing members of a third branch. The judiciary is supposed to be independent of the President, not allied with him. It hardly needs emphasis that the judiciary is not intended to work under the President. This point is of special importance in light of the fact that many of the Court's decisions resolve conflicts between Congress and the President. A presidential monopoly on the appointment of Supreme Court Justices thus threatens to unsettle the constitutional plan of checks and balances.

History supports this view of the text and structure. The Convention had four basic options of where to vest the appointment power: It could have placed the power (1) in the President alone, (2) in Congress alone, (3) in the President

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1. This Part borrows heavily, and often verbatim, from David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992). In order to promote readability, I have not included footnotes.

with congressional advice and consent, or (4) in Congress with presidential advice and consent. Some version of each of these options received serious consideration.

The ultimate decision to vest the appointment power in the President stemmed from a belief that he was uniquely capable of providing the requisite "responsibility." A single person would be distinctly accountable for his acts. At the same time, however, the Framers greatly feared a presidential monopoly of the process. They worried that such a monopoly might lead to a lack of qualified and "diffused" appointees, and to patronage and corruption. The Framers also feared insufficient attentiveness to the interests of different groups affected by the Court. The compromise that emerged—the system of advice and consent—was designed to counteract all of these various fears.

A. *The Early Agreement on Congressional Appointment*

It is important to understand that during almost all of the Convention, the Framers agreed that the Senate alone or the legislature as a whole would appoint the judges. The current institutional arrangement emerged in the last days of the process. On June 5, 1787, the standing provision required "that the national Judiciary be [chosen] by the National Legislature." James Wilson spoke against this provision and in favor of presidential appointment. He claimed that "intrigue, partiality, and concealment" would result from legislative appointment, and that the President was uniquely "responsible." John Rutledge responded that he "was by no means disposed to grant so great a power to any single person. The people will think we are leaning too much towards Monarchy."

James Madison agreed with Wilson's concerns about legislative "intrigue and partiality," but he "was not satisfied with referring the appointment to the Executive." Instead, he proposed to place the power of appointment in the Senate, "as numerous eno' to be confided in—as not so numerous as to be governed by the motives of the other branch; and as being sufficiently stable and independent to follow their deliberative judgments." Thus, on June 5, by a vote of nine to two, the Convention accepted the vesting of the appointment power in the Senate.

On June 13, Charles Pinckney and Roger Sherman tried to restore the original provision for appointment of the Supreme Court by the entire Congress. Madison renewed his argument and the motion was withdrawn.

The issue reemerged on July 18. Nathaniel Ghorum claimed that even the Senate was "too numerous, and too little personally responsible, to ensure a good choice." He suggested, for the first time, that the President should appoint the Justices, with the advice and consent of the Senate—following the model set by Massachusetts. Wilson responded that the President should be able to make appointments on his own, but that the Ghorum proposals were an acceptable

second best. Martin and Sherman endorsed appointments by the Senate, arguing that the Senate would have greater information and—a point of special relevance here—that "the Judges ought to be diffused," something that "would be more likely to be attended to by the 2d. branch, than by the Executive." Edmund Randolph echoed this view.

In the end, the Ghorum proposal was rejected by a vote of six to two. At that point, Ghorum suggested, as an alternative, that the President should nominate and appoint judges with the advice and consent of the Senate. On this the vote was evenly divided, four to four.

Madison then proposed presidential nomination with an opportunity for Senate rejection, by a two-thirds vote, within a specified number of days. Changing his earlier position, Madison urged that the executive would be more likely "to select fit characters," and that "in case of any flagrant partiality or error, in the nomination, it might be fairly presumed that 2/3 of the 2d. branch would join in putting a negative on it." Pinckney spoke against this proposal, as did George Mason, who argued: "[A]ppointment by the Executive [is] a dangerous prerogative. It might even give him an influence over the Judiciary department itself."

The motion was defeated by six to three. By the same vote, the earlier Madison proposal, in which the Senate would appoint the Justices, was accepted.

The issue next arose on August 23. Morris argued against the appointment of officers by the Senate, considering "the body as too numerous for the purpose; as subject to cabal; and as devoid of responsibility." But it was not until September 4 that the provision appeared in its current form. Morris made the only recorded pronouncements on the new arrangement and seemed to speak for the entire, now unanimous assembly. Morris said, "[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." The Convention accepted the provision with this understanding.

B. *The Meaning of the Shift to Presidential Appointment with Advice and Consent by the Senate*

There is no evidence of a general agreement that the President should have plenary power over the appointments process. On the contrary, the ultimate design mandated a strong role for the Senate in the form of the advice and consent function. In this way, it carried forward the major themes of the debates. With respect to the need for a presidential role, the new system ensured "responsibility" and guarded against the risk of partiality in the Senate. With respect to resistance to absolute presidential prerogative, the principal concerns included (1) a fear of "monarchy" in the form of exclusive presidential appointment; (2) a concern for "deliberative judgments;" (3) a belief that "the

Judges ought to be diffused," that is, diverse in terms of their basic commitments and alliances; (4) a fear of executive "influence over the Judiciary department itself;" and (5) a desire for the "security" that a senatorial role would provide. It is clear that these concerns reflected a belief that the Senate could consider what we would now call ideology.

As several of the comments suggest, the Senate's role was to be a major one, allowing the Senate to be as intrusive as it chose. Even Hamilton, perhaps the strongest defender of presidential power, emphasized that the President "was bound to submit the propriety of his choice to the discussion and determination of a different and independent body." Of course, the President retained the power to continue to offer nominees of his selection, even after an initial rejection. He could continue to name people at his discretion. Crucially, however, the Senate was granted the authority to continue to refuse to confirm. It also received the authority to "advise."

These simultaneous powers would bring about a healthy form of checks and balances, permitting each branch to counter the other. That system was part and parcel of general deliberation about Supreme Court membership. The Convention debates afford no basis for the view that the Senate's role was designed to be meager. On the contrary, they suggest a fully shared authority over the composition of the Court. That shared authority was to include all matters that the Senate deemed relevant, including the nominee's point of view.

C. *The Early Practice*

The practice of the Senate in the early days of the Republic and thereafter attests to the same conclusion. George Washington's nomination of John Rutledge, then Chief Justice of South Carolina, as Chief Justice of the United States is a revealing case in point. Rutledge's challenge to the Jay Treaty, negotiated by Washington with Great Britain, played a pivotal role in the confirmation process. The Jay Treaty was challenged by the Republicans as a concession to Britain but approved by the Federalists as a way of keeping the peace. Rutledge attacked the treaty in a prominent speech in Charleston. The Federalists sought to block the Rutledge appointment on straightforwardly political grounds. Hamilton, a leader of the support for the Jay Treaty, led the opposition to Rutledge. The Senate ultimately rejected Rutledge in part for political reasons, by a vote of fourteen to ten.

Nor was the Rutledge rejection unique. In 1811, the Senate rejected Madison's appointment of Alexander Wolcott, partly on the basis of political considerations. In 1826, President Adams' appointment of Robert Trimble was nearly rejected on political grounds. The 1828 nomination of John Crittenden, a Whig, was ultimately prevented through postponement, and squarely on ideological grounds. Similar episodes occurred in the first half of the nineteenth

century. In fact, during the nineteenth century, the Senate blocked one of every four nominees for the Court, frequently on political grounds.

The Senate has at times insisted on the "advice" segment of its constitutional mandate. In 1869, President Grant nominated Edwin Stanton after receiving a petition to that effect signed by a majority of the Senate and the House. In 1932, the Chair of the Judiciary Committee, George W. Norris, insisted on the appointment of a liberal Justice to replace Oliver Wendell Holmes. Greatly influenced by a meeting with Senator William Borah, President Hoover eventually appointed Benjamin Cardozo to the Court. The Senator persuaded President Hoover to move Cardozo, then at the bottom of the President's list of preferred nominees, to the top.

More recently, the ideology of judges has played a role in the Senate's consideration of many Supreme Court nominees, including David Souter, Robert Bork, Clarence Thomas, Ruth Bader Ginsburg, Stephen Breyer, Anthony Kennedy, and others. Both Republicans and Democrats have considered the general approach and likely pattern of votes of presidential nominees, including nominees for the lower courts. It would not be excessive to say that in the last twenty years, a bipartisan consensus has emerged on the relevance of ideology, so much so that no Senator, and no outside observer, has seriously argued that it does not matter.

Constitutional text, history, and structure strongly suggest that the Senate is entitled to assume a substantial role. There are analogies to proposed legislation and treaties, and to the presidential veto. No one thinks that the Senate must accept whatever bill or treaty the President suggests simply because it is a "competent" proposal; it would be odd indeed to claim that the President must sign every bill before looking closely at the merits. Under the Constitution, the role of the Senate in the confirmation process should be approached similarly.

II. THE CONTEMPORARY FEDERAL JUDICIARY

None of the foregoing discussion suggests that in all periods, the Senate should give careful consideration to the ideology of prospective judges. If the federal judiciary were appropriately diverse, and if it were showing appropriate respect for the prerogatives of the elected branches of government, there would be great reason to defer to presidential choices. If the Court were left-of-center, and pressing its own will in the guise of constitutional interpretation, the Senate should certainly respect any presidential efforts to redress the balance. But we are in the midst of a different and quite unusual situation. This is a period of conservative judicial activism, in which federal judges appear far from reluctant to reject the judgments of other branches of government. The Supreme Court is leading this unfortunate tendency, but the lower federal courts are entirely willing to strike down acts of Congress as well.

Because this is a period of conservative judicial activism, it is very different from other eras. For example, the period from 1935 to 1950 was generally one of judicial caution, in which the Court tended to uphold whatever the elected branches did. The period from 1958 to 1968 saw a great deal of left-wing judicial activism. We might even say that the Rehnquist Court is the conservative counterpart to the Warren Court, showing an even greater willingness to strike down legislation.

In terms of sheer competence, no one should doubt that the current Supreme Court is unusually distinguished. But there are two disturbing facts about the current Court and indeed the current federal judiciary as a whole. First, it does not defer to democratically elected branches. Second, it shows a distinctive ideological tilt. It is fair to say that it has a heavy right wing, a heavy center, but no left at all. Let me take these points in sequence.

The simplest fact about the Rehnquist Court is that it has struck down more federal laws per year than any other Supreme Court in the last half century. Indeed, the Rehnquist Court has been significantly more aggressive in invalidating federal statutes than the Warren Court itself. Because the Supreme Court struck down only one federal statute between the founding and 1856, there is a good chance that the Rehnquist Court is the all-time national champion, in terms of its sheer willingness to strike down federal statutes.[2] Many of the statutes invalidated by the Court have had strong bipartisan support within Congress, and in many of the relevant cases, there was a powerful argument on behalf of constitutionality.

Consider a few simple illustrations:

1. The Rehnquist Court has reinvigorated the Commerce Clause as a serious limitation on congressional power for the first time since the New Deal itself.[3] As a result, a number of existing federal statutes have been thrown into constitutional doubt.

2. The Rehnquist Court has sharply limited congressional authority under Section Five of the Fourteenth Amendment, in the process striking down key provisions of the Americans with Disabilities Act, the Religious Freedom Restoration Act,[4] and the Violence Against Women Act,[5] all of which received

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2. Of course the raw numbers do not tell us everything we have to know. Perhaps the Court was correct to invalidate a good deal of federal legislation; perhaps Congress has been, in the relevant period, enacting a number of unconstitutional statutes. To evaluate these claims, we need to go behind the numbers. But I believe a careful inspection of the cases shows that too much of the time, this Court is far from respectful of democratic prerogatives.

3. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

4. City of Boerne v. Flores, 521 U.S. 507 (1997).

5. United States v. Morrison, 529 U.S. at 598.

bipartisan support. In fact, Section Five of the Fourteenth Amendment has a narrower reach than at any time in the nation's history because of the Rehnquist Court's decisions.

3. The Rehnquist Court has imposed serious barriers to campaign finance legislation[6]—with Justices Scalia and Thomas suggesting that they would be prepared to strike down almost all legislation limiting campaign contributions and expenditures.[7] Many people do not believe that campaign finance legislation is a good idea. But many of those who would question it in principle (as I do) also believe that this is not a subject to be settled by federal judges.

4. The Rehnquist Court has thrown affirmative action programs into extremely serious doubt,[8] raising the possibility that public employers, public schools, and public universities will not be able to operate such programs. Many people reasonably doubt the sense, wisdom, and fairness of affirmative action programs. But those who have these doubts usually do not believe that the issue should be resolved by federal judges, as it now threatens to be.

5. The Rehnquist Court has given heightened protection to commercial advertising, to the point where advertising does not have much less constitutional protection than political dissent.[9]

6. In many cases, the Rehnquist Court has interpreted regulatory statutes extremely narrowly, choosing the interpretation that gives as little as possible to victims of discrimination, pollution, and other misconduct.

On the basis of all this, there can be no doubt that this is a quite activist Court—activist in the sense that it does not have a modest conception of its role in the constitutional design.[10]

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6. *See, e.g.*, FEC v. Nat'l Conservative PAC, 470 U.S. 480 (1985).

7. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (Thomas, Scalia, JJ., dissenting).

8. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Metro Broad. v. FCC, 497 U.S. 547 (1990).

9. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

10. The idea of "judicial activism" is an unusually vexed one, above all because any claim that the judges are activist seems to depend on accepting a certain theory of legitimate interpretation. If originalism is the right approach to constitutional law, then Justice Scalia is no activist. If democracy reinforcement is the right approach to interpretation, then Earl Warren was hardly an activist. Here is the problem: If we need to agree on a theory of interpretation in order to know whether judges are activist, discussion of the topic of "activism" will become extremely difficult and in a way pointless. A disagreement about whether judges are activists will really be a disagreement about how judges should be approaching the Constitution, and the notions of activism and restraint will have added nothing. Following Judge Richard Posner, I am using a neutral definition here. A court is activist when and to the extent that it is willing to strike down legislation or other acts and decisions by other branches of government. On this view, to call a court activist is not necessarily to condemn it. It is on this view that the Rehnquist Court counts as the most activist in the nation's history, simply because and to the extent that it has struck down more federal laws,

Now to the issue of "tilt." It is notable that the Supreme Court has moderates but no liberals—no one who stands as a jurisprudential successor to Justices William Brennan and Thurgood Marshall. The so-called "liberal wing" actually consists of two moderate, precedent-respecting Republicans (John Paul Stevens and David Souter) and two moderate Democrats who are respectful of precedent and represent centrist thinking (Ruth Bader Ginsburg and Stephen Breyer). The Court has no liberals in the sense that none of its members would follow in the path set by Brennan and Marshall.[11]

If we put the Court's activist inclinations together with its tilt, we reach a simple conclusion: The Court is all too willing to review federal statutes, and the statutes that it is willing to strike down are usually those that diverge from a conservative orthodoxy. It is unsettling but true to find a considerable overlap between the general directions charted by the current Court and the general directions charted by Republican Party platforms over the last two decades. There can be no doubt that the transformation in the federal judiciary, produced over the last twenty years, has been a product of political forces, and in particular of a self-conscious effort by Republicans in the White House and the Senate, to ensure a judiciary of a certain stripe. This effort to transform the federal judiciary has been quite successful—in part because President Clinton, to his credit, generally made centrist appointments on the Supreme Court and on the lower courts. In fact it is hard to think of any noncentrist appointment by President Clinton within his eight years in the White House. By contrast, President Bush and particularly President Reagan made a sustained effort to appoint young, conservative judges, many of whom continue to have a dominant influence on the lower courts, charting its basic directions.

III. THE SENATE'S CURRENT ROLE

If President George W. Bush follows the path set by his predecessors, and if the Senate remains passive, what might the future look like? We could easily imagine a situation in which federal judges:

1. strike down affirmative action programs, perhaps eliminating such programs entirely;
2. strike down campaign finance reform;

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on an annual basis, than of its predecessor Courts. To be sure, this statistic does not tell us everything we need to know. But it is highly suggestive about current tendencies and trends.

11. This is lamentable not because I believe that this is the correct path (in fact I strongly disagree with the path marked out by Justices Brennan and Marshall), but because a Court that lacks anyone committed to it is missing something important—just as a Court lacking the views of Scalia and Thomas would be missing something important.

3. invalidate portions of the Endangered Species Act and the Clean Water Act;

4. reinvigorate a controversial understanding of the Second Amendment, so as to disable Congress and the states from enacting gun control legislation;

5. elevate commercial advertising to the same basic status as political speech, thus preventing controls on commercials by tobacco companies, among others;

6. further reduce congressional power under the commerce clause;

7. generally limit democratic efforts to protect disabled people, women, and the elderly from various forms of discrimination;

8. significantly extend the reach of the Takings Clause, thus limiting environmental and other regulatory legislation;

9. ban Congress from allowing citizens to sue to ensure enforcement of the law;

10. and much more.

From the constitutional point of view, what would be most troublesome about such a future would not be the results. It would be the large transfer of power from democratic branches to the federal judiciary. For people of varying political commitments, this transfer of power should be quite troublesome. The conservative attack on "liberal judicial activism" is now out of date, but it had a great deal of merit. Conservative judicial activism is not better.

Should anything be done about the situation? In an ideal world, neither Democrats nor Republicans would have to think, most of the time, about the political convictions of judicial nominees. In such a world, both Republicans and Democrats would insist on high quality judges who would decide cases based on legal grounds that could be accepted by people with diverse views. As I have suggested, rule by left-wing judges is as bad as rule by right-wing judges. In the 1970s, I believe that Republicans were right to attack undemocratic, overly ambitious rulings of the Warren Court. Yet by focusing so carefully on judicial appointments, recent officials have also produced an undemocratic judiciary, one with far too little respect for the prerogatives of the elected branches.

If President Bush seeks judges with political missions, there is only one remedy. As a minimal step, the Senate should be prepared to block any effort by President Bush to fill the courts with people of a particular ideological stripe. Of course the Senate has the power to refuse to consent to a presidential appointment; and the Senate should deny its consent to nominees who cannot demonstrate that they have a healthy respect for democratic prerogatives, and will refuse to participate in any general effort to engraft new constitutional limitations on congressional power. Justices Scalia and Thomas have been distinguished members of the Court, and their voices deserve to be heard. But a

federal judiciary that follows their lead would make unacceptable inroads on democratic self-government. The Senate should not permit this to happen.

Under the Constitution, the Senate also has power to provide advice to the President. As we have seen, the Constitution's Framers intended the Senate's "advice and consent" role to provide security against what they greatly feared: an overreaching President willing to dominate the judiciary. The Senate should reclaim its advisory role, collaborating to ensure the creation of a modest, and properly balanced, federal judiciary. The Senate would be well within its rights to insist on a role in "advising" the President about the appropriate mix of federal judges, on the lower courts as well as the Supreme Court. It would be most surprising if mutual agreeable accommodations could not be worked out.

A clarification: If the Court lacked anyone with Justice Scalia's views, and if it was tilted to the left, it would be appropriate to confirm someone like Justice Scalia, and perhaps even appropriate to insist on someone like Justice Scalia. A successful effort by Democrats, to create a left-wing judiciary with similar hubris, would properly meet with an aggressive Republican response.

IV. CONCLUSION

In the context of the judiciary, the idea of ideology is a complicated one. Some people seem to think that they really know how to interpret the Constitution, and speak and write as if everyone who disagrees has an ideology. But it is better to think that there are several reasonable approaches to interpreting the Constitution, and that in a democratic society, it is desirable to ensure a reasonable mix.

No one really doubts that ideology, in terms of general approach, or patterns of likely votes, is relevant to the nomination and confirmation of federal judges. Everyone would consider certain views out of bounds. In the present circumstances, it is appropriate for the Senate to impose a high burden of proof on presidential nominees, in order to ensure that the federal judiciary has an appropriate mix of views, and does not accelerate the current trend toward an unacceptably aggressive role for federal judges in the constitutional order.

STATEMENT BY PROFESSOR EUGENE VOLOKH*

Mr. Chairman, Senator Sessions, thank you for inviting me to address this very important topic. My name is Eugene Volokh, and I'm a professor of law at the University of California at Los Angeles.

The chief point I'd like to make today is that the Supreme Court's recent jurisprudence, including the views of the Court's more conservative members, has been firmly within the mainstream of American constitutional thought. One may agree or disagree with this jurisprudence, but one has to acknowledge that it's entirely mainstream. And this is equally true of the Rehnquist Court's decisions striking down federal statutes.

The federal government is constrained by both the Bill of Rights and the structural provisions of the Constitution. In fact, many of the Framers, including James Madison, believed that the structural provisions were more important protections against federal abuse than the Bill of Rights would be. The Court has a duty to enforce both sorts of provisions. It has a duty to enforce them against the states, and it has a duty to enforce them against the federal government.

In the fourteen years since Justice Rehnquist became Chief Justice, the Supreme Court has struck down thirty-two federal statutes on constitutional grounds. Of these, about one-third—eleven—involved the Free Speech Clause, which all agree must be enforced by the courts. About one-sixth—five—involved other Bill of Rights provisions: the Takings Clause, the privilege against self-incrimination, and the Seventh Amendment right to trial in jury cases. All likewise agree that these provisions must be enforced by the Court. Another one-sixth—five—involved various structural provisions of the Constitution, namely various aspects of the separation of powers and the Export Clause. Those provisions, too, bind the federal government, and must be judicially enforced.

Finally, another one-third—eleven—involved limits on federal power vis à vis the states. As at least eight sitting Justices have recognized, the Court has an obligation to enforce those constitutionally specified limits as well.[1] Though I recognize that reasonable minds may differ as to the exact scope of those limits, I think that everyone must agree that these limits do exist. And I think the places that the Court has drawn those lines place it well within the mainstream of American legal thought.

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* Professor, UCLA School of Law.

1. All the Justices but Souter and Breyer took this view in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and Justice Souter took this view in *New York v. United States*, 505 U.S. 144 (1992).

This is clearest with regards to the Court's decisions having to do with the substantive scope of federal power.[2] The Constitution clearly sets up a federal government of enumerated powers—this is one of the fundamentals of James Madison's scheme. That's clear from the text of the document, and from all the contemporaneous historical evidence.

By very mildly reining in federal power, the Supreme Court has simply reaffirmed this fundamental constitutional principle. In fact, in one of these cases, *Boerne*, even Justices Stevens and Ginsburg agreed that the Congress had overreached its enumerated powers. And in *Jones v. United States*,[3] all nine Justices, in an opinion written by Justice Ginsburg, took the view that applying a federal arson statute to "traditionally local criminal conduct" with no connection to commercial activity would at least pose a very serious constitutional problem.

Moreover, even in *Lopez* and *Morrison*, the debate was between the more liberal Justices' position that Congress has powers that are pretty much one hundred percent unlimited, except by the Bill of Rights and some of the other structural provisions, and the more conservative Justices' position that Congress has powers that are ninety-five percent unlimited. Even after these decisions, Congress still has tremendous powers, even in areas of traditional state influence. The Court simply recognized that at some point even Congress' great powers go too far. The decisions are important, but they are mostly symbolic constraints. They do not seriously interfere with Congress' power to legislate.

Likewise, the state sovereign immunity decisions are part of a tradition that goes back a century and a half. There is a contentious historical debate about how the Constitution should be interpreted on this question; I don't know which side is right on this matter. But though as a policy matter I do not like sovereign immunity,[4] it's clear to me that the Court's decisions follow a longstanding tradition, and are consistent with the great majority of the precedents.

The Court's two decisions holding that the federal government may not commandeer state legislatures and executive officials to perform federal functions, *New York v. United States*[5] and *Printz v. United States*,[6] are also fully within the mainstream of constitutional thought. Even Justice Souter, who has taken a narrow view of the federalism constraints on Congress, joined the *New York v. United States* majority; and even a forceful critic of those cases, Professor Matthew Adler, acknowledges that these were "hard decisions" that properly

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2. United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. at 507; United States v. Lopez, 514 U.S. 549 (1995).

3. Jones v. United States, 529 U.S. 848 (2000).

4. *See* Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161, 1164 n.6 (2000).

5. New York v. United States, 505 U.S. 144 (1992).

6. Printz v. United States, 521 U.S. 898 (1997).

reflect the fact that the Court is competent "to specify the content of state sovereignty," and must "continue to struggle with the meaning of state sovereignty."[7]

Though the Rehnquist Court has not tried to transfigure the legal system by overturning state laws anywhere nearly as much as the Warren Court did, it has been striking down federal laws more often than past Courts have. But this is largely because there are now more federal laws than in the past, especially in constitutionally sensitive areas.

