

Center for American Progress



“QUIET REVOLUTION”

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CENTER FOR AMERICAN PROGRESS**

PANELISTS:

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MR. MARK AGRAS: If those of you who are in the back would like to take seats, there are some seats up here in the front, and you're more than welcome to move up and take them.

Well, now we have for you a discussion of the film, *Quiet Revolution*, which you have just seen. We have four distinguished constitutional experts with us. Nan Aron, of course, who you've already met. Seated to her right, are Dawn Johnsen, professor of law and Ira C. Batman Faculty fellow at Indiana University School of Law, where she teaches constitutional law, the First Amendment and the separation of powers. Before joining the law school faculty in 1998, she spent five years in Washington as the legal director of NARAL, and served as a deputy assistant attorney general, and then acting assistant attorney general, for the Office of Legal Counsel.

Emily Bazelon, to her right, a senior editor at *Slate*. She edits the magazine's health and science columns, co-edits its religion coverage, and writes on law and family issues. Before joining *Slate*, she worked as an editor and writer at *Legal Affairs* magazine. Her work has appeared in many other publications including *The New York Times* magazine, the *Atlantic Monthly*, and *Mother Jones*.

And finally, Jamie Raskin, a professor of constitutional law at American University, and director of its program on law and government. He founded the Marshall-Brennan constitutional literacy project, which sends law students into public high schools and junior high schools to teach about the Constitution and the Bill of Rights. He's the bestselling author of *We the Students*, and *Overruling Democracy: The Supreme Court versus the American People*.

Let me begin by asking each of our panelists for their reactions to some of the elements in the film. Let me start with Dawn Johnsen, who of course appeared in the film as well. Dawn, in the film Peter Edelman described the goal of judicial conservatives as the creation of a government with vast power to invade our lives, and little power to protect us. In your own work, you've examined the blueprints for this agenda that were drafted during the Reagan administration. Can you tell us more about those documents, and more importantly, how they have been used in practice since then?

MS. DAWN JOHNSEN: Yes. First, let me say how impressed I am by this film. I think it does an excellent job at capturing the key elements of what are literally hundreds and hundreds of pages, and I brought one copy of reports like this issued by the Reagan administration's Department of Justice, in just 23 minutes so – great, great job, and I'd recommend that you all read through this little pamphlet for more detail. Those who really want to get in deep, though, you've got to read the reports to really appreciate the radical nature of the agenda.

When I first read these documents several years ago, I found most shocking one of the reports, entitled "Guidelines on Constitutional Litigation," and that's because that report actually lists issue by issue the Supreme Court opinions that the Reagan

administration deemed wrong, and it directed government lawyers at the Department of Justice to seek to overrule those cases. And I was just shocked by the arrogance and the complete disrespect – lack of respect for either the courts or Congress, and just this presidential arrogance. Having just come from five years with the Department of Justice, this was certainly not how we viewed Supreme Court opinions, or the role of Congress.

So I brought with me another report. This is the “Constitution Year 2000,” this is the one that appeared in the film, there was the table of contents, you couldn’t read it, but I thought I would read to you from it. So this document, this is 199 pages, very detailed and comprehensive 15 chapters on different issues, issues that are the most fundamental of all legal controversies even today. A few examples: one chapter on revitalizing the Takings Clause, and the Contracts Clause in order to invalidate economic and environmental regulation. Another chapter, interpreting the religion clauses in order to allow tax money to go directly to private religious education. One, of course, on the right to privacy, and the “right to privacy” is in scare quotes, and as the movie made clear –I was shocked, of course they had *Roe v. Wade* on the list of targets, but I was shocked to see *Griswold v. Connecticut*, the right of married people to use contraception; *Skinner v. Oklahoma*, the right not to be forcibly sterilized by the government, on the list of decisions targeted for overruling. So a few more examples, of course expand so called states’ rights while narrowing Congress’ power to enact legislation that is essential to protecting individual rights, and also protecting the environment and other public concerns.

Final example, very important today: essentially, a chapter on limiting the power of the courts to decide cases involving presidential authority in the areas of foreign policy and national defense. So that was their goal in 1988: what they wanted to achieve by the year 2000, and obviously, all very important today. The record so far, I’d say it’s mixed. You know, on some of these issues they’ve made significant progress; others, the court is five-four on many of these, some in their direction, some still in our direction. The main way in which they say they’ll achieve these goals – this whole book is designed to urge Congress and the American public and presidents to consider the legal views of judicial nominees, and remake the courts, and they have certainly made great progress there. But read the reports if you want, when you get the full tone of what they were seeking to achieve.

MR. AGRAST: Thank you. I’m glad that *Skinner* remains the law of the land at least as we speak. (Laughter.) Let me go to Emily. Emily, this film argues that the movement as a whole is a kind of, dare I say, vast right wing conspiracy among politicians, intellectuals, and financiers of the conservative movement. What’s your assessment of this, and how do you account for the extraordinary success that they’ve had?

