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WINNERS AND LOSERS VERSUS HOW YOU PLAY THE GAME: SHOULD IDEOLOGY DRIVE JUDICIAL SELECTION?

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"'When *I* use a word,' Humpty Dumpty said in a rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'"[1]

I. INTRODUCTION

Mr. Dumpty could just as well have been a Supreme Court Justice, law school professor, or President of the United States as a large egg in this classic story. Chief Justice Charles Evans Hughes, after all, expressed a similar sentiment when he said that the Constitution "is what the judges say it is."[2] And it was President Bill Clinton who, under

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[1] LEWIS CARROLL, THE COMPLETE ILLUSTRATED WORKS OF LEWIS CARROLL 136 (Edward Guiliano ed., Crown Publishers 1982) (1871).

[2] Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce (May 3, 1907), *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK 1906-1908, at 133, 139 (Robert H. Fuller & Gardner Richardson eds., 1908). In 1977, the Supreme Court held that imposing the death penalty for the crime of rape violated the Constitution's Eighth Amendment ban on "cruel and unusual punishment." Coker v. Georgia, 433 U.S. 584, 592 (1977). Justice White wrote for a plurality of the Court that "the Constitution contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 597 (emphasis added). Dissenting from the Court's recent decision that executing the retarded similarly violates the Eighth Amendment, Justice Scalia quoted Justice White's statement from *Coker* and replied, "The arrogance of this assumption of power takes one's breath away." Atkins v. Virginia, 122 S.Ct. 2242, 2265 (2002) (Scalia, J., dissenting).

oath, explained his conduct using particular definitions of words such as "alone" and "is."

The debate about the role of "ideology" in judicial selection suffers from the same definitional confusion. On June 26, 2001, the Senate Judiciary Subcommittee on Administrative Oversight and the Courts held a hearing titled "Should Ideology Matter?: Judicial Nominations 2001." Subcommittee chairman Senator Charles Schumer, New York Democrat, delivered a long opening statement in which he referred to "ideological beliefs" and "the ideology of particular nominees." He referred to "judges of a particular stripe."[3] He did not, however, define any of these terms.

Inferring definitions from Senator Schumer's statement is difficult. Among the factors he cited as relevant to the Senate's consideration of ideology, for example, was "the composition of the courts at the time of nomination."[4] Looking at the Eisenhower administration, Senator Schumer alternately discussed this composition in political ("the balance of the courts was leftward") and partisan ("four out of every five federal judges were Democrats") terms.[5] These are not necessarily coincident

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[3] *Should Ideology Matter?: Judicial Nominations 2001, Hearing of the Subcomm. on Admin. Oversight and the Courts Before the Senate Comm. on the Judiciary*, 106th Cong. (2001) [hereinafter *Hearing*] (statement of Sen. Charles Schumer, Chairman, Subcomm. On Admin. Oversight and the Courts of the Senate Comm. on the Judiciary), http://judiciary.senate.gov/oldsite/te062601cs.htm (June 26, 2001).

