

## IDEOLOGY MATTERS:

### A Progressive View of the Judicial Confirmation Process

*Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.*

—ALEXIS DE TOCQUEVILLE<sup>1</sup>

Over the next four years, President Bush will almost certainly have the opportunity to nominate one or more justices to the Supreme Court of the United States and a substantial number of additional judges to the lower federal courts.<sup>2</sup> His choices will have a profound influence on the course of American society for decades to come.

As the ultimate interpreters of the Constitution, the federal courts play a central role in such sharply contested issues as abortion, voting rights, property rights, environmental protection, privacy, religious expression, the death penalty, the rights of criminal defendants and the financing of political campaigns. These issues will continue to dominate the courts' agenda in the coming years.

The judges who decide these questions should have the character, training, life experience, and breadth of understanding to appreciate the meaning and significance of the cases that come before them, both for the litigants and for society, and to make difficult choices among competing legal principles and social goods. Their decisions will also invariably reflect what is commonly referred to as their “ideology”—their beliefs about the Constitution and the role of the courts in interpreting it; their substantive views on the law; and the philosophical ideas and attitudes that inform their worldview. It is for this reason that it is important for the Senate to evaluate carefully the ideology of all judicial nominees to ensure that only individuals who operate within the constitutional mainstream and are committed to the protection of

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The importance of ideology in judicial decisionmaking is apparent from an examination of the line of decisions in which the courts have construed the scope of congressional power to enact national policies to protect civil rights and safeguard the citizenry against such threats as those posed by terrorism, lawlessness, and corporate irresponsibility. For the past quarter century, that authority has been under assault. The Supreme Court and the lower federal courts have become increasingly dominated by ultraconservative and “activist” judges who, far from deferring to the political branches, as they claim to do, have taken a restrictive view of Congress’s powers to regulate under the Commerce Clause<sup>3</sup> and to enforce the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In a series of 5-4 decisions, the Rehnquist Court has struck down more laws than any court in modern history, invalidating statutes that: prohibited the carrying of guns near school grounds;<sup>4</sup> required local police officers to carry out criminal background checks on gun purchasers;<sup>5</sup> permitted state employees to chal-

lenge discrimination based on age<sup>6</sup> and disability;<sup>7</sup> and permitted victims of sexual assault to sue their attackers.<sup>8</sup> Nor has the Court hesitated to strike down measures embraced by conservatives as well as progressives, such as the Religious Freedom Restoration Act, which mandated strict review of governmental actions that burden religious exercise.<sup>9</sup>

In light of these cases, it is surprising to hear it argued on the right that judges should simply “apply the law” and not second-guess the legislature; that ideology does not determine how judges decide particular cases, and therefore ideological considerations should play no role in the judicial selection process. Although many cases are decided on established law and precedent, it is clear that in many important and closely contested cases, a judge’s ideology plays a significant and often decisive role.

Thirty-four percent of the cases reported by the Supreme Court last term were decided by a 5-4 or 6-3 margin, and most of these decisions divided along recognizably conservative/progressive lines.<sup>10</sup> While not all Republican appointees have proven as reliably right-wing as progressives feared—or as the presidents who selected them might have wished—the rightward shift in the composition of the federal bench has resulted in a lack of balance and an increasingly narrow range of viewpoints.

Having done so much to accelerate this shift during his first administration, President Bush shows little inclination to correct it during his second. It is therefore essential that senators vigorously exercise their constitutional authority to give or withhold their “Advice and Consent”<sup>11</sup> to judicial nominations. They should carefully evaluate the fitness of the president’s nominees, confirming only those who recognize that the meaning of the Constitution has continued to evolve to meet the needs of a changing society, are committed to protecting fundamental

constitutional rights, and will consider each case with an open mind. Senators should object strenuously to any nominee whose views on the Constitution and the judicial function are antagonistic to due process, the right to privacy, and equal protection of the laws. And they should oppose those whose ideology is inimical to congressional efforts to defend these fundamental rights and promote a more just, equitable and inclusive society.<sup>12</sup>

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Most Americans would likely agree that presidents should nominate and the Senate should confirm individuals whose views on such matters can be located within the “constitutional mainstream.” It is unlikely, however, that many people who endorse this view have a clear idea of how the mainstream should be defined. One working definition can be derived from a celebrated opinion written by Justice John Marshall Harlan, who was appointed to the Court by President Eisenhower in 1955. Writing about the scope of the Due Process Clause of the Fourteenth Amendment, Harlan articulated an approach to constitutional interpretation that construes fundamental liberties, not in a narrow and literal fashion, but as part of a continuum that is greater than the sum of its parts:

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>13</sup>

That statement has become the touchstone for a long line of substantive due process cases in which the Supreme Court has recognized a protected liberty interest under the Fourteenth Amendment in personal decisions relating to marriage,<sup>14</sup> procreation,<sup>15</sup> and intimate personal relationships.<sup>16</sup> As the Court has affirmed, “Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.”<sup>17</sup>