Before the advent of the Internet, most speech restrictions, except in the specialized area of radio and television broadcasting, were imposed by states. Congress had never passed the Book Decency Act or the Movie Decency Act. But when Congress stepped in to restrict speech in the new nationwide (and international) medium of the Internet, naturally the Court stepped in, and imposed on Congress the same rules that it had long imposed on the states.

Until recent years, violent crime—except in the context of clearly interstate transactions—was largely seen as a state matter. But when Congress enacted laws such as the Gun-Free School Zones Act or the Violence Against Women Act, the Supreme Court had to step in and consider whether Congress had overreached the constitutional boundaries. That is the Court's job, and the further Congress tries to reach, the more likelihood there will be that there is indeed overreaching.

The Supreme Court has an obligation to enforce constitutional constraints, both against the state governments and against the federal government. The federal government has broad power under our Constitution, but not unlimited power. And the Court's recent decisions, both as to federalism and as to other constitutional restrictions, are both eminently defensible and well within the traditional understanding of the Court's proper role.

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7. Matthew Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 170 (2001).

APPENDIX

Rehnquist Court decisions striking down federal statutes:

On Free Speech Clause grounds:

1. *Sable Communications v. FCC*, 492 U.S. 115 (1989).
2. *United States v. Eichman*, 496 U.S. 310 (1990).
3. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).
4. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).
5. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996).
6. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).
7. *Reno v. ACLU*, 521 U.S. 844 (1997).
8. *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999).
9. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).
10. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).
11. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

On other Bill of Rights grounds:

1. *Hodel v. Irving*, 481 U.S. 704 (1987) (Takings Clause).
2. *Babbitt v. Youpee*, 519 U.S. 234 (1997) (Takings Clause).
3. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (Seventh Amendment).
4. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Takings Clause and Due Process Clause).
5. *Dickerson v. United States*, 530 U.S. 428 (2000) (Self-Incrimination Clause and *Miranda*).

On nonfederalism structural grounds:

1. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (separation of powers).
2. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (separation of powers).

3. *United States v. IBM Corp.*, 517 U.S. 843 (1996) (Export Clause).
4. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (Export Clause).
5. *Clinton v. City of New York*, 524 U.S. 417 (1998) (separation of powers).

On federalism structural grounds:

1. *New York v. United States*, 505 U.S. 144 (1992) (commandeering of state government).
2. *United States v. Lopez*, 514 U.S. 549 (1995) (substantive limits on federal power).
3. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (state sovereign immunity).
4. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (substantive limits on federal power).
5. *Printz v. United States*, 521 U.S. 898 (1997) (commandeering of state government).
6. *Alden v. Maine*, 527 U.S. 706 (1999) (state sovereign immunity).
7. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (state sovereign immunity).
8. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (state sovereign immunity).
9. *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (state sovereign immunity).
10. *United States v. Morrison*, 529 U.S. 598 (2000) (substantive limits on federal power).
11. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (state sovereign immunity).

STATEMENT BY MARCIA D. GREENBERGER*

My name is Marcia Greenberger, and I appreciate your invitation to testify today. I am Co-President of the National Women's Law Center, which since 1972 has been at the forefront of virtually every major effort to secure and defend women's legal rights. With me is Judith Appelbaum, the Center's Vice President and Director of Employment Opportunities.[1]

I. INTRODUCTION: WHY THE SENATE'S CONFIRMATION ROLE IS CRITICAL

The issue that is before the Subcommittee today is one that is of central importance to the American people. What is at stake is nothing less than the composition, for decades to come, of one of the three separate and equal branches of our government. While more public attention is generally focused on the process of selecting the occupants of the other two branches—through the presidential and congressional elections—the judiciary has at least as much impact on the lives of our citizens, through its role in interpreting and applying the laws of the land that govern us, including the fundamental rights and liberties protected by the Constitution. Moreover, because members of the judicial branch are appointed with lifetime tenure, the scrutiny that they receive during the nomination and confirmation process is the only form of accountability for them that our system provides, short of the extreme—and extremely rare—remedy of impeachment. That is why the way in which the Senate carries out its constitutional role in the confirmation of judges is of such paramount importance to all Americans.

For women, and in fact for all Americans, over the last thirty years the federal courts have allowed important advances to be made in the elimination of barriers to equal opportunity for all. Through their interpretations of the equal protection and privacy guarantees of the Constitution and of federal statutes aimed at eradicating sex discrimination and arbitrary barriers to the advancement of women, minorities, the disabled and older Americans, the federal courts have given life to the protections our laws provide for important rights and liberties—including the right to equal opportunity in the workplace, in education, and indeed in all facets of society, as well as a woman's right to choose to terminate a pregnancy. The role of the Supreme Court in protecting women's rights, with some barely surviving by 5-4 margins, and the ways in which many hard-fought gains have been weakened by slim majorities of the Court in recent years, are the

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* Co-President, National Women's Law Center, Washington, D.C.

1. I would also like to acknowledge the assistance of two Center legal fellows, Nicole Deddens and Susannah Voigt, in the preparation of this testimony.

subject of a National Women's Law Center report entitled *The Supreme Court and Women's Rights: Fundamental Protections Hang in the Balance*,[2] which is attached to this testimony and which I would like to submit for the record. This report documents in detail how a shift of even just one vote on the Court could turn back the clock for women's core legal rights.

While our report focuses on the Supreme Court, it is important to recognize the enormous power that lower federal courts, especially the courts of appeals, also wield over these and other critical issues. The vast majority of cases in the federal system are never accepted for review by the Supreme Court, and the highest level of review available is a court of appeals.[3] Indeed, the number of cases heard by the High Court has declined in recent years.[4] Moreover, while some have suggested that lower court nominations require less scrutiny because these courts are constrained by Supreme Court precedents, the Supreme Court's jurisprudence in many areas leaves a great deal of latitude for lower courts. For example, the Supreme Court's decision in *Planned Parenthood v. Casey*, adopted a highly subjective standard that allows states to impose restrictions on abortion as long as they do not place an "undue burden" on a woman who seeks to terminate her pregnancy. When is a burden "undue"? The Supreme Court gave little guidance, and some lower court judges decided that even substantial obstacles placed in a woman's path were not "undue." A full eight years elapsed between the time the Supreme Court established the standard and the time it first reviewed any lower court's application of it in 2000, and countless women had their right to choose irrevocably lost by erroneous lower court rulings in the meantime. On other issues, some judges have gone so far as to disregard precedents of the Supreme Court altogether.[5]

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2. This report is available at http://www.nwle.org/pdf/SupremeCtReport.pdf.

3. While 54,693 cases were acted on in 1999 by the twelve courts of appeals, only eighty-three cases were argued before the Supreme Court in 1999. *See* SUPREME COURT OF THE UNITED STATES, 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html; JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR, *available at* http://www.uscourts.gov/judbus2000/contents.html; *see also* Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 984-85 (2000); Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 722 (1999).

4. *See, e.g.*, Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403; David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 779 (1997); *see also, e.g.*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES 77 (2001).

5. See, for example, *Hopwood v. Texas*, 78 F.3d 932 (1996), in which a panel of the Fifth Circuit, explicitly declining to follow Justice Powell's reasoning in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), held race-based affirmative action can never be used to further diversity in institutions of higher education. *Id.* at 945-48. In *United States v. Dickerson*,

Lower court appointments also take on particular significance in light of the current composition of many of those courts. A majority of the courts of appeals are comprised of majorities that reflect a conservative judicial philosophy. And the extreme views of some Circuits, especially the Fourth, on the fundamental legal issues of the day have been the subject of extensive commentary.[6] A tilt to the right has been exacerbated by the Senate's refusal to confirm an inordinately high number of qualified nominees—some thirty-six in all—to the courts of appeals during the last eight years, thus disrupting the balancing process that normally takes place over time as administrations change. There are now over thirty open seats on the courts of appeals. If these seats are filled with conservatives who make it through the Federalist Society screening process, and who fit the mold of Justices Scalia and Thomas, whom President Bush has cited as appropriate judicial role models, the overall ideological tilt of the federal judiciary will shift even further to the right, with serious repercussions for all those who look to the courts for the protection of civil rights, women's rights, individual liberties, and other fundamental values of our society. We will see even fewer of the splits among the circuits that normally trigger Supreme Court review, and less of the kind of debate among different judicial perspectives within panels of circuit judges that can affect the outcome of cases and the development of the country's jurisprudence.

Moreover, the very ability of Congress to protect the American people is on the line. When the courts take an unduly narrow view of the constitutional authority of Congress to pass legislation—as the Supreme Court has done, to cite just a few examples, in striking down the civil rights remedy in the Violence Against Women Act,[7] invalidating the right of plaintiffs under the Americans with Disabilities Act[8] and the Age Discrimination in Employment Act[9] to hold state employers accountable for their discrimination, and striking down the Gun-Free School Zones Act[10]—they wipe away years of hard legislative effort, ignore

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166 F.3d 667, 692 (4th Cir. 1999), *rev'd* 530 U.S. 428 (2000), the appeals court held, contrary to thirty years of precedent, the Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 498 (1966), was not binding in federal courts. The Supreme Court subsequently reversed this decision by a 7-2 vote. Dickerson v. United States, 530 U.S. at 428.

6. *See, e.g.*, Brooke A. Masters, *Battle Brewing over 4th Circuit Nominees*, WASH. POST, May 5, 2001, at A1 ("Considered the nation's most conservative appeals court, the 4th Circuit has drawn national attention for its decisions limiting federal power, upholding death sentences and narrowing the rights of citizens to file environmental and civil rights law suits."); Associated Press, *Helms Set to Back Nominee*, RICH. TIMES-DISPATCH, May 3, 2001, at B4 (noting the Fourth Circuit is "the nation's most conservative appeals court").

7. United States v. Morrison, 529 U.S. 598 (2000).

8. Bd. of Trs. v. Garrett, 531 U.S. 356 (2001).

9. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

10. United States v. Lopez, 514 U.S. 549 (1995).

what often amounts to mountains of legislative history,[11] substitute their judgment for that of Congress, prompting Justice Breyer, in one dissent, to protest, "The Congress of the United States is not a lower court,"[12] and, because such rulings are based on the Constitution, leave little opportunity for Congress to repair the damage. And while Congress can and does enact "restoration acts" to undo the damage when the Court misconstrues the language and intent of its statutes, as it has had to do repeatedly for Title VII of the Civil Rights Act, prohibiting discrimination in employment on the basis of race, sex, religion, or national origin, Title IX of the Higher Education Amendments, prohibiting sex discrimination in education, as well as the laws prohibiting discrimination on the basis of race, national origin, age, and disability, these legislative battles—as members of this Committee know all too well—consume enormous amounts of time and energy that could be better spent on moving forward a positive agenda for the American people.

For all of these reasons, with all that is at stake, the Framers of the Constitution wisely lodged the responsibility to appoint federal judges not exclusively with the President, but with the Senate as well. And having had that heavy responsibility conferred on this body, each member of the Senate must carry out his or her "advice and consent" duty in a way that will protect and defend our most precious rights and principles. It is to that subject that I now turn.

II. THE SENATE'S ROLE IN JUDICIAL CONFIRMATIONS

A. *The Senate's Coequal, Independent Role*

The "advice and consent" language of the Constitution itself, and the history of the Framers' adoption of this formulation, make it clear that the Constitution creates an independent role and set of responsibilities for the Senate in the confirmation process.[13] And, as in so many other ways, the Framers of the

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11. *See* United States v. Morrison, 529 U.S. at 628 (Souter, J., dissenting).

12. Bd. of Trs. v. Garrett, 531 U.S. at 383 (Breyer, J., dissenting).

13. *See, e.g.*, Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551, 552-56 (1986); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1204 (1988); Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 648-49 (1993); David A. Strauss & Cass R. Sunstein, *The Senate, The Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1494-1501 (1992); *see generally* Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Richard D. Freer, *Advice? Consent? Senatorial Immaturity and the Judicial Selection Process*, 101 W. VA. L. REV. 495 (1999); Albert P. Melone, *The Senate's Confirmation Role in Supreme Court Nominations and the Politics of Ideology Versus Impartiality*, 75

Constitution were right. The judiciary, after all, is independent from the Executive and Legislative Branches, and indeed is sometimes called upon to resolve disputes between the two. If the President were given a superior role in judicial appointments, it would upset the neutrality of the judiciary and the system of checks and balances of which it is a part. Unlike cabinet members or other appointments to the Executive Branch, judges do not work for the President or serve at the pleasure of the President only while he, or someday, she, is in office. So while it may be appropriate for Senators to give deference to a President's choices of the personnel who will work for him and implement his policies in the departments and agencies of the federal government—and even then, deference is not a blank check—it would be entirely inappropriate to give deference to the President's selection of judicial candidates.

The late Charles L. Black, Jr., said it well in an article in the *Yale Law Journal* in 1970. After arguing that a Senator should let the President have wide latitude in filling Executive Branch posts, "These are his people; they are to work with him,"[14] Professor Black continues: "Just the reverse, just exactly the reverse, is true of the judiciary. The judges are *not* the President's people. God forbid! They are not to work with him or for him. They are to be as independent of him as they are of the Senate, neither more nor less."[15]

At bottom, no judicial nominee enjoys a presumption in favor of confirmation. Rather, as numerous legal scholars have shown, it is the nominee who carries the burden of convincing the Senate that he or she should be confirmed, and any doubts should be resolved against confirmation.[16] Articulating this shared view, Professor Chemerinsky has written:

> Under the Constitution there is no reason why a President's nominees for Supreme Court are entitled to any presumption of confirmation. The Constitution simply says that the President shall appoint federal court judges with the advice and consent of the Senate. The Senate is fully entitled to begin with a presumption against the nominee and confirm only if persuaded that the individual is worthy of a lifelong seat on the Supreme Court.[17]

No person has an entitlement to a lifetime seat on the federal bench, and if a nominee cannot clearly satisfy the Senate that he or she meets all of the criteria

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JUDICATURE 68 (1991); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633 (1987).

14. Black, *supra* note 13, at 660.

15. *Id.* (emphasis in original).

16. *See, e.g., id.*; Erwin Chemerinsky, *October Tragedy*, 65 S. CAL. L. REV. 1497 (1992); Monaghan, *supra* note 13, at 1207; Strauss & Sunstein, *supra* note 13, at 1519.

17. Chemerinsky, *supra* note 16, at 1509.

for confirmation, the American people should not be asked to bear the risk of entrusting that individual with the reigns of judicial power. As Senator Robert Byrd said in the debate over the elevation of Justice Rehnquist to Chief Justice, "The benefit of any doubt should be resolved in favor of the people of the United States."[18] He elaborated in the debate over the nomination of Clarence Thomas to the Court: "If there is a cloud of doubt, this is the last chance . . . . [I]f there is a doubt, I say resolve it in the interest of our country and its future, and in the interest of the Court."[19]

The history of Supreme Court confirmations reflects the Senate's own understanding of its proper role as an independent—indeed, assertive—partner in the confirmation process. During its first hundred years, between 1789 and 1900, twenty of eighty-five Supreme Court nominees did not make it to the bench—they were rejected, withdrawn, or not acted upon.[20] Between 1895 and 1969, during a period in which many administrations did not use judicial philosophy as a driving selection criterion, just one nominee was rejected.[21] But in the last thirty years, there has been a return to the original pattern, as five Supreme Court nominations have failed, with an additional two prevailing only after intense battles in the Senate.[22]

B. *The Standards Senators Should Apply*

In light of all that is at stake, and the Senate's constitutional responsibility to determine who will be entrusted with life tenure on the bench, the Senate must scrutinize the fitness of judicial nominees with extraordinary care. In addition to meeting the necessary requirements of honesty, integrity, character, temperament, and intellect, to be confirmed to a federal judgeship a nominee should be required to demonstrate a commitment to protecting the rights of ordinary American citizens and the progress that has been made on civil rights and individual liberties, including those core constitutional principles that protect women's legal rights under the Equal Protection Clause and the right to privacy, which includes contraception and abortion, as well as the statutory provisions

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18. 132 CONG. REC. S12,781-01, S12,784 (1986) (statement of Sen. Byrd).

19. 137 CONG. REC. S14,626-702, S14,633-44 (1991) (statement of Sen. Byrd).

20. JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS ix-x (1990).

21. *Id.*; Freer, *supra* note 13, at 499 n.27 ("President Hoover's 1930 nomination of Chief Judge John J. Parker of the Fourth Circuit was the only Supreme Court nomination rejected by the Senate between 1896 and 1969.").

22. Freer, *supra* note 13, at 498.

that protect women's legal rights in such fundamental areas as education, employment, and health and safety.[23]

There is widespread agreement among scholars and commentators that it is absolutely appropriate, and indeed necessary, for Senators to inquire into, and base their confirmation votes on, judicial nominees' positions and views on these and other substantive areas of law.[24] Professor Charles Black, reasoning that a judge's judicial work is necessarily "influenced and formed by his whole lifeview, by his economic and political comprehensions, and by his sense, sharp or vague, of where justice lies in respect of the great questions of his time," concludes that a nominee's

> policy orientations are material—and . . . can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President think them not harmful.[25]

He summarizes:

> The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope?[26]

Before he was a member of the Court, Chief Justice Rehnquist reprimanded the Senate for its passive role in Supreme Court confirmation proceedings in an article published in *Harvard Law Record* in 1959. He quoted

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23. As articulated by some two hundred law professors in a May 8, 2001 letter to the Senate, on file with author, the Senate should evaluate every judicial nominee to ensure that he or she is found to have an exemplary record in the law; bring an open mind to decision making, with an understanding of the real world consequences of their decisions; demonstrate a commitment to protecting the rights of ordinary Americans and not place the interests of the powerful over those of individual citizens; have fulfilled the professional obligation to work on behalf of the disadvantaged; have a record of commitment to the progress made on civil rights, women's rights and individual liberties; and manifest a respect for the constitutional role Congress plays in promoting these rights and health and safety protections, and ensuring recourse when these rights are breached.

24. *See, e.g.*, Black, *supra* note 13, at 657; Chemerinsky, *supra* note 16, at 1513; James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989); Lively, *supra* note 13, at 554; Melone, *supra* note 13, at 69; William Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959; Ross, *supra* note 13, at 634; Strauss & Sunstein, *supra* note 13, at 1513.

25. Black, *supra* note 13, at 660.

26. *Id.*

with approval a speech made by Senator Borah on the Senate floor during the confirmation debate on John J. Parker in which the Senator said:

> They (the Supreme Court Justices) pass upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare a national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Court something of their views on these questions.[27]

This is nothing new; there is ample historical precedent for the Senate to consider ideology, policy views, and judicial philosophy in considering judicial nominations—dating back to George Washington's nomination of John Rutledge as Chief Justice in 1795 and his rejection by the Senate on the basis of his views on the Jay Treaty.[28] When President Wilson nominated Louis Brandeis to the Court in 1916, strong opposition was expressed based on his history of fighting for the regulation of factories and other progressive economic causes.[29] When President Lyndon Johnson proposed to elevate Justice Abe Fortas to Chief Justice in 1968, his confirmation proceedings focused heavily on his prior rulings—and those of the Warren Court majority—that strengthened the rights of the accused and First Amendment protection of obscenity, and a filibuster blocked his elevation to Chief Justice.[30] It is worth noting that during the Fortas debate, Senator Thurmond made the following remarks:

> It is my opinion, further, that if the Senate will turn down this nomination we will thus indicate to the President and future Presidents that we recognize our responsibility as Senators. After all, this a dual responsibility. The President merely picks or selects or chooses the individual for a position of this kind, and the Senate has the responsibility of probing into his background, into his character and integrity, and *into his philosophy*, and determining whether or not he is a properly qualified person to fill the particular position under consideration at the time.[31]

A number of other prominent Senators, of both parties, also have expressed the view that the philosophy of a nominee is an appropriate subject of Senate

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27. Rehnquist, *supra* note 24, at 7-10.

28. Gauch, *supra* note 24, at 358-63.

29. Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1151-52 (1988).

30. ROBERT A. KATZMAN, CONGRESS AND THE COURTS 24-25 (1997). Questions about Fortas' financial dealings, which led to his resignation from the Court, were not raised until later, in 1969. HENRY J. ABRAHAM, JUSTICE, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 219 (1999).

31. 114 CONG. REC. 28,729, 28,774 (1968) (statement of Sen. Thurmond) (emphasis added).

inquiry and an appropriate basis for a Senator's vote. For instance, Senator Robert Byrd has said,

> [I]t is asserted that Senate inquiries into a nominee's fitness for office [are] limited to qualifications, but that other areas of obvious concern, notably his or her personal philosophy or ideology, are off limits to Senate scrutiny. It is a corollary of proponents of this view that the Senate is obligated to place its stamp of approval on a nominee so long as he or she can demonstrate the requisite minimum qualifications for the office in question.
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> All of these assertions have been made time out of memory but, unlike love they do not become better or truer the second or third time around. Indeed, if anything, their repetition offends propriety because they are transparent appeals to political expediency and opportunism and intended to deter the responsible exercise of the advice and consent function.[32]

Similarly, Senator Lott has said:

> We should look not only at their education, background, and qualifications, but also—particularly when it comes to circuit judges—what is their philosophy with regard to the judiciary and how they may be ruling. We have a legitimate responsibility to ask those questions. . . . [A]gain these are not insignificant. These are big-time, lifetime, high paid jobs that are going to affect our lives, and, if we do not know who they are, if we do not ask questions, then we will be shirking our responsibilities.[33]

Senators therefore have a duty to study a nominee's record and to probe during the confirmation hearing in order to form a judgment about what kind of jurist the nominee will be based on judicial philosophy and the nominee's views on what Professor Black called "the large issues of the day." This does not mean asking a nominee for his or her personal views on questions of religion or morality or how he or she has voted on ballot measures in the privacy of the voting booth. It does mean, as reflected in past practice, probing into a nominee's views on the correctness of important Supreme Court precedents establishing the right to privacy and its application in *Roe v. Wade*, or the appropriate standard of scrutiny under the Equal Protection Clause for sex- or race-based classifications, or the scope of Congress' authority under the Commerce Clause or the Fourteenth Amendment to enact civil rights protections. It also means that a nominee's writings or statements should be taken seriously. Confirmation conversions should be viewed with "strict scrutiny."

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32. 133 CONG. REC. S10,829-901 (daily ed. July 29,1987) (statement of Sen. Byrd).
33. 142 CONG. REC. S9418 (daily ed. Aug. 1, 1996) (statement of Sen. Lott).

Carrying out the Senate's responsibility also means that if a nominee has little or no relevant record, he or she bears the burden of assuring the Senate of his or her commitment on key issues and principles. This is particularly important when, as is currently the case, there is a President in office who has made clear that he is looking for judicial nominees of a particular type, in this case those in the mold of Justices Thomas and Scalia. The White House and Justice Department have the opportunity and ability to thoroughly vet potential nominees, before they are sent to the Senate, to ensure that those nominees do indeed fit the President's judicial philosophy requirements. Thus, it is fair to assume that a judicial candidate who appears in his or her confirmation hearing to be a blank slate has revealed him- or herself to administration vetters to be nothing of the kind. The Senate, then, must satisfy itself as to the nominee's views on critical issues. As one scholar put it:

> No judge is a blank slate; every judge has views on important issues before assuming the bench and those preexisting beliefs influence decisions. Whether stated or not, the views still exist. Thus, a judicial candidate's refusal to answer questions does not communicate open-mindedness, just secrecy.[34]

Nominees who refuse to provide insights into their judicial philosophy have failed to meet their burden.

These points can be illustrated with a brief look at the confirmation hearings of Clarence Thomas to the Supreme Court—before Anita Hill's allegations of sexual harassment surfaced, and specifically what happened when he was asked about his views on *Roe v. Wade*. Then-Judge Thomas had a prior written record of his views on *Roe* but attempted to explain them away during his hearing. Asked about his enthusiastic praise of an anti-abortion polemic by the Heritage Foundation's Lewis Lehrman (Justice Thomas had called it "splendid"), he explained that he had merely skimmed the article and was praising it for a different reason. Asked about a report of a White House Working Group on the Family that he had signed, which was highly critical of the Supreme Court's protection of privacy and which had pronounced *Roe* "fatally flawed," Justice Thomas said that he had signed the report but had never read it.[35] Other anti-*Roe* writings he disowned by explaining that he wasn't a Supreme Court Justice when he wrote them, so they had no relevance to what he would do on the Court.[36]

At the same time, Justice Thomas repeatedly insisted that he had no ideological agenda on the right to choose and had a completely open mind. "I

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34. Chemerinsky, *supra* note 16, at 1506.