[4] *Id.*

[5] Commentator Stuart Taylor claims that "the party registration of the nominating President has become the best rough predictor of how a federal appellate judge is likely to vote in the most-controversial cases." Stuart Taylor Jr., *The Role of Ideology in Judicial Selection: A Test Case*, 34 NAT'L J. 445, 446 (2002). He offered no empirical basis for this claim, and plenty of anecdotal evidence exists that, particularly on the Supreme Court, partisan affiliation can actually be a poor predictor of a judge's votes. Democrat appointee Justice Byron White, for example, dissented from "liberal" decisions such as Moore v. City of East Cleveland, 431 U.S. 494 (1977); Roe v. Wade, 410 U.S. 113 (1973); and Miranda v. Arizona, 384 U.S. 436 (1966), while writing the opinion in "conservative" decisions such as Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); Bowers v. Hardwick, 478 U.S. 186 (1986); and New York v. Ferber, 458 U.S. 747 (1982). Republican appointee Justice David Souter joined or wrote the opinion in "liberal" decisions such as Atkins v. Virginia, 122 S.Ct. 2242 (2002); Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002); PGA Tour v. Martin, 532 U.S. 661 (2001); Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001); Stenberg v. Carhart, 530 U.S. 914 (2000); Dickerson v. United States, 530 U.S. 428 (2000); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000); Davis v. Monroe County Board of Education, 526 U.S. 629 (1999); Bragdon v. Abbott, 524 U.S. 624 (1998); United States v. Virginia, 518 U.S. 839 (1996); Romer v. Evans, 517 U.S. 620 (1996); U.S. Term Limits v. Thornton, 514 U.S. 779 (1995); United States v. National Treasury Employees Union, 514 U.S. 527 (1995); Madsen v. Women's Health Center, 512 U.S. 753 (1994); Planned Parenthood v. Casey, 505 U.S. 833 (1992); and Lee v. Weisman, 505 U.S. 577 (1992); and joined or wrote a dissenting opinion from "conservative" decisions such as Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002); Good News Club v. Milford Central School, 533 U.S. 98 (2001); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); Bush v. Gore, 531 U.S. 98 (2000); Mitchell v. Helms, 530 U.S.

and, by that inconsistency alone, fail adequately to define the ideology that some argue should drive judicial selection.

II. WHAT IS IDEOLOGY IN JUDICIAL SELECTION?

An effective hiring process begins with an accurate job description. Professor Gary McDowell correctly observes that the debate about judicial selection is actually about "the proper role of [judges] in American society, and about the nature and extent of judicial power under a written Cconstitution."[6] The question whether ideology should drive judicial selection, then, depends on whether ideology is consistent with the proper exercise of judicial power.

The debate about judicial power posits two basic models of judging. The first, commonly called judicial restraint, includes a modest view of judicial power based on legitimate process, whatever the results. In this process, judges take the law as they find it, determine the meaning already provided by the lawmaker, and apply it in their cases. The law restrains judges because it exists in both form and substance.

The second model, commonly called judicial activism, includes an expansive view of judicial power based on desirable results, whatever the process. Judges can give existing law new meaning or even create new law, as when they find so-called "unenumerated rights" in a written constitution. The law does not restrain judges because it exists in form only.

A. America's Founders Focused on Process, Not Results

1. The Separation of Powers

America's founders established a system of government requiring a restrained judiciary. The Constitution delegates to the federal government, including the judiciary, "few and defined" powers,[7]

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793 (2000); Boy Scouts of America v. Dale, 530 U.S. 640 (2000); United States v. Morrison, 529 U.S. 598 (2000); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); National Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Printz v. United States, 521 U.S. 898 (1997); Kansas v. Hendricks, 521 U.S. 179 (1997); Bennis v. Michigan, 516 U.S. 299 (1996); Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995); Vernonia School District v. Acton, 515 U.S. 646 (1995); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Missouri v. Jenkins, 515 U.S. 70 (1995); United States v. Lopez, 514 U.S. 549 (1995); Dolan v. City of Tigard, 512 U.S. 374 (1994); and Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

[6] Gary L. McDowell, *Doubting Thomas*, NEW REPUBLIC, July 29, 1991, at 12, 12.

[7] THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

assigning legislative power to the legislature[8] and judicial power to the judiciary.[9] Judicial power, by definition, excludes the power to make law.

America's founders believed that the Constitution is "a rule for the government of *courts*, as well as of the legislature."[10] The judiciary is as much a part of the government governed by the Constitution as is the legislature. If the Constitution is whatever judges say it is, they are governed by themselves and not by the Constitution. In addition, the Constitution's opening assertion that "we the people . . . do ordain and establish"[11] the charter would be rendered hollow.