It is that approach to constitutional interpretation that remains under sharp attack from ultra-conservative judges who couch their antagonism to fundamental rights as “strict constructionism.” Those claiming to be strict constructionists refuse to acknowledge constitutional rights that are not explicitly stated within the language of the Constitution itself. Thus, Justice Scalia has written in regard to reproductive choice:

The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.<sup>18</sup>

While such restrictive theories of constitutional interpretation are favored in extreme right-wing circles, it is for the Senate to determine whether they fall within the “mainstream” or not. Before confirming nominees who share such views, senators should consider the implications for many “liberty interests” that today are taken for granted. For example, Justice Scalia’s reasoning would have left in place state laws barring interracial marriage that were held unconstitutional in 1967.<sup>19</sup>

As indicated above, similar doctrinal divisions can be found on such fundamental questions as the power of Congress to enact legislation under the Commerce Clause and section 5 of the Fourteenth Amendment. Such questions serve to illustrate that judicial ideology is neither an abstraction nor an irrelevancy: it lies at the core of the judicial function.

Presidents have always understood this, and have examined with care the ideology of their prospective nominees. The Senate must do so with equal diligence to ensure that judicial nominees bring to the bench not only sterling professional qualifications but also a judicial philosophy that is protective of fundamental rights and the legislation needed to effectuate them.

## CURRENT STATE OF PLAY

Looking at the composition of the Supreme Court in 1985, Professor Laurence Tribe observed, “Almost inevitably, a bench filled with older Justices leads to a spate of appointments that can radically reshape the Court.”<sup>20</sup> His prediction came true, with six of the nine justices leaving the Court between 1986 and 1994.

Since then, despite annual forecasts of retirements from the Court, not a single vacancy has occurred.<sup>21</sup> But with two justices in their eighties, including an ailing Chief Justice, and all but two over the age of 65, it is virtually certain that President Bush will have the opportunity to make at least one and perhaps several appointments to the Court. He will also name a substantial number of additional judges to the lower federal courts.<sup>22</sup>

The 13 federal courts of appeals generate thousands of decisions each year that represent the last word within their circuits in the overwhelming majority of cases that never reach the Supreme Court. These courts also play a powerful role in determining what Supreme Court rulings mean as they apply them to subsequent cases. In addition, it is increasingly from the ranks of the courts of appeals that nominees to the high court are chosen.

Of the 179 judgeships on the federal courts of appeals, 99 (59 percent) were filled by Republican presidents and only 68 (41 percent) were filled by Democratic presidents (the remaining 12 judgeships being vacant as of this writing).<sup>23</sup> Ten of the 13 circuit courts now have Republican-appointed majorities while only two (the Second Circuit and the Ninth Circuit) have a majority of active judges appointed by Democratic presidents (the remaining court, the Third Circuit, is evenly divided).<sup>24</sup>

## Ideology and Judicial Selection

In 1795, after months of fierce debate, the Senate rejected President Washington's nomination of former Supreme Court Justice John Rutledge to be Chief Justice of the United States. Rutledge was a distinguished jurist who was clearly well-qualified for the post, but his nomination was defeated over his opposition to the Jay Treaty with Great Britain. From that day forward, the history of the republic is replete with confirmation battles in which a nominee's views on political and doctrinal matters played a decisive role. As Professor Erwin Chemerinsky has stated, "Those who contend that ideology should play no role in judicial selection are arguing for a radical change from how the process has worked from the earliest days of the nation. Never has the selection or confirmation process focused solely on whether the candidate has sufficient professional credentials."<sup>25</sup>

In fact, while it has become fashionable on the far right to suggest otherwise,<sup>26</sup> presidents have always taken ideology into account in making nominations to the federal courts, and the Senate has always reserved the right to withhold its consent on the same basis. They have done so because they understand that judges' ideological views are a major factor in how they make decisions.<sup>27</sup>

While there are some well-known examples of judges whose behavior on the bench surprised the presidents who appointed them (Eisenhower, for example, famously remarked that he had made two mistakes in his presidency, both of which were sitting on the Supreme Court), recent studies show that "the political party of the appointing president is a fairly good predictor of how individual judges will vote" in ideologically contested cases.<sup>28</sup>

In a study published in March 2004, Professor Cass Sunstein and two of his colleagues examined 4,958 decisions by three-judge panels and the 14,874 associated votes by individual appellate judges in such areas as abortion, capital punishment, criminal appeals, property rights, affirmative action, race and sex discrimination, campaign finance reform, the scope of congressional power under the Commerce Clause, and "federalism" challenges to federal laws and regulations. They found that "Republican appointees vote very differently from Democratic appointees,"<sup>29</sup> with Democratic appointees issuing a "liberal" vote 51 percent of the time and Republicans doing so 38 percent of the time. The authors conclude that while ideology was hardly the only factor in these cases, "the litigant's chances . . . are significantly affected by the luck of the draw."<sup>30</sup>