35. *Nomination of Clarence Thomas to Be an Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 102d Cong. 129-30 (1991).

36. *Id.* at 231-32, 264-67.

have no agenda," "I don't have an ideology to take to the Court," and "I retain an open mind," he said when asked about *Roe* and the right to choose.[37] Asked by Senator Biden whether the right to privacy protects a woman's right to terminate a pregnancy, Justice Thomas said he could not comment without undermining his impartiality.[38] Others pressed him again and again, and he simply refused to say what he thought. And many recall the exchange with Senator Leahy in which Justice Thomas claimed he had never discussed *Roe* with anyone, even though the decision came down when he was in law school.[39]

In the face of all of these assurances of a completely open mind, a mere eight months after this testimony, Justice Thomas joined Justices Rehnquist, Scalia, and White in a Rehnquist opinion that said, "*We believe that Roe was wrongly decided, and that it can and should be overruled* consistently with our traditional approach to *stare decisis* in constitutional cases."[40] And he has not wavered from this view. Just last year Justice Thomas wrote that *Roe* was "grievously wrong."[41]

Reporters have subsequently documented that prior to Justice Thomas' confirmation hearing, the White House had made a firm decision that Justice Thomas must disclose nothing harmful at the hearing, and specifically that he must not indicate his opposition to *Roe v. Wade* because it could jeopardize his confirmation. One of his handlers conceded, on the record, that this was a calculated strategy.[42]

I hope that Senators will bear this experience in mind as future nominees, both to the High Court and to the lower federal courts, come before the Senate. The stakes are too high—especially on such a closely divided Supreme Court, and courts of appeals that already reflect an imbalance to the right—to allow nominees to walk away from their past or to shield their views and ideology from Senate and public scrutiny.

III. CONCLUSION

As Senators, you hold the tremendous power and responsibility to advise and consent on federal judicial nominees. How you exercise that power and responsibility—the degree to which you are demanding and thorough in examining the records and views of the nominees that come before you, and the

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37. *Id.* at 180, 296.
38. *Id.* at 127.
39. *Id.* at 222-23.
40. Planned Parenthood v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, White, Scalia & Thomas, JJ., concurring in part, dissenting in part) (first emphasis added).
41. Stenberg v. Carhart, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting).
42. JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 210 (1994).

extent to which you are willing to assert your constitutional prerogative to say "no" when appropriate—will have a tremendous impact on the lives of American citizens for many years to come.

STATEMENT BY CLINT BOLICK*

I offer this statement on behalf of the Institute for Justice, a libertarian public interest law firm that litigates nationally in support of individual liberties and limited government.

We have always asserted, in Democratic and Republican administrations alike, that the Senate's advice and consent role should be both robust and principled. At the same time, the President is constitutionally entrusted with the authority to nominate judges; and in past administrations, the Senate has accorded due deference to the President to nominate judges who reflect his philosophy. To preserve the independence of the judiciary and to keep the confirmation process moving, the Senate has focused primarily on the qualifications and judicial temperament of nominees to district and appellate judgeships, confining questions about ideology to nominees' ability and willingness to abide by the constitutional oath and adhere to the rule of law.

What we are now seeing is an effort by left-wing advocacy groups like People for the American Way and the Alliance for Justice to elevate ideology to an unprecedented level of consideration. They seek to manipulate the Senate into abandoning its traditional role and bringing the judicial confirmation process to a halt solely on the grounds that the President is nominating highly qualified judges who share his philosophy. And I fear that this hearing, far from exploring important philosophical issues, is really an attempt to place an academic fig leaf on a partisan and fiercely ideological campaign of judicial obstructionism.

Although my organization is keenly interested in the composition of the judiciary, I want to state at the outset that the Institute for Justice did not oppose a single judicial nominee during the eight years of the Clinton Administration. That is emphatically *not* because the Clinton Administration nominated only moderate judges—to the contrary, Clinton's judicial appointees as a whole, and especially his appointees to the United States Supreme Court, have been demonstrably more liberal than the judges appointed by Presidents Reagan and Bush.

Rather, the reason that we refrained from opposing Clinton judicial nominees is self-restraint. We believe that it is essential to the integrity of our organization to choose our battles carefully. For nominees to judgeships in district courts and courts of appeals—whose decisions are subject to review by higher courts—our touchstone is whether a judicial nominee is so extreme that his or her willingness and ability to enforce the rule of law is seriously called into question.

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* Vice-President & Director of Litigation, Institute for Justice, Washington, D.C.

That is not just our touchstone—it reflects the same approach that the United States Senate has traditionally taken toward lower court judgeships for two hundred years. The approach was summed up in 1994 by Senator Joseph Biden who articulated three attributes that he would consider for nominees to district courts and courts of appeals:

> First, that the nominee has the capacity, competence, and temperament to be on the court of appeals or a trial court.
>
> Second, is the nominee of good character and free of conflict of interest?
>
> Third, would the nominee faithfully apply the Constitution and the precedents of the Supreme Court?
>
> If they meet those three tests, assuming they are not on the ideological fringe and they are not someone who is so out of the mainstream that you either question their competence, you question their character, you question their temperament, then it seems to me they should be given an opportunity to fulfill the seat for which they have been named.

This approach reflects well the respective constitutional roles given to the President to make nominations and for the Senate to advise and consent. At a time of divided government, the system would grind to a halt if the Senate refused to confirm nominations based on mere philosophical differences. Historically, and continuing in recent years, Republican Senates have confirmed the vast majority of Democratic administration judicial nominees and vice versa. If we are contemplating a sea change where the Senate delays or denies confirmation to well-qualified, mainstream judicial nominees on differences of philosophy—or, more egregiously, to the ideological whims of a single Senator withholding a "blue slip"—we had better contemplate the serious consequences. As Senator Patrick Leahy declared in 1997, "Those who delay or prevent the filling of [judicial] vacancies must understand that they are delaying or preventing the administration of justice."

Not only will such tactics paralyze the confirmation process—creating or exacerbating a judicial crisis—but it will create an entirely new rule for future confirmations. Democrats have accused Republicans of holding up judicial confirmations during the Clinton Administration, notwithstanding that 377 judges—almost half the federal judiciary—were confirmed during that time. The point is that judicial confirmations have taken longer in each succeeding administration, leading us to the point of judicial crisis. Adding greater ideological scrutiny to the process will slow it down even further.

That comes, remarkably, at a time of relative public quietude regarding the federal judiciary. Americans seem satisfied with their courts. And for good

reason: the era in which activist judges were taking over school and prison systems, imposing judicially created taxes, creating welfare rights, and letting criminals out on technicalities seems largely behind us. Whenever the public perceives that the judiciary is straying too far from the public consensus—whether in the heyday of the Warren Court or when the Rehnquist Court seemed poised to overturn *Roe v. Wade*—it can and usually does produce a democratic correction. In the past election, Vice President Gore tried gamely to make an issue of judges, but to little avail. To the contrary, the *New York Times* recently found that a majority of Americans believe that President Bush will appoint judicial nominees who are about right. (Some think his nominees will be too liberal!)

And indeed, President Bush's record so far is remarkably good. His first group may comprise the most highly qualified group of judicial nominees ever put forward at a single time. They are a bipartisan group and richly experienced as judges or attorneys. The American Bar Association—whose ratings have been referred to by several Democratic Senators as the "gold standard"—have given "qualified" or "well-qualified" ratings to every nominee evaluated so far. In terms of judicial philosophy, several of the nominees have argued numerous cases in the Supreme Court and compiled stellar winning records, demonstrating that they are well within the mainstream of American jurisprudence.

Nor will the nominees significantly alter the balance in the judiciary. Roughly half the federal judiciary are Republicans and half are Democrats. Most of the current retirements are from Republican judges.

But balance is not what the left-wing advocacy groups are after. They want to post a sign outside the door of the federal courthouse reading, "No conservatives need apply." They want this Senate to do their bidding, denying confirmation to anyone who does not share their activist agenda. That these groups are themselves anywhere near the "mainstream" of public opinion is laughable. The Senate should not take its lead from such groups.

Nor should it seek to do so indirectly by attempting to clothe judicial obstructionism with an academic veneer. With due and tremendous respect to Professor Tribe and Professor Sunstein, their writings have not been aimed at greater objectivity or balance in judicial confirmations, but at creating a more liberal judiciary in accord with their own philosophical predilections.

Their real complaint is with the United States Supreme Court, which they characterize as an activist conservative Court. They do not disdain judicial activism in general—surely they applaud many of the activist cases of the Warren era—but they dislike a Court that will rein in other branches of government to vindicate principles such as federalism, equality under law, and private property rights. Of course, the Court cannot rein in government if government itself is not testing the boundaries of activism; and it is precisely the

role of the judiciary, articulated most eloquently in *The Federalist No. 78*, to ensure that the other branches of government do not overstep their constitutional boundaries. Moreover, we need to keep all this in perspective: after all, this is the Court that struck down laws prohibiting flag desecration; that invalidated Virginia Military Institute's ban on female students; that struck down Colorado's initiative prohibiting gay rights ordinances; and that placed the right to an abortion on firmer constitutional ground. These are not hallmarks of a "right-wing" Court—although conservative justices voted with the majority in all of those decisions.[1]

The bottom line, though, is that the academics' advice is a recipe for partisan and ideological gridlock. Sometimes gridlock is good, but not when it paralyzes the judiciary, whose role in protecting fundamental individual liberties is central to our constitutional system. Presently, there are over one hundred judicial vacancies. About one-third of them have been classified as judicial emergencies. As each day passes, the specter of judicial obstructionism becomes ever greater a populist issue with an appropriate threat of popular backlash.

Facing the threat of gridlock, last year the Task Force on Federal Judicial Selection issued a report entitled *Justice Held Hostage: Politics and Selecting Federal Judges*. The Task Force was remarkably bipartisan, including such liberal luminaries as Professor Norman Dorsen and Elliot Mincberg of People for the American Way. Among other things, the Task Force finds that the Senate "should make it a high priority to take final actions on nominees in a more expeditious manner." It specifically decries the blue slip process, which "should not be allowed to undermine collective decision-making in an open, deliberative process." It urges nominations within 180 days of vacancies and confirmations within sixty days of nominations. By moving nominations to a prompt vote by the full Senate we can have a robust and open debate about ideology in judicial nominations and about individual nominees' philosophies. And, in the end, I am confident that we will have the vast majority of judges confirmed.

But so far the operative number is zero, which is the number of hearings scheduled and confirmations made so far. Instead of having hearings on the role of ideology in judicial nominations, this Committee should be moving forward and applying the same rules and principles it has applied for two centuries.

In the coming days, my organization will remind the public of comments that were made about the judicial crisis and the proper role of the Senate during the previous Administration. We will work to alert the public to the existence of a de facto judicial blockade if one is imposed by this Committee. And, of course,

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1. Our report, *State of the Supreme Court 2000*, can be found on the Institute for Justice website at http://www.ij.org. We find that the Rehnquist Court has compiled an excellent overall record on protecting individual liberties.

we will make our most reasoned and passionate arguments in support of nominees who have manifested a commitment to the rule of law and the principles of a free society.

In the meantime, we will see what emerges in the Senate. Will this be a time of statesmanship? I hope that this hearing will lead us in that direction, but I fear it is a step in the direction of ever more rancorous partisanship.

STATEMENT BY SENATOR ORRIN G. HATCH, RANKING MEMBER*

I would like to thank Chairman Schumer for permitting me to say a few words on the very important question of what role ideology should play in the judicial nominations process.

The shift of power in the Senate has focused a great deal of attention on the Judiciary Committee and how it will handle the confirmation of President Bush's judicial nominees. I hope that this heightened focus proves to be unwarranted, and that the new Democratic majority will fairly treat President Bush's nominees to our federal courts. In particular, fair treatment includes maintaining the Committee's longstanding policy against injecting political ideology into the judicial confirmation process and, thus, into the federal judiciary.

There are myriad reasons why political ideology has not been—and is not—an appropriate measure of judicial qualifications. Fundamentally, the Senate's responsibility to provide advice and consent does not include an ideological litmus test because a nominee's personal opinions are largely irrelevant so long as the nominee can set those opinions aside and follow the law fairly and impartially as a judge.

In our constitutional scheme, it is the members of the Legislative Branch *elected by the people*, and *accountable to the people*, who make our laws. When the voters do not like these laws, they can, and, as we know all too well, do, vote their elected representatives out of office. This is what makes our system a representative democracy, founded on our faith in self-government.

Federal judges, by contrast, are unelected, have life tenure, and by design are not accountable to the people. Their power is nonetheless justified—indeed, indispensable—to the extent it is only exercised by interpreting the written, duly enacted law. The role of federal judges is, quite simply, to apply the written law, be it the Constitution or enacted legislation, to the case before them.

But when federal judges deviate from the written law and decide cases based on their own policy preferences or views of what is just or right, they in effect make up laws of their own despite the lack of legitimate authority for doing so. When judges twist the language of legislation to enact the policies they prefer, they usurp the role of the legislature and destabilize the balance of power. Even worse, when they read their own preferences and political agenda into the Constitution, judges directly thwart the will of the people. And voters have no recourse. As a result, entire spheres of policymaking are, in effect, ruled off-

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* United States Senator, Utah (Republican).

limits from the people's elected officials, and instead are usurped by imperial judges—all-knowing guardians of justice. This is judicial activism, and it represents a direct attack on the democratic principles that are central to our constitutional system.

These are the reasons why the Senate's appropriate role is not to probe the political ideology of nominees, but rather to make sure that nominees will follow and apply the law, not personal conviction, when deciding cases. When I discharge my responsibility as a United States Senator to advise and consent, that is the test I apply—not political affiliation or views on any particular issue, but philosophy on a judge's limited role in our constitutional system of checks and balances.

Now that I have explained why we must keep political ideology out of the confirmation process, I would like to address some recent attempts to reinvent history by repeating the convenient myth that I, as Chairman, blocked President Clinton's judicial nominees on the basis of political ideology. At the outset, I must note that the confirmation statistics from the past six years demonstrate that the Republican-led Senate appropriately put aside the politics of judicial nominees. During President Clinton's two administrations, the Senate confirmed 377 judicial nominees. This is only five fewer than the number confirmed under President Reagan, who holds the all-time record. This comparison is particularly relevant to the question of political ideology when you consider that President Reagan enjoyed six years of a Senate controlled by his own party, while President Clinton faced six years of a Republican-controlled Senate. The overall rate of confirmations speaks for itself: the Senate confirmed ninety percent of President Clinton's judicial nominees. If Republicans had based their votes on partisanship or litmus test issues, there would have been but a few Clinton judges sitting on the federal bench today—not a near record.

How did we accomplish the confirmation of 370-plus Clinton judicial nominees? Well, for one thing, I held prompt hearings on many nominees. For example, twenty Clinton judicial nominees received a hearing within two weeks of their nomination. Thirty-four Clinton judicial nominees received a hearing within three weeks of their nomination. And sixty-six Clinton judicial nominees received a hearing within a month of their nomination.

In many months, I also held multiple confirmation hearings. For instance, in 1997, we held three hearings in September, three in October, and three in November. We often held hearings for more than ten nominees in a month. And in other months as many as fifteen or sixteen nominees received a hearing. As a result, 377 of President Clinton's nominees are sitting judges on the federal bench today, many of whom have political philosophies completely at odds with my own.

Given this Committee's recent track record, it is clear that the real question posed by this hearing is not the role of political ideology in past confirmations, but rather whether the Committee should now begin injecting political ideology into the process. Mr. Chairman, I read recent press reports on a Farmington, Pennsylvania retreat that forty-two Democratic Senators attended in late April. According to the reports, a panel discussed the need to scrutinize judicial nominees more closely than ever. One person who attended was quoted by the *New York Times* on May 1, 2001, as reporting that "[t]hey said it was important for the Senate to change the ground rules and there was no obligation to confirm someone just because they are scholarly or erudite." It appears that today's hearing may represent the first step in a troubling attempt to accomplish the goal of changing the ground rules by altering the longstanding practice of avoiding any examination of political ideology beyond the question of whether nominees could put such ideology aside.

President Bush has indicated that he will not use social policy litmus tests in selecting judicial nominees, including nominees for the Supreme Court. Rather, he is focusing on qualifications, temperament, integrity, and a commitment to the rule of law. This, I believe, is consistent with the approach that our Founding Fathers envisioned and that Americans expect. I hope that my colleagues in the Senate will follow the same principles in their advice and consent role in confirming nominees.

In addition to the philosophical importance of judicial restraint to our system of government, and to the wide public support for an independent judiciary, there is also a very practical reason to keep politics out of the confirmation process: No one quite knows how to assess politics in this context.

Take, for example, the hearing held in 1990 concerning the nomination of then-Judge David Souter for the Supreme Court. At that hearing, Kate Michelman, Executive Director of the National Abortion Rights Action League, testified that "the Supreme Court is on the very brink of taking away an established fundamental constitutional right" and that "we are just one vote away from losing our right to choose." Ms. Michelman said she had "conducted a thorough and searching examination of his record" and concluded that she was "intensely concerned that, if confirmed, Judge Souter would destroy 17 years of precedent and cast the deciding vote to overrule *Roe v. Wade*." I argued that Judge Souter would be fair and would follow precedent. As everyone knows, the holding in *Roe* has not only been upheld but also expanded since then, and Justice Souter has proven to be a very reliable vote for the pro-choice position.

Ms. Michelman is certainly not alone in being unable to use a nominee's political views, or perceived political views, to predict how that nominee will rule on future cases once confirmed to the bench. Indeed, history is replete with examples of judges who surprised even the very Presidents who appointed them. President Eisenhower nominated liberal icons Earl Warren and William J.

Brennan, Jr.; President Nixon nominated Harry A. Blackmun, the author and defender of *Roe*; and President Ford nominated John Paul Stevens, whom some consider to be the Court's most liberal Justice. And two of President Reagan's nominees, Sandra Day O'Connor and Anthony M. Kennedy, have voted repeatedly with Justice Souter to uphold *Roe v. Wade*.

It is even problematic to characterize the Court itself. It is fashionable in some circles to refer to the current Supreme Court as "conservative," and to conclude despite the evidence that the change of one Justice will inevitably result in a seismic shift in the Court's decisions. But a thorough review of cases demonstrates that the Rehnquist Court defies labeling and is marked instead by shifting and often unpredictable coalitions. In fact, while many conservatives expected that Reagan and Bush appointees would turn back Warren-era precedents, the reality is that major precedents have not been overturned. Even *The Washington Post* noted in an article after last summer's major decisions were handed down that the Court "mixes its high-profile messages." What this illustrates is that history often proves wrong those who seek to label the political ideology of individual judicial nominees as well as courts as a whole.

In sum, Mr. Chairman, the change of power in the Senate has focused media attention on the judicial confirmation process. At the same time, the Democratic Senate leaders—despite a few intemperate comments by some members—have recently pledged to treat President Bush's judicial nominees fairly—and I appreciate those sentiments. This would be a particularly bad time to make the historic misstep of injecting political ideology into the confirmation process. Instead, we ought to renew our traditional focus on evaluating competence, fairness, integrity, and—above all—a commitment to enforcing the Constitution and laws of this country, as promulgated through our constitutional democracy.

STATEMENT BY SENATOR MITCH McCONNELL*

Determining what is the exact role of the United States Senate in the confirmation process is an important question, and I thank the Chairman for convening this hearing to try to answer it. From press accounts I have read, I am very concerned, however, that some of my colleagues have a much more specific, and a much more disturbing, goal for this hearing. That goal is to establish that it is somehow constitutionally incumbent upon this body to disqualify otherwise well-qualified judicial nominees simply because they are not on the left of the political spectrum. Once my colleagues and their supporters on the far left believe they have established this premise, I fear they will then work to block all judicial nominees who do not fall on the "correct" side of the political spectrum, as they define it.

This is a troubling proposition. It is one that does not bode well for the nomination process, nor for the rich intellectual tradition that has characterized our federal judiciary. One of the great traditions of our Republic has been the free exchange of thoughts, embodied in the metaphor of the "marketplace of ideas," where speakers hawk their wares, bidding for the minds of men. Our judiciary has benefited from what has been, up until now, our profound national commitment to diverse thought and rigorous debate. I cannot imagine how much poorer our legal tradition would be if it would have been deprived of the rich intellect of such different thinkers as Oliver Wendell Holmes, Hugo Black, William Brennan, and Antonin Scalia.

But unfortunately it appears that some on the left are increasingly dedicated to shutting down this vibrant marketplace and replacing it with a monopoly of thought, where the only commodity to be bought is liberal orthodoxy. Their reason? That conservative views are not "in the mainstream." Well, Mr. Chairman, I'm sorry, but the values of middle America are most certainly in the mainstream, and arguably embody it.

All these states in red—these states, commonly known as "middle America"—are "in the mainstream."[1] Kentuckians, for example, are "in the main stream." So too are Kansans and Ohioans. Odds are, if you are from these states, you will have middle-American values. And if you do, and you are nominated to the federal bench, you most likely will be unable to serve, because those on the far left are crafting a new, *six-point litmus test* to bar you from the bench.[2]

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* United States Senator, Kentucky (Republican).

1. This chart is on file with author.
2. This chart is on file with author.

Now, we are all familiar with litmus tests, but I'm afraid that some on the far left are taking it to new, disturbing levels. In their view, in order to serve as a federal judge, you must:

1. Support judicial activism;
2. Restrict First Amendment rights of political speech and association;
3. Oppose Second Amendment rights for law-abiding citizens;
4. Support partial birth abortion;
5. Support racial preferences; and
6. Expand the federal government by diminishing the role of the states.

Under their approach, if a nominee is tripped up by any one of these hurdles, he is unfit to serve. His education will not matter. His experience will not matter. His achievements, both personal and professional, will not matter, nor will the fact that he may have overcome numerous adversities, suffered untold hardships, and even received the approval of the ABA. It will not matter if he has fought for his country, given to his community, or sacrificed for his family. Because he is not the person whom the editorial board of the *New York Times* would have picked to serve on the bench, he is barred from service.

Over the years, people from time to time have objected to judicial nominees on the ground that their legal views were extreme. But until now, they have saved "Borking" for an unlucky few. Until now, they have not tried to convert the usage of Borking from an exception to the rule itself. They have not sought to disqualify an entire class of nominees from public service based on their philosophy. They have not essentially said, until now, "pro-lifers need not apply."

My colleagues, if we go down this road, we will have a meltdown in our nomination process. It will be mutually assured destruction that will cripple the federal judiciary. It is naive to think that such a dramatic escalation in partisanship will not, by necessity, be visited upon the next Democrat to occupy the White House. We therefore cannot allow "advice and consent" to become "demand and dictate." The Constitution does not provide for one hundred—or even fifty-one—co-Presidents. So I caution my colleagues to be judicious in their objections to the well-qualified Americans who will come before them.

Voting for nominees of another philosophical stripe can be painful, but both sides have always done it. Most recently, I point to President Clinton's near record number of 377 judicial nominees who were confirmed, *even though Republicans controlled the Senate for seventy-five percent of his term. For eight long years* I voted to confirm most of President Clinton's nominees, although there is no way I would have nominated most of these people if I were President because I disagreed with their judicial philosophy, sometimes vigorously so. But I did not wage some sort of jihad to stop them because, quite frankly, it was not appropriate for me to do so. Nor would it be appropriate now for my colleagues on the other side to bow to pressure from groups on the far left and wage an all-

out war against well-qualified Americans who seek to serve their country. So, in closing, I would caution my colleagues to be mindful of the precedent they are setting, and to be wary of what they wish for.

STATEMENT BY SENATOR CHARLES E. SCHUMER*

Today, for the first time in over a decade and for the first time during the Bush Presidency, we are formally examining the judicial nominations process.

This hearing is specifically focused on the vital question of what role ideology should play in the selection and confirmation of judges. Let me start by saying that it is my intention to hold a series of further hearings that will examine in detail several other important issues related to the judicial nominating process.

At this point, we plan to hold at least three more hearings on the following issues:

1. The proper role of the Senate in the judicial confirmation process. What does the Constitution mean by "advice and consent" and historically how assertive has the Senate's role been?

2. What affirmative burdens should nominees bear in the confirmation process to qualify themselves for lifetime judicial appointments? The Senate process can be criticized for being a search for disqualifications. We will examine whether the burden should be shifted to the nominees to explain their qualifications and views to justify why they would be valuable additions to the bench.

3. The significance of the Supreme Court's recent federalism decisions for the judicial selection process. Most Americans probably do not realize what these cases curtailing the powers of Congress mean for their everyday lives and futures. We will try to make these somewhat esoteric and often abstract decisions more real and relevant for ordinary citizens.