2. The Nature of Written Law

Judicial power must also be exercised in a way consistent with the nature of written law. As Justice Antonin Scalia explains, "Every issue of law resolved by a federal judge involves interpretation of text – the text of a regulation, or of a statute, or of the Constitution."[12] America's founders believed that, in such a system of written law, the judiciary's task is "interpretation,"[13] which is the "process of . . . ascertaining the meaning of a . . . written document."[14] The very act of "interpreting a document *means* to attempt to discern the intent of the author."[15]

Thus, in a system of separated powers under a written constitution, judicial power is properly understood in terms of process, not results. Professor Eugene Hickok explains that, while results may count in a legislature, "*how* that decision is reached, the interpretive road followed, is what judging ultimately is all about."[16] Testifying before Senator Schumer's subcommittee, former Clinton White House Counsel Lloyd Cutler agreed, perhaps unexpectedly, that judges should be "dedicated to a process, not a result."[17]

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[8] U.S. CONST. art. I, § 1.

[9] U.S. CONST. art. III, § 1.

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[11] U.S. CONST. pmbl.

[12] ANTONIN SCALIA, A MATTER OF INTERPRETATION 13 (1997).

[13] THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[14] BLACK'S LAW DICTIONARY 817 (6th ed. 1990).

[15] Lino Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1020 (1992).

[16] Eugene W. Hickok, *Judicial Selection: The Political Roots of Advice and Consent*, *in* JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 3, 5 (1990).

[17] *Hearing*, *supra* note 3 (statement of former White House Counsel Lloyd Cutler), *available at* http://judiciary.senate.gov/oldsite/te062601cutler.htm (June 26, 2001).

3. Legitimacy and Accountability

When judges apply law as made by the people, the results are attributable to the law, and thus to the people, rather than to the judge. The process of the people making the law and judges faithfully interpreting and applying it legitimizes those results. Lines of democratic authority and accountability remain basically clear and stable, and the possibility of legal change and cultural stability remains open. In this way, law, especially the Constitution, reflects or embodies the consent of the governed, identified by the Declaration of Independence as the only source of government's just powers.[18]

This restrained view of judicial power naturally translates into an emphasis on the judicial process, on the "interpretive road followed," in the judicial selection process. As Senator Orrin Hatch, Utah Republican and ranking minority member of the full Judiciary Committee, told Senator Schumer's subcommittee, judicial selection should not be driven by "political affiliation or views on any particular issue" but rather by "philosophy on a judge's limited role in our constitutional system of checks and balances."[19]

B. Ideology Focuses on Results, Not Process

In contrast, many academics and political activists today promote an activist judiciary, one that is unrestrained by the law. While Hamilton said that the judiciary's task is limited to interpretation,[20] one contemporary scholar argues that its task is actually "reinterpretation."[21] While the Constitution establishes one method for amending it,[22] contemporary advocates argue that judges should perform that function.[23] This activist, results-oriented view of judicial power makes the ends justify the means. Its primary advocates are those for whom the ordinary process of direct or representative democracy proves unfruitful in achieving political or policy objectives. Thus, the far left remains today the strongest group of advocates for an activist judiciary.

Harvard law professor Laurence Tribe is a particularly forceful proponent of an activist, results-oriented judiciary. In his 1978 treatise *American Constitutional Law*, he argued that the legitimacy of Supreme

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[18] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[19] *Hearings*, *supra* note 3 (statement of Sen. Orrin Hatch, Chairman, Subcomm. On Admin. Oversight and the Courts of the Senate Comm. on the Judiciary), *available at* http://judiciary.senate.gov/oldsite/ogh062601fair.htm (June 13, 2001).

[20] THE FEDERALIST NO. 78, *supra* note 13, at 467.

[21] LEONARD W. LEVY, AGAINST THE LAW 29-30 (1974).

[22] U.S. CONST. art. V.

[23] *See, e.g.*, Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1040 (1979).