The conclusions of the Sunstein study are supported by a new report by the nonpartisan Environmental Law Institute. The report examined 325 judicial rulings in cases brought under the National Environmental Policy Act (NEPA) and found a dramatic correlation between the outcome of NEPA cases and the party affiliation of the president who appointed the judge. Federal judges appointed by Democratic presidents are several times as likely to rule in favor

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of plaintiffs who sue the government claiming violations of environmental laws. On the district court level, Democratic appointees ruled for environmental plaintiffs nearly 50 percent of the time, while Republican appointees did so only 28 percent of the time. Judges appointed by the current president were even less sympathetic to environmental plaintiffs, voting with them just 17 percent of the time. In suits brought by industry or pro-development interests the results were reversed: Republican appointees ruled for the plaintiffs nearly 60 percent of the time while Democratic appointees did so just 14 percent of the time. On the

appellate level, Democratic-majority panels favored environmental plaintiffs 58 percent of the time, but Republican-majority panels did so just 10 percent of the time.<sup>31</sup>

### The Right-Wing Judicial Revolution

For the past quarter century, the far right has engaged in a concerted and methodical campaign to populate the judiciary with individuals who are ideologically committed to constitutional doctrines that constrain the ability of Congress to pass laws that further the national interest and limit the power of the courts to create remedies that protect fundamental rights. The 1980 Republican Party platform included the following declaration:

We pledge . . . the appointment of women and men . . . whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens, and is consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials. We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.<sup>32</sup>

Once in office, the Reagan administration set about implementing that pledge. According to U.S. Court of Appeals Judge Stephanie K. Seymour, Attorney General Edwin Meese hired a special assistant whose “sole and specific purpose was investigating the judicial philosophies of prospective nominees. While the administration insisted it was not quizzing candidates on how they would rule in specific cases, several nominees, especially women, claimed they were asked how they would rule in potential cases concerning abortion.”<sup>33</sup>

In 1988, the Justice Department’s Office of Legal Policy set about the task of formalizing its views on constitutional interpretation for the benefit of the incoming Bush administration. It issued two reports, remarkable for their boldness and candor, which challenged and sought to overturn a large body of established precedent that the Reagan administration regarded as “inconsistent” with those views.<sup>34</sup> The first of these documents, *Guidelines on Constitutional Litigation* (the “*Guidelines*”), took an exceedingly narrow view of congressional power under the Commerce Clause and the Fourteenth Amendment and called into question a host of settled precedents, including cases sustaining congressional power to regulate interstate commerce,<sup>35</sup> protecting the right to counsel for the accused,<sup>36</sup> and affirming the fundamental right to privacy.<sup>37</sup> The *Guidelines* did not merely challenge these precedents but sought to overturn them, departing from longtime departmental practice by directing government lawyers not to defend statutes that were inconsistent with the views of the administration.<sup>38</sup>

In the second document, a report to the attorney general entitled *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, the department turned its attention from strategies aimed at persuading the courts to adopt its views to strategies aimed at peopling the courts with appointees who would share those views.<sup>39</sup> This report was presented as a guide to the administration's views on a series of major constitutional controversies "the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court."<sup>40</sup> Far from urging that judicial philosophy has no relevance to the consideration of judicial nominations, the authors expressed their hope that the report "will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible."<sup>41</sup>

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President Reagan lost little time in selecting judges who could be relied upon to put into action the positions presented in the 1988 *Guidelines*. Among those whom he nominated that year was D. Brooks Smith, a state court judge whom he named to the federal district court for the Western District of Pennsylvania. Once ensconced on the court, Judge Smith gave a speech to the Federalist Society in which he outlined his exceedingly narrow view of congressional power under the Commerce Clause, stating, "The Framers' primary, if not sole, reason for giving Congress authority over interstate commerce was to permit the national government to eliminate trade barriers."<sup>42</sup> Judge Smith also argued that the Violence Against Women Act was unconstitutional, saying, "Notwithstanding whatever 'findings' Congress can muster regarding the alleged effects of domestic violence on interstate commerce, promiscuous invocation of the Commerce Clause should be avoided."<sup>43</sup> President George W. Bush evidently did not consider these positions too far "out of the mainstream;" in 2002, he elevated Judge Smith to the Court of Appeals for the Third Circuit.<sup>44</sup>

Early in the second Bush administration, a Republican counsel to the Senate Judiciary Committee published a candid account of the explicit ideological criteria employed by the Reagan administration to determine whether a judicial candidate would adhere to a consistent right-wing philosophy and advised the incoming administration to emulate this approach. The author quoted verbatim a memorandum by Reagan's Office of Legal Counsel which listed the attributes of an "ideal" Supreme Court candidate:

- (1) awareness of the importance of strict justiciability and procedural requirements; (2) refusal to create new constitutional rights for the individual; (3) deference to states in their spheres; (4) appropriate deference to agencies; (5) commitment to strict principles of 'nondiscrimination'; (6) disposition towards 'less government rather than more'; (7) recognition that the federal government is one of enumerated powers; (8) appreciation for the role of the free market in our society; (9) respect for traditional values; (10) legal competence; and (11) strong leadership on the court/young and vigorous.<sup>45</sup>

The approach to judicial nominations initiated by the Reagan Justice Department was continued under the first President Bush, whose White House counsel, C. Boyden Gray, acknowl-

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edged that the goal of the Bush nominations was to “shift the courts in a more conservative direction.”<sup>46</sup>

As a result of their adoption of such explicit criteria, successive Republican administrations have made considerable headway in their efforts to remake the courts.<sup>47</sup> Thus, as noted above, the Rehnquist Court has struck down in the name of state sovereignty more laws than any court in modern memory, invalidating with the narrowest of majorities a series of progressive measures that provided remedies for a broad range of national problems, from religious freedom to age discrimination to gender-based violence to the purchase

of firearms by individuals with criminal records. While the right-wing justices have not been able to consolidate these gains completely, they are within one or two votes of doing so.<sup>48</sup>

## THE PROPER ROLE OF IDEOLOGY IN THE CONFIRMATION PROCESS

It is not only appropriate but necessary for both the president and the Senate to consider the myriad factors that may affect a nominee's discharge of her duties. It is proper for them to consider whether she has a genuinely open mind and whether her views will add an important perspective to the bench. It is proper for them to inquire into her beliefs about the Constitution and the role of the courts in interpreting it; her substantive views on the law and leading cases; and the philosophical ideas and attitudes that inform her view of the world. And it is proper for them to consider whether those views are sufficiently within the mainstream of legal and constitutional thought to enable her to uphold the rule of law and faithfully defend the Constitution as her oath of office requires.

It is also appropriate for the president and the Senate to consider the effect of a prospective appointment on the overall composition of the court on which the vacancy is to be filled to determine whether the nomination will preserve or enhance the ideological breadth of the court. Such considerations have particular salience when—as in the present period—ideological considerations have resulted in a conspicuous lack of balance and diversity of viewpoint in the federal courts.

It is partly for this reason that Senator Charles E. Schumer has argued that the role of ideology in the selection process should be frankly acknowledged and given “more open and rational consideration” in the course of Senate review of judicial nominees.<sup>49</sup> Schumer suggests that the failure to do this has degraded the confirmation process by causing those who oppose a nominee on ideological grounds “to seek out non-ideological disqualifying factors, like small financial improprieties from long ago, to justify their opposition.”<sup>50</sup>

Taking ideology into account does not require senators to seek pre-commitments or “litmus tests” as to how the candidate would resolve a given case or reach a particular result, nor should they do so.<sup>51</sup> Similarly, nominees should not be asked to predict how they might rule on an issue in the abstract without knowing the facts and circumstances in which it might arise.<sup>52</sup> Provided that they are careful to avoid such excesses, the members of the Senate are not only

entitled to consider ideology as the president has done, they have a responsibility to do so. The judicial nomination and confirmation process has been described as “a means by which the people influence the development of constitutional law through their choice of Presidents and senators.”<sup>53</sup> That can take place only if the Senate is a full partner in the process.

## PROGRESSIVE RECOMMENDATIONS

1. *The president should nominate, and the Senate should confirm, individuals of the highest qualifications and integrity who recognize that the meaning of the Constitution has continued to evolve to meet the needs of a changing society and who will interpret the Constitution to preserve and promote the ability of Congress and the courts to protect fundamental rights.*

Federal judicial appointees should be individuals of the highest professional distinction, character, and integrity, who will bring energy, openness and intellectual curiosity to the bench. The Senate should conduct a careful inquiry into the views of nominees to ensure that they see the Constitution not as a static document frozen in time, but as an organic document that has continued to respond to the challenges and complexities of modern life; that they will interpret the Constitution so as to preserve the ability of the courts to safeguard fundamental rights; and that they are not ideologically committed to constitutional or interpretive doctrines that would cause them unduly to constrain the ability of Congress to pass laws in furtherance of the national interest.

It is to be hoped that the president will select nominees who meet these standards. If instead he selects nominees with extreme views who are outside the constitutional mainstream, senators must be willing to use their political capital, and to employ all legitimate means consistent with their Advice and Consent power, to see that such nominees are rejected.