Today's hearing on ideology is a good place to start because it will touch upon all of these issues and serve as the beginning of the important dialogue that we in the Senate should be having before we proceed much further with nominations hearings and certainly before we embark on the consideration of Supreme Court nominees.

I have read all of the testimony submitted by the witnesses and I have to say all of it is terrific. Both sides of this issue present alluring arguments and certainly underscore how difficult and how important the issue we are wrestling with today is.

One thing is clear: the ideology of particular nominees often plays a significant role in the confirmation process. Unfortunately, knowing when and to what degree ideology should be a factor for the Senate is far more obscure.

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* United States Senator, New York (Democrat); Chair of Subcommittee.

For whatever reason, possibly senatorial fears of being labeled partisan, legitimate considerations of ideological beliefs seem to have been driven underground. It's not that we don't consider ideology, we just don't talk about it openly.

And, unfortunately, this unwillingness to openly examine ideology has sometimes led Senators who oppose a nominee to seek out nonideological disqualifying factors, like small financial improprieties from long ago, to justify their opposition. This in turn has led to an escalating war of gotcha politics that has warped the Senate's confirmation process and harmed the Senate's reputation.

As many of you know, this was not always the Senate's practice. During the first one hundred years of the Republic, one out of every four nominees to the Supreme Court was rejected by the Senate, many for clear ideological reasons. George Washington's appointment of John Rutledge to be Chief Justice and President Polk's nomination of George Woodward are two early examples of the Senate rejecting nominees on purely ideological grounds.

The power of the Senate in the nominations process has, however, been accordion-like, and from 1895 to 1967, only one Supreme Court nominee was defeated. Since 1968, ideological considerations have occasionally surfaced, notably in Republican opposition to the Fortas nomination to be Chief Justice and in Democratic opposition to the nomination of Robert Bork.

But since the Bork fight in 1987, ideology, while still an important factor for the Senate, has primarily been considered sub rosa, fostering a search for a nominee's disqualifiers that are more personal and less substantive.

It is high time we returned to a more open and rational consideration of ideology when we review nominees. Let's make our confirmation process more honest, more clear, and hopefully more legitimate in the eye of the American people. And let's be fair to the nominees the President picks.

If we do this, the knotty question we face is how dominant a factor should a nominee's ideology be in the Senate's consideration. Historically, the role ideology has played in past confirmations has varied, but it seems to me that several factors are relevant:

First, the extent to which the President himself makes his initial selections on the basis of a particular ideology; second, the composition of the courts at the time of nomination; and third, the political climate of the day.

The Eisenhower Presidency is instructive and shows how these factors affect the Senate's confirmation process. First, Eisenhower's selection criteria were nonideological. He brought the ABA into his selection process and sought candidates with, as he put it, "solid common sense," eschewing candidates with "extreme legal or philosophical views."

Second, the balance of the courts was leftward in light of twenty years of Democratic appointments. In fact, when Eisenhower took office, four out of every five federal judges were Democrats. Third, politically Eisenhower had a strong mandate, having been elected by overwhelming majorities in both 1952 and 1956.

Thus, in a time when the courts had been filled by Democrats, a split Senate had little cause to ideologically oppose the nonpolitical picks of an overwhelmingly popular Republican President.

Today, the calculus is much different. President Bush campaigned on a pledge to appoint judges of a particular stripe, like Justices Scalia and Thomas. And the balance of the courts, especially the Supreme Court, leans decidedly to the right.

Politically, the American people were completely divided in our recent national elections, sending a message of moderation and bipartisanship.

This era, perhaps more than any other before, calls out for collaboration between the President and the Senate in judicial appointments. It certainly justifies Senate opposition to judicial nominees whose views fall outside the mainstream and who have been selected in an attempt to further tilt the courts in an ideological direction.

Having one or even two Justices like Scalia and Thomas might be legitimate because it provides the Court with a particular view of constitutional jurisprudence. But having four or five or nine Justices like them would skew the Court, veering it far from the core values most Americans believe in. The Constitution instructs the Senate to first advise the President as to his choice of nominees and then to review and decide whether to confirm the President's picks. As the research of Professors Tribe, Sunstein, and others has forcefully revealed, the debates of the Constitutional Convention suggest a fully shared authority between the President and the Senate as to the composition of the Supreme Court.

As Professor Sunstein has written, the text of Article II, Section Two assigns two distinct roles to the Senate: an advisory one before the nomination and a reviewing function after it. The clause envisions, or at least encourages, collaboration in which presidential consultation leads to easier confirmation.

Let me conclude by saying that I and many of my colleagues see the appointment of judges as the ultimate test of bipartisanship.

In electing two branches of our government, the country was split down the middle, leaving appointments to the third branch as perhaps the defining indicator of the political direction our country will take.

The President, of course, can choose to exercise his nomination power however he sees fit. But if the President sends countless nominees who are of a particular ideological caste, Democrats will likely exercise their constitutionally

given power to deny confirmation so that such nominees do not reorient the direction of the federal judiciary.

But if the President does not grossly inject ideological politics into his selection criteria, neither will the Senate.

Today, we are going to hear from two former White House Counsels who spent years advising and recommending candidates for the federal bench in both Republican and Democratic administrations.

We will also hear from some of the brightest legal academics around who have dedicated their careers to studying judicial nominations and the way the Senate and President handle them.

The issue we're discussing today is not merely academic. The stakes involved for our country are enormously high. The Supreme Court has split 5-4 on so many fundamental issues of the day, including most importantly the extent of power held by the Court's coequal and democratically elected branches of government.

We therefore begin this important inquiry and examination of the nominations process carefully, conscientiously, and fairly. Let me thank in advance our distinguished witnesses; we are very interested to hear your testimony and engage you on these issues.

I'll now turn to our Ranking Member, Senator Sessions for his opening statement. And let me just thank him up front for helping to make this a fully bipartisan hearing with equal numbers of witnesses. He and his staff are a pleasure to work with and I look forward to holding future hearings in the same manner.

HEARING BEFORE THE SENATE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS ON THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: WHOSE BURDEN?

SEPTEMBER 4, 2001

STATEMENT BY SENATOR PAUL SIMON*

I'm pleased you are having this hearing on the historic role played by the Senate and the President in judicial nominations.

At the founding of our nation, the idea was that the Senate could be a sort of informal cabinet for the President, advising him regularly on a host of matters. It soon became apparent that that hope was unrealistic. When the Senate reached the point of confirming nominations from the President, the Senate invited George Washington to join them for consideration of the nominees, but Washington wisely declined, stating that the Senate should feel free to accept or reject nominees without any pressure from the President.

By tradition the President does seek the advice of Senators or ranking House members for district judgeships. The Constitution is being followed. At the appellate level it is sometimes followed. Because I served on this Committee, I had conversations with the White House on a few of these appointments. But at the most important level, the Supreme Court, it is rarely followed today. We are a long way from a Supreme Court contest in which President James Garfield wrote that a nomination he made "will settle the question whether the President is the registering clerk of the Senate or the Executive of the United States."

Two days after George W. Bush took the oath of the presidency, he met with six Democrats—Senator John Glenn, Carter Press Secretary Jody Powell, Walter Mondale's Chief of Staff Richard Moe, former Congressman Bill Gray,

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* Former United States Senator, Illinois (Democrat).

former Democratic National Committee Chair Robert Strauss, and myself—on how he could reach out to Democrats. I stressed that when it comes to nominations for the United States Supreme Court, he should take his time, consult with members of this Committee of both political parties, and with others, because that legacy will live long after his presidency.

On the lower courts, it is important that you get the opinion of the American Bar Association. Even with that screening, occasionally a marginal nominee would appear before us, where I said to myself, "I hope nothing too complicated comes before this judge." I stopped only two nominations that I recall, one a nominee who made racially insensitive remarks, and the other a nominee who refused to resign from a club which discriminated, a practice I am pleased to say the Committee now follows.

Beyond that, unless views expressed by a lower court nominee are extreme or there is evident lack of ability or question about integrity, I believe the nominee should be approved. Let me illustrate. When Clarence Thomas came before this Committee for chairmanship of the Equal Employment Opportunities Commission, I voted against him because he did not believe in the mission of the agency. When he came before us as a nominee for the appellate court, I voted for him, but said at the time if he should be nominated to the United States Supreme Court, I would probably vote against him because of his philosophy. That I did.

On Supreme Court nominations, whatever is considered by the President properly should be considered by the Senate. And while it is true that sometimes nominees follow an unexpected pattern, in the large majority of cases the background of the nominee is an accurate gauge of the future decisions that a Justice will make. In one of the worst decisions the Supreme Court ever made, the *Korematsu* decision, approving President Franklin Roosevelt's 1942 order to suddenly relocate 115,000 Japanese Americans—not a one of whom had committed a crime—one of the three Court dissenters was a nominee of President Herbert Hoover, and among the six in the majority were Justices Hugo Black and William Douglas, usually champions of civil liberties. And one of the few people within the Administration to speak out against the President's actions was J. Edgar Hoover, later not so sensitive to our basic liberties. But that unexpected pattern is unusual.

The best recent example of how a nomination should be handled was President Gerald Ford's nomination of John Paul Stevens. The President asked Attorney General Ed Levi to scour the landscape for a quality Justice. Senators were consulted, as were many others. The President did not act hastily. No President should. Nor should the Senate. While it is not ideal, the Supreme Court can operate with eight members; and whatever problems that presents, it is much better than approving someone like Woodrow Wilson's appointment of Justice James McReynolds, the clear winner of the award as the worst Justice to serve on that high body.

During my twelve years on the Senate Judiciary Committee, no President ever talked to me about a possible nominee prior to the nomination. A President should do that. That's what the Constitution calls for. The President does not need to follow the advice of the Senate, nor the Senate of the President. The Senate favored naming Aaron Burr as Ambassador to France and sent James Monroe and James Madison to talk to the President about it. George Washington refused, saying he had "made it an invariable rule never to suggest to a high and responsible office a man whose integrity" he questioned. The President was right, the Senate wrong.

Three suggestions:

1. *Again, you should take into consideration philosophy for a Supreme Court nominee.* When Earl Butz came before the Senate as the nominee for Secretary of Agriculture, Senator Hubert Humphrey said to him: "I am worried about your economic philosophy. . . . Your bonds and stocks are to your credit. . . . You have earned everything that you have. You can put all that in escrow, but I don't think you can put your philosophy into escrow." If that is a consideration for a Secretary of Agriculture, how infinitely more true is it of a lifetime member of the United States Supreme Court?

2. *Practical political experience should be at least a minor consideration.* Linda Greenhouse recently had an article in the *New York Times* in which she mentioned that only one member of the Supreme Court, Justice Sandra Day O'Connor, has ever held elective office, having served in the state legislature. Greater elected office experience would be of help to this Court.

3. *A broad look for nominees of the Supreme Court should include non-lawyers and members of the opposite party.* Justice Hugo Black favored having one or two members of the Court who are not lawyers. Someone who became a Supreme Court scholar like Irving Dilliard of the *St. Louis Post-Dispatch* would have made a superb Supreme Court Justice. Let me add that at the age of seventy-two I am not talking about myself. As to political party, in the last century, Presidents Taft, Wilson, Harding, Hoover, FDR, Truman, Eisenhower, and Nixon all nominated at least one Justice of the other party.

One final footnote. In the history of the Senate, it has rejected one-fifth of the nominees to the Supreme Court. In the nineteenth century it rejected one-fourth—reason enough for the President and the Senate to work together.

STATEMENT BY PROFESSOR SANFORD LEVINSON*

Mr. Chairman and Members of the Subcommittee:

I am honored by the invitation of the Committee to present this statement on the criteria that should be applied with regard to confirming nominees for lifetime appointments to the federal judiciary. This responsibility, of course, is truly one of the most awesome responsibilities that Senators have.

I begin with two quotations from members of the Supreme Court itself. The first was written by Felix Frankfurter some seventy years ago:

> [M]embers of the court are frequently admonished by their associates not to read their economic and social views into the neutral language of the constitution. But the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the justices are their "idealized political pictures" of the existing social order.

A far more recent Justice, Stephen Breyer, has put the matter slightly differently, but he arrives at the same basic conclusion. After first stating that "[p]olitics in our decision-making process does not exist," he distinguished what might be termed "low" from "high" politics. Thus, he said, "By politics, I mean . . . will it help certain individuals be elected?" He quickly went on to say that "[p]ersonal ideology or philosophy is a different matter. . . . Judges have had different life experiences and different kinds of training, and they come from different backgrounds." Most importantly, for our present purposes, is Justice Breyer's forthright comment that "[j]udges appointed by different presidents of different political parties may have different views about the interpretation of the law and its relation to the world."

Obviously, Presidents must take care—and the most basic function of this Committee, and of the entire Senate, is to make certain—that nominees to the judiciary meet certain baselines of professional competence. To be frank, this is almost never a serious hurdle. Instead, as already indicated, the crucial question is precisely the content of the "idealized political pictures" and "personal ideolog[ies]" of the nominees submitted to you for your assessment. You must give "advice" and not only "consent" to the Executive Branch, and therefore you must ask if the nominees offer compelling visions of what our constitutional order truly is or should be.

The vital role played by the Senate in the confirmation process is not only constitutionally compelled, with full warrant in the original deliberations of the

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* W. St. John Garwood and W St. John Garwood, Jr. Regents Chair in Law, University of Texas Law School; Professor, Department of Government, University of Texas.

Framers of the Constitution, it also makes complete political sense in terms of the contemporary operation of the federal judiciary, at all of its levels, as an active and independent branch of government that plays a role well beyond the conceivable imagining of any Framer of the Constitution.

The Framers would probably be even more astounded by the linkage between membership in a political party and appointment to the judiciary, not least because most members of the Philadelphia founders were appalled by the very idea of political parties. Yet, James Madison became, during the 1790s, one of the leading founders of the Democratic-Republican Party that vigorously opposed the Federalist Party headed by Alexander Hamilton. The creation of the party system led to the election fiasco of 1801, when only a combination of threats by Jeffersonian governors to call out the state militia plus Alexander Hamilton's detestation of Aaron Burr led, after thirty-five inconclusive ballots, to the House of Representatives breaking the electoral vote tie between Jefferson and Burr in favor of Jefferson.

One other aspect of what Jefferson referred to as "the Revolution of 1800" should be mentioned, for it is relevant to our present situation. Almost literally, the last thing that the outgoing Federalist President, John Adams, did was to pack the judiciary with Federalists, confirmed by a lame duck and popularly repudiated Federalist Senate. Adams firmly hoped that these new judges would use all the powers at their disposal to put stumbling blocks in the way of the feared Jeffersonians. The most famous such appointment is, of course, John Marshall, whose designation as Chief Justice was understood by one and all to be a powerful political statement. Thus, only a dozen short years after the ratification of the Constitution, the practice of linking judicial appointment to possession of the correct party membership and ideological perspective was firmly established. "Nonpartisan" simply does not describe the two centuries of nominating and confirming federal judges.

Both Professors Cass Sunstein and Laurence Tribe, in their earlier testimony to this Committee, have spelled out the role that ideological judgment can legitimately play when considering judicial appointments. Perhaps it is worth stating that one consequence of accepting the legitimacy of ideological assessment is to make it difficult, if not impossible, for Democrats to be very critical, in the abstract, of efforts made by Republican Senators to block the confirmation of many of President Clinton's nominees to the judiciary, at least when that opposition was candidly expressed as a good faith belief that a nominee possessed an unacceptable view of the Constitution. All Senators, after all, take an oath to "support" the Constitution. That means, therefore, that every Senator, particularly those on the Judiciary Committee, must decide what the Constitution, best understood, actually requires in our never ending quest to realize the great aims of the Preamble and its emphasis on "establish[ing] Justice." This is obviously not an easy task and, as already acknowledged,

reasonable people can certainly disagree. If I disagreed with the Republican opposition to President Clinton's nominees, it was because I do not share their own ideological commitments, not because I think they had a duty, automatically, to exhibit great deference to President Clinton's contrary judgments. Senators of both parties must think through all of these issues for themselves rather than bow down humbly before a presidential determination as to who should be on the federal judiciary.

It is, therefore, thoroughly legitimate, under the most ordinary of circumstances, for Senators to concern themselves with the direction in which federal judges are travelling. But *these* are not ordinary times. Hovering over any discussion in 2001 of judicial nominations is the Supreme Court's decision last December in *Bush v. Gore*. That decision remains the equivalent of a stinking pig in the parlor, and it would be grotesque to ignore its implications for senators who both share my concerns about the "idealized political pictures" reflected in the decisions issued by the current majority over the past decade and believe that the Court's intervention in the political process last December was an especially ugly breach of judicial propriety.

In at least one way the events in the aftermath of the 2000 election were even more disturbing than its counterpart two hundred years ago. In 1800, no one doubted that the House of Representatives was the proper body to decide the election dispute. In December 2000, however, we were presented with the spectacle of five Republican Judges using their power to shortcut not only the process of counting the votes in Florida, but also, in effect, to render irrelevant the possibility that Congress, exercising its powers under both Article II and the Twelfth Amendment, would resolve any continuing disputes, and, as in 1800 and 1824, name the President. Instead, the Court, in effect, named George W. Bush as President. One need not accuse them of consciously betraying their oaths of office; as Laurence Tribe told this Committee, if that were the case, the proper subject of discussion would be impeachment. But no one could seriously doubt that all of these Justices relished the prospect that the White House would be inhabited by a Republican who could, among other things, nominate their successors. And, of course, in December 2000, it appeared that the Senate would continue to be Republican. The very possibility that the five Justices were completely sincere in the views they articulated only underscores the point that judges inevitably have a propensity to read the Constitution in a way that provides "happy endings," where happiness is defined precisely as achieving a good fit between outcome and the judge's "idealized political picture" or political "ideology." In this case the happy ending is a Republican President picking Republican Justices to be confirmed by a Republican Senate.

Many law professors, of whom I am one, regard *Bush* v. *Gore* as a patently illegitimate decision, and, many of us believe, its illegitimacy extends to Mr. Bush himself. Whatever might be said about any custom or duty of the Senate to

extend deference to a President when submitting nominees for the federal bench is really quite irrelevant in the present circumstance.

As a practical matter, there is little that one can do about *Bush* v. *Gore.* Mr. Bush does indeed occupy the White House, and no one seriously suggests that he ought not be accepted as our President.

But it is absolutely incumbent on those who were properly appalled by the Court's behavior last December to stand vigilant against its undoubted desire that the Court—and the federal courts in general—be packed with nominees who are committed to extending what many thoughtful observers, both liberal and conservative, are describing as "a constitutional revolution" that is occurring at the behest of the Court's current majority. Indeed, this was the very title used in a highly admiring 1997 article in the *Wall Street Journal* written by Northwestern Professor Steven Calabresi, a cofounder of the Federalist Society. He was referring specifically to the Court's decision in *Printz v. United States*, which invalidated a part of the Brady Bill that required the cooperation of local police authorities in doing the background checks of those who wished to purchase firearms. This, of course, is only one of a host of decisions in which the Court's current majority has invalidated or significantly limited important acts of Congress. This invalidation rests on a view of state "sovereignty" that has far more in common with Jefferson Davis, or, at best, Andrew Johnson, than with the commitments of Abraham Lincoln and the Framers of the Fourteenth Amendment to enabling a strengthened national government to protect the rights—what the Constitution calls the "privileges or immunities"—of *all* American citizens.

The prior testimony of Professors Sunstein and Tribe included excellent discussion of the ongoing revolution, and I will not repeat their arguments. I am, however, submitting today the text of an article coauthored by Yale Law School professor, Jack M. Balkin, and myself, entitled *Understanding the Constitutional Revolution*, which will appear next month as the lead article in the *Virginia Law Review.* In it we set out our own understanding of the situation that faces us, including the implications of *Bush v. Gore* for the appointment process. We do not attack the good faith of those who believe that the current majority manifests a correct constitutional vision. We respectfully disagree, and we present an overview of what we believe to be a far better perspective. No doubt the current majority and its supporters would say that it is our own vision that deserves rejection. Perhaps they are right, but the central point is that the adequacy of constitutional vision should be the primary concern of members of this Committee.

I have emphasized my general agreement with the testimony offered by my friends and distinguished colleagues Cass Sunstein and Laurence Tribe. I do, however, disagree with them in at least one important respect: Both of them evoke a metaphor of "balance" and achieving the right "mixture" of viewpoints.

Each seems to suggest that it is especially important to prevent the Court from becoming too unbalanced in favor of right-wing perspectives. The problem with the imagery of balance is that we have literally no idea how to figure out what a proper balance is. No one, for example, would have suggested to FDR or, for that matter, most future Presidents that anyone be nominated who shared the pre-1937 understanding of a national government without power to engage in effective economic regulation or of state governments that could not pass basic social welfare legislation. No one suggested that President Johnson should nominate a segregationist instead of Thurgood Marshall in order to achieve some balance on what had become a racially liberal Warren Court. Instead, emphasis was properly placed on the political legitimacy enjoyed by the appointing Presidents and the fact that the confirming Congresses shared the political visions of the relevant Presidents. The same thing might be said, incidentally, about the nomination and confirmation of Antonin Scalia during the Reagan Administration, shortly after his smashing victory in 1984 and the return of a Republican Senate. Similarly, if George Bush had won a sweeping victory coupled with continuing Republican control of the Senate, he would be able to claim a certain mandate for his vision of the Constitution, one shared by Senate Republicans. One could well understand a desire to entrench that vision by assuring that it rests on more than a fragile 5-4 majority. A Republican President and a Republican Senate would have no duty to put the prospects for maintaining their vision at risk by appointing someone less than wholly committed to it. The question at that point would be the propriety of those opposing the nomination in using the Senate's procedures of extended debate to forestall confirmation.

The call for balance in fact points to the question raised by Illinois Senator Stephen A. Douglas in one of the most electric moments in our political history. In one of his famous debates with Abraham Lincoln, he posed the following question: "Mr. Lincoln cannot conscientiously submit, he thinks, to the decision of a court composed of a majority of Democrats. If he cannot, how can he expect us to have confidence in a court composed of a majority of Republicans?" Douglas emphasized the obvious point that these new jurists would be selected precisely in order to reject the proslavery constitutional vision then associated with the Democratic Party, and put in its place a decidedly different vision of the Constitution, then associated with the newly formed Republican Party. Why should Democrats put their trust in such a Court? And note, incidentally, that Douglas properly emphasized the importance of the Court's "majority;" he would not be satisfied with the presence of, in that case, a minority of Democrats who would be consistently outvoted in cases that mattered most deeply to him and to those who shared his views. Douglas' question is extremely important; and, in fact, no question is harder to answer in a satisfactory way.

The perception of the judiciary as the arm of only one part of the political spectrum may indeed lead to a loss of respect from significant elements of the

public; this may, obviously, contribute to a willingness to disregard judicial holdings. Nonetheless, as I have already suggested, a desire to achieve "representativeness" on the judiciary would not have justified confirming a segregationist committed to the validity of *Plessy v. Ferguson*, just as Lincoln was surely correct to appoint only opponents of *Dred Scott* to the Court. At the end, one must always return to the acceptability of the "idealized political pictures" painted by potential nominees.

I offer two final comments about balance. First, to the extent that balance is desirable, the best way to achieve it is through the ordinary political process of shifts in political power among the political parties in both the Presidency and the Senate. It may be, however, that our ordinary political system is failing us in important respects. I would point to two important factors that make the current situation markedly different from most times in the past. First, no Democratic President named anyone to the Supreme Court between 1967-1993, and President Clinton, though serving two full terms, named only two Justices, both in his first term. One explanation for this is the second factor, which is an unfortunate propensity for judges to serve far too long, to take all too seriously their appointment to lifetime terms. In part, this is linked with the propensity of Justices, of both political parties, to attempt to "time" their leave taking in a way that achieves the important political objective of keeping the seat for their preferred political party. This well-recognized phenomenon is one of the most dramatic proofs of the fact that Justices do not in fact leave their political loyalties behind them when they ascend to the Supreme Court.

Secondly, if this Committee does wish to wrestle with such questions as to what constitutes the best "mix" of judges on a court, I would emphasize the importance not only of abstract ideology, but also of what Justice Breyer described as "life experience and different kinds of training." I believe that a significant lack on the current Supreme Court is someone with a significant degree of political experience. The developing custom of appointing only persons with prior experience on the bench is, I believe, decidedly unwise, depriving the Court of important perspectives that are the result of real immersion in the political process. Courts in the past have regularly included former Senators, governors, cabinet officials, and, in one instance, a former President. We would do well to return to that practice, and this Committee should use its "advisory" role to encourage such nominations.