Court decisions depends on their particular "outcome" rather than the process used to reach that outcome.[24]

Professor Tribe has not only advocated such a powerful outcome-based judiciary, he has helped shape a judicial selection process that will produce it. At a time when President Ronald Reagan was appointing restrained judges, Professor Tribe wrote his book *God Save This Honorable Court* as "a model for the Senate to follow in carrying out its constitutional duty"[25] of "Advice and Consent" on judicial nominations.[26] In that new model, he urged the Senate to explore "the full range of views each Justice will bring to the Court"[27] for the purpose of determining how they, if confirmed, would rule on particular issues.[28]

Democrats became the Senate majority in the 1986 election and, the following year, used this new model to defeat President Reagan's nomination of Robert Bork to the Supreme Court.[29] When Democrats again became the Senate majority in 2001, they similarly invited Professor Tribe to help create a strategy on how to conduct their advice and consent function. According to one news report, he met with Senate Democrats at a retreat in April 2001 about "chang[ing] the ground rules" of the confirmation process.[30] And when he testified before Senator Schumer's subcommittee in June 2001, Professor Tribe again advocated an "open-textured and fluid reading of the Constitution" and urged Senators to evaluate nominees based on "the anticipated consequences" of the decisions they would make if confirmed.[31]

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[24] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 52 (1978) ("The legitimacy in fact of these decisions, then, cannot be a product of method . . . but of outcome: the values these decisions invoked, notwithstanding the difficulty of their implementation, are values we truly hold.").

[25] LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 125 (1985).

[26] U.S. CONST. art. II, § 2, cl. 2.

[27] TRIBE, *supra* note 25, at 40.

[28] Professor Tribe argued, for example, that nominees should be rejected if they held "knee-jerk attitudes" on issues such as "gun control, capital punishment, or the right to life," *id.* at 94-97, or were too "fond of" such "arcane requirements" for judicial jurisdiction as standing, ripeness, and justiciability. *Id.* at 122.

[29] *See* PATRICK B. MCGUIGAN & DAWN M. WAYRICH, NINTH JUSTICE: THE FIGHT FOR BORK (1990).

[30] Neil A. Lewis, *Democrats Readying for a Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

[31] *Hearing*, *supra* note 3 (statement of Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School), *available at* http://judiciary.senate.gov/oldsite/te062601tri.htm (June 26, 2001). Professor Tribe also phrased this in terms of "the nominee's substantive views on the burning legal and constitutional issues of the day" and the "consequences for the nation" if a nominee were confirmed. He argued that "in choosing one Supreme Court nominee rather than another" the Senate would be "making a choice among [the] answers" to constitutional questions. *Id.*

III. IDEOLOGY SHOULD NOT DRIVE JUDICIAL SELECTION

Hence, "ideology" means the anticipated substantive results of a nominee's judicial decisions.[32] The question, therefore, is whether the anticipated substantive results of a nominee's judicial decisions should drive judicial selection. The answer is no for two basic reasons.

A. The Foundation of Ideology-driven Judicial Selection

The first reason why ideology should not drive judicial selection is that this approach is founded on an excessive, or activist, view of judicial power. As explained above, that view is incompatible with a system of separated powers under a written constitution.

It is also incompatible with self-government. Just as judicial restraint helps keep lines of authority and accountability relatively clear, judicial activism blurs these lines beyond recognition. Judges, especially federal judges appointed "during good behavior,"[33] as opposed to state judges elected for a defined term, are unaccountable. Activist judges not only make law without the people's consent, but they also invite legislating in ways that guarantee judicial involvement so that legislators may avoid ultimate electoral accountability.

This is why preventing judges from making law was so important to America's founders. Quoting Montesquieu, Hamilton insisted that there would be no liberty if judges legislated.[34] That famous phrase "a government of laws and not of men" in the Massachusetts Constitution of 1780 was the result of denying to judges any legislative power.[35] The activist, expansive view of judicial power underlying ideology-driven judicial selection undermines or destroys these requirements of liberty.