2. *The president, in consultation with the Senate, should seek nominees who will enhance the racial and ethnic diversity of the federal courts; who will expand the professional and intellectual breadth of the bench; who have been engaged in their profession and their community and enjoy the support of their peers; and who have demonstrated the intellectual and personal strengths that will enable them to become leaders of the courts on which they serve.*

A judge’s philosophy and worldview are informed by the totality of her experiences. The president, in consultation with the Senate, should look for nominees whose life experiences have broadened their minds by exposing them to diverse ways of thinking and being, and whose varied socioeconomic and professional backgrounds may offer them opportunities to educate and influence their fellow judges.

Efforts should be made to identify nominees with expertise in areas of the law that are likely to form a significant portion of their docket, and to ensure that the judges in each jurisdiction

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encompass a broad cross-section of the legal profession: prosecutors and public defenders; corporate counsel and plaintiff's attorneys; lawyers from large firms and solo practitioners; public interest lawyers and academics.

Particular attention should be given to increasing the demographic diversity of the bench by identifying and advancing women and people of color who have distinguished themselves within the legal profession. The president should take aggressive steps to ensure that the racial and ethnic composition of the courts more closely approximates that of the geographic jurisdictions they serve.

Attention should also be given to identifying nominees who have affirmed their commitment to improving the justice system, demonstrated their engagement with the needs of their communities, and earned the respect of their peers by assuming leadership roles in bar associations, charitable institutions, and other professional and civic enterprises.

Finally, the president and the Senate should look for intellectually vigorous and energetic nominees who demonstrate the curiosity, industry, collegiality and independence to become

leaders of the courts on which they serve and who may be expected to serve long enough to have an impact on the law.

3. *The president and the Senate should develop an orderly process that fosters broad consultation and input on prospective nominees.*

Pursuant to the Constitution, the president and the Senate are charged with significant responsibilities with respect to the selection, nomination, and confirmation of judges to the federal bench. Therefore, the president and the Senate should work together to develop an orderly process for vetting prospective nominees to the Supreme Court, the federal courts of appeals, and the federal district courts that is respectful of the constitutional role and prerogatives of each branch of government.

*Seek cooperation and consultation.* The president should meet with the bipartisan leadership of the Senate Judiciary Committee to signal his readiness to seek the advice of the Senate on judicial nominations and to work cooperatively with committee leaders to fill vacancies on the federal courts in a timely fashion. He should encourage senators who do not employ a bipartisan commission process in developing district court recommendations to consider doing so. And he should designate senior members of his administration with strong relationships with key senators and Senate staff on both sides of the aisle to serve as ongoing points of contact in the selection process.

*Restore independent review.* The Senate Judiciary Committee should reinstate a longstanding practice that dates from the Eisenhower administration: the confidential prescreening of

prospective nominees by the American Bar Association's Standing Committee on the Federal Judiciary. This will not only help ensure that nominees meet a threshold standard of integrity, professional competence and judicial temperament, but will avoid embarrassment to them and to the White House by enabling the names of prospective nominees who do not meet this standard to be withdrawn before they become public.

*Seek timely notice of vacancies and provide the Senate with an adequate opportunity to conduct a thorough and searching review.* The president should ask the chief justice of the United States, as presiding officer of the Judicial Conference, to urge all judges planning to retire or take senior status to give early notice to the president so he can move quickly to fill vacancies. He should consult widely with members of the Senate, other elected officials, and members of the bar in the effort to identify the most qualified nominees. Once he has decided to submit a nomination, he should give timely notice to the chairman and ranking member of the Judiciary Committee so that they can undertake a thorough review. He should provide timely access to dossiers, background checks, questionnaire responses, and such other documents concerning the nomination as they may request, subject to any procedures that may be necessary to protect sensitive information from unauthorized disclosure.

4. *Members of the Senate must be willing to exercise their constitutional prerogatives.*

In assigning shared responsibility for judicial appointments to the president and the Senate, the Framers contemplated that Advice and Consent would act as an effective check on the Executive Branch.<sup>54</sup> If they are to fulfill that constitutional role, senators must insist on full consultation and timely access to information pertaining to the president's judicial nominees. Should the president fail to consult or refuse to provide such information, or should senators determine after review that a nominee should not be confirmed, they are entitled to exercise the means afforded them under the rules of the Senate to ensure that their concerns are heard. As Senate historian Robert A. Caro has noted,

The writings of the framers of the Constitution make clear that Senators, whether acting alone or in concert with like-minded colleagues, are entitled to use whatever means the Senate rules provide to vigorously contest a President's assertion of authority with which they strongly disagree. One could say, in fact, that under the fundamental concept of the Senate as envisioned by the founding fathers, it is not merely the right, but the duty of Senators to do that.<sup>55</sup>

Where necessary, those means include the filibuster, one of a number of time-honored devices by which the Senate ensures respect for minority views. For more than a century, the Senate required unanimous agreement to end debate.<sup>56</sup> In its modern form, the filibuster enables the minority to extend debate until 60 senators agree to invoke cloture. The filibuster has been employed on numerous occasions by both conservatives and progressives to extend debate on judicial nominees. But it is the threat of a filibuster, rather than its actual use, that is perhaps the most potent weapon for encouraging the president to seek accommodation with the Senate on nominees whom senators will be willing to confirm.