MS. EMILY BAZELON: Well, conspiracy is always a tricky word to use, but I will say that from the vantage point of a journalist, who sort of is looking out on this, and obviously people come to me and try sometimes to influence what *Slate* is writing and covering, one feels like it’s certainly a juggernaut. During the Alito and Roberts’

confirmations, while I was writing a lot of stories about that, there is sort of an inundation of e-mails and information, and I do think that the left has gotten smarter about countering that.

Nan's organization and also the People for the American Way were sending me a lot of materials as well, and so I don't think that it is simply on one side. But I do think that the right has its kind of attack-dog mechanisms down in a way that the left is less comfortable doing, and frankly I'm not sure I want the left to be out there in the same way with these tactics. But I know just from my own experience, and I'm sure other people have had this experience as well, that when you're out there writing about the record of a judicial nominee or some legislation that's pending that the Republicans – the administration wants passed, you can expect to be attacked, and you can expect that will be personal, that your name will be out there, that people will be calling you names.

And I don't think that the left has really kind of figured out exactly what to do about that, other than to sort of take the high road, and often the high road may be the best option, but it can leave one feeling sort of exposed, and I think that over time – Nan and I were down there talking this earlier, and she used the word “chilling effect,” and it does have a chilling effect on journalists and commentators because if you know that some right-wing blog, or a whole bunch of right-wing blogs, are going to pile onto a piece you've written and there are going to be 82 comments within two days calling you all kinds of names, you do think twice about whether you want to take a stance on a particular issue, and do you have all of your Is dotted and your Ts are crossed?

That can be a healthy instinct. You know, one of the dangers of internet publishing is that it's awfully easy to do, and so you want to make sure you're not making mistakes, but I think that there is another side of it which is less healthy, and more has to do with being worried about really throwing punches, and we need to be throwing some of those punches. I also wonder – sometimes I feel like I'm sort of figuring things out on my own to some degree, and there are people who I check in with regularly, but I wonder – I don't know, if I was a conservative writer in this area, if there will be people kind of grooming me and cultivating me, and sending me off to conferences, and making sure that I was sort of being led along. So anyway, that's more a speculation, but I do wonder about that.

MR. AGRAS: Thank you. Let me turn to Jamie Raskin. Jamie, in the film, Professor Cass Sunstein describes this quiet revolution as a program of constitutional revision unprecedented in our nation's history. One of the key elements of that program has been the effort of states' rights conservatives to restore the narrow view of federal policy, of federal power that existed before the New Deal – the so-called Constitution in exile. How real is this threat, and what would America look like if it were to succeed?

MR. JAMIE RASKIN: Well, the threat is real, clearly. The movie demonstrates it. I would change the terminology around. In fact I loved everything about the movie, but I don't like the title because I wouldn't concede the glorious word of revolution, or revolutionaries to these reactionary know-nothings who are trying to drive the country off

the cliff to the right, and I think that I would also disagree a little bit with Cass in the sense that it's not unprecedented because the truth is that for most of our history the Supreme Court's been a profoundly reactionary institution. In the 18th and 19th centuries, you can't name a civil libertarian or libertarian decision of the Supreme Court. I mean, after *Marbury v. Madison*, the next time we had an exercise of judicial review invalidating a federal law was in the Dred Scott decision with the Missouri Compromise.

So we went through a profound constitutional transformation in the Civil War with the Reconstruction Amendments. And with the 14th Amendment, we got a new Constitution. I was up at the Philadelphia Constitution Center where they did all this wonderful stuff on the Bill of Rights, and then there was a little plaque about this big about the 14th Amendment, which was startling to me because it was the 14th Amendment that made the Bill of Rights come alive for us.

And similarly, I think that the Supreme Court during the *Lochner* period was very much true to form in terms of its politics – striking down social and economic regulation – and it was a constitutional revolution. We must admit, when we got away from the *Lochner* period and the court allowed for social and economic regulation, and it was that opening and that liberalism that helped to create both politically and jurisprudentially the space for the civil rights movement and the women's movement and the Civil Rights Act and the Voting Rights Act, and so on.

That's what these people are reacting against. It is the civil rights revolution of the 20th century, and the National Labor Relations Act and OSHA and the Federal Labor Standards Act, and so on. It was the social revolution of the 20th century which made the Constitution an instrument of democratic participation and liberty and equality. So these people are counterrevolutionaries. They want to go back to a very old vision of the Constitution as serving a tiny group of people in society. And when we started America, we know that we were not anything like a democracy; we were a slave republic of Christian white male property owners, and the people today who would try to rewrite the 8th Amendment so cruel and unusual punishment doesn't mean anything – they're going back to a very old vision of what our Constitution stands for.

MR. AGRAS: So a restoration rather than a revolution.

Nan, do you agree with that?

MS. NAN ARON: No. (Laughter.) No. I mean, to the extent a revolutionary signifies a positive – you know, I'm not – this is certainly not a positive movement or advance, but these people have – their goals are to change the law, to change the courts, change the judges, change the way the laws are interpreted. It's huge. It's enormous. And I think sometimes, and I think one of the reasons that we felt this was an appropriate topic to highlight in this film is that certainly after the heartbreaking confirmation debates and losses – Alito and Roberts – it really – I mean, it occurred to us – it didn't just occur then, but not enough people on this country really have much of an idea of just how pernicious and harmful this effort is and how bold their agenda aims to be.