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[32] Professor Michael Gerhardt, then, was simply wrong when he claimed earlier in the symposium that "ideology" in judicial selection refers to the process of arriving at results rather than the results themselves. "Judicial philosophy" may refer to views on process, but "ideology" refers to results. Professor Tribe distinguished between "the nominee's overall approach to the task of judging" and "the nominee's substantive views on the burning legal and constitutional issues of the day." He separated "the general approach to constitutional interpretation" from "the anticipated consequences" of judicial decisions. *Id.*

[33] U.S. CONST. art. III, § 1.

[34] THE FEDERALIST NO. 78, *supra* note 13, at 466 ("There is no liberty if the judiciary power be not separated from the legislative and executive powers.") (quoting MONTESQUIEU, THE SPIRIT OF LAWS 163 (T. Nugent trans., F.B. Rothman 1991) (1758)).

[35] *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

B. The Consequences of Ideology-driven Judicial Selection

1. Destroying Judicial Independence

The second reason that ideology should not drive judicial selection is the consequences of this approach. First, the means necessary to determine the anticipated substantive results of a nominee's judicial decisions destroy judicial independence. This quest comes in two forms. The first probes a nominee's views about specific legal issues and court precedents and even asks how a nominee would apply those precedents in future cases.

For example, Marcia Greenberger, Co-President of the National Women's Law Center, testified before Senator Schumer's subcommittee and argued that judicial nominees "should be required to demonstrate a commitment to . . . the progress that has been made" on issues including the "right to privacy."[36] That is, they must promise to rule a particular way on issues corresponding to the far-left political and cultural agenda.

The second, more subtle approach probes a nominee's personal, as opposed to judicial, beliefs or views on particular issues. Rather than asking directly how a nominee would actually decide future cases raising those issues, this approach simply assumes that judges can, and should, base their judicial rulings on their personal views. This more subtle approach is used today with respect to appeals court nominees.[37]

Liberal advocacy groups, for example, highlighted the pro-life political and personal views of Federal District Judge Charles Pickering, nominated to the U.S. Court of Appeals for the Fifth Circuit.[38] The reason for this focus was initially confusing because Judge Pickering had

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[36] *Hearing, supra* note 3 (statement of Marcia D. Greenberger, Co-President, Nat'l Women's Law Ctr.), *available at* http://judiciary.senate.gov/oldsite/te062601Grr.htm (June 26, 2001).

[37] Senator Schumer is using this approach in nomination hearings. On July 23, 2002, for example, he said to appeals court nominee Priscilla Owen that "choice is a very legitimate issue for us to question judges on, and so I'd like to know your views." *Nomination of Priscilla Owen to Be a Circuit Judge for the 5th Circuit: Hearing Before the Senate Judiciary Comm.*, 107th Cong. 50 (2002) [hereinafter *Nomination*] (statement of Sen. Charles Schumer, Member, Senate Comm. on the Judiciary).

[38] People for the American Way, for example, singled out a 1984 speech in which Judge Pickering, then president of the Mississippi Baptist Convention, offered his personal view about the Bible as the authority for judging human conduct. PEOPLE FOR THE AMERICAN WAY, REPORT OF PEOPLE FOR THE AMERICAN WAY OPPOSING THE CONFIRMATION OF CHARLES W. PICKERING, SR. TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT 20-21 (2002), *at* http://www.pfaw.org/pfaw/dfiles/file_53.pdf (Jan. 24, 2002). Similarly, the Alliance for Justice highlighted a pro-life resolution passed by the Mississippi Baptist Convention during Judge Pickering's leadership. ALLIANCE FOR JUSTICE, THE CASE AGAINST THE CONFIRMATION OF CHARLES W. PICKERING, SR., TO THE U.S. COURT OF APPEALS FOR THE 5TH CIRCUIT 5 (2002), *at* http://www.afj.org/jsp/news/pickeringfull.pdf (Jan. 24, 2002).