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After Democrats employed the filibuster to block a number of nominations by President Bush, the Senate majority leader threatened to seek changes to the rules that would eliminate or modify the use of the device in regard to judicial nominations. Such changes would have serious consequences for an institution that has functioned since its inception under such customs and traditions as senatorial courtesy and unanimous consent. Indeed, such is the Senate's regard for minority rights that in over 200 years, no rule has ever been adopted to allow a simple majority to cut off debate. Were the Senate to adopt such a measure now, it would encourage the president to select more extreme nominees and would surrender much of its ability to provide a counterweight to presidential power with respect to the appointment process. Such a profound shift should not be undertaken lightly or for short-term political advantage.<sup>57</sup>

## ENDNOTES

<sup>1</sup> Alexis de Tocqueville, 2 *Democracy in America* 280 (Phillips Bradley ed., Knopf 1945).

<sup>2</sup> There have been a number of important developments affecting the Court since this chapter was first published. On July 1, 2005, Associate Justice Sandra Day O'Connor notified the president of her intention to retire once a successor is confirmed. On July 19, 2005, the president nominated Judge John G. Roberts Jr. of the U.S. Court of Appeals for the District of Columbia Circuit to succeed her. With the death of Chief Justice Rehnquist on September 4, 2005, the president withdrew Judge Roberts' nomination and re-nominated him as Rehnquist's successor. He was confirmed on September 29, 2005, by a vote of 78-22 and took the oath as the 17th Chief Justice of the United States later that day. On October 3, 2005, the president nominated his white house counsel, Harriet Miers, to succeed Justice O'Connor, but she asked that her name be withdrawn from consideration on October 27, 2005. On October 31, 2005, the president announced his nomination of Judge Samuel A. Alito Jr. of the U.S. Court of Appeals for the Third Circuit to succeed her. The Senate Judiciary Committee will begin hearings on his nomination in January 2006. Meanwhile, Justice O'Connor remains on the Court pending confirmation of a successor.

<sup>3</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>4</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>5</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>6</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

<sup>7</sup> *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001). Garrett held that the Eleventh Amendment bars suits by state employees under Title I of the Americans with Disabilities Act. *But cf.* *Tennessee v. Lane*, 124 S.Ct. 1978 (2004), another 5-4 ruling in which the Court permitted a state to be sued under Title II of the Act. Similarly, a 6-3 decision in 2003 held that states can be sued under the Family and Medical Leave Act. *Nevada Department of Human Resources v. Hibbs* 538 U.S. 721 (2003).

<sup>8</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>9</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>10</sup> Charles Rothfeld, *The Supreme Court in a Time of Transition: A Fragile Balance as the New Term Begins*, A Report by the Center for American Progress (Oct. 8, 2004).

<sup>11</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>12</sup> As Dean Edley has written with respect to racial justice, "A president committed to progress on race must not pick judges through a process as indifferent to views on race as is the process we use to pick presidents." Christopher Edley Jr., *Leading the Races*, *American Prospect*, Aug. 2004, at 37. His words apply with equal force to senators charged with considering judicial nominees.

<sup>13</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1967) (Harlan, J., dissenting from dismissal on jurisdictional grounds), *quoted in* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992); *see also* *Rochin v. California*, 342 U.S. 165, 171-172 (1952) (Frankfurter, J., writing for the Court) (“To believe that this judicial exercise of judgment could be avoided by freezing ‘due process of law’ at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges.”).

<sup>14</sup> *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (use of contraceptives by married persons); *Loving v. Virginia*, 388 U.S. 1 (1967) (interracial marriage).

<sup>15</sup> *See, e.g.*, *Carey v. Population Services International*, 431 U.S. 678 (1977) (distribution of contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

<sup>16</sup> *See, e.g.*, *Lawrence and Garner v. Texas*, 539 U.S. 558 (2003).

<sup>17</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848 (1992) (O’Connor, Kennedy and Souter, JJ., writing for the Court in an opinion expressly adopting the Harlan position).

<sup>18</sup> *Casey*, at 980 (Scalia, J., concurring in part and dissenting in part) (citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (Scalia, J., concurring)).

<sup>19</sup> *Casey*, at 847-48 (“Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th Century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.”), *citing* *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>20</sup> Laurence Tribe, *God Save This Honorable Court* xvii (1985).

<sup>21</sup> *See supra* note 2.

