THE CONSTITUTION AS THE PLAYBOOK FOR JUDICIAL SELECTION

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The Federalist Society plays an indispensable role in educating our fellow citizens about the principles of liberty, a task that is both critical and challenging. It is critical because, as James Madison put it, "a well-instructed people alone can be permanently a free people."[1] The ordered liberty we enjoy is neither self-generating nor self-sustaining, but is based on certain principles that require certain conditions. Knowledge and defense of those principles and conditions will be the difference between keeping and losing our liberty.

This educational challenge, however, has perhaps never been more daunting. We live in a culture in which words mean anything to anyone, celebrities substitute for statesmen, and people are no longer well instructed. Forty-two percent of Americans do not know the number of branches in the federal government, and more than sixty percent cannot name all three.[2] Four times as many Americans say that a detailed knowledge of the Constitution is absolutely necessary as say they actually have such knowledge.[3] Twenty-one percent of Americans believe the First Amendment protects the right to own a pet.[4]

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1. James Madison, Second Annual Message, *in* 8 THE WRITINGS OF JAMES MADISON 123, 127 (Gaillard Hunt ed., 1908).

2. Press Release, Nat'l Constitution Ctr., Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll (1997).

3. STEVE FARKAS ET AL., KNOWING IT BY HEART: AMERICANS CONSIDER THE CONSTITUTION AND ITS MEANING 16 (2002), *available at* http://www.publicagenda.org/files/pdf/knowing_by_heart.pdf.

4. Christopher Lee, *Noted with Interest*, WASH. POST, Mar. 3, 2006, at A15; *see also* McCormick Tribune Freedom Museum, Americans' Awareness of First Amendment Freedoms, Forum for Education and Democracy, Mar. 1, 2006, http://www.forumforeducation.org/node/147.

A few factors contribute to this state of affairs. Most people get their information about the legal system only from television. Unless people sue each other or commit crimes—habits we really should not encourage—they will likely have no first-hand knowledge or experience to draw from. Furthermore, people hold lawyers in low esteem. If you plug the term "lawyer joke" into Yahoo, it returns a whopping 25.7 million hits, a number on the rise almost as fast as the national debt. The problem with lawyer jokes is that most lawyers do not think they are funny and most other people do not think they are jokes. This low view of lawyers means people have little motivation to learn more about what lawyers and judges really do.

The media do not help this state of affairs. The *Harvard Journal of Law & Public Policy* recently published an excellent article by Michigan Supreme Court Justice Stephen Markman,[5] who served as my chief counsel when I chaired the Senate Judiciary Subcommittee on the Constitution in the early 1980s. He describes how the media's penchant for focusing on winners and losers significantly shapes and distorts how people understand what judges actually do, often for the worse.[6]

Nonetheless, the timing of this Essay is auspicious in several respects. First, I write in the wake of two very relevant Federalist Society student symposia, last year's about the people and the courts[7] and this year's about the separation of powers.[8] Second, President Obama has been particularly clear from the time he was a candidate about his intention to appoint judges who will exercise a strikingly political version of judicial power.[9] Third, he has already started acting on that intention by making his first judicial nominations.[10] New Presidents typically make their first judicial nominations in July or even August,

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5. Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL'Y 149 (2009).

6. *Id.* at 151–52.

7. Symposium, *The People & The Courts*, 32 HARV. J.L. & PUB. POL'Y 1 (2009).

8. Symposium, *Separation of Powers in American Constitutionalism*, 33 HARV. J.L. & PUB. POL'Y (forthcoming 2010).

9. *See infra* notes 26–27.

10. President Obama has nominated David Hamilton to the U.S. Court of Appeals for the Seventh Circuit, Gerard Lynch to the Second Circuit, and Andre Davis to the Fourth Circuit. Michael A. Fletcher, *Obama Names Judge to Appeals Court*, WASH. POST, Mar. 18, 2009, at A4; Jerry Markon, *Obama Taps 2 for Key Appellate Courts*, WASH. POST, Apr. 3, 2009, at A6. Each is currently a U.S. District Judge.

yet the Senate Judiciary Committee has already held a hearing on the President's first nominee to the U.S. Court of Appeals, and the President sent two more nominees to the Senate just a few days ago.

Mark Twain popularized the notion that there are three kinds of lies: lies, damned lies, and statistics.[11] I prefer Senator Daniel Patrick Moynihan's comment that you may be entitled to your own opinion, but not your own set of facts.[12] Either way, I will statistically describe two macro and two micro factors of the judicial confirmation process to show its recent transformation before turning to how it should be conducted going forward.