And it's interesting when you – as many of us in this audience know, when you talk to a group of college students today and mention Robert Bork, they all know who Robert Bork is, and yet to us in 1987 that really set the table for so much of the way in which hearings are conducted today in the United States Senate. So a huge need to educate, but at the same time there's much we can do to stop it. We just have to, in the progressive community, decide that this is going to become a priority. It has become a priority with the other side quite clearly, and you have no better example of that than Harriet Miers, who had all the qualifications – all the qualifications to be a Supreme Court justice, but no track record – proven track record to please and placate ultra-conservatives, and so the echo chamber, the movements, the law firms, the right-wing press all teamed up essentially to defeat her confirmation. That base really cares, and this movie is an effort to educate our base, our people, and get them to care, and more importantly get them to do something.

Every single senator who voted for John Roberts ought to be getting letters from people every single time he renders a decision that is harmful to the environment, harmful to civil rights, harmful to workers. We have to care as much as the right wing, and we've got to communicate that caring to members of the Senate who vote on these nominations day in, day out.

MR. AGRAS: Well, Nan, one of the problems seems to be that they're not always very candid about what they're trying to do. The authors of the blueprint that Dawn was talking about were extraordinarily candid. If you read that document, it leaps out at you, the intentions are entirely transparent, and in fact admirably so. But when it comes to implementing that agenda by putting judges on the bench, the film depicts more of a stealth campaign where the nominee hides behind euphemisms and is anything but candid. Why the subterfuge and how can the Senate and the public learn the truth about stealth nominees?

MS. ARON: Does someone else want to get to it?

MS. JOHNSON: I just want to say one thing about that when you talk about how candid the reports of the Reagan administration were. I love that the Alliance for Justice picked out my favorite quote from all the reports to highlight. The movie is so fabulous at demonstrating the utter hypocrisy of the radical right when they try to mislead the public through these buzz words – you know, that kind of Jon Stewart-like series of clips where they use the same exact words, over and over and over. I thought it was just fabulous in showing how hypocritical they are.

But here's my favorite quote is from the introduction of the Constitution in 2000 where they are completely transparent: "There are a few factors that are more critical to determining the course of the nation than the values and philosophies of the men and women who populate the federal judiciary. It is hoped that this report will allow members of Congress of both parties to assist judicial nominees in the most thorough and informed manner possible." Well, that's what they were back in the 1980s, and now

when they say strict constructionist, “interpret, not make law,” you know that they’re seeking to appoint people who have these same sets of views, and that was – they said their whole strategy for implementing their radical agenda was by appointing judges. And nothing’s changed there except we don’t have the transparency anymore, but we all know what they mean when they say those kinds of phrases, and this film is so effective at conveying that.

MR. AGRAS: Well, they also say that the Senate, when it confirms these people, ought not to consider questions of judicial ideology or judicial philosophy. Should they do so, and how should they do so?

MS. JOHNSEN: Yes, and they absolutely ought to do so. And this is where I think, you know, Reagan got it right for once, that the legal views of our judges are incredibly critical to who we are as a nation and how our Constitution is interpreted, and everybody knows that – they put it down in hundreds and hundreds of pages back in the ‘80s, and they have been incredibly effective, I think in turning it into quiet whatever you call it, in a stealth attempt to radically remake constitutional law. And one of our main objectives has to be the objective of this film, to unmask what is really going on and to show them for the hypocrites they are.

MR. AGRAS: Jamie, did you want to get in on this?

MR. RASKIN: Really, it’s interesting that the strategy that they used during the confirmation process where if it’s something that they’ve done personally that’s unethical, they say it’s completely irrelevant to how they’ll rule as judges; if it’s something they’ve written as an academic, they say that’s purely academic and intellectual. It has nothing to do with judicial philosophy. If it’s something that they’ve done politically like Alito’s work with that right-wing newspaper at Princeton, they say, “That’s him just taking his views as a citizen; that’s not what he would do as a judge,” but then if it’s their judicial opinions, they say they’re just following the law and their interpretation of it. So there’s no way you can – they’ve got a perfectly closed system where you can’t contest anything that they’re saying.

And of course judicial philosophy is the central mission. I mean, if you think about all these five-four decisions we have, I’ve asked my students, I say, “Why do we have five-four decisions? Is it because five justices are smart, and four are stupid? Or five have good clerks and four have bad clerks? Or you know, five have worked hard and four are – you know.” No, it’s because there are profound differences of judicial philosophy that go to the interpretation of the text and our conception of what the Constitution is.

And what I think happened over the course of the second half of the 20th century is we replaced a very reactionary, pinched conception of constitutional rights and the rights of citizens with a much more expansive conception that brings everybody into constitutional democracy, and that’s the vision of the Constitution that we’re defending against this right-wing counterrevolution or coup – judicial coup that they would like to

impose on us by sneaking people onto the bench who would have us turn the clock back on decades of constitutional development.