In one sense, this emphasis on political experience is independent of ideology inasmuch as there are obviously both Democrats and Republicans who would bring rich political backgrounds to the judiciary. But there is at least one connection worth mentioning: Several analysts of the current Supreme Court emphasize a specific ideological theme that runs through many of its decisions. This can accurately be described as a near contempt for politics and politicians. The current Court is composed of a majority of Justices who appear to view

politicians as simply the agents of private interests and pressure groups, unworthy of trust, coupled with a fear of disorder if the political process is not tightly controlled. *Bush v. Gore* is the most dramatic illustration of this point. The disdain for other branches of government, and for the wisdom that might be generated by service in these branches, leads the Court to give the impression that only it can be trusted to enforce constitutional values or to think about what the Constitution means. The best example is the Court's decision in *Flores v. City of Boerne*, in which the Court blithely invalidated the Religious Freedom Restoration Act, supported by overwhelming majorities of both Houses of Congress and by the President of the United States. The Supreme Court, therefore, has made its own contributions, together with the tabloid press and cable news shows, to the pervasive cynicism about the political process that is corroding our political system. The voice of an honorable practitioner of the art of politics would be a valuable addition both in the conference room of the Supreme Court and, indeed, in the written opinions themselves.

I have emphasized the issues posed by nominations to the Supreme Court, but one should not minimize the importance of appointments to what the Constitution deems "inferior" federal courts. Indeed, because of the fact that the Supreme Court hears only relatively few cases in any given year, almost all decisions of the circuit courts are in fact final, not only for the litigants in the particular case, but also for the millions of persons who happen to live in a particular circuit. Circuit judges do not enjoy the same degree of freedom as do Supreme Court Justices with regard to overruling past decisions, but it would be foolish to ignore the extent to which imaginative and innovative circuit judges can indeed exercise a real influence on legal developments, for good and for ill. This does not mean that the same level of ideological scrutiny should be applied to all nominees at whatever level. It does mean, however, that ideology is not irrelevant, even when considering a nominee to a federal district court.

STATEMENT BY PROFESSOR RONALD D. ROTUNDA*

I. INTRODUCTION

I thank the Subcommittee for inviting me to express my views. I am the Albert E. Jenner, Jr., Professor of Law at the University of Illinois College of Law where I researched and taught constitutional law and legal ethics for over a quarter of a century. This fall, I am Visiting Professor of Law at George Mason University School of Law.

Let me begin by making several points on which I will elaborate at the end of this Paper.

FIRST, IF IT AIN'T BROKE, DON'T FIX IT. We have today—and we have had the entire twentieth century—the most powerful and respected judiciary in the world. I have traveled from Cambodia to Moldova as a constitutional advisor to newly emerging democracies. Foreign lawyers admire our legal system. Even if they do not fully understand our system, even if the commissars had kept them in the dark, they know that it is the system that they would like to emulate.[1]

That sentence bears repeating because I am paraphrasing judges, lawyers, and politicians in Eastern Europe, Far East Asia, and South America. They all say that they want their judicial systems to be like our federal system. They want their judges to be like our judges. The lawyers in South America were familiar with our system, the lawyers formerly under Communist domination were not, yet they knew that it was our system that they wanted to copy. They were all more familiar with the French civil law system, but they wanted to copy our system, not the French.

In Moldova, for example, a member of the Supreme Constitutional Court told me that, years earlier, when he was writing his dissertation on comparative constitutional law, he had to secure special permission to travel to Moscow to read the Czech Constitution, which was under lock and key at the time—although Czechoslovakia was then a Communist country, and hardly a model of Western democracy. This Moldovan Justice knew nothing about our system except that he wanted to copy it. He knew that if the commissars were concerned

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* Albert E. Jenner, Jr. Professor of Law, University of Illinois College of Law; Visiting Professor of Law, George Mason University School of Law.

1. *See, e.g.*, Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lesson from Romania*, 1991 U. ILL. L. REV. 1065, 1066 (1991); Ronald D. Rotunda, *Eastern European Diary: Constitution-Building in the Former Soviet Union*, 1 THE GREEN BAG 2D SERIES 163 (Winter 1998).

with the destabilizing influence of the Czech Constitution they were overwhelmed by the American Bill of Rights.

Our judicial system is at the top of the food chain, and that is a good reason to leave well enough alone. Given the fact that the Senate has been confirming federal judges for years, and the product is admired around the world, one wonders why we should think of changing the way the Senate confirms.[2] There is no reason to change presumptions or change the way the confirmation process works when the present system has produced—over a period that spans several lifetimes—the best judiciary in the world. Granted, some judicial decisions are not immediately accepted. The one person, one vote decisions fall in that category,[3] but now they are part of the warp and woof of our Constitution. Our federal judiciary is independent by design of the Framers of our Constitution. An independent judicial system means that sometimes judicial opinions will be unpopular, and we must accept that.

SECOND, IT IS A COMMON, *AND ERRONEOUS*, BELIEF THAT JUDGES RULE AS DEMOCRATS OR AS REPUBLICANS ONCE THEY ARE ON THE BENCH. THAT IS FALSE. The judges are human, to be sure. They put on their robes two legs at a time. But they act in good faith in coming to their conclusions, and they do not vote based on the election returns. They know that their ultimate judge is history, not the politics of the moment. We want fair courts—not liberal courts, not conservative courts, not moderate courts, but fair courts, and by "fair," I mean we want judges who will call them as they see them, without regard to politics.

Let us take the D.C. Circuit, for example. I have heard it said that the D.C. Circuit is one of the most partisan, and that one can predict how the case will come out when you know which judges are sitting on the three person panel. That is the popular notion *and it is wrong.* A former law professor, Harry

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2. *But see* Vikram Amar, *How Do You Think? Ideology and the Judicial Nominee*, LEGAL TIMES, July 9, 2001, at 50 (arguing that the Senators should ask the nominees "various hypothetical or not-so-hypothetical cases," with questions that are "concrete," and based "on actual live controversies," and that the Senators should take into account a "lawyer's decision to take a case that he knows will involve the making of certain kinds of arguments that may be probative of his beliefs").

I disagree: we should not judge lawyers by their clients. Lawyers have every right (and duty) to defend members of the Communist Party or the KKK although they strongly disapprove of those organizations. "Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse." MODEL CODE OF PROF'L RESPONSIBILITY EC 2-27 (1980). Lawyers may defend guilty people and secure their acquittal. The fact that a lawyer takes such cases and is successful in his legal arguments is not "probative of his beliefs." We do not judge lawyers by their clients.

3. Philip Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 677 (1970); ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 59, 174 (1970); ARCHIBALD COX, THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM 125 (1968).

Edwards, the highly respected judge of the D.C. Circuit, studied this issue as only a scholar would. He studied the cases and the votes of the judges based on the President who appointed them. Based on the facts, Judge Edwards concluded that the judges did not act as Democratic judges or Republican judges but as judges. He strongly objected to "a growing perception that federal judges decide cases on political grounds . . . ." This view, he said, is not only simply wrong, and a "myth," but it "*tends to undermine public confidence in the judicial process*."[4]

THIRD, COMMENTATORS, PRESIDENTS, AND SENATORS MAY THINK THAT THEY CAN PREDICT HOW A NOMINEE WILL VOTE ONCE THAT PERSON IS CONFIRMED, BUT OUR HISTORICAL EXPERIENCE SHOULD TEACH US TO BE MORE HUMBLE. We do not know what will be the major legal issues ten, fifteen, or even five years from now, much less what might be the "liberal" or "conservative" answer to them. We cannot predict with any accuracy. History has repeatedly taught us that lesson.

For example, the National Organization for Women (NOW) recently rallied in Washington, D.C., demonstrating because of their concern that Justice O'Connor might retire soon and were concerned about her replacement.[5] However, when President Reagan appointed her, NOW was substantially less enthused. When Justice Powell was nominated, the President of NOW testified that Powell's confirmation would mean that "justice for women will be ignored."[6] When Justice Stevens was nominated, President of the Women's Legal Defense Fund issued a statement that Justice Stevens has "blatant insensitivity to discrimination against women."[7] If NOW were a baseball team, it would be batting zero.

Similarly, civil rights lawyer Henry L. Marsh III testified at the Powell confirmation hearings about Powell's "record of continued hostility to the law,

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4. Harry Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 621 (1985) (emphasis added).

5. Charles Lane, *O'Connor Denies Plans to Leave Supreme Court*, WASH. POST, May 2, 2001, at A9, *available at* 2001 WL 17625103. "The National Organization for Women rallied to a recent demonstration in Washington in part by warning that O'Connor was about to step down." *Id.*

6. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the Senate Comm. on the Judiciary*, 92d Cong. 424 (1971) [hereinafter *Rehnquist and Powell Hearing*] (statement of Wilma Scott Heide, President, National Organization for Women, Inc.).

7. *Nomination of John Paul Stevens to Be a Justice to the Supreme Court: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong. 227 (1975) [hereinafter *Stevens Hearing*] (statement of Nan Aron, President, Women's Legal Defense Fund).

his continual war on the Constitution."[8] That is not the Justice Powell that any of us would recognize.

Presidential batting averages are equally poor, as I explain more fully below. President Roosevelt appointed both Felix Frankfurter and William O. Douglas, two Justices who were both thought liberal before they were appointed. The same President appointed both men, and once they were on the bench, they were as alike as oil and vinegar.

FOURTH, IT IS COMMONLY REPEATED THAT THE COURT HAS BECOME MORE CONSERVATIVE OVER THE YEARS AND THAT PRESIDENT CLINTON DID NOT APPOINT LIBERAL JUDGES. I DO NOT BELIEVE THAT THE RECORD SUPPORTS THAT ROUTINE ASSERTION. Elsewhere, I have written on the difficulties of these labels, "liberal," and "conservative,"[9] and so I will resist mightily the effort to repeat myself. Let us look at a few facts.

During the last two terms on the Supreme Court—during just these last two terms—the Court invalidated a state law that intruded on the parental relationship by mandating grandparents' visitation rights.[10] This same Court threw out state laws that interfered with federal power over international affairs,[11] and motor vehicles.[12] The Court upheld federal privacy laws that regulated state motor vehicle departments and placed upon them the same restrictions imposed on private parties.[13]

There are those who complain that the present Court is too deferential to the states, although some prominent Democratic law professors say otherwise.[14] Yet, this same Court has shown that, when it is protecting civil rights and liberties, it is willing to override both state or federal laws and regulations to

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8. *Rehnquist and Powell Hearings*, *supra* note 6, at 389-90 (statement of Henry L. Margh, III, Chairman, Judicial Appointments Committee).

9. *See* RONALD D. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (1986).

10. Troxel v. Granville, 530 U.S. 57, 71 (2000).

11. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000).

12. Geier v. Am. Honda Motor Co., 529 U.S. 861, 864 (2000).

13. Reno v. Condon, 528 U.S. 141, 143 (2000).

14. While some Democratic commentators have made this argument, it is interesting that former acting Solicitor General Walter Dellinger appears to have rejected it. The new federalism cases still leave Congress with considerable legislative power, but, Mr. Dellinger was quoted as saying that it will be more difficult for Congress to enact legislation that is "more appropriate to county commissions than to a national government." Mary Deibel, *Court Cutting Federal Role*, CHI. SUN-TIMES, June 25, 1999, at 35.

Professor Laurence Tribe has supported an even broader view of states' rights. He has argued for "islands in the stream of commerce" that would be immune from federal regulation. Tribe, *Federal-State Relations*, *in* 4 JESSE CHOPER ET AL., THE SUPREME COURT: TRENDS AND DEVELOPMENTS 164 (1983); *see* LAURENCE TRIBE, CONSTITUTIONAL CHOICES 125-32 (1985).

meet that goal. The Court is neither liberal nor conservative as those labels are commonly used because the Justices are not politicians.

There are many other examples one can cite. Justice Scalia, which the popular culture typically portrays as conservative, voted twice to protect burning the American flag as free speech.[15] Justice Stevens, which the media tells us is liberal, dissented in both of those two cases.[16]

A few months ago, this Supreme Court voted unanimously to reverse the Ohio Supreme Court and hold that a witness who denied wrongdoing still had a constitutional right to assert the privilege against self-incrimination.[17] I do not think that this and similar decisions be explained by any facile reference to politics.

Justice Scalia recently wrote the opinion that banned warrantless searches using high technology heat seeking devices.[18] By the way, Justice Stevens wrote the dissent.[19] Some commentators cannot understand this lineup and complain that Justice Scalia is acting not true to form. Perhaps the problem is the commentators. When they cannot put a square peg in a round hole, the problem may not be the peg, but the commentators who have predicted that the square peg will be round, and are upset that their prediction is incorrect.

It is interesting that the year after Justice Scalia was appointed to the Court, Professor Larry Tribe became one of his fans:

> So far I find myself more in agreement with him than with any other justice this term. His opinions show a degree of care and attention to the actual issues before the Court that is refreshing and I wish was

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15. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

16. Justice Stevens claimed that the majority's opinion would allow vandals to spray graffiti on the Washington Monument. Texas v. Johnson, 491 U.S. at 436 (Stevens, J., dissenting). However, Congress owns the Washington Monument and can prosecute those who defile it as an ordinary trespass. Texas did not prosecute Johnson for trespass, disorderly conduct, arson, theft of flag, vandalism, etc. Chief Justice Rehnquist, joined by Justices White (a Democratic appointee) and O'Connor, filed a blistering dissent that included long excerpts quoted from poems, such as Ralph Waldo Emerson's *Concord Hymn* and John Greenleaf Whittier's *Barbara Frietchie*, hailing the flag. *Id.* at 421 (Rehnquist, White, O'Connor, JJ., dissenting).

17. Ohio v. Reiner, 532 U.S. 17, 22 (2001) (per curiam). The Court comes out this way because the Justices act in good faith without regard to political labels.

18. Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a [Fourth Amendment] 'search,' and is presumptively unreasonable without a warrant.").

19. *Id.* at 41 (Stevens, Rehnquist, Kennedy, O'Connor, JJ., dissenting).

> shown by others on the Court. The clarity of his analysis so far puts him in a class by himself.[20]

AND FIFTH, AS A MATTER OF JUDICIAL ETHICS, JUDGES AND CANDIDATES FOR JUDGES MAY NOT PROMISE TO VOTE PARTICULAR WAYS ON PARTICULAR CASES. Any person who is a candidate for appointment to a judicial office "shall not: make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."[21]

It is wrong for a nominee to promise to vote a certain way, to promise to vote to overrule or to not overrule a particular precedent, or promise to approach a legal problem with a particular mind set.

The Senate should not confirm anyone who should make such promises. I have talked to people who went through the vetting process under former President Bush and none of them were asked such questions. I cannot believe that President Clinton or his aides would have asked such questions, nor that such questions would be asked in the vetting process under President George W. Bush.

Senators should not vote for or against a nominee because of predictions—often wrong—of how that nominee might vote on legal questions. As Professor Larry Tribe has advised regarding Justice Kennedy, "He's conservative on a great number of issues. I don't have any illusions he will be liberal. But *he shouldn't be opposed just because of that.*"[22]

I think it is permissible to ask nominees if they have made any promises—*other than* "the faithful and impartial performance of the duties of the office"—to the President or to any Senator. If the nominee has made such promises, then the Senate should know what they are. But I believe that neither the Senate nor the President may or should seek such promises; the Senate should not confirm someone who treats the judicial office as an elected office. If judges are no different than politicians, the people should elect them directly.

As various Democratic commentators have advised, we should not oppose judicial nominees because of our predictions of how their legal views might mature over the years, and we should not ask nominees to promise to vote a particular way on legal issues.[23] And, as former White House Counsel Lloyd

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20. Stephen J. Adler, *Scalia's Court: How the Newest Justice Has Effected a Quiet Revolution in the Rehnquist Court*, 9 AM. LAW. 1, 20 (1987).

21. ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 5A(3)(d)(i); *see* RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 62-2 (2000); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 644-55 (7th ed. 2000).

22. HARV. L. REC., Nov. 20, 1987, at 1 (emphasis added).

23. Ruth Bader Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539, 553-57 (1981); Wm. Reece Smith, *Involving the Judiciary in Political Campaigns*, 66 A.B.A. J. 1318, 1318 (1980) (noting the ABA's House of Delegates

Cutler under President Carter and President Clinton, and former Representative Mickey Edwards (Republican-Oklahoma) have recommended "the President and the Senate must not ask for, and the candidate not offer or consent to give, any pre-commitments about unresolved cases or issues that may come before them as judges."[24]

In short, senatorial questions to nominees ought to be guided by three standards:

- *First*, it is essential that the independence of the courts be preserved. This means that the business of judging cannot be treated as though it is solely outcome-based, that is, who wins and who loses on a particular policy issue.
- *Second*, we want fair courts—not liberal courts, not conservative courts, not moderate courts, but fair courts, and by "fair," I mean we want judges who will call them as they see them, without regard to politics. And,
- *Third*, neither Senators nor the President should ask nominees about particular issues and outcomes because nominees should only promise the faithful performance of their judicial duties.

With that introduction, let me turn in more detail to some interesting history that may, hopefully, put the present issues in perspective.

II. OUR EARLIER TRADITIONS

It has only been in relatively recent times that the Senate has subjected nominees to wide-ranging confirmation hearings, yet it has always been a given that the nominees do not make promises other than the faithful performance of their judicial duties. The last three quarters of a century has seen dramatic changes in the style and format of these hearings.

The hearing process used to be much simpler. For example, on September 4, 1922, Justice John H. Clarke resigned. On the very next day, President Warren Harding nominated George Sutherland to the Supreme Court,

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declaration that it disapproved of "any [political party] platform plank" that deviated from the selection of judges on the basis of merit by requiring a test of the candidate's "particular political or ideological philosophies"); HARV. L. REC., Nov. 20, 1987, at 1 (quoting Professor Larry Tribe).

24. Lloyd Cutler & Mickey Edwards, *A Case of the Judgeless Benches*, WASH. TIMES, Sept. 12, 2001, at A21.

and the Senate confirmed later that same day.[25] No one would expect the Senate to act so promptly today.[26]

Until 1929, if the Senate Judiciary Committee would hold confirmation hearings on the Supreme Court nominee, they would be closed.[27] And, until relatively recent times, the nominee would never appear and testify at the confirmation hearing.

For most of our history, it was considered inappropriate for a judicial nominee to appear in person and testify. The Senate had the duty to advise and consent, but the Senators should not directly question nominees about their philosophies. Typically the nominee might be staying at a hotel near the Capitol, where he could respond to questions by sending telegrams or letters to the Committee, but he would not personally attend and would not be subject to direct and follow-up questioning.[28]

III. PERSONAL APPEARANCE

The first nominee who actually appeared in person was Harlan Fiske Stone. Calvin Coolidge nominated Stone on January 25, 1925. In accord with the custom of the time, Stone did not appear before the Senate Judiciary Committee, which approved him unanimously. But Stone had a powerful adversary, Burton K. Wheeler, Senator from Montana, and Wheeler had many friends. Wheeler was under investigation by the Justice Department, and Stone was the Attorney General who had asked Wheeler to appear before a federal grand jury in Washington, D.C.

Senator Thomas Walsh, on behalf of Wheeler, persuaded the Senate to resubmit the nomination to the Committee. Stone then took the unprecedented step of agreeing to appear before the Committee for a narrow purpose: to answer questions about the Wheeler affair, provided that the hearing would be public. On January 28, the Committee questioned Stone for nearly five hours. On February 2, in executive session, the Committee again sent forward Stone's

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25. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 186 (1985).

26. When President Clinton left office, there were forty-one judicial nominees pending, and sixty-seven judicial vacancies. Today, there are 107 vacancies on the federal bench.

27. 71 CONG. REC. 3034-44 (1929). It was not until 1981, during the confirmation hearings of Sandra Day O'Connor, that the Senate Judiciary Committee allowed radio and television to be present in the hearing room. Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213 (1988).

28. *See* John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172, 200-04 (1941).

nomination, and the Senate approved 71-6, with Wheeler and the other Montana Senator abstaining.[29]

Interestingly, Wheeler later became good friends with Stone; Wheeler believed that someone had lied to Stone, for "that [is] the only way you can account for the handling of the case against me after he became Attorney General."[30]

After Stone's testimony, the Senate reverted to its standard procedure of having confirmation hearings without the nominee's ever testifying. In fact, five years after Stone's appearance, when Herbert Hoover nominated Judge John Parker to the Supreme Court, the Judiciary Committee rejected a motion to allow him to appear before the Committee and testify![31] Parker had to follow the traditional procedure of answering any charges made against him in writing.[32] The Senate rejected Parker and then approved the next nominee, Owen Roberts.

Felix Frankfurter also broke tradition and appeared before the Judiciary Committee. At first, Frankfurter followed tradition and refused to appear personally before the Committee, but after a steady stream of witnesses attacked Frankfurter, his associations, his foreign birth, and his religious beliefs, the Committee asked him to appear. He did so, accompanied by his lawyer, Dean Acheson.

Frankfurter began by reading a prepared statement declaring that he would not discuss or express his personal views on controversial issues that were before the Court. He responded to Senator Patrick McCarran's questions about his patriotism by affirming his belief in "Americanism." His personal appearance was dramatic and brief. *He spoke, in total, only for about ninety minutes.*[33]

John Marshall Harlan was the third nominee who appeared to testify. Since that time, which only dates to 1955, Supreme Court nominees have appeared and given testimony. This relatively recent tradition now has become so expected that it would be unheard of for a nominee to refuse to speak before a public session of the Senate Judiciary Committee.

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29. ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 188-99 (1956).

30. *Id.* at 191 n.*.

31. WILLIAM C. BURRIS, DUTY AND THE LAW: JUDGE JOHN J. PARKER AND THE CONSTITUTION 82 (1987).

32. *See, e.g.*, 72 CONG. REC. 7793-94 (1930).

33. *Nomination of Felix Frankfurter to Be an Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 76th Cong. (1939); L. BAKER, FELIX FRANKFURTER 208-10 (1969).

IV. COURTESY CALLS

Another new tradition has developed relatively recently. It has now become the norm for Supreme Court nominees to pay courtesy calls on selected Senators. While it is true that Louis Brandeis had an informal dinner meeting with two Senators who had expressed doubts on his nomination,[34] the Brandeis meeting was like the Stone personal appearance, viewed as an aberration and not as leading to any new tradition.

Within the last few decades, the new custom for the modern nominee is to walk the corridors of the Senate buildings and meet privately with individual Senators. Afterward, a Senator may announce to the press that the Senator has had doubts answered, or not answered, and will therefore support, or oppose, the nomination. Justice Sandra Day O'Connor, for example, made various courtesy calls reported by the press.[35]

Some commentators have criticized this new convention.[36] What exactly does the nominee say in private? The Senators usually do not tell us but merely make conclusory statements. Perhaps that is all that was said. This practice now seems a permanent fixture.

With the advent of personal appearances before the Senate Judiciary Committee, some people think that the Senators would use the hearing to glean some knowledge about the nominee's philosophy of constitutional interpretation. Some commentators believe that an often unstated purpose is to know something about how the nominee might decide a controversial issue, such as search and seizure.

Yet, in spite of all the efforts to predict how nominees will rule and in spite of the modern tools now used to try to divine how the nominee will act once confirmed, the batting averages of Presidents and Senators and the general public have been remarkably poor. We should not be surprised that Senators have been no more successful than Presidents in predicting how nominees will turn out. The same President Franklin Roosevelt who nominated conservative Felix Frankfurter to the Court also nominated liberal William O. Douglas. It may be easier to predict stock market tops and bottoms than to predict how nominees will rule.

The analogy between stock market watching and Court watching is a useful one. Some money managers develop good short-term records in timing the stock market—deciding the best times to buy and sell—and predicting the

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34. ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE 503-04 (1946).

35. *Judge O'Connor Talks with Potential Critics*, N.Y. TIMES, July 18, 1981, at L24; *Mrs. O'Connor Makes the Scene*, N.Y. TIMES, July 19, 1981, at E4.

36. *E.g.*, Carol Marcy, *Nominees Shouldn't Pay Courtesy Calls on Senators*, N.Y. TIMES, July 29, 1981, at A23.

various turns in the market, but it is much harder to develop a consistent long-term record. The market timer must know not only when to sell—when the market is at the top, but also when to buy.