<sup>22</sup> As of November 10, 2005, President Bush had appointed 219 judges to the federal bench, including 42 to the courts of appeals.

<sup>23</sup> Alliance for Justice, *Federal Judiciary by Court and Appointing President*, *available at* [http://www.allianceforjustice.org/judicial/judicial\\_selection\\_resources/selection\\_database/byCourtAndAppPres.asp](http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtAndAppPres.asp) (last viewed Aug. 15, 2005).

<sup>24</sup> Alliance for Justice, *Active Judges Report*, *available at* [http://www.allianceforjustice.org/judicial/judicial\\_selection\\_resources/selection\\_database/activeJudges.asp](http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/activeJudges.asp) (last viewed Aug. 15, 2005).

<sup>25</sup> Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. Davis L. Rev. 619, 625 (2003).

<sup>26</sup> For example, C. Boyden Gray, who as White House Counsel in the first Bush administration presided over the ideological vetting of judicial candidates, testified in June 2001 before a subcommittee hearing chaired by Senator Charles E. Schumer on the question, “Should Ideology Matter?” He replied to the question as follows:

I can answer in one word: No. The only legitimate question on this subject—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.

Prepared Statement of C. Boyden Gray before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts (June 26, 2001) at 1.

<sup>27</sup> As one conservative judge has acknowledged, “Anyone who is realistic about the American judicial process knows that ideology affects decisions, especially the ‘hot button’ decisions that engage the attention of politicians. . . .” Hon. Richard A. Posner, *20 Questions for Circuit Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit*, *available at* [http://legalaffairs.org/howappealing/20q/2003\\_12\\_01\\_20q-appellateblog\\_archive.html#107025481874565902](http://legalaffairs.org/howappealing/20q/2003_12_01_20q-appellateblog_archive.html#107025481874565902) (last viewed Oct. 21, 2004).

<sup>28</sup> Cass Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 305 (March 2004).

<sup>29</sup> *Ibid* at 304.

<sup>30</sup> Ibid at 306. The authors also identified a phenomenon they refer to as the “panel effect,” by which a judge’s ideological tendency “is likely to be dampened if she is sitting with two judges of a different political party” and “to be amplified if she is sitting with two judges from the same political party.” Ibid at 304. Thus, they found that panels composed of three Democratic appointees issued a “liberal” ruling 61 percent of the time, whereas panels of three Republican appointees did so only 34 percent of the time. Panels composed of two Democratic appointees and one Republican appointee issued a liberal ruling 50 percent of the time, while panels composed of two Republican appointees and one Democratic appointee did so 39 percent of the time.

<sup>31</sup> Jay E. Austin, John M. Carter II, Bradley D. Klein & Scott E. Schang, *Judging NEPA: A “Hard Look” at Judicial Decision Making Under the National Environmental Policy Act*, A Report by the Environmental Law Institute (October 2004).

<sup>32</sup> 38 Cong. Q. Wkly. Rpt. 2030, 2046 (July 19, 1980), *quoted in* Hon. Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?* 34 Tulsa L. Rev. 691, 699-700 (Spring 2004). Judge Seymour was appointed to the U.S. Court of Appeals for the Tenth Circuit by President Carter in 1979 and assumed senior status on October 16, 2005.

<sup>33</sup> Ibid at 700.

<sup>34</sup> Office of Legal Policy, U.S. Dep’t of Justice, *Guidelines on Constitutional Litigation* (1988); Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988).

<sup>35</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>36</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>37</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>38</sup> See Dawn Johnsen, *Presidential Influences on Constitutional Change*, 78 *Indiana L. J.* 363, 391 n. 151 (2003).

<sup>39</sup> See Dawn Johnsen, *Tipping the Scale*, *Washington Monthly* (July/Aug. 2002), at 17.

<sup>40</sup> Office of Legal Policy, U.S. Dep’t of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988) at iii.

<sup>41</sup> Ibid at v.

<sup>42</sup> D. Brooks Smith, Speech to the Pittsburgh Chapter of the Federalist Society, June 29, 1993, *quoted in* Alliance for Justice Report: Judge D. Brooks Smith’s Judicial and Ethical Record (May 22, 2002), at 15.

<sup>43</sup> Ibid.

<sup>44</sup> Following a contentious confirmation fight, Judge Smith was confirmed by the Senate in July 2002 only after renouncing the views expressed in the speech. Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, *N.Y. Times*, Oct. 22, 2004, at A1.

<sup>45</sup> Ed R. Haden, *Judicial Selection: A Pragmatic Approach*, 24 *Harv. J. L. & Pub. Pol’y* 531 n. 24 (Spring 2001) (*quoting from* a report by Roger Clegg, Special Assistant to the Attorney General, *discussed in* David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* 143-44 (1999)).