MR. AGRAS: Mm-hmm. Thank you. One of the questions I want to ask and I think maybe, Jamie, you would want to start on this. Conservatives are fond of decrying judicial activism as a phrase. They don't define it, and they claim that the judges they appoint only follow the law, but if activism is measured by the court's willingness to strike down legislation – I think the point was made in the film that the Rehnquist Court is the most activist court in American history, striking down the gun-free school zones law, the portions of the Violence against Women Act, and so on.

MR. RASKIN: Religious Freedom Restoration Act.

MR. AGRAS: Religious Freedom Restoration Act. What's wrong with judges using their power to strike down laws that they believe are unconstitutional?

MR. RASKIN: Nothing, that's –

MR. AGRAS: Isn't that what judges are supposed to do?

MR. RASKIN: Yeah, I mean – you know, and this is why it's phony when people use judicial activism to decry a decision where a court strikes a law down. Unless they're willing to say that *Marbury vs. Madison* was wrong, then it's just a political deployment of the phrase, and the right will use it sometimes to mean a judge striking a law down, but oftentimes they use it to mean a judge who won't strike a law down, like an affirmative action law or a state legislative redistricting that they don't like because it doesn't end up with the right political results for them.

So I try not to use the phrase judicial activism in that way, and I think that people – it's incumbent upon people to define their terms at least. I mean, one way of defining it is you're willing to overthrow a precedent; that the right is clearly willing to do. Another is you're willing to strike down federal laws; that they're clearly willing to do – the Religious Freedom Restoration Act. Another is you're willing to strike down state laws; that they're willing to do when they disagree with them. Another is that you propound an active political philosophy while on the bench. I mean, the master of that, of course, is Justice Scalia. And so I don't really know what it means. It's sort of an all-purpose epithet that's thrown around by the right, but there's no analytical clarity given to it, and I would say given the work that Dawn has done and others, it's very clear that they have a very specific jurisprudence that's integrated into a political program and they're willing to promote it, and maybe that's the best definition of it.

MR. AGRAS: Emily, did you want to say something about that?

MS. BAZELON: Yeah, I do want to say something. You know, I think we – Jamie's argument, this is an argument that the left has been making and it totally makes sense. It's coherent, it holds together the pun of legislating from the bench, these phrases

– these catchphrases that the movie captured so effectively. They’re kind of still out there, and it seems like they should have fallen apart by now. They shouldn’t be effective anymore because it’s been so thoroughly disproven.

And I am really interested in this coming Supreme Court term to see if there is any erosion in that because the court it’s going to be facing these cases that are really going to be forcing these conservative judges to be activists if they want the outcomes that they were nominated. You know, if they are going to take away the right to a partial birth abortion, then they’re going to have to overturn a precedent from just a few years ago. If they’re going to stop schools from using race as a factor in promoting diversity, then they’re going to have to say that these local school boards were doing the wrong thing.

So maybe I’m fooling myself that that will have any impact on us today because one sometimes feels like these terms were entrenched 20 or 25 years ago, and we’re kind of stuck. You know, Orrin Hatch is still saying the same thing and it’s never going to go away. But I do at least hold out some hope that this term the charges of kind of hypocrisy and inconsistency that a lot of us have been making for a long time may start to stick in some way.

MS. JOHNSEN: I think you’re being too optimistic. (Laughter.) These terms – you have ten minutes, you can explain the emptiness and hypocrisy, but they’re going to keep saying judicial activists; interpret, not make law. The only thing I think that is going to change it is a shift in political power. As long as they have Republican senators, who are up there asking every judicial nominee, “Are you going to interpret the law or are you going to make the law? Are you going to legislate from the bench?” Every nominee has to answer to those questions one way, and so there’re these empty phrases that the right, of course, knows what is being conveyed there. So I think the only way to turn it around is – I know this is a nonpartisan event, a nonpartisan organization, but you would need progressive senators who will call them on it in a very public way, and it’s not that tough to do.

But I think the recent Supreme Court confirmation hearings were tremendously disappointing. And we saw in the film clip after clip where they were able – the nominees – to get away with saying over and over again the same exact phrases, and nobody effectively called them on it. You know, they certainly are disciplined. The phrase “I have no quarrel with” must mean something very different than any of us think it means. So I think it all ultimately comes down to effective political action, and when we don’t have political power working through organizations like the Alliance for Justice and Center for American Progress.

MR. AGRAS: Well, before we open it up to the audience for their comments and questions, I’d like to just invite any of the panelists to expand on what both Nan and Dawn have said about what we do about this. If, for example, a nominee refuses to answer a perfectly clear question that doesn’t require him or her to reveal how a future case would be decided, or if an individual nominee says, you know, “I would respect

stare decisis,” and you know that that person is lying through his teeth, what do you do about it? Anybody? Any takers? (Laughter.)