never decided an abortion case in his dozen years on the federal trial bench. This focus, however, is explained by the activist view of judicial power, in which judges are free and even expected to decide cases not on the basis of law but according to their personal views. As such, despite Judge Pickering's stated commitment not to allow his personal views to drive his judicial decisions,[39] Judiciary Committee members considered those personal views, that is, his ideology, highly relevant to their confirmation decision. The Senate Judiciary Committee defeated the Pickering nomination.[40]

If ideology drives judicial selection, the Senate must resort to what has come to be called a political "litmus test." Even the liberal Brennan Center for Justice has outlined the dangers of this results-oriented approach.[41] These dangers include the following:

- foster[ing] partisan attacks that trivialize the judicial selection process and undermine confidence in surviving nominees
- plac[ing] pressure on judges to act as proponents of ideology rather than as impartial adjudicators of disputes
- increas[ing] the potential for and appearance of biased decision-making and thus erod[ing] public trust in the fundamental fairness of our justice system, and
- diminish[ing] our ability to rely on the judiciary to defend individual rights against overreaching by the executive and legislative branches.[42]

President Bush has pledged not to use such issue-based or results-oriented litmus tests in choosing judicial nominees.[43] Instead of ideology and results, he says he will focus on philosophy and process.[44]

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[39] Judge Pickering said, "[M]y personal views are irrelevant." Audrey Hudson, *Judge Rebuts Charges of Racism*, WASH. TIMES, Feb. 8, 2002, at A8; *see also Politics of Personal Destruction*, WASH. TIMES, Mar. 7, 2002, at A18 ("[A]s a Legal Times analysis of Judge Pickering's judicial career points out, he has testified that he would 'consider it his "duty as an appellate . . . judge to follow [precedents that are inconsistent with his personal beliefs]."'"); Terry Eastland, *Nomination Trapped by the Jeffords Effect*, WASH. TIMES, Feb. 22, 2002, at A16 ("[H]is record on the bench isn't that of a judge who fails to distinguish between his own personal and political views and what the law says . . . .").

[40] *See* Helen Dewar & Amy Goldstein, *Appeals Court Choice Rejected*, WASH. POST, Mar. 15, 2002, at A1.

[41] BRENNAN CENTER FOR JUSTICE, WHY LITMUS TESTS THREATEN THE INTEGRITY OF OUR COURTS, *at* http://www.brennancenter.org/resources/resources_act_litmus.html (Oct. 1999).

[42] *Id.*

[43] President George W. Bush, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html (May 18, 2001). President Bush used the announcement of his first judicial nominations to describe "the standards by which I will choose all federal judges." *Id.* He said,

> Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. To paraphrase

2. Violating the Judicial Oath

The second negative consequence of ideology-driven judicial selection is that judges must violate their judicial oath before they even take it. That oath states in part, "I do solemnly swear that I will administer justice without respect to persons" and to "faithfully and impartially discharge and perform all the duties incumbent upon me" as a judge.[45] Judges deciding cases on the basis of ideology rather than law, especially after making a commitment to do so on particular issues, destroys the primary basis on which the people respect and support the judiciary as an institution. Litigants and appellants have the right to believe that the judge to whom they bring their case has not already decided it.

3. Distorting the Senate's Role

The third negative consequence of ideology-driven judicial selection is distortion of the Senate's role in the judicial selection process. Indeed, this model of judicial selection was designed explicitly to achieve this distortion. Those who say ideology should drive judicial selection argue that the Senate has a role equal to the President's. Professor Tribe's argument for such an active role in *God Save This Honorable Court* has been echoed by many others. For example, Marsha Greenberger told Senator Schumer's subcommittee that the Senate actually has a "co-equal, independent role" in selecting judges.[46]

This view is incompatible with the Constitution's own language. Judicial selection is mentioned only in Article II, regarding the executive branch; Article I, regarding the legislative branch, is silent on the subject.[47] Similarly, the President's role in legislation is mentioned only

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> the third occupant of this house, James Madison, the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference.