The two macro factors are hearings and confirmations. The Judiciary Committee held hearings for fewer judicial nominees during the 110th Congress than any Congress since before I entered the Senate. This lack of hearings is not the result of the Judiciary Committee's inability to multitask. Instead, it is the result of a political choice, one that has been reversed since the last election. The Judiciary Committee has already held a hearing on President Obama's first appeals court nominee, just two weeks after that nominee arrived in the Senate.[13] Under a Republican President, Judiciary Committee Chairman Patrick Leahy waited an average of 197 days to give an appeals court nominee a hearing.[14] The last election amounted to the political equivalent of Drano, as the confirmation pipes are now wonderfully unobstructed and flowing freely once again.

Some might assume that Republicans demonstrate such strong partisan preference, but they would be wrong. Since I was first elected, Democrats running the Senate have granted hearings to forty-one percent more Democratic than Republican judicial

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11. Mark Twain, *Chapters from My Autobiography—XX*, 186 N. AM. REV. 465, 471 (1907) (quoting Benjamin Disraeli).

12. Timothy J. Penny, *Facts Are Facts*, NAT'L REV. ONLINE, Sept. 4, 2003, http://www.nationalreview.com/nrof_comment/comment-penny090403.asp.

13. President Obama nominated David Hamilton to the Seventh Circuit on March 17, 2009. Fletcher, *supra* note 10. His hearing was on April 1, 2009. U.S. Senate Judiciary Comm., Official Hearing Notice (Apr. 1, 2009), http://judiciary.senate.gov/hearings/hearing.cfm?id=3757.

14. This statistic, like those that follow, was compiled by Senator Hatch's staff from sources including the *Congressional Record*; Federal Judicial Center, Biographical Directory of Federal Judges, http://www.fjc.gov/public/home.nsf/hisj; The Library of Congress, Legislative Information Service Databases, http://thomas.loc.gov/; and the records of the Senate Judiciary Committee and Senator Hatch's staff. The statistics are on file with Senator Hatch's staff.

nominees. When Republicans run the Senate, the partisan differential is less than five percent.

Moving from the Judiciary Committee to the Senate floor, the second macro factor is confirmations. In the last eight years, President Bush had the slowest pace of judicial confirmations of any President since Gerald Ford. Last year, the Senate confirmed fewer judicial nominees than in any President's final year since 1968, the end of the Johnson Administration. By comparison, when I chaired the Judiciary Committee during President Clinton's last year in office, the Senate confirmed twice as many appeals court nominees as it did last year.

As with hearings, the picture is not the same when Republicans are in charge. When Democrats run the Senate, they confirm forty-five percent more Democratic than Republican judicial nominees. When Republicans run the Senate, the differential is only nine percent.

At the ground level, the two micro factors in the confirmation process are votes and filibusters. The Senate has traditionally confirmed most unopposed lower court nominees by unanimous consent rather than by time-consuming roll call votes. From 1950 to 2000 the Senate confirmed only 3.2 percent of all district and appeals court nominees by roll call vote. During the Bush presidency, that figure jumped to nearly sixty percent. The percentage of roll calls without a single negative vote nearly tripled. And under President Bush, for the first time in American history, the filibuster was used to defeat majority-supported judicial nominees.[15] With all due respect to Mark Twain, I think these numbers accurately give you at least a taste for the partisan division and conflict that now characterize the judicial confirmation process. It has become, to edit Thomas Hobbes just a bit, quite nasty and brutish.

Turning from what has been to what should be, I believe we can get on a better path by, as Madison emphasized in *The Federalist* No. 39, "recurring to principles."[16] The judicial selection process has changed because ideas about judicial power have changed. My basic thesis is this: Our written Constitution and its separation of powers define both judicial power and judicial se-

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15. *See* Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 819–23.

16. THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

lection. They define the judicial philosophy that is a necessary qualification for judicial service, and they counsel that the Senate defer to the President when he nominates qualified individuals.

Consider a judicial nomination as a hiring process based on a job description. The job description of a judge is to interpret and apply law to decide cases. This job description does not mean whatever a President, political party, or Senate majority wants it to mean. Our written Constitution and its separation of powers set the judicial job description. Interpreting written law must be different than making written law. Because law written in statutes or the Constitution is not simply words, but really the meaning of the words, only those with authority to make law may determine what the words of our laws say and what those words mean. Judges do not have authority to make law, so they do not have authority to choose what the words of our laws say or what they mean. In other words, judges apply the law to decide cases, but they may not make the law they apply. Judges and the law they use to decide cases are two different things. Judging, therefore, is about a process that legitimates results, a process by which the law made by the people and those they elect determines winners and losers.