MS. BAZELON: I mean, you have to change the whole norm, and I guess one way the start is to have – you know, if we’re lucky enough to have the next nominee or a next nominee be a Democratic nominee, to have a more forthright approach to answering those questions. The problem is that that sort of becomes a kind of thankless task, and that would be a risk that someone will have to take. And though recent Democratic nominees have not been willing to take that risk, and it’s perfectly understandable why they haven’t, so you know the really – that whole notion that the nominees can’t answer questions is a vastly overblown idea about judicial ethics and some hugely inflated idea of what judges can’t talk about pending cases. That doesn’t mean they can’t talk really about all these other things. But I think we’ve all to some – or many of us have bought into that norm to some degree, and it’s going to be really hard to shift it.

MR. RASKIN: I think I agree with some of what Emily said a moment ago, which was that it’s very hard to communicate a complex idea in the thick of battle, and then people fall back on these rhetorical formulations like legislating from the bench and interpret the law and so on.

I think a lot of these battles take place against the background of tremendous constitutional illiteracy and ignorance in the public, and so one of the things that I’ve been doing at AU and a bunch of other law schools have joined us now, is to get law students who have a surplus of constitutional consciousness and enthusiasm and commitment to go out into high schools and junior high schools and to teach people about the Bill of Rights, and we use cases that affect students directly. So locker searches, drug testing, censorship of student newspapers and yearbooks, and we’re able to educate thousands of kids a year about the Constitution to get them thinking about these things so they don’t fall for a lot of the, you know, stupid pet tricks like that.

But the other thing is – and here I just want to salute Nan and the Alliance, I mean, it’s really critical in the thick of these battles to have people who are willing to go out and to engage in rhetorical combat on the talk shows and so on, to fight back, because otherwise, especially where a lot of people don’t have the means of intellectual self defense, they just mow everybody down. And so you need people who are willing to stand and fight, and so that’s why it’s so good that the Alliance mobilizes law professors and students and lawyers to get involved, and I’ve certainly been called into service a several times to go down and to do a press conference to explain what just happened in a hearing, and why they’re pulling the wool over our eyes.

MS. ARON: May I?

MR. AGRAST: Oh, yes. Go ahead, Nan, and then we’d like to open it up.

MS. ARON: And Jamie does a great job doing it, too. One other thing I would say is that it’s – obviously we want our senators to be more focused, but we all in this

room know that the way to do that is for us to be more engaged for the constituents back home to be more involved. And we're hoping that as many people as possible see this movie and understand what's going on and then take that understanding, and when the Supreme Court, or even a court of appeals – if it issues a decision that's plainly wrong or plainly harmful, we have to act. We need to write letters to the editors, write op-eds, we have to write our friends, we have to put it on blogs; we cannot remain indifferent or passive to what these courts are doing. We've got to stand up and we've got to – whatever organization people are members of, get to those organizations, put it in our journals, our magazines, write articles, get the word out about what's going on.

And then secondly, if people are connect up with one of Alliance for Justice's new outreach mechanisms called Full Court Press; we let people know about some of these harmful decisions, and not just about the substance of harmful decisions, but who the judges were who wrote them. And we're looking to people throughout the country, who are serious, to write to the senators and to let them know they care about what judges are doing. Not simply notifying a senator to do this or that, but to say, "You know what? That decision affecting clean air in my state, that's caused great devastation. Please, next time you have a judicial nominee in front of you, think twice, ask that person about this decision, ask him what they would do."

So we're really putting I think the burden back on people to see this, talk about it, write about it, and then get the word out any way they possibly can about some of these decisions coming down.

MR. AGRAS: And, Nan, just to be clear, you're not advocating, as some on the right do, that people take judges to task for their decisions as such.

MS. ARON: Well, I think it's – even the ABA, and Mark's been a leader in the ABA is – certainly, it's fine to criticize a judge.

MR. AGRAS: Right.

MS. ARON: That's something that's well within our First Amendment freedoms, but clearly I don't think that's our goal really, to go after the judiciary. It's more to let people now what the judiciary is doing so that they will register views, they'll speak up, they'll write, they'll participate.

MR. AGRAS: With that, let me – I see a lot of questions in the audience. What I will ask is that when I recognize you, please wait until the microphone is brought to you because all of this is being recorded for rebroadcast. State your name, your affiliation, if you have one, and finally I'd ask, so that we have time for as many questions as possible, to please keep your question brief and to the point – questions rather than statements, if you please. And with that, let's begin.

Yeah?

Q: Nan – Joe Onek, Open Society Institute Constitution Project – Nan, you may have answered this, but I think I want to make you restate the point. In the Bork nomination I believe ten Republicans or more voted against Bork. I don't believe a single Republican voted against Alito or Roberts or even Janice Rogers Brown, and that includes blue state and purple state Republicans, and it seems to me that indicates that the passion on judges is on the other side, and not on our side. So first of all, why is that up to now, and in addition to the things you have just said, how do we ignite that passion so that it will be possible to have senators like that voting against nominees the way they did against Bork?