Id.

[44] *Id.*

[45] *See* 28 U.S.C. § 453 (1988).

[46] *Hearing, supra* note 3 (statement of Marsha Greenberger, Co-President, National Women's Law Center), *available at* http://www.nwlc.org/pdf/nominationstestimony.pdf (June 26, 2001).

[47] Courts have analyzed the President's power to make treaties the same way. *See, e.g.*, Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979). The court stated,

> It is significant that the treaty power appears in Article II of the Constitution, relating to the executive branch, and not in Article I, setting forth the powers of the legislative branch. It is the President as Chief Executive who is given the constitutional authority to enter into a treaty; and even after he has obtained the consent of the Senate it is for him to decide whether to ratify a treaty and put it into effect.

in Article I; Article II is silent on that subject. Yet, no one would argue that the President has a "co-equal, independent" role in legislation.

Hamilton made clear that "in the business of appointments the executive will be the principal agent."[48] Far from a co-equal, independent role, America's founders believed that the Senate's role would be "in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters."[49]

Senator Schumer made an even more bizarre argument in his opening statement before last year's hearing on ideology. He said, "The Constitution instructs the Senate to first advise the President as to his choice of nominees and then to review and decide whether to confirm the President's picks."[50] He said that the Senate has two distinct roles, "an advisory one before the nomination and a reviewing function after it."[51] Anyone reading Article II, Section 2, knows this is false. That section reads in part, "The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."[52] Senator Schumer's reading requires not just Humpty Dumpty's definitional manipulation, but quite literally rearranging the punctuation and grammar of this provision.

Instead, it seems Senator Schumer's revision of the Senate's role is designed to give the Senate control over the nomination, as well as the confirmation, of judges. In his scheme, the obvious message to the President is that post-nomination "consent" is possible only if the President follows the Senate's pre-nomination "advice." Thus, a Democrat Senate might be able politically to extort nominees a Republican president would otherwise not choose.

The Constitution assigns both the power to nominate and the power to appoint judges to the President. The Senate's role of advice and consent is a check on the latter power, not the former. This distribution of a primary power to one branch, checked and balanced by a secondary power assigned to another branch, is a central feature of the system of disbursed and limited powers created by America's founders. While the Constitution creates co-equal branches, it does not assign them coequal, independent powers.

Id. at 705.

[48] THE FEDERALIST NO. 65, at 439 (John Jay) (Clinton Rossiter ed., 1961).

[49] THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[50] *Hearing, supra* note 3.

[51] *Id.*

[52] U.S. CONST. art. II, § 2.

4. Turning Judges into Representatives

The fourth negative consequence of ideology-driven judicial selection is the increasing perception that courts and judges represent political interests or constituencies. This perception, in turn, fosters an expectation of politically correct results and, as we know from the world of real politics, expectation breeds entitlement. We already see different political groups, particularly those with a racial basis, arguing that legitimacy of the entire judicial system depends on politically favorable results. The eventual delegitimizing of justice is thus a natural and necessary result of an activist view of judicial power and ideology-driven judicial selection.

During the hearing on Priscilla Owen's nomination to the U.S. Court of Appeals, Democrat Senators demonstrated this consequence. In one very disturbing exchange, Senator Edward Kennedy asked Justice Owen, "[C]an you point to a case in which you stood up for a consumer or individual plaintiff over the objections of the majority?"[53] That is all he wanted to know. The law, the facts, or the issues in such cases were apparently irrelevant. Someone who "stands up for" someone else is an advocate, not a neutral party. The suggestion that a judge "stands up for" the parties or interests for whom she rules reflects perhaps the most political and aggressively ideological approach imaginable.