The Constitution and its separation of powers compel this judicial job description. This kind of judge is consistent with limited government and the ordered liberty it makes possible. Justice Markman's article describes what he calls a "traditional jurisprudence—one that views the responsibility of the courts to say what the law 'is' rather than what it 'ought' to be."[17] Such a philosophy of judicial restraint—an understanding of the limited power and role of judges—is a qualification for judicial service. This is the kind of judge a President should nominate.

Our written Constitution and its separation of powers also define how the confirmation stage of the judicial selection process should operate. The Constitution gives the power to nominate and appoint judges to the President, not to the Senate. The best way to understand the Senate's role is that the Senate advises the President whether to appoint his nominees by giving or withholding its consent. I explored this role in more detail in the *Utah Law Review* a few years ago in the context of showing that the use of the filibuster to defeat majority-supported judicial nomi-

17. Markman, *supra* note 5, at 149.

nees is inconsistent with the separation of powers.[18] One basis on which the Senate may legitimately withhold its consent to a judicial nominee, however, is that the nominee is not qualified for judicial service. Qualifications include more than information on a nominee's resume. And with all due respect to the American Bar Association, their rating does not a qualification determine. Instead, qualifications for judicial service include whether a nominee's judicial philosophy—his understanding of a judge's power and role—is in sync with our written Constitution and its separation of powers.

Judges, after all, take an oath to support and defend the Constitution of the United States. To be qualified for judicial service, a nominee must believe there is such a thing, that the supreme law of the land is not simply in the eye of the judicial beholder, and that judges need something more than a legal education, a personal opinion, and an imagination to interpret it.

I propose looking to the basic principles of our written Constitution and its separation of powers to guide the judicial selection process. For the President, those principles require nominees with a restrained judicial philosophy. For the Senate, they require deference to a President's qualified nominees. Senators, of course, must decide how to balance qualifications and deference. Our written Constitution and its separation of powers, however, provide normative guidance for the judicial selection process. Presidents and Senators will have to decide, and be accountable for, how they use or reject that guidance.

No matter how philosophically sound this proposal may be—and I believe it is philosophically rock solid—it may nevertheless be politically controversial. We have traveled a long way from Alexander Hamilton describing the judiciary as the weakest and least dangerous branch.[19] We have traveled a long way from the Supreme Court saying in 1795 that the Constitution is "certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it."[20] We have traveled a long way from the Senate Judiciary Committee saying in 1872 that giving

18. *See* Hatch, *supra* note 15, at 826–31.

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

20. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 308 (1795).

the Constitution a meaning different from what the people provided when adopting it would be unconstitutional.[21]

For a long time now, we have instead labored under Chief Justice Charles Evans Hughes's notion that the Constitution is whatever judges say it is.[22] It has become fashionable to suppose that the only law judges may not make is law we do not like. Legal commentator Stuart Taylor correctly observes that "[l]ike a great, ever-spreading blob, judicial power has insinuated itself into every nook and cranny."[23] One of my predecessors as Senator from Utah who later served on the Supreme Court, George Sutherland, described the transformation in 1937 as it was literally under way. He warned that abandoning the separation of powers by ignoring the distinction between interpreting and amending the Constitution would convert "what was intended as inescapable and enduring mandates into mere moral reflections."[24] Less than two decades later, Justice Robert Jackson described what he saw as a widely held belief that the Supreme Court decides cases based on personal impressions rather than impersonal rules of law.[25]

Judicial power and judicial selection are inextricably linked. Sometimes the Senate can appear to produce a lot of activity but take very little action. To some, that means the Senate is the world's greatest deliberative body. To others, it means that it produces a lot of sound and fury signifying nothing. But I hope that the debate over President Obama's judicial nominees will really be a debate over the kind of judge our liberty requires. The debate should be about whether judges should decide cases by using enduring mandates and impersonal rules of law or by using their own moral reflections and personal impressions.

President Obama has already taken sides in this debate. When he was a Senator, he voted against the nomination of John Roberts to be Chief Justice, stating that judges decide cases based on

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21. *See* Raoul Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 297–98 (1986) (citing S. REP. NO. 21, 42d Cong., 2d Sess. 2 (1872)).

22. Charles Evans Hughes, Speech before the Elmira Chamber of Commerce, May 3, 1907, *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 133, 139 (Robert H. Fuller & Gardner Richardson eds., 1908).