Business school studies typically conclude that it is very difficult—if not impossible—to consistently time and beat the market over the long term. Similarly, it is extremely difficult—if not impossible—to predict with any consistency how Court nominees will turn out.

If a lot of predictions are made, some will be correct. Even a stopped clock is right twice a day. But the President and the Senate do not have the luxury of making a lot of predictions. A President may have only one or two nominations to make (Jimmy Carter had none), and a Supreme Court appointee may sit on the Court for decades. The margin of error in making predictions must be remarkably small. History has shown us that the margin of error is, in fact, quite high.

Joseph Story. Consider President James Madison's appointment of Joseph Story in 1811. Why did Madison choose Story? Madison was a member of the Democratic-Republic party. His mentor, Thomas Jefferson, had defeated the last Federalist to hold the presidency, John Adams. Story, like his father before him, and like Madison, was also a Democratic-Republican. President Madison probably expected that the strong-willed Story, already a successful lawyer, politician, and legal scholar, would serve as an intellectual counterweight to the views of Federalist Chief Justice John Marshall. Yet, once on the Court, Story often supported and expanded Marshall's views.[37] Some contemporaries concluded that he even out-Marshalled Marshall.

Hugo Black. The difficulty in predicting a nominee's performance is also well illustrated in more modern times by FDR's appointment of Alabama Senator Hugo Black. Black was generally viewed as a Roosevelt crony. Black had enthusiastically supported Roosevelt's ill-fated efforts to pack the Court. Black had even once been a member of the Ku Klux Klan. Although he had resigned a dozen years before his Supreme Court appointment, he still received an unsolicited membership card, and many people charged that his resignation was opportunistic; a leopard never changes his spots.[38] But Black surprised his critics.

If the Senators had tried to predict how Black would rule on racial and free speech issues, they most certainly would have guessed wrong, and we would have been deprived of one of the greatest Justices in our nation's history.

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37. *See* JOSEPH STORY'S COMMENTARIES ON THE CONSTITUTION v-xxii (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press, 1987) (1833).

38. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 212-13 (2d ed. 1985).

Oliver Wendell Holmes. Even short-term predictions are often wrong. President Theodore Roosevelt appointed Oliver Wendell Holmes to the Court and thought he would strengthen federal power over interstate commerce. In one of the first major opinions after Holmes was appointed, the Court upheld federal power but Holmes dissented. T.R. then announced that he "'could carve out of a banana a judge with more backbone than that.'"[39]

Modern Nominees. Dwight Eisenhower appointed William Brennan and Earl Warren, both of whom turned out to be strong liberals. Sandra Day O'Connor was considered a right-wing ideologue. Now the news media and many commentators regard her as a leader of the moderates.[40] O'Connor has also upset those who have disagreed with her votes to allow restrictions on the previously declared women's right to an abortion.

Some Court watchers believe that they can prophesy what a nominee will do by looking at his record. This belief may be a factor encouraging Presidents to look primarily at lower-court judges when choosing appointees to the High Court. However, like generals who are always fighting the last war, past practices do not always control the future. We can look to history not for prophecy, but for conjecture.

V. JUDICIAL PHILOSOPHY

In recent times, Court watchers have also sought to focus on the judicial philosophy of the nominee. Evidence that the nominee will seek to look at the historical intention of the Framers of our Constitution is strong evidence, we are told, that the nominee will be too conservative.[41] For example, if a Justice would claim that "justices are not platonic guardians appointed to wield authority according to their personal moral predilections," many commentators would see such a declaration as a code word for judicial conservatism. Yet the language just quoted came from Justice William Brennan only a few years ago, in 1985.[42] Brennan will go down in history as one of our most influential Justices. There are those who believe that the Senators should look for code words or phrases to determine a Justice's philosophy and that Justice Brennan's reference to judicial

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39. RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 171 (6th ed. 2000).

40. *See, e.g.*, Russell W. Galloway, *Who's Playing Center?*, A.B.A. J., Feb. 1, 1988, at 42, 45.

41. *See, e.g.*, MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY ix-x, 101-14 (1982) (stating that judges should seek the "right answers" by going "beyond the value judgments established by the framers of the written Constitution (extraconstitutional policymaking)"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978) (stating that judges should have a "more candidly creative role").

42. *Excerpts of Brennan's Speech on Constitution*, N.Y. TIMES, Oct. 13, 1985, at L36.

restraint—"justices are not platonic guardians"—should be the kiss of death. These people would have voted against Justice Brennan.

Finally, when we seek to predict how a nominee will vote on the Court, we should remember that predictions of what might happen later this afternoon or tomorrow morning are easier than predictions of what will happen in six months or six years.

The stock market analogy is again instructive here. The amount of money one can make in the market is usually quite limited if one's horizon is measured in just hours or a few days. As finance studies show, buying and holding stock for the long term is more profitable than trying to guess the latest zig and zag in the market. The real question is whether one can make money over the long term, and in order to do that, one needs a long-term outlook. It is necessary to act like an investor, not like a speculator.

If we treat the Supreme Court as an investment and not as a speculation, then the President and the Senators and the media as well should worry less about how a nominee might vote on any particular issue than about what they think of the nominee's personal integrity, good faith, and intellectual ability.[43] The alternative, trying to predict how a Justice will act on particular legal issues for five or ten years from now is difficult, if not impossible. We do not know what the major judicial questions will be five or ten years from now. We would be even less successful in forecasting what the liberal or conservative answers to those questions will be.

President Bush has made several nominations already.[44] Some people have criticized some of them as possessing the wrong ideology. I do not know how these nominees will vote on the bench in specific cases, and I doubt that they do either. It is one thing to argue as an advocate for a client and another to

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43. In the past, people have argued that Senators should reject a nominee because they disagree with his politics. The history of these instances should teach us to be more meek. Consider the extensive criticism of Justice Brandeis: "The senior Senator from Massachusetts" said of Brandeis that he "'may be keen of intellect . . . but his record impeaches him on far higher grounds than those of intellectual ability.'" Forrest McDonald, *Supreme Court Nominees: A Look at the Precedents*, WALL ST. J., Sept. 16, 1987, at 16 (Midwest ed.).

The President of the ABA and six former ABA Presidents agreed that Brandeis was "not a fit person to be a member of the Supreme Court." *Id.*; *see generally* ALPHEUS THOMAS. MASON, BRANDEIS: A FREE MAN'S LIFE 465-508 (1946); A. L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS (1964).

44. In President Clinton's eight years in office, six of them with a GOP Senate, Clinton had 377 of his judicial nominees confirmed. President Reagan's record was only five higher at 382, despite the fact that he also had six years with a GOP Senate. There are those who say that some Republicans hindered President Clinton's appointments of federal judges. Even if that charge is true—I am sure some people sincerely believe it—President Bush is hardly to blame. He was in Texas attending to state business at the time. Nor are his nominees at fault.

decide as a judge. It is one thing to write an article about a legal issue and another to decide a concrete issue with concrete parties.

This simple fact is illustrated by no less a judicial titan than Judge Henry Friendly, a great judge and prolific author. In one case, when one of the parties cited to him one of his own articles indicating how an issue should be decided, Judge Friendly decided that he disagreed with what he himself had earlier written; the genius of the common law system, as he recognized, is that judges must make the decisions in the context of concrete cases, not in the context of law review articles. Judge Friendly dissented,[45] while the majority relied on Friendly's law review article.[46]

What I do know of President Bush's nominees is best expressed by another excellent lawyer, Walter Dellinger, who was acting Solicitor General in the Clinton Administration. After President Bush announced his list, Mr. Dellinger said that, although he couldn't comment knowledgeably on all the nominees, "this is a very strong list in terms of professional qualifications." "In particular, he cited John Roberts, a Washington lawyer and Supreme Court practitioner, and Michael McConnell, a University of Utah law professor."[47]

VI. CONCLUSION

As I have explained in this statement, the history of the nomination and confirmation process supports the Senate's current practice of focusing on a nominee's character and ability to follow the law rather than his or her putative political ideology and reputed view on particular politically hot topics of the day. The Senate should continue to play the constitutionally mandated role of reasoned advisor to the President, not prophet, seer, or investigative reporter.

Further, nominees should only promise the faithful performance of their judicial duties. Hence, there should be no presumption *against* confirmation if a nominee chooses not to answer a politically charged question, or if the question requires, or appears to require, the nominee to promise to decide a legal question a particular way, or if he or she believes an answer will compromise, or will appear to compromise, a judge's ability to later make an independent law-based

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45. Williams v. Adams, 436 F.2d 30, 35 (2d Cir. 1970) (Friendly, J., dissenting). Judge Friendly, the judge, not the author, was vindicated when the Second Circuit, en banc, reversed the panel decision, in 441 F.2d 394 (2d Cir. 1971) (per curiam). But the United States Supreme Court agreed with Henry Friendly, the author, and not Henry Friendly, the judge, as it reversed the Second Circuit. Adams v. Williams, 407 U.S. 143 (1972).

46. Williams v. Adams, 436 F.2d at 34 n.2 (quoting Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV., 929, 952 (1965)).

47. Robert S. Greenberger, *Bush to Send List of 11 Diverse Nominees for U.S. Appeals Courts to Senate Panel*, WALL ST. J., May 9, 2001, at A3.

decision. Nominees should not be judged or punished because of the clients that they have represented.

The twentieth century has demonstrated that we have the best judicial system in the world, bar none. The Senate has the weighty responsibility to preserve it by not changing the ground rules as we begin the twenty-first century.

STATEMENT BY PROFESSOR JUDITH RESNIK*

Thank you for inviting me to testify. I applaud the Committee for taking the time to reflect on its role in the confirmation process.

I will speak to two issues: (a) the major transformations within the federal courts during the last half-century that have augmented the powers of life-tenured judges, and (b) the contributions that the Senate has made and ought to continue to make when discharging its constitutionally mandated role of evaluating individuals proposed for life-tenured judgeships.

I. THE FEDERAL COURTS TODAY

Article III judges are unique in this constitutional democracy as they hold their charter for life. Those selected and confirmed to serve must, therefore, be individuals in whom all can have confidence.

I use the term "Article III judges" deliberately, as I hope that your attention and your energies will not be focused exclusively on nominees to either the Supreme Court or the appellate courts. Life-tenured district judges are critical and powerful actors as well, and their appointments also merit your full consideration.

Indeed, the saliency and import of the federal judiciary has grown substantially over the twentieth century, with an increase in the number of life-tenured judges and with an increase in their docket. Recall that one hundred years ago, in 1901, some seventy district judges sat throughout the country, with a single judge serving entire states, such as Maryland, Massachusetts, and Indiana.

Today, more than 650 authorized judgeships exist in the district courts. In addition, some 180 appellate court judgeships are authorized, and hundreds of senior Article III judges augment this work force.

During the second half of the twentieth century, Congress also authorized two new sets of federal judges—magistrate and bankruptcy judges. These judges sit within the Article III judiciary but do not have life tenure and constitutionally protected salaries; rather they serve for renewable terms. Today, more than 450 magistrate and 325 bankruptcy judges join district judges at the trial level. For clarity, I shall refer to the life-tenured federal judges as our *constitutional federal*

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* Arthur Liman Professor of Law, Yale Law School; Copyright © 2002 by Judith Resnik, all rights reserved. My thanks to Julie Suk and Anna Horning for helping me with the preparation with this statement.

judges, and to those judicial officers who work within our Article III courts but without constitutional guarantees as *statutory federal judges*.

In short, the federal judiciary today looks vastly different than it did even fifty years ago. Congress has played a central role in this expansion—by authorizing new life-tenured judgeships, by creating auxiliary, statutory judgeships and periodically enlarging their mandates, and by giving new work to the federal courts. According to the Administrative Office of the United States Courts, between 1974 and 1998, more than 470 new causes of action were created.[1]

As a consequence, constitutional judges today have three tasks:

1. As is familiar, they *adjudicate*, and their rulings touch our lives in a myriad of ways. Today, the federal judiciary's profile is especially high, with recent rulings that have held unconstitutional several federal statutes.

2. Constitutional judges now have the responsibility of *selecting* statutory judges. The district court selects and then decides whether to reappoint magistrate judges; the appellate courts do the same for bankruptcy judges. Recall the numbers; the constitutional trial bench is now somewhat smaller in number than its statutory siblings.[2] Indeed, as of 2001, in six district courts, the number of magistrate judges was greater than that of life-tenured judges;[3] in another sixteen, their numbers were equal.[4] Constitutional judges are thus responsible for the selection, appointment, and reappointment of more than seven hundred statutory judges. Those chosen to be our constitutional judges not only shape the law through adjudication, they also shape the law by deciding who will serve as our statutory judges.

3. The life-tenured judiciary has, over the course of the last several decades, taken it upon itself to *advise* Congress about the desirability of creating new causes of action, both civil and criminal. That role is new and represents a change in attitude. In the earlier part of the century, the life-tenured judiciary

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1. Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998) (memorandum) (on file with author).

2. *See* Chart, Authorized Trial Level Federal Judgeships in Article III Courts, Nationwide: 1999, *infra*, app.

3. As of January 2000, those districts were the following: the Middle and Southern Districts of Alabama, the Western District of New York, the Eastern and Southern Districts of California, and the Western District of Texas. Telephone Interview with Staff, Magistrates Division, Administrative Office of the U.S. Courts (Jan. 9, 2001).

4. Those districts were in New Mexico, Arizona, the Northern District of New York, the Virgin Islands, the Western District of North Carolina, the Middle District of Louisiana, the Northern District of Mississippi, the Western District of Michigan, the Eastern District of Arkansas, the Northern and Southern Districts of Iowa, North Dakota, Idaho, Montana, Oregon, and the Southern District of Georgia. Telephone Interview with Staff, Magistrates Division, Administrative Office of the U.S. Courts (Jan. 9, 2001).

thought it inappropriate to provide this form of collective advice on matters of legislative policy.[5] Now, however, through the Judicial Conference of the United States, the Article III judiciary relies on its corporate voice to promote the use of the federal courts for certain matters and not for others.[6] On several occasions, it has urged this Congress not to enact certain causes of action.[7] Constitutional judges have thus taken on a lobbying role, pressing Congress to enact legislation that comports with a very particular and narrow view of the role of the federal courts.

In sum, when asked to think about whether the current federal bench has a point of view, Congress should turn not only to the judgments rendered but also to the policy positions taken. In 1995, the Judicial Conference of the United States, in its first ever long-range plan,[8] urged Congress to limit access to the federal courts and to have a presumption against the creation of new civil causes of action and new criminal protections for citizens. Beginning that very same year, the United States Supreme Court, in a series of 5-4 rulings, held unconstitutional criminal and then civil causes of action that this Congress had enacted.[9] The voices that now dominate the federal judiciary surely have a particular ideological stance—against the use of the federal courts for the protection of a wide range of rights and against the enactment by Congress of new rights for Americans.

Given the multiplying roles for life-tenured judges and the increasingly consistent antiaccess approach of many sitting jurists, the question of selection of constitutional judges has never been more important. Additionally, given the close divide at the last election and the current split in government, it is incumbent on the Senate to ensure that the federal judiciary as a whole reflects the breadth of concerns in this polity.

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5. Individual judges and justices have, in contrast, often provided their views. *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, & THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

6. *See, e.g.*, THE JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, 166 F.R.D. 49 (1995) [hereinafter JUDICIAL CONFERENCE LONG RANGE PLAN].

7. For example, the Judicial Conference warned against enactment of Y2K legislation; it also initially opposed the Violence Against Women Act and then, in 1993, decided to take no position. *See* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2000); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925 (2000).

8. *See* JUDICIAL CONFERENCE LONG RANGE PLAN, *supra* note 6, at 49.

9. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 602 (2000); United States v. Lopez, 514 U.S. 549, 551 (1995).

II. THE SENATE'S ROLE: REFLECTING AND ARTICULATING LEGAL NORMS AND VALUES

A first question posed for these hearings is about the Senate's role, and specifically whether the Senate ought to consider the attitudes, judicial philosophy, and ideology of nominees. The Senate's historical practices make plain that it has done so in the past.

I hope I can help make clear that considering the bedrock views of nominees is not only common and unavoidable, albeit often done implicitly, but also to be celebrated as contributing to our legal norms. When attitudes are widely shared, they are not perceived to be "ideology." Only when norms and values are contested do we think of a set of questions as touching on ideology. The nominations of judges is one place in which legal norms are expressed and, equally importantly, developed. Through hearings such as this and those of individual nominees, we learn about and we develop this nation's values.

The important contribution of the Senate—and the work yet to be done—can be illustrated by a brief review of when the question of women's rights became a part of discussions at nominations. It was not until 1970 that a nominee, George Harrold Carswell, was questioned about his attitudes towards women.[10] Congresswoman Patsy Mink from Hawaii called the nomination of

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10. Over the past two hundred years, some 140 individuals have been nominated to the Supreme Court. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 965-71 (Kermit L. Hall et al. eds., 1992). Information about nominations first became generally available in 1916, when the Senate Judiciary Committee held public hearings and published a report on the nomination of Louis D. Brandeis, the first Jewish Justice on the Supreme Court. *See Preface*, ROY M. MERSKY & J. MYRON JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES: HEARINGS & REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (2d ed. 1977). For an understanding of the confirmation process during the nineteenth century, the records of which can be found in the National Archives, see John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles, and Politics* (pts. 1-3), 1941 WIS. L. REV. 172, 343, 461, which addresses late nineteenth century as well as twentieth century appointments.

While public hearings occurred in the Brandeis nomination, Brandeis himself did not testify. Harlan F. Stone was the first, in 1925, to testify on his own behalf before the Senate's Committee on the Judiciary. *Id.* at 492. According to the Committee notes, the invitation was extended at 10:00 a.m., and then-Attorney General Stone appeared at 11:30 and "he was interrogated by a number of the members of the Committee. The proceedings are in the form of transcript, taken by a stenographer." COMM. ON THE JUDICIARY, 68TH CONG., SPECIAL MEETING OF THE FULL COMM. ON STONE NOMINATION, U.S. SENATE MINUTES 1923-25 (Jan. 28, 1925). However, that testimony is not reproduced in the Mersky and Jacobstein compilation nor listed as available in the Library of Congress holdings. Transcripts are also not readily available from the period when women's suffrage was much before the public, culminating in the passage of the Nineteenth Amendment in the early part of the twentieth century. Moreover, according to Mersky and Jacobstein, not all of the Senate Judiciary Committee proceedings since then have been made public. MERSKY & JACOBSTEIN, *supra*.

Carswell "an affront to the women of America;" she cited his role in a case upholding the refusal to employ women with children of pre-school age, although men with children of pre-school were so employed.[11] When Senator Birch Bayh of Indiana asked Judge Carswell to address "the impression that [Carswell was] not in favor of equal rights for women," Carswell responded that he was committed to the enforcement of the "law of the land."[12]

The Carswell nomination was rejected, but not because of Carswell's views on women's role in society.[13] The following year, when William Rehnquist and Lewis Powell were nominated to be Associate Justices, several witnesses objected to both nominees' attitudes towards women's rights.[14] While

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In the later part of the twentieth century, more research materials became available. A review of hearings on Supreme Court nominees beginning in the 1960s reveals that the first questioning about women's rights occurred at the Carswell hearings. *See Nomination of George Harrold Carswell to Be an Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, U.S. Senate, 91st Cong. (1970) [hereinafter *Carswell Hearings*].

11. *Carswell Hearings*, *supra* note 10, at 81-82. Carswell's role in that case was quite limited; he was a member of an en banc panel that denied rehearing in *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, *reh'g denied en banc*, 416 F.2d 1257 (5th Cir. 1969). Ida Phillips claimed that the company had violated her Title VII rights by declining to give her, a mother of pre-school age children, a job not denied men with pre-school age children. The Fifth Circuit concluded that the policy did not discriminate against women but was based upon "the differences between the normal relationships of working fathers and working mothers to their pre-school age children." *Id.* at 4. That decision was reversed and remanded by the Supreme Court. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

12. *Carswell Hearings*, *supra* note 10, at 40-41.

13. According to one historian of the proceeding, criticism of Carswell centered on his general lack of distinction as well as his 1948 prosegregation stance, later repudiated. *See, e.g.*, JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 103-06 (1991). Frank noted Congresswoman Mink's opposition, but in his view, the "real sticking points were civil rights and competence." *Id.* at 113. Frank also discussed the political context, a Democratically controlled Senate distressed at the forced resignation of Abe Fortas, which animated the unsuccessful nomination of Clement Haynsworth (in Frank's view, unfortunately rejected) as well as that of Carswell (in Frank's view, appropriately rejected). *Id.* at xiv, 19, 28, 44, 94-95, 102-03. In May 1970, the Senate approved, with ninety-four affirmative votes, and six absentees, the nomination of Harry Blackmun as an Associate Justice. *Id.* at 124. No questions were addressed to Blackmun about his views on women's rights during the brief one day hearing. *Nomination of Harry A. Blackmun to Be an Assoc. Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 91st Cong. (1970) [hereinafter *Blackmun Hearings*].

14. *See Nominations of William H. Rehnquist and Lewis F. Powell, Jr. to Be Assoc. Justices of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 92d Cong. (1971) [hereinafter *Rehnquist and Powell Hearings*]. Objections were raised about William Rehnquist's testimony while he was in the Justice Department on the Equal Rights Amendment (ERA) and the Women's Equality Act, *id.* at 428-29, and about Lewis Powell's failure as a leader of the American Bar Association to take stands on issues affecting women. *Id.* at 423-25, 428-36; *see also id.* at 460 (statement of Catherine G. Roraback, President of the National Lawyers' Guild) (indicating that under Powell's leadership, the ABA was silent on equal rights for

such testimony prompted Senator Bayh to ask William Rehnquist about his views on equal rights for women,[15] no such questions were addressed to Lewis Powell.[16] A nominee's attitudes towards women's rights played a minor role in the hearings, and did not become a subject of analysis by those commenting on the nomination process.[17]

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women). Barbara Greene Kilberg of the National Women's Political Caucus testified, not about the nominees, but about the absence of a female nominee, *id.* at 421-23, a topic that had been in the news, prompted in part by President Nixon's statements that "qualified women" should be considered for the two vacancies. *See* James M. Naughton, *Harlan Retires; Nixon Hints Poff is a Court Choice*, N.Y. TIMES, Sept. 24, 1971, at 1.

15. In 1971, as Assistant Attorney General in the Nixon Administration, Rehnquist had testified before the House Judiciary Committee; the testimony is somewhat ambiguous but in some respects supported the ERA. *See Federal Rights for Men and Women 1971: Hearings on H.J. 35,280 and Related Bills Before House Subcomm. No. 4 of the Comm. on the Judiciary*, 92d Cong. 323 (1971) (statement of Representative Wiggins) (noting while the "administration is positively committed to the support of this constitutional amendment," it also said that the amendment was "not necessary").

When testifying as a nominee to be an Associate Justice before the Senate Judiciary Committee, William Rehnquist declined to state his personal view on the ERA. When asked his view on the rights of women under the Fourteenth Amendment, he responded that it "protects women just as it protects other discrete minorities, if one could call women a minority." *Rehnquist and Powell Hearings, supra* note 14, at 163. Thereafter, noting that some of the issues were pending before the Court, he declined to address additional questions on women's rights. *Id.* at 164.

16. According to a biography of Justice Powell, when confronted by "a group of women's rights activists," he responded: "Ladies, I've been married for thirty-five years and have three daughters. I've got to be for you." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 233 (1994). As Professor Jeffries describes it, "[T]he crucial issue was not gender but race." *Id.* While Justice Powell had resigned his memberships in all-white clubs, concern was raised about his role in the "(non)desegregation of the Richmond schools." *Id.* at 234. Justice Powell's defense was to rely on endorsements by a variety of individuals attesting to his efforts to respond calmly to the complex problems of school integration, his work with the all-black National Bar Association, and his commitment to fairness. *Id.* at 235-36.

17. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT, 20-22 (3d ed. 1992); *Nomination of John Paul Stevens to Be an Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 94th Cong. (1975); *Nomination of Antonin Scalia to Be Assoc. Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 99th Cong. (1986) [hereinafter *Scalia Hearings*]; *Nomination of Justice William Hubbs Rehnquist to Be Chief Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 99th Cong. 114 (1986).