<sup>46</sup> Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, *N.Y. Times*, Apr. 10, 1990, at A1; *see also* David Johnston, *In Justice Dept. of the 90’s, Focus Shifts From Rights*, *N.Y. Times*, Mar. 26, 1991, at A1 (“The Reagan Administration’s efforts to reshape the Federal judiciary by appointing conservative judges have continued under Mr. Bush.”).

<sup>47</sup> If anything, this effort has accelerated under President George W. Bush, who had appointed 219 judges to the federal bench as of November 10, 2005, including 42 to the courts of appeals. Many of these are extreme conservatives: “Of Mr. Bush’s first batch of nominees, 8 of 11 were proposed by the [Federalist Society, a right wing lawyers’ group]. There could have been no clearer signal that Mr. Bush intended to follow the pattern set by his father and President Ronald Reagan of shifting the courts rightward and reaping the political benefit of pleasing social conservatives.” Neil A. Lewis, *Mixed Results for Bush in Battles Over Judges*, *N.Y. Times*, Oct. 22, 2004, at A1.; *see also* Editorial, *John Kerry for President*, *N.Y. Times*, Oct. 17, 2004, § 4, at 10 (“Thanks to Mr. Bush, Jay Bybee, the author of an infamous Justice Department memo justifying the use of torture as an interrogation technique, is now a federal appeals court judge. Another Bush selection, J. Leon Holmes, a federal judge in Arkansas, has written that wives must be subordinate to their husbands and compared abortion rights activists to Nazis.”).

<sup>48</sup> It is often noted that a large proportion of the cases decided by the Court are relatively non-controversial, and result in unanimous decisions based on law and precedent rather than ideological considerations. But 25 of the 73 cases (34 percent) reported by the Court last term were decided by a 5-4 or 6-3 margin, and 23 these decisions divided along recognizably conservative/liberal lines. Rothfeld, *supra* note 10.

<sup>49</sup> Prepared Statement of Senator Schumer, *Should Ideology Matter? Judicial Nominations 2001*, Hearing before the Senate Committee on the Judiciary Subcommittee on Administrative Oversight and the Courts (June 26, 2001) at 2.

<sup>50</sup> *Ibid.*

<sup>51</sup> See, e.g., Justice Held Hostage: Politics and Selecting Federal Judges, The Report of the Citizens for Independent Courts Task Force on Federal Judicial Selection 7 (1999).

<sup>52</sup> Tribe, *God Save This Honorable Court* 122 (1985) (“Nominees should not be asked to travel forward in time to guess how an issue will next arise; Justices should decide cases on the basis of considered judgments made in full context, not of inflexible predispositions held in the abstract.”). See also Ronald D. Rotunda, *The Role of Ideology in Confirming Federal Court Judges*, 15 *Geo. J. Legal Ethics* 127 (Fall 2001).

<sup>53</sup> Johnsen, *supra* note 35, at 407 (describing the theory of “partisan entrenchment” advanced in Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *Va. L. Rev.* 1045 (2001)).

<sup>54</sup> See Michael J. Gerhardt, Testimony before the Senate Committee on Rules and Administration on S.Res. 138, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., June 5, 2003 at 3 (“The [Appointments Clause] does not . . . vest the President with a privileged role within the appointments process. Relegating the Senate to a secondary or even subservient role within the appointments process is inconsistent with the clause and the Senate’s historic role in counter-balancing the President’s nominating authority.”).

<sup>55</sup> Letter from Robert A. Caro to Senator Trent Lott and Senator Christopher J. Dodd, June 3, 2003, at 1 (on file with the Center for American Progress). As then-chairman of the Senate Committee on the Judiciary Orrin G. Hatch has remarked, “The Senate’s power of Advice and Consent, after all, is not a rubber stamp.” Statement of Orrin G. Hatch on “Judicial Nominations” before the Executive Business Meeting of the Senate Committee on the Judiciary (Sept. 28, 2000), *available at* [http://judiciary.senate.gov/oldsite/9282000\\_ogh.htm](http://judiciary.senate.gov/oldsite/9282000_ogh.htm) (last viewed Nov. 13, 2004).

<sup>56</sup> *Ibid.* at 3.

<sup>57</sup> After this chapter was first published, a vote on the so-called “nuclear option” to curtail the judicial filibuster was averted when a bipartisan group of 14 senators (seven Republicans and seven Democrats) signed a memorandum of understanding on May 23, 2005, under which the signatories agreed: (1) to vote for cloture on three pending nominations to the courts of appeals, while making no commitment to vote for or against cloture on two other pending nominations; (2) to reserve the judicial filibuster for “extraordinary circumstances,” leaving it to each signatory to “use his or her own discretion and judgment in determining whether such circumstances exist”; and (3) to “encourage the Executive Branch to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate for consideration.” While the memorandum put an end to the nuclear brinkmanship for the immediate future, the long-term viability of the agreement remains uncertain.