MS. ARON: Well, actually, I think we may have gotten Chafee. Didn't we – who voted in opposition to Alito? A lot of good that did, but I was glad to see it, and of course, well, that's water under the dam. (Laughter.) Yes, the passion has always been on the right, and that can be traced back to 1954 with *Brown v. Board of Education* where people around this country, but primarily in the South, started putting bumper stickers on their cars – impeach Earl Warren. And that decision fueled really a movement and then together in the '60s and '70s, aided and abetted by big business, Monsanto, Pfizer, tobacco companies, put together a real strong, effective movement. And this movie tells us what the results are, but clearly to the right wing of the Republican Party, the issue of judges is one that fuels their passions.

There's no other way to say it, whether it's abortion or gay rights or school prayer or even school integration, there is a ready-made army of activists willing to pressure whomever, whether it's the press, whether it's the Senate. There's really no better illustration of that than the nomination of Harriet Miers. She wasn't done in by George Bush or a few senators. She was taken on by this army of activists out there who weren't absolutely sure that she would do what they wanted her to do and, therefore, together they organized and caused Bush to withdraw her nomination.

Well, we've got to be that organized. Our passions have to be that fuelled. But before that happens, we've got to know what they're up to and what they're about, and this movie is one step in that direction. I'll just leave you with something else. A couple of weeks ago on C-SPAN radio, there was a discussion between Lyndon Baines Johnson and his then Attorney General Nick Katzenbach, and Katzenbach walks into LBJ's office, and says, "Mr. President, there's a vacancy on the Supreme Court. Harlan is stepping down." And guess what Lyndon Baines Johnson's first question is? The first question is: "Well, who is on the Supreme Court now?" (Laughter.) Well, we can't let that happen. The base of the Democratic Party has to know these answers, has to know what this agenda is about, and most importantly has to be willing to speak out.

MR. AGRAS: Next question. Yes, sir?

Q: Thank you. I have a question about the –

MR. AGRAS: Can you state your name and affiliation?

Q: Oh, sorry. My name is Todd Wiggins and I'm employed, but I don't really have any affiliation – (laughter) – as far as this is concerned. I wanted to ask a question about your group as how you sort of were assembled, and do you have some relationship in your ideology or do you sometimes find that you have a difference of approach to some of these issues amongst yourselves? Because obviously it seems like we have a society – a political society seems to be Republican or Democrat, and the pendulum swings back and forth. Do you sometimes have differences in opinion as to how solutions can come about based on your own differing backgrounds and ideologies?

MR. AGRAS: Well, before I invite answers to that question, I also want to make very clear that the Center for American Progress is neither Republican nor Democratic. It is a nonpartisan organization. We do not endorse candidates, et cetera, et cetera. And with that, does anybody like to respond?

MR. RASKIN: Well, let me say, my two favorite justices in the Supreme Court are Republican appointees: Souter, who was appointed by Bush's dad, and Stevens, who was appointed by Ford. And so I think what we've experienced is a transformation in the Republican Party, which is why we're getting the kind of lockstep march towards the most right-wing appointees at every level, not just the Supreme Court, but at the circuit court and district court levels, and there are a lot of Democratic appointees who are great, and a lot that I don't like so much.

And so I think that when we're talking about the courts, we should be looking at what are the substantive values that judges and justices are actually protecting. And the reason why I prefer to see these people as counterrevolutionaries or right-wing lunatics is that, you know, we've had a transformation in our Constitution with the 14th Amendment, with the First Amendment. These Amendments have come alive in the 20th century with the decisions of the Supreme Court and the (white?) primary cases, and *Brown v. Board of Education*, and there has been a steady march.

Now, in the Rehnquist period, the march stopped in a lot of areas, but the right wing has not succeeded in overthrowing the basic framework of values that were put into place during the Warren court period. That's what they're targeting here. They want a much narrower interpretation of what the Commerce clause allows Congress to do. They want a much – you know, they want to read the Equal Protection Clause out of the Constitution except as it might benefit white man challenging affirmative action. And so they just have a different vision of what the Constitution is, and I think we've got to stand with the legacy of the New Deal and the Great Society and the Civil Rights Act and the Voting Rights Act and the great equal protection and First Amendment decisions of the last five decades.

MS. JOHNSEN: If I could just add to that, I completely agree with Jamie that we need to approach this not as a partisan issue, but as one of substantive values that we believe the court should uphold. And that list you just articulated is absolutely right, and the problem is the Republican Party has retreated from protecting those fundamental values, but it's not – for those of us who are progressive, liberal, whatever we like to call

ourselves, moderate even, and don't want this radical transformation, if we can continue to work within both political parties, which we need to do, that is certainly the way to be most effective.

MS. BAZELON: And it's important to remember that it wouldn't be a stealth revolution if the majority of Americans clearly embraced this. This really is a minority viewpoint, even though it doesn't always feel that way.

MR. AGRAS: That seems to have triggered a lot of questions. Yes, sir, in the middle there. Yes?

Q: Thank you. My name Chester Hartman, I'm from PRRAC, the Poverty and Race Research Action Council. How does this recent move to remove the courts from any role – passing legislation by Congress that says the courts can't do anything – how does that – what's that all about, and how does that fit in with the notion of a quiet revolution?