The nominees did not respond with detailed defenses or point to their efforts to enhance women's participation in the political, economic, and social life of the country. Indeed, Justice Scalia defended his membership in an all-male club on the grounds that although the club did discriminate by excluding women, that form of discrimination was not "invidious." *See Scalia Hearings, supra*, at 91 (commenting also that a judge should not belong to a club that "practices invidious discrimination"). Justice Scalia resigned his membership in that club; he explained that several factors influenced his decision, including that he "was uncomfortable at doing something

The hearings on the nomination of Robert Bork, in 1987, were the first in which women's issues moved to center stage and became relevant to the outcome.[18] Many witnesses questioned Judge Bork's interpretations of constitutional doctrine to exclude women from heightened protection under the Fourteenth Amendment,[19] as well as his decisions in nonconstitutional cases. Judge Bork's opinions caused concern about his capacity to appreciate problems from the perspectives of women litigants.[20] While many factors contributed to

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which, although [he] thought it was perfectly OK, was offensive to friends whose feelings [he was] concerned about." *Id.* at 105.

18. *See generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 NW. U. L. REV. 935 (1990).

19. *Nomination of Robert H. Bork to Be Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 100th Cong. 160-61 (1987) [hereinafter *Bork Hearings*]. One case that received attention was *Griswold v. Connecticut*, 381 U.S. 479 (1965), which involved a challenge to a statute making it a crime to prescribe contraceptives. Robert Bork had called the statute a "nutty law," and then, at the hearings, described the case as an "academic exercise." *See Bork Hearings* at 114, 240-43; Stuart Taylor, Jr., *Bork Tells Panel He Is Not Liberal, Not Conservative*, N.Y. TIMES, Sept. 16, 1987, at A1; *see generally* Andi Reardon, Griswold v. Connecticut: *Landmark Case Remembered*, N.Y. TIMES, May 28, 1989, at CN6 (describing the efforts of Estelle Griswold and Charles Lee Buxton to lobby the Connecticut legislature to repeal that law and their subsequent arrest for operating a clinic that openly dispensed contraceptives to poor women; Yale law professor Thomas Emerson, who had argued the case, explained its import as one of the early recognitions of a constitutionally based right to privacy).

20. For example, while on the Court of Appeals for the District of Columbia, Judge Bork wrote a unanimous opinion for a panel of three judges in which that court upheld, against a challenge under the Occupational Safety and Health Act, a company policy that required women of childbearing potential to be sterilized if they wanted to hold jobs exposing them to chemicals alleged to cause harm to reproductive capacities. Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co., 741 F.2d 444 (D.C. Cir. 1984). Judge Bork's opinion described the company's plan as an attempt to deal with "unattractive alternatives" and wrote that rather than firing women, the company had given them "a most unhappy choice" of sterilization. *Id.* at 445, 450.

At the confirmation hearings, the question was whether Bork's discussion evidenced understanding of the stark options put to women workers: be fired, demoted, or sterilized. *Bork Hearings*, *supra* note 19, at 467. Senator Metzenbaum questioned Judge Bork about the opinion he wrote in *American Cyanamid Co. Id.* When questioned, Judge Bork commented that "some of [the women], I guess, didn't want to have children." *Id.* at 468; *cf.* SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 450 (1991) (quoting Betty Riggs's letter to the Senate: "Only a judge who knows nothing about women who need to work could say that. I was only twenty-six years old, but I had to work, so I had no choice. . . . This was the most awful thing that ever happened to me. I still believe it was against the law, whatever Bork says."). In 1991, the United States Supreme Court ruled that, given evidence of the potential for harm to the reproductive systems of both men and women if exposed to lead, Title VII and the Pregnancy Disability Act prohibit employers from banning only women of childbearing capacity from certain jobs. *See* UAW v. Johnson Controls, 499 U.S. 187 (1991).

Further, the Bork hearings also addressed an opinion by Judge Bork on sexual harassment, in which he had written about "sexual dalliance" and "sexual escapades," choosing

Judge Bork's rejection, his belief that discrimination against women was not directly prohibited by the Equal Protection Clause of the Fourteenth Amendment,[21] his opposition to the Equal Rights Amendment,[22] and his narrow construction of statutory rights for women played an important part.

The effects were visible three months later, when Anthony Kennedy was before the Senate seeking confirmation to the seat denied Judge Bork. The discussion of women's concerns took a notably different turn. Judge Kennedy made a point of affirming his commitment to women's rights. He explained in some detail his growing understanding of the issue; he described his unsuccessful efforts to change the policy of the all-male club to which he had belonged and his subsequent resignation.[23] As he put it, "Over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and minorities in society. This was an issue on which I was continuing to educate myself."[24] Similarly, in 1990, when David Souter was questioned by the Senate Judiciary Committee about sex discrimination, he rejected the application of only a rational basis test to sex discrimination, and he noted the "difficulty" with the "looseness" of the "heightened scrutiny" standard applied to discrimination on the basis of sex.[25]

With this review of questions put to Supreme Court nominees over the past two decades, one can learn something about the useful role that "ideology" played and the contributions that the Senate has made through the hearing process. Up until 1970, women were invisible in the hearings. Then, during the

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language that could be read as making light of an atmosphere in which sexual compliance was allegedly required. Vinson v. Taylor, 760 F.2d 1330, 1330, 1332 (D.C. Cir. 1985) (Bork, J., dissenting from the suggestion for rehearing en banc), *panel opinion aff'd in part and rev'd in part sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

21. Judge Bork argued that the Fourteenth Amendment was addressed to race and ethnicity, not to gender, and that rules relating to race should not and could not be transposed to gender, because "our society feels very strongly that relevant differences exist and should be respected by government" (referring to single-sex bathrooms and women in combat); *see* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 328-31 (1990).

22. *Bork Hearings*, *supra* note 19, at 161-62. Bork explained that his opposition was not heated; he had not "campaigned" against the ERA, but he did believe it would be inappropriate to "put all the relationships between the sexes in the hand of judges." *Id.*

23. *Nomination of Anthony M. Kennedy to Be Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 100th Cong. 23, 104-11 (1987).

24. *Id.* at 105.

25. *Nomination of David H. Souter to Be an Assoc. Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 101st Cong. 75-76, 106 (1990). Judge Souter responded generally to questions about women's rights with discussion of the legal tests that govern the Equal Protection Clause and privacy. *Id.* at 53-57. Senatorial concern about these issues is also evident in the Senate's report on the nomination; in his "additional views" on the nomination, Senator Biden noted that Souter had demonstrated a "commendable concern" for ensuring sufficient constitutional protection for women's rights. *Id.* at 28-30.

1970s and through most of the 1980s, women were but minor footnotes. The change comes in the late 1980s. Through nomination hearings, as well as through several pieces of legislation, the Senate has helped women to become equal rightsholders under the United States Constitution.

I wish I could report that the work is over. But the substance of those rights remain in dispute, and some of the nominees who will come before you are likely to support women's rights only at a very general level of abstraction. In 1994, Congress enacted a major civil rights act for women, the Violence Against Women Act; in 2000, by a 5-4 majority, the Court found one section of it unconstitutional.[26] Lower courts are concluding that the Family and Medical Leave Act cannot be applied against states and raising questions about the Child Support Recovery Act being beyond Congress' power.[27] Last term, the Supreme Court, 5-4, upheld the constitutionality of differential treatment of children depending on whether their mother or their father is a citizen of the United States.[28] At issue in case after case are women's rights to privacy, to be free from violence, to be both wage workers and care givers. Debate continues about what level of scrutiny applies to gender-based classifications. Therefore, as each and every nominee comes up for appointment to the district or the appellate courts, the Senate must continue its work of shaping legal norms to ensure women's equality.

More generally, the Senate should view the nomination process as an important venue for discussions of equality in the courts, in terms of the demography of the judiciary, treatment of litigants, lawyers, and witnesses, and the legal doctrine. One obvious concern is for diversifying the judicial work force so that those who sit in judgment reflect more of the characteristics of those whom they judge. Here again, while some progress has been made, more is needed. It is not that the struggle for what Judge Leon Higginbotham has called "judicial pluralism"[29] has been won or that affirmative efforts to do so are popular, but that hostility to pluralism is no longer plausible. Whether from the

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26. United States v. Morrison, 529 U.S. 598 (2000) (holding Congress lacked power under either the Commerce Clause or the Equal Protection Clause to enact 42 U.S.C. § 13981, which provides a civil remedy for gender-motivated violence). The remainder of this legislation remains, and in 2000, Congress reauthorized its many important provisions. *See* 42 U.S.C. §§ 13931-14040 (1994 & Supp. 1999).

27. *See, e.g.*, United States v. Faasse, 227 F.3d 660, *vacated by* 234 F.3d 312 (6th Cir. 2000); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223 (3d Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000); United States v. King, No. S1 00 CR. 653 (RWS), 2001 WL 111278 (S.D.N.Y. Feb. 8, 2001), *rev'd*, 276 F.3d 109 (2d Cir. 2002).

28. Nguyen v. INS, 533 U.S. 53 (2001).

29. *See* A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 DUKE L.J. 1028 (1993) (discussing the building of a representative judicial system).

left or the right, political parties speak of the need for inclusion, as they prominently display individuals of both sexes and of a variety of races and ethnicities as emblems of their commitment to inclusion.

But what does diversity mean, and is inclusion enough? The Senate should be concerned not only that women and men of all colors come before it as nominees, but also that those candidates view the law—both statutory and constitutional—as having an affirmative role to play in expanding opportunities for all.

The Bork nomination was a watershed in other respects. The Senate's extensive public questioning of the nominee prompted a vigorous debate about the meaning of the Senate's constitutional obligation and about the effects of the public nomination process. At that time, like today, debate focused on whether the power to provide both "advice and consent" ought to mean that the Senate should presume it will consent. Further, assuming a substantive role for the Senate, the issue raised was whether Senators could inquire directly about what was then termed "judicial philosophy" and what is now called "ideology"—or whether "judicial temperament" and "professional competence" were the only permissible topics.

Reviewing the nominations both before and since the Bork hearings, I hope that the question about the Senate's role can now be understood as settled. As Charles Black explained some years ago, no reason—"textual," "structural," "prudential," or "historical"—exists for objecting to reading the Constitution's words "advice and consent" as authorizing Senators to take an active role in shaping the federal judiciary.[30] As I have just detailed, in recent years, the Senate has used that role to illuminate both the ideas and beliefs of an individual nominee and the concerns of the nation.

I hope that the Senate will embrace the constitutional structure. We should all applaud the insights of the Constitution to build in roles for both the Executive and the Senate. Through these layers of repeated inquiry, first by the President's staff and then by the Senate, power is distributed. The Senate should not hesitate to engage nominees in careful exploration of their views, their work experiences, and their commitments.

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30. *See* Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 664 (1970); *see generally* PAUL SIMON, ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT NOMINATION BATTLES 36-37 (1992); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988); Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858 (1990); Judith Resnik, *Changing Criteria for Judging Judges*, 84 NW. U. L. REV. 889 (1990); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

This series of hearings has also focused on a related question: whether nominees ought to be asked to make an affirmative showing or whether they come with a presumption of confirmability. No such presumption ought to attach. The Article III judiciary is conceived as independent of both Congress and the Executive. Federal judges are not and ought not to be selected to be a part of the President's "team." When Presidents select a broad and diverse group of nominees who in turn represent a wide spectrum of views, Senatorial concern might relax, but when Presidents pick a narrow band, such choices ought to prompt "heightened scrutiny."

Searching inquiries are necessary today for two reasons. First, we are in the midst of a significant debate about the meaning of federal law. To preview questions that I understand will be central in the next hearings of this Committee, the meaning of "Our Federalism," to use Justice Black's phrase from *Younger v. Harris*,[31] is deeply contested. By way of a simple summary, today the Commerce Clause has been read to mean something different than it did in 1994.[32] The same can be said for both the Eleventh and Fourteenth Amendments.[33] These new interpretations all come by virtue of decisions made by a bare majority on the Supreme Court.

What is at stake in the appointment of life-tenured judges is not only constitutional rights but also the many statutory rights crafted by Congress. Historically, a shared view was that courts were obliged to defer to congressional judgments; doctrinally, this view was expressed by the rule that federal statutes were entitled to a presumption of constitutionality. That presumption is entirely proper, marking the constitutionally shared power of the branches of the federal government to make the meaning of federal law.

But, as I begin this fall to teach my new students about the federal courts, I cannot report to them that this presumption remains intact. Members of the federal judiciary have undermined it substantially as they strike federal statute after federal statute. As Justice Breyer wrote in his dissent last term in the *Garrett* case, the five person majority of the Supreme Court is treating the record developed through hearings in this Congress "as if it were an administrative agency record" and substituting its own evaluation for that of this legislature.[34] Several of the majority's decisions are what I term "factless," by which I mean that they are filled with abstract theoretical claims about constitutional structure

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31. Younger v. Harris, 401 U.S. 37, 44 (1971).

32. *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

33. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999).

34. Bd. of Trs. v. Garrett, 531 U.S. 356, 376 (2001) (Breyer, J., dissenting).

rather than grounded in the experiences of litigants, the materials produced through congressional hearings, and the detailed facts within the records.

That approach ought not be one to which anyone aspires. As the Senate considers nominees to the federal bench, it ought to inquire about their attitudes towards the job of judging. Rather than presume them appropriate for the judiciary, assess what they have done, as lawyers and as judges. Further, when considering individuals, the Senate ought also to assess the wisdom of their joining the specific courts for which they have been proposed. I also hope that you will think about the nominees as a group and reflect upon the degree to which they bring to the bench diverse experiences as lawyers, involved with the full range of legal and political activities rather than drawn from only a limited sector. We need individuals who have been lawyers for all kinds of people. The ranks of the judiciary ought to include prosecutors and defense attorneys, those who have worked full time as legal services lawyers and those who have worked in large commercial firms, lawyers involved in the public sector, those who work for all aspects of government, and lawyers for non-profits.

No single formulation captures the many attributes that are needed to be a good judge. But the Senate can approach the issue by looking for objective indices of nominees' views. For example, one can learn whether a person, as a part of a professional career, has contributed time and energy to represent those unable to afford lawyers. One can learn whether nominees are aware of the many recent studies demonstrating that courts are not yet seen as providing equal treatment, regardless of race, language, ethnicity, and gender.[35] More than sixty court-commissioned reports address the subject matter of gender, race, and ethnic bias in the courts and the legal profession.[36] Bar associations have taken on these issues as well. One can learn whether nominees contributed to such projects.

Through a variety of means, the Senate can learn whether nominees evidence concern for the human beings whose lives are to be affected by court rulings and whether they can be sensitive to the fact that disputants are often needy. One can look for evidence of a patient willingness to be tethered to records, to be grounded in the minutiae that make up legal proceedings, and to be constrained by the role to delve into the parties' claims to ascertain the merits. One can look at whether a nominee sees the use of federal courts as an important

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35. *See, e.g.*, AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM (1999).

36. *See, e.g.*, NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES (1991); NEW YORK TASK FORCE ON WOMEN IN THE COURTS, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, *reprinted in* 15 FORDHAM URB. L.J. 11 (1986); NINTH CIRCUIT GENDER BIAS TASK FORCE, THE EFFECTS OF GENDER IN THE FEDERAL COURTS: THE FINAL REPORTS OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, *reprinted in* 67 S. CAL. L. REV. 727 (1994).

aspect of justice in the United States and supports ready access to the federal courts.

In sum, at this point in our history, I do not believe that the question is really whether the Senate can ask questions and engage in a full inquiry. Nor do I believe that the Senate has any basis in law or practice to feel itself beholden to the President and obliged to confirm his nominees. Rather, the real question is whether the Senate will have the willingness to devote itself to the work at the level required to do so. Stamina, commitment, and energy are required. Hence, I come today not only to offer historical and scholarly materials, drawn from both the archives of the federal judiciary and contemporary databases, but also as a citizen, appreciative that this Committee has convened this hearing—and to ask for more. I have spent much of my life as a lawyer and law professor thinking about the role of the federal judiciary. I am deeply admiring of this institution, for, as one of our Supreme Court Justices put it, "[T]he independent judiciary . . . has been one of our proudest boasts, by reason of Art[icle] III."[37]

The task now is to make good on that constitutional promise. To do so requires a fulsome commitment by the United States Senate to ensure that the individuals entrusted with this life-tenured position, and who therefore have the power to adjudicate, to appoint other judges, and to advise this institution on the role of the federal courts, represent all of America rather than only a narrow slice of our legal, political, and social life.

Thank you.

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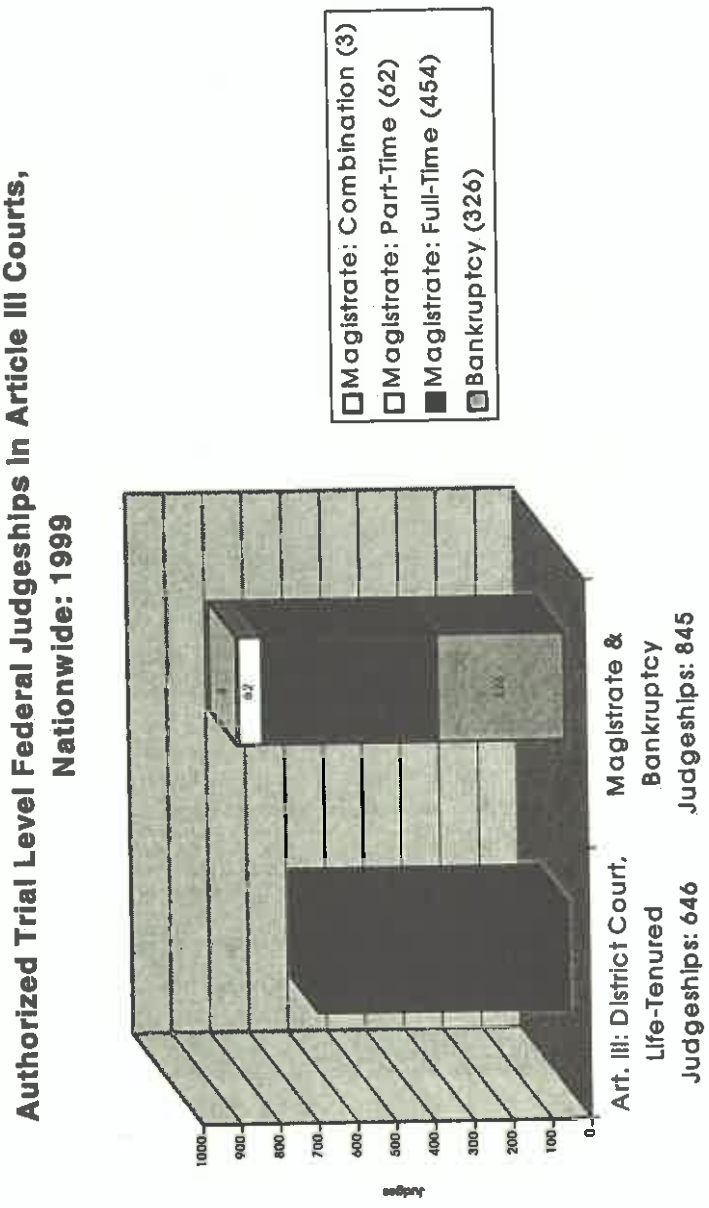
37. Palmore v. United States, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting).

APPENDIX


Authorized Trial Level Federal Judgeships in Article III Courts,
Nationwide: 1999
Magistrate: Combination (3)
Magistrate: Part-Time (62)
Magistrate: Full-Time (454)
Bankruptcy (326)
Judges
1000
900
800
700
600
500
400
300
200
100
0
Art. III: District Court, Life-Tenured Judgeships: 646
Magistrate & Bankruptcy Judgeships: 845

STATEMENT BY DEAN DOUGLAS W. KMIEC*

Mr. Chairman, thank you for inviting me here to testify on the appropriate inquiries for the Senate in considering judicial nominees.

My proposition is simple: the proper Senate inquiry of a judicial candidate is demeanor, integrity, legal competence, and fidelity to the rule of law. It is not partisanship or policy agreement. While textually the Senate is free to inquire and to reject a nominee on any ground—even a highly political, constitutionally problematic one like the nominee's views on outcomes in specific cases—it should not do so. Undertaking to make nominees carry a type of political burden of proof will over time merely invite a subservience of mind and personality that is contrary to an independent judiciary.

The significance of an independent judiciary is well known to every school child. The point was made plain in the bill of indictment included against the English King in our Declaration of Independence. "He has made Judges dependent upon his Will alone, for the tenure of their offices," our founders complained. Any attempt to transform the Senate's advice and consent role into a similar partisan inquiry would cut deeply against our history and unnecessarily invite making federal judges dependent upon constitutionally inappropriate considerations. In the Constitutional Convention of 1787, great concern was expressed against having judicial appointments influenced by the Legislature out of "cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."[1] Indeed, in this past century, there has been only one other such blatant effort to subvert the independence of the federal judiciary: FDR's court packing plan.

The court packing plan, in essence, proposed that when a federal judge who had served at least ten years waited more than six months after his seventieth birthday to retire or resign, the President would add a new judge to the bench, with up to six additional slated for the Supreme Court. FDR talked about the need for "new blood" and so forth, but everyone knew that the President wanted to change the jurisprudential direction of the Court—to bend it to his will. FDR himself gave up the pretense soon enough. As one scholar noted, "[T]he President virtually abandoned this line of argument and came out with his main reason: that the Court was dominated by a set of conservative justices who were

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* Dean & St. Thomas Moore Professor of Law, Catholic University of America Law School.

1. THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 301 (Gaillard Hunt & James Brown Scott eds., The Law Book Exchange, Ltd. 1999) (1920).

making it impossible for liberal government to function."[2] Sound familiar? These were times of great economic distress. Millions were out of work and the Court was showing little deference for FDR's regulatory initiatives to address the problem. Yet, even under these dire circumstances—which are hardly equivalent to the relative prosperity of today—"it quickly became apparent that opponents of the plan enjoyed widespread support."[3]

Like President Roosevelt, some in the Senate today may believe the Rehnquist Court, and even the lower federal courts, even though they have recently been augmented with 377 new judges sharing the judicial philosophy of former President Clinton, to be ideologically contrary to desired policy. Like FDR, these members of the Senate ask for a judicial population that will not weigh case or controversy by adherence to precedent or textual or structural interpretation, but by the desirability of particular outcome. This course is ill advised and should not be pursued. The short-term political gratification of defeating one or a handful of judicial nominees on partisan or ideological grounds will harm the federal judiciary and bring dishonor to this deliberative body.

Why dishonor? Consider the words of the Senate Judiciary Committee in turning away FDR's attempt to inject partisanship into the composition of the courts. The plan was denounced for applying "force to the judiciary. It is an attempt to impose upon the courts a course of action, a line of decision which, without that force, without that imposition, the judiciary might not adopt."[4] This assault upon judicial independence came with the following warning which unfortunately seems equally apt to the arguments being presently made to force judicial nominees to prove their ideological bona fides:

> Let us, for the purpose of the argument, grant that the Court has been wrong, wrong not only in that it has rendered mistaken opinions but wrong in the far more serious sense that it has substituted its will for the congressional will in the matter of legislation. May we nevertheless safely punish the Court? . . . If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another

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2. William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, *in* ESSAYS ON THE NEW DEAL 86 (Harold M. Hollingsworth & William F. Holmes eds., 1969).
3. *Id.* at 83.
4. S. REP. NO. 75-711, at 7-8 (1937).

> and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.[5]

In the end, the Senate Judiciary Committee in the 1930s strongly denounced the court packing exercise as having the "initial and ultimate effect [of undermining] the independence of the courts," and violating "all precedents in the history of our Government and would in itself be a dangerous precedent for the future."[6]

The future is apparently now, and sixty-four years later packing the courts on the basis of desired outcomes looks no better and is no more consistent with the spirit of the Constitution and its guarantee of judicial independence.

But more than judicial independence is at stake, because an attempt to exclude men and women of excellent credential and judgment because they don't happen to subscribe to your particular conception of federalism, or because they do not possess the right disposition toward this or that doctrinal formulation of due process, or affirmative action, or any other topical subject is a use of the vital senatorial role of advice and consent that is either wholly random since it seeks to predict the unpredictable or deeply antidemocratic as it seeks to undo a national election and the contemplated sovereignty of the people in the selection of judges through the election of a new executive.

Nominee selection—as a matter of fact—is seldom sufficient to predict accurately the philosophical direction of a particular judicial candidate once appointed to a lifetime job with no salary diminution. Eisenhower had his Earl Warren; Nixon had his Blackmun; Bush had his Souter. In each case, it is either popularly speculated or actually articulated that the nominee's service was at some considerable variance to the philosophy of the nominating president. A recent study for the *LBJ Journal of Public Affairs* estimates that one Justice in four disappointed his appointing President.