Focusing on expected outcomes is not only inconsistent with the proper role of judges and the proper scope of judicial power, it is often not even accurate.[54] In his testimony to Senator Schumer's subcommittee, Senator Hatch offered a poignant example. At Supreme Court Justice David Souter's confirmation hearing, Kate Michelman, executive director of the National Abortion Rights Action League, said that she was "intensely concerned that, if confirmed, Judge Souter would . . . cast the deciding vote to overrule Roe v. Wade."[55] He, of course, was the deciding vote to reaffirm Roe.[56]

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[53] *Nomination*, *supra* note 37, at 33 (statement of Sen. Edward Kennedy). Similarly, Senator Leahy said that Justice Owen's decisions "if not every time most of the time favor big business interests." *Id.* (statement of Sen. Patrick Leahy). Obviously, Senator Leahy was not merely making a factual or statistical observation but was implying intention or motive. In so doing, he reflected the view that judges can, and even should, impose ideological views or value choices through their rulings, leaving the only relevant question which views or values a particular judge or judicial nominee is likely to impose.

[54] *See supra* note 5.

[55] *Hearing*, *supra* note 3 (statement of Kate Michaelman, Executive Director of National Abortion Right Action League), *available at* http://judiciary.senate.gov/oldsite/ogh062601fair.htm (June 26, 2001).

[56] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

IV. JUDICIAL PHILOSOPHY, NOT IDEOLOGY, SHOULD DRIVE JUDICIAL SELECTION

The debate over judicial power and judicial selection is hardly new. In 1990, the National Legal Center for the Public Interest published a monograph titled *Judicial Selection: Merit, Ideology, and Politics* analyzing these issues.[57] The Free Congress Foundation's 1981 book *A Blueprint for Judicial Reform* included a chapter by newly elected Senator Charles Grassley, Iowa Republican, on the Senate's judicial selection role. He wrote,

> I sought a place on the Judiciary Committee in large part because I wanted to help to put an end to the era in which federal judges have acted as Platonic Guardians – supreme lawmakers who legislate for an imaginary Utopia – rather than as interpreters of the Constitution and laws of these imperfect United States.[58]

America is still in the era of judicial Platonic Guardians, and ideology-driven judicial selection will keep us there.

During the last two decades, the primacy of judicial philosophy, which focuses on process and how the judicial "game" is played, has been replaced by political ideology, which focuses on results and the winners and losers of the judicial game. Reflecting on Robert Bork's confirmation hearings at which Professor Tribe's new ideology-driven model was deployed, Judge Grover Rees observed that many Senators "seemed determined to obliterate any distinction between judicial philosophy and political ideology."[59]

Writing in 1981, Senator Grassley argued that "Senators have a duty to consider the nominee's *philosophy*, just as the President considers his philosophy in deciding whether to nominate him."[60] In his opening statement at last year's hearing, Senator Schumer said that Senators must consider "the extent to which the President himself makes his initial selections on the basis of a particular *ideology*."[61]

Maintaining this distinction is necessary for a proper view of judicial power. Using ideology to drive judicial selection embraces an inappropriately expansive view of judicial power, distorts the Senate's role in judicial selection, undermines judicial independence, and ultimately delegitimizes the justice system itself. Judges and, therefore, those who select them must focus instead on judicial philosophy, on how the game is played, rather than on winners and losers.

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[57] JUDICIAL SELECTION, *supra* note 16.

[58] Charles Grassley, *Judicial Nominations and the Senate's "Advice and Consent" Function*, *in* A BLUEPRINT FOR JUDICIAL REFORM 107, 107 (Patrick McGuigan & Randall W. Rader eds., 1981).

[59] Grover Rees, *The Next Bork*, NAT'L REV., Dec. 9, 1988, at 32, 34.

[60] Grassley, *supra* note 58, at 110 (emphasis added).

[61] *Hearing*, *supra* note 3 (emphasis added).

In his opening statement before last year's hearing, Senator Schumer said that the best course was simply to acknowledge that ideology has often driven judicial selection and to be open and honest about it.[62] Rather, the best course is to eliminate it entirely.

[62] *Id.*