MS. JOHNSEN: Well, I mentioned that in this "Constitution Year 2000," one of the goals was to take the courts out of the picture so that the president would have unchecked authority in the area of foreign affairs and national security. So that's been a goal of the radical right for a long time. And I think one of the scariest developments of recent years has been Congress's recent willingness in the Military Commissions Act to go along with that and take away the protections of habeas from people who are detained by the president.

You know, when I teach constitutional law the first years, I always – since I've been teaching in '98 – used as my first example of fundamental checks and balances in our constitutional structure the fact that no individual may be deprived of their liberty without the cooperation of all three branches of government. They all have to play a role, and so that most fundamental of protections now Congress has taken away from currently non-American citizens, even those who are here legally in the United States. If the president declares them to be an enemy combatant, they have no ability to go to court to challenge that, and that I think is of everything that's happened in recent years the most frightening development to me because it's an attack on the fundamental structure of our constitutional government and the checks and balances that protect all of us.

MS. BAZELON: The more you think about what happening to the courts structurally is, you know, this is the frustration of the right wing: that the judiciary isn't entirely under its control, and that even when you have a Supreme Court that is majority Republican nominees and appointees, you still don't get the decisions you exactly want because what the Bush administration has been after in these areas of habeas and detention are so extreme. So I think that's what we're seeing: you try and take over the judiciary, but then you also express your frustration when the judges – you know, they're independent, they have tenure. It often seems to happen that once they're in these positions, they don't go along with the most radical steps that are being asked of them, and so then you just eliminate them.

MR. AGRAS: Mm-hmm.

MR. RASKIN: Let me just echo that point. When they think they're going to win, they'll get it before the court, like partial birth abortion or race in elementary school assignments. And when they're not sure, they'll try to take it away from the courts entirely. So the school prayer, for example, they feel like there's no way of turning the clock back far enough on school prayer, so they would just assume yank jurisdiction from the courts entirely. You know, and this is the court, remember, that chose George Bush in 2000, and even that's not right wing enough for where they want to go, so for them it is a political agenda and they can use the courts when they think it's going to work and when not, they'll try to take the courts out of the equation.

MR. AGRAS: Well, in fact the House of Representatives this term passed legislation that would strip the courts of the ability to determine whether the pledge of allegiance is or is not constitutional, so – oh, right here.

Q: Hi, Sharon Franklin with the Constitution Project. Is your – for all the panelists – main critique with the judges' strategy the hypocrisy here, so that if progressive candidates, presumably Democrats, but if progressive candidates should take over the White House and the Senate again, that they should really follow the same strategy of putting in judges who would have a proper interpretation and just being open about it?

MS. JOHNSON: Yeah, I think that's right. The other thing we haven't talked about very much is that in the meantime, before we achieve that kind of political power, we need to be working on developing what it is we think the vision of the country should be. We need our own well developed, progressive vision of the whole range of constitutional issues. We have much of that work done, and I think a lot of the building blocks are there, but I do think we have more work to do through organizations like – Nan's has been working on this for decades. When I was at NARAL back in the '80s, we worked together on some of these issues. But I think now in the 21st century, now we have the Center for American Progress, American Constitution Society, other organizations, more money I think coming in, so that we are thinking about these issues in a more deliberate way. And you have to be prepared for political power, with the ideas and the conservatives have, I think, had a leg up on us for the last several decades on that score.

MS. ARON: I would just say, quite frankly, when you look at the judiciary now, you see the very fact that Anthony Kennedy is a swing vote certainly tells you a lot about the shift of the center of gravity on that court. When you look at the courts of appeal, the fact that 10 out of 13 are now dominated by judges appointed by presidents with litmus tests tells you that if there is a Democrat in the White House, we do need to reassert balance and we've got to be very clear about that, straightforward. That's got to be a goal of the next administration, and we shouldn't shy away from saying we have got to

reassert balance not just on the Supreme Court, but on the lower courts as well. And that's got to be a priority for all of us.

MR. RASKIN: It seems to me when Republicans get in, they appoint the people they want; when we get in, like with Clinton, we do it tit for tat. Well, we'll give you one, right? And so I don't really understand the arithmetic.

MS. BAZELON: Or we don't get anybody in at all. (Laughter.)

MR. RASKIN: Or we don't get anybody in at all. But, you know, on the point about constitutional vision, I do think we need to enlarge our constitutional vision here. I think that one way to get out of the trap of them saying, "Well, the liberals just want to paste their policy agenda on the Constitution," which is precisely what they're doing – is to say, "You know what? We've changed the Constitution many times in our history and it's been almost always the progressives who have done it, like during the Reconstruction period, like the 17th Amendment guaranteeing direct election of U.S. senators, like the 23rd Amendment which gave the people here in D.C. the right to participate in presidential elections, or the 24th Amendment abolishing poll taxes, or the 26th Amendment extending the right to vote to 18 year-olds."