Whether or not Presidents have been dismayed by their nominees at times, judicial behavior is certainly a hazard to predict. "Chief Justice Earl Warren, prior to his appointment, supported President Roosevelt's decision to intern United States citizens of Japanese ancestry during World War II. . . . But as Chief Justice, Warren became an icon of civil liberties organizations . . . ."[7] Consider also just the past term of the High Court. So-called conservative Justices Scalia and Thomas insisted that law enforcement observe the privacy of a home from the intrusion of a rare thermal imaging device, while claimed liberal Justice Stevens dissented. Meanwhile, Justice Breyer, assumed by the President

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5. *Id.* at 10.
6. *Id.* at 3.
7. Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 682 (1989).

who nominated him, the media, and this body to have a progressive or liberal ideology at the time of his confirmation, has joined results permitting a student Bible club to use a public school classroom in the after school hours, and, earlier, that would more easily exclude adult cable programming. As Professor Richard Garnett has observed: "[The] justices are neither easy to pigeonhole nor easy to predict. Their dispositions are not merely 'restrained' or 'activist.' Their decisions aren't predetermined by the ideological labels slapped on by partisan animators."[8]

But even if there was a greater level of predictability, what possibly authorizes the Senate to substitute its judgment for that of the electorate under the disguise of inquiring into judicial fitness? Despite the disagreements that you or I may have with individual decisions of the present Supreme Court or the lower federal courts, there is little to suggest that, in the aggregate, these institutions are composed of individuals unrepresentative of the people. Quite the contrary. Five presidents have contributed to the makeup of the present Court and Presidents Reagan and Clinton had the opportunity to appoint virtually identical numbers of lower federal court judges over their respective terms, 377 for Clinton and 382 for Reagan. And despite the fact that the last national election may have hung by a chad, or that some academics would have preferred greater reliance upon political, rather than adjudicative, means of resolving the electoral disputes that emerged, the outcome—supported at its most basic level by seven justices, labeled conservative and liberal alike—has vested the power to nominate judicial officers in President Bush by a majority of electoral vote. And that vote has meaning for executive and judicial appointment that ought not be undone covertly by this body.

Here it is good to recur to first principle. As Professor Stephen Presser, my coauthor of *The American Constitutional Order* and the very able Northwestern legal historian, pointed out before this body earlier this year, the critics of the Constitution were particularly worried about any policymaking tendencies of federal judges, especially as it might displace state authority. Hamilton responded to this criticism by emphasizing that it was not the job of judges to make law, that their role under the Constitution was simply to enforce the Constitution and laws as they were written, according to their original understanding. By doing so, Hamilton explained, federal judges would be acting as agents of the sovereign people themselves, and would do their part in implementing the rule of law. It was true that judges might sometimes be called upon to declare statutes invalid because of the dictates of the Constitution, but this was the role envisioned in those specific, and one might hope, rare cases.

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8. Richard W. Garnett, *Disrobed! Actually, They Think for Themselves*, WASH. POST, July 1, 2001, at B2.

The Constitution itself sets limits on what Congress may do, Hamilton explained, and when the Legislature exceeds those limits it ceases to act pursuant to the will of the people. It is then the job of the people's other agents, the Courts, to reign in the Legislatures.[9] All this is a long way of saying, as Hamilton did succinctly, that in properly deciding matters of unconstitutionality, the courts are not implementing their own preferences, but that of the people.

Professor Presser further bolstered this historical reference by mention of the separation of powers. It was well understood to our Framers, pursuant to the theories of Montesquieu, that liberty could not be preserved unless judges were barred from legislating. Lawmaking was left to the Legislature and the people themselves. As Hamilton wrote in *Federalist 78*, quoting Montesquieu's *Spirit of Laws* directly, "'[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.'"[10]

Sadly, this is forgotten far too often today. Courts are casually discussed as merely alternative policymakers. Mr. Joseph Califano, Jr., in an essay just last week, for example, accused the Congress as a whole of "political pandering," "gridlock," and "failure," and as a result argued that federal courts must become (and have become) "powerful architects of public policy."[11] I doubt very much whether the Senate wants to indulge Mr. Califano's harsh premise of the failure of Congress. Perhaps, as a policy matter, I would support a more aggressive regulatory, perhaps even prohibitory, policy toward tobacco or handguns, and, reading him, I suspect so would Mr. Califano. But the Congress has chosen a different path—to regulate tobacco advertising and to pursue background checks for certain weapon purchases. These are policy choices. Congress has made them. When the Supreme Court was asked to do more than Congress was willing to do—to authorize explicitly the FDA to regulate tobacco products—it declined. If Congress is truly displeased with that judicial outcome, it has a far more direct and appropriate constitutional means than to smuggle a highly partisan, policy litmus test into the judicial confirmation inquiry.

The President has the power of choice in his nomination. Textually, the Senate has unfettered power to deny that choice. But text is necessarily bounded by its historical context. History reveals that the Senate up until the 1980s largely confined its inquiries to integrity, demeanor, competence, and subscription to the rule of law. "There will, of course, be no exercise of choice on the part of the Senate," wrote Hamilton in *Federalist 66*. In observing this precept over time, the Senate was observing the designed independence of the judiciary, respecting the democratic will of the people, and abiding by the

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9. THE FEDERALIST NO. 78, at 398 (Alexander Hamilton) (Max Beloff ed., 1987).
10. *Id.*
11. Joseph A. Califano, Jr., *Yes, Litmus-Test Judges*, WASH. POST, Aug. 31, 2001, at A23.

separation of powers. It certainly was not attempting to escape any allegation of its own policy forfeiture, and to seek to do indirectly that which it has lacked the political courage to do directly.

If the Senate is truly interested in improving the federal judiciary, I respectfully suggest that these hearings would be better devoted to examining judicial method and fidelity to text and legislative purpose, rather than partisanship; in other words, to inquire whether nominees coming before you are willing to abide by the text of the statutory law as you have authored it. Legitimate questions can be asked whether there is a difference between statutory and constitutional interpretation, and how a prospective nominee would address that difference. The Constitution is to "endure for the ages," after all, and statutes often are intended to have a shorter life or a narrower object. But that said, what this body needs to know—especially from lower court nominees—is whether the judicial nominee proposes to observe the intended scope of statutory text given to it by the Congress, or one of his or her own making.

In brief, personal integrity, judicial temperament or demeanor, and learning in the law or competence are the primary indicia for eligibility of judicial service, and underlying them all must be a sincere commitment to abide by the rule of law. Judicial independence from mean spirited or shallow political posturing or inquiry is merited because, in this country, citizens are still entitled to believe that lawyers called to the bench—and those receiving the confirmation of the Senate—will allow the prospective application of previously and regularly enacted rules to prevail over arbitrary power, even when they may dislike the rule at issue. Nominees should face no obstruction or delay or improper placements of political burdens so long as they believe that all people, rich and poor alike and of whatever race, are to be equally subject to generally applicable law administered by ordinary, regular courts. Yes, the Senate has a duty to inquire whether a nominee subscribes to these age-old precepts of the rule of law, well summarized to our founders by Blackstone, and traceable to the earliest manifestations of the common law. But this inquiry bears no resemblance to the bumper-sticker-like characterizations of whether one nominee or another is conservative or liberal.

If this is so well settled, why are we invited to reconsider it now? There is little by way of a coherent response that the proponents of a heightened nominee burden of proof give. Some proponents of a reconfigured Senate role, like my friend and constitutional law colleague Laurence Tribe, propose that the ultimate purpose of the questioning is to have a balanced court. With all due respect to Professor Tribe's erudition in matters of constitutional study, a 5-4 court on the most delicate issues of the day is a fairly solid indicator of balance. Perhaps the balance "tilts" slightly to the center-right, rather than the center-left, but there is no real measure of this from term to term. So, too, it is recently popular to claim that there aren't enough varieties of experience on the bench—too many former

judges, as it were. This characterization, however, slights the lifetime of achievement of the present Court. Ruth Bader Ginsburg had prior appellate judicial experience, but also led a litigation arm of a very active national organization on gender issues. Several of the Justices had executive or administrative experience (Rehnquist, Scalia and Thomas); others were teachers (Breyer and Kennedy) and still others distinguished practitioners (Stevens).

However, even if balance could be defined, another witness before you today, the distinguished Professor Sanford Levinson, says balance is the entirely wrong inquiry. Professor Levinson urges you to substantively object to the Court's Fourteenth Amendment, Commerce Clause, and Eleventh Amendment jurisprudence. Why does Professor Levinson feel comfortable substituting his view of these issues for those of the present Court, or more relevantly to today's discussion, to the views of the people as represented by the President through the appointment process? Bluntly: because, to quote him, *Bush v. Gore* is "a patently illegitimate decision, . . . monumentally unpersuasive; and . . . its illegitimacy taints Mr. Bush's own status as our President." We owe Professor Levinson a debt of gratitude for his candor because I believe his remarks are the gravamen of this hearing.

This is not the place to re-argue *Bush v. Gore*, and I won't. However, it is clear that, unlike some academics, the overwhelming percentage of people, and seven Justices of the Supreme Court, accept the proposition that equal protection when applied to ballots means at least this: if you're asked to count them, you have to know what you're counting. When the Florida Supreme Court reflected upon the matter, five of the state justices who had previously ordered the standardless recount affirmed that "the development of a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the State of Florida should be left to the body we believe best equipped to study and address it, the Legislature."[12]

Respect for the lawmaking enterprise, for legislatures, especially the Congress, is a salutary by-product of the proper exercise of advice and consent.

> Limiting the judicial function to interpreting the Constitution guarantees the political branches their legitimate powers, which keeps policymaking in the hands of those who are most accountable to the people. . . . The Senate's power of advice and consent is a broad one, though it is not arbitrary. A fair interpretation of the qualities required of judicial nominees by the

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12. Gore v. Harris, 773 So. 2d 524, 526 (Fla. 2000) (per curiam) (disposing of the matter after it was remanded by the United States Supreme Court the second time in *Bush v. Gore*).

> Constitution emphasizes legal capacity, personal integrity, and a commitment to abide by the Constitution.[13]

But obtaining commitments to abide by favored policy outcomes this is not. The Senate need not fear that not undertaking a more partisan screening is a default of duty. As Hamilton explained:

> [T]he necessity of [your] concurrence would have a powerful, though in general a silent, operation. It would be an excellent check upon the spirit of favouritism in the president, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connexion, from personal attachment, or from a view to popularity.[14]

In short, the Senate need not, and should not, place the burden of proving partisan compatibility upon judicial nominees in order to faithfully perform its intended constitutional role.

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13. Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 379 (1999).

14. THE FEDERALIST NO. 76, at 389 (Alexander Hamilton) (Max Beloff ed., 1987).

STATEMENT BY PROFESSOR MARK TUSHNET*

I want to thank Senator Schumer and the Subcommittee for inviting me to testify on the important question of the criteria Senators should use in determining whether to vote in favor of a proposed appointment to the federal courts, and especially the Supreme Court. My observations are informed by historical experience and, I believe, constitutional principle. I begin with some general comments about whether nominees must show that they are particularly qualified for the appointment, or whether, in contrast, those who oppose the nomination must show that the nominees are not qualified.

My comments then turn to the relevance of political experience to appointment to the federal courts, and especially the Supreme Court. In my brief comments I will provide some snapshots from history, which indicate that many Supreme Court Justices, including some of the most celebrated, have had substantial experience at the national political level.[1] After giving these snapshots, I will explain why I think that such experience is an important asset that a person can bring to the Supreme Court. I do not argue, of course, that *only* people with such experience should be appointed to the Court, but rather that the Court serves us best when it contains a mixture of people with different backgrounds—and among those backgrounds should be some with substantial national political experience.

I believe that constitutional principle shows that nominations come to the Senate essentially in equipoise, because the considerations relevant to a burden of persuasion are basically in balance. This conclusion seems to me supported by the most basic aspects of our system of separation of powers, famously described by James Madison in *The Federalist 51* as one in which ambition counters ambition. That is, the separation of powers system works best when each branch—here, the President and the Senate—take positions that each calculates independently would serve the American people best.

In the context of judicial nominations, the process of ambition countering ambition works in this way: The nominee and his or her supporters can point out that the nomination was made by a President who presumptively has the support of the people of the United States as a whole, having been chosen by a majority of them. Senators can reasonably respond that they too were chosen by a majority of the American people taken as a whole. Indeed, they can note that the

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* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

1. My comments draw in part on Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992).

President was chosen by a majority of the American people in a single election, capturing the people's views at a moment in time, while Senators were chosen in a series of elections that, taken together, might better capture the more enduring values of the American people. In that connection, questions of timing may matter as well: The more remote the presidential election is, the more powerful is the Senate's claim to represent the people as of the time of the nomination.

The historical record is, unsurprisingly, subject to varying interpretations. One historian describes the Senate's role as "reactive," responding to the initiative taken by the President in selecting a nominee.[2] Presidents always have political allies in the Senate, who almost always take the position that the nominee is fully qualified for the position and that, in any event, the President's judgment that the nominee is qualified deserves some deference. Evidence taken from statements by *supporters* of a nomination is therefore, in my judgment, less valuable than evidence taken from statements by a nomination's opponents. In addition, the confirmation of a nominee has often been something of a foregone conclusion, which makes statements of principle on the question of confirmation something of a free shot by supporters and opponents: The supporters can structure their comments to lay the groundwork for using the confirmation as a precedent, and the opponents can dismiss those statements because they have no effect on the confirmation process.

These considerations lead me to conclude that the most historically informed inquiry would examine highly contested nominations, a much smaller number, of course, than all nominations. Dean Solomon describes the history as one in which "politics, policy, and professionalism" all play a role. He points out that "policy concerns dominate when presidents attempt to transform governmental structures or policies and perceive the Court as a necessary ally in accomplishing that agenda." Controversy has arisen when presidents made selections based on concerns that the Senate did not share, whether the disagreement was over the policy course the President sought to set through the nominations or over the patronage-type politics the President pursued in selecting a nominee.[3]

I would summarize a complex history by saying that, in general, opponents have never thought that the mere fact of nomination carried with it any special presumption in favor of the nomination. Nomination contests have focused on whatever seemed relevant at the time. The nominee's ideology, the nominee's

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2. Rayman L. Solomon, *Nominees, Controversial*, *in* THE OXFORD COMPANION TO THE SUPREME COURT 595-96 (Kermit L. Hall ed., 1992).

3. For example, the Senate rejected the nomination of Ebenezer Hoar to the Supreme Court in 1879 because the President represented one segment of the Republican Party, to which Hoar adhered as well, while the majority of the Senate formed a different faction in the same party and sought a nominee from that faction.

performance in executive office pursuing policies with which the Senate did not agree, whether the nomination would have particularly dramatic effects on the overall direction of the Court, the nominee's background, whether the President is using the nomination essentially as a patronage appointment or to appeal to some particular interest group—all this has been fair game. In my view, that is precisely the way the system of ambition countering ambition should work.[4]

I turn now to the question of political experience as a qualification for judicial office. Consider first the membership of the Supreme Court when it decided *Brown v. Board of Education*. The Chief Justice had been Governor of California, the Republican Party's candidate for the vice-presidency in 1948, and a realistic contender for the presidential nomination in 1952 until Dwight Eisenhower entered the race. Hugo Black had been a Senator and a leader in promoting some of Franklin Roosevelt's most important legislative initiatives. William O. Douglas had been a presidential adviser and chair of one of the New Deal's major administrative agencies, the Securities and Exchange Commission. Stanley Reed had been a state legislator, general counsel to an important Depression era agency, and Solicitor General. Felix Frankfurter had been a close presidential adviser and a major public commentator on the Supreme Court and the Constitution. Robert Jackson had been Solicitor General and Attorney General. Tom Clark had been a close presidential adviser and Attorney General under Harry S. Truman. Even the least distinguished members of the *Brown* Court had significant national political experience: Harold Burton had been Mayor of Cleveland and a Senator, and Sherman Minton had been a Senator from Indiana before his 1940 election defeat, after which he was appointed to the federal court of appeals.

The substantial political experience represented on the *Brown* Court was not unique, or a response to the Court's obstructionism during the early New Deal, as a second snapshot reveals. The Court in the 1920s also had several members with substantial national political experience. The Chief Justice, William Howard Taft, had of course been President of the United States. James McReynolds had been Attorney General. Louis Brandeis had been a major public figure, leading the nation's consumer movement. Joseph McKenna had been a member of the House of Representatives and, briefly, Attorney General. And George Sutherland had been a leading figure in the United States Senate, after having served in the state legislature and the House of Representatives.

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4. My personal judgment is that the American people are better served when Senators focus on nominees' visions of the Constitution and the law, on how they understand the job for which they have been nominated, rather than on aspects of the nominees' personal life that shed less direct light on their ability to serve the people well. The constitutional scheme does not, however, dictate how each Senator should assess the relative importance of personal qualities and judicial ideology.

A third snapshot includes the men who have served as Chief Justice. John Jay, of course, had been an important diplomat for the new nation and an author of a handful of *The Federalist Papers*. John Marshall had been a Virginia legislator, an important legal and political adviser to George Washington, a member of the House of Representatives, and, briefly, Secretary of State. Roger Taney had been, again, a close adviser to President Andrew Jackson, Secretary of the Treasury and Attorney General. Salmon Chase was a governor and Senator, and Lincoln's Secretary of the Treasury, and, even while serving on the Court, a persistent potential candidate for the presidency. Edward Douglass White served in the Senate for three years before his appointment as Chief Justice. I have already mentioned William Howard Taft. Taft's successor Charles Evans Hughes had been Governor of New York for two terms before his appointment to the Court, and was the unsuccessful Republican candidate for the presidency in 1916. Before his reappointment as Chief Justice, Hughes served as Secretary of State. Fred Vinson was a member of the House of Representatives, and, after resigning as a federal judge, occupied a number of important positions in Roosevelt's wartime administration before becoming Secretary of the Treasury in 1945.

My final snapshot is drawn from a list of Justices provided in the first pages of the constitutional law casebook of which I am a coauthor. The list is designed, we say, "to offer at least some sense of the background, personality, and intellectual style of the justices who have had the greatest impact on modern constitutional law."[5] Omitting the Court's present members, we describe twenty-nine Justices, of whom seventeen, in my judgment, had substantial political experience, almost all of them on the national level.

I should note at this point an important qualification. Of course, determining whether someone has had substantial political experience on the national level is a matter of judgment, and I have no doubt that some of my judgments could be challenged. In my efforts to count and evaluate, for example, I treat Louis Brandeis and Thurgood Marshall as people with substantial national political experience even though neither had occupied elective office before they became Justices, and Brandeis had not held even an appointive national office. But I did not include Lewis Powell in my list of Justices with substantial national political experience, despite the important positions he held in Virginia's education system during the early years of desegregation and despite the fact that he had been president of the American Bar Association. I counted serving, even briefly, as Attorney General as having national political experience, but what of Justice Byron White's service as Deputy Attorney General?

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5. GEOFFREY STONE ET AL., CONSTITUTIONAL LAW lxxi (4th ed. 2001).

The snapshots I have given indicate rather clearly, I think, that over the course of United States history, substantial experience in national politics has been regarded as an asset for Supreme Court Justices. This is not to say that such experience has been a prerequisite for appointment, or that Justices with such experience have uniformly been better, according to *any* relevant criteria, than Justices without it. Rather, it is to say only that the judgment of Presidents and Senators appears to be that having a Court with *some* Justices with national political experience is valuable for the Court and the nation.

What might explain that judgment? I will identify three reasons, in decreasing order of importance, for thinking that the Supreme Court's quality, and therefore the quality of constitutional law, is improved when some Justices have had significant national political experience. Again, of course, one's view about the quality of constitutional adjudication depends at least in part on the general understanding one has about what constitutional adjudication *is*, and each Senator will have to assess what I have to say in light of his or her individual understanding about that question.

The most important reason for thinking that substantial national political experience is a valuable attribute of Supreme Court Justices is that an important component of what we want from Supreme Court Justices is what Dean Anthony Kronman of Yale Law School calls prudence or practical wisdom, precisely because Justices are called upon not to articulate principles of justice in the abstract but rather to develop principles of justice suitable for regulating government in the present day, under real world conditions.

We can find practical wisdom in many places, of course, but people with substantial national political experience have two characteristics that make them particularly suitable candidates for finding it. First, they have *displayed* their capacity to exercise practical wisdom in their public lives. So, we simply have a larger evidentiary base for evaluating a nominee's capacity to exercise practical wisdom when the nominee has been an important public figure. No doubt backroom advisers and lawyers in private practice can *have* practical wisdom, but only those whom they advise will be able to say with confidence that the nominees are indeed people of sound practical judgment.

Second, an important reason that people become *successful* public figures over the long run is that they actually demonstrate their good judgment. Among other things, success requires that political figures listen well to people with views different from theirs, and learn how to respect and to some degree accommodate those views without yielding on what is fundamental to the political actor. Here, substantial national political experience does not itself give the person a particular asset, such as knowledge about the realities of government that he or she can contribute to the Court. Rather, successful performance on the national political stage is an indication that the nominee has the valuable character trait of practical wisdom and judgment that we seek in judges.

A somewhat less important reason for thinking that national political experience should be regarded as an asset in a judicial nominee is the sense of reality that people with such experience can bring to constitutional adjudication. To the extent that Supreme Court Justices are developing doctrine aimed at ensuring that the American people are governed as well as we can be within constitutional limits, knowing how government actually works may be a valuable asset. The usual example given to support this point is that someone sensitive to the realities of the national legislative process would not dismiss legislative history as a guide to interpreting statutes.[6] Another example might be that of Justice Byron White, the Court's most articulate defender of the proposition that separation of powers questions should be resolved with an appreciation of the way in which members of Congress and members of the Executive Branch are engaged in long-term interactions. Justice White based this understanding of the Constitution on his experience as Deputy Attorney General.

I think it is indeed important that the Supreme Court as an institution have access to this sense of the realities of governing. One problem, however, is that those realities change, and a person appointed in one era might not understand the new realities. Justice Black, for example, clearly knew what Congress was like in the late 1930s, but he served through the 1960s, by which time the realities of the legislative process had changed dramatically. He could, and did, contribute his sense of the realities of governance to the Court in the 1940s, but his ability to make such a contribution dissipated over time. This consideration suggests to me that Senators should be concerned that they be presented with some regularity with nominees with substantial national political experience. A long run of nominees without such experience is, I think, likely to impair the quality of constitutional law.

Finally, in conversations about the contributions people with substantial political experience can make to constitutional adjudication, sometimes I have heard politicians disparaged as people who are good at the art of compromise but—for that reason—not well suited for developing constitutional principles. Designing a statute that accommodates competing interests, it is thought, is quite different from articulating a constitutional principle to regulate some general area like free speech. In the main, I agree with this position, although I think it fails to appreciate the extent to which politicians themselves act on principle. Still, I think it worth noting that the art of compromise is not foreign to the Supreme Court. As with statutes, opinions contain language whose terms are sometimes negotiated among the Justices, as the inspection of the papers of various Justices at the Library of Congress reveals. A person adept of explaining to a recalcitrant

6. I note, though, that to some extent those who argue against resort to legislative history have an account of statutory meaning based on a theory of democratic self-governance, according to which the actual operation of the present legislative process is irrelevant.

colleague why a change in language is desirable and need not impair what the colleague thinks important serves a valuable function on the Court. To the extent that people with substantial political experience bring such talents to the job, all the better. But, of course, those talents are not unique to people with such experience, so the ability to work out compromises over doctrinal formulations is the least important asset people with substantial national political experience bring to the Court.

I should be clear that neither my snapshots nor my normative argument establish that we should have *only* people with substantial national political experience on the courts. For example, having some grasp of the realities of government is useful, but so is having some grasp of the realities of business, and having some grasp of the realities of the criminal justice system, and so on. Different nominees bring different experiences to the courts, and what seems desirable is having a decent mix of people, among whom are some with substantial political experience.[7] When a new nomination is put forward, one important question, of course, is whether the nominee will add something valuable to the mixture already present on the Court.

To summarize: Historically it has been thought important that some significant number of Supreme Court Justices have substantial experience in national politics. And there are good reasons, based on what I think is the best understanding of what we seek in constitutional adjudication, supporting that judgment. In particular, judges with such experience are likely to bring a sense of reality to constitutional adjudication, and, more important, practical wisdom as well.

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7. I think it worth noting as well one disadvantage associated with the nomination of people with substantial national political experience: The Senators who will consider them in the confirmation process are likely to have had personal relations with the nominees. Such relations can enhance the quality of the Senators' judgments, but they also can distort those judgments: A nominee who has been easy to get along with may mistakenly be seen as wise and prudent.