We should not be constitutional fraidycats. We should not be the one – I mean, the right wing will always say we need a constitutional amendment to get prayer back into schools, to ban abortion, to balance the – actually, they don't talk about balancing the budget anymore – (laughter) – but they will put forward a positive constitutional agenda; we need to put forward a positive constitutional agenda. We should never take the position that the Constitution is a complete document. It's always an unfinished draft, but in the way that we amend it is when there are serious gaping holes.

For example, it's become clear over the last several elections we don't have a constitutional right to vote and the problems with that filters all the way down to what takes place in your precincts – you know, that we should be talking about the constitutional Amendments we need. Jesse Jackson, Jr. has a proposed constitutional amendment on the right to vote and he's talked about a proposed constitutional amendment on the right to education and equally funded education. That should be part of what our constitutional vision is.

Q: Rochelle Bobroff. I'm with the National Senior Citizens Law Center. I want to applaud the film and all that it covered. One thing that I was waiting for and didn't see, so I just want to ask a question as to whether you would agree as part of what's going on here is the class and poverty issues of the – all of the statutes that have given people the safety nets statutes and how they are being attacked, and *Maine vs. Tibitoe* (ph) has been threatened by Gonzaga, which is trying to chip away at the right of the people to get into court. So I was looking for that and didn't see it, and so just raise that as a question.

MS. ARON: That'll be in the sequel. (Laughter.) But you're right.

(Cross talk.)

MR. RASKIN: And you've done that before –

MS. ARON: (Just as important, too?).

Q: Yes.

MR. RASKIN: – the right to just, access to justice.

MS. ARON: Right.

MR. ARGAST: Last question, way in the back.

Q: My question is largely for Emily, since you're a member of the press, but I'm eager to hear everyone's responses if you have one. And that's – in the last three, four years or so, I noticed two distinct assaults on the Constitution that I want to highlight. One is the Federal Marriage Amendment, which got all kinds of press. And the other was – about the same time that debate was going on for the first time, the Supreme Court handed out a decision called *Gonzales v. Raich*, where Justice Thomas wrote that the New Deal, the Civil Rights Act of 1964, and much of the laws that we cherish are unconstitutional.

Now, I think it's interesting that when a small part of the 14th Amendment tried to be carved away by the Congress, that got all kinds of ink, but when the entire foundation of our equal protection jurisprudence and our Commerce Clause jurisprudence tried to be carved away by a Supreme Court justice, very little ink was spilt. And my question is, how do we get the press to spill the same amount of ink on judicial assaults on the Constitution, as they do on acts of the legislature?

MR. AGRAST: And before she answers, just identify yourself, please.

Q: I'm sorry. I'm Ian Millhiser with the American Constitution Society.

MR. AGRAST: Thank you.

MS. BAZELON: So you're certainly right about the lopsidedness of the coverage of those developments. To whatever degree there was a difference in ink spilled, there was even a greater difference in television coverage, I'm sure, if you looked at it. And, you know, I think the reasons for that are not surprising and kind of depressing, which is just that it's very easy to explain what it is to try and prevent gay marriage. People understand that in one sentence. Whereas the issues about Section 5 of the Equal Rights Amendment that were at issue in *Raich* are more complicated; you have to explain some law.

I mean, I feel like I deal with this a lot and I worry about making the things I write as accessible as possible, but also not making them totally simpleminded. And there are people who are – you know, writers, people in the press who really do understand these issues and who try to do that, but you can only take it so far yourself, and the editors who are making decisions about how to place things, the people certainly on television about how to cover things, they want things they can understand quickly. I mean, that's – you know, we're seeing this with this scandal about Congressman Foley. I mean, it's all useful in terms of the election, but is it exactly what we want to hang the Republican Congress on substantively? No. I mean, is this why Denny Hastert should go? There are a lot of other reasons. (Laughter.)

So, you know, what to do about that? I think Jamie was talking earlier about sending law students to educate high school students and those are the kinds of initiatives that we all have to applaud and take seriously, and it can feel frustrating because it's a little bit at a time and it's not a kind of magic solution. But on the other hand the press – I mean, I know this always seems like a bit of an excuse – but the press really does reflect what we think, the appetite of people reading and viewing us are, and so to the extent that you really want lots and lots of coverage of more technical and tricky legal issues, there has to be a public who's willing to absorb those the same way they are happy to read lots of instant messages from Congressman Foley. (Laughter.)

MR. AGRAST: Well, that's an odd note, perhaps, to end on, but I certainly want to thank the panelists for giving us an excellent discussion. We thank Alliance for Justice for producing a remarkable film. Before we close, a few other words of thanks to Anna Soellner and Paige Fitzgerald of our events team, to Alex Pryor, Tyler Hall, and Mario Sanchez, our facility staff; to our domestic policy assistant, Abby Witt; and my own terrific assistant Sam Berger, and to Kellye McIntosh and the wonderful team at the Alliance for Justice.

Finally, please note that a complete video and transcript of this program will be available on our website at www.americanprogress.org. Thank you for being with us. Please join me now in thanking our panelists.

(Applause.)

(END)