23. Stuart Taylor Jr., *Imperial Judges Could Pick the President—Again*, 36 NAT'L J. 2877, 2877 (2004).

24. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

25. Brown v. Allen, 344 U.S. 443, 535 (1953) (Jackson, J., concurring in the result).

their deepest values, their core concerns, and the content of their hearts.[26] On the campaign trail, he pledged that he would select judges according to their empathy for certain groups such as the poor, African Americans, gays, the disabled, or the elderly.[27] The real debate is about whether judges may decide cases based on empathy at all, not the groups for which they have empathy. It is about whether judges may make law at all, not about what law judges should make. Conservatives as well as liberals often evaluate judges and judicial decisions by their political results rather than by their judicial process. But a principle is just politics unless it applies across the board. Professor Steven Calabresi, one of the Federalist Society's founders, wrote last fall that "[n]othing less than the very idea of liberty and the rule of law are at stake in this election."[28] He was right, and they remain at stake in the ongoing selection of federal judges.

Judges have no authority to change the law, regardless of whether they change it in a way I like. I am distinguishing here between judicial philosophy, which relates to process, and political ideology, which relates to results. Senators often reveal their view of judicial power when participating in judicial selection, proving once again that the two are inextricably linked. During the debate over Chief Justice Roberts's nomination, for example, one of my Democratic colleagues wanted to know whether the nominee would stand with families or with special interests. She said the American people were entitled to know how he would decide legal questions even before he had considered them.[29] Another Democratic Senator similarly said that the real question was whose side the nominee would be on when he decided important issues.[30] Would he be on the side of corporate or consumer interests, the side of polluters or Congress when it seeks to regulate them, or the side of labor or management?

In this activist view of judicial power, the desired ends defined by a judge's empathy justify whatever means he uses to

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26. 151 CONG. REC. S10366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

27. Posting of Mark Murray to First Read, http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx (July 17, 2007, 16:21 EDT) (report by Carrie Dann).

28. Steven G. Calabresi, *Obama's "Redistribution" Constitution*, WALL ST. J., Oct. 28, 2008, at A17.

29. 109 CONG. REC. S10641 (daily ed. Sept. 29, 2005) (statement of Sen. Stabenow).

30. Interview by Matt Lauer with Senator Edward Kennedy, *available at* http://www.tedkennedy.com/journal/165/senator-kennedy-nbctoday-show-interview.

decide cases. This activist view of judicial power is at odds with our written Constitution and its separation of powers and, therefore, with ordered liberty itself. The people are not free if they do not govern themselves. The people do not govern themselves if their Constitution does not limit government. The Constitution cannot limit government if judges define the Constitution.

Terry Eastland aptly described the result of judicial activism in a 2006 essay titled *The Good Judge*: "The people's text, whether made by majorities or, in the case of the Constitution, supermajorities, would be displaced by the judges' text. The justices became lawmakers."[31] This quotation highlights one of the many differences between God and federal judges. God, at least, does not think He is a federal judge. And it brings up the question of how many federal judges it takes to screw in a light bulb. Only one, because the judge simply holds the bulb as the entire world revolves around him.

There is perhaps some reason for optimism. One poll found last year that, no matter for whom they voted, nearly three-quarters of Americans said they wanted judges "who will interpret and apply the law as it is written and not take into account their own viewpoints and experiences."[32] This debate is indeed the one we should be having, whether judges have the power to make law. When judges apply law they have properly interpreted rather than improperly made, their rulings may have the effect of helping or hurting a particular cause, of advancing or inhibiting a particular agenda. They may, at least by the political science bean counters, be considered liberal or conservative. The point, therefore, is not which side wins in a particular case, but whether the winner is decided by the law or by the judge. When judges interpret law, the law produces the results. Thus, the people can choose to change the law. When judges make law, judges produce the results and the people are left with no recourse at all. That state of affairs is the antithesis of self-government.

Let me close by saying that the effort to defend liberty never ends. Andrew Jackson reminded us as he left office in 1837 that

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31. Terry Eastland, *The 'Good Judge': Antonin Scalia's two decades on the Supreme Court*, WKLY. STANDARD, Nov. 13, 2006.

32. Press Release, The Federalist Society, Key Findings from a National Survey of 800 Actual Voters (Nov. 5, 2008), *available at* http://www.fed-soc.org/publications/pubid.1183/pub_detail.asp.

"eternal vigilance by the people is the price of liberty; and that you must pay the price if you wish to secure the blessing."[33] The approach I outline actually joins an effort that began long ago and reminds me of a resolution passed by the Senate Republican Conference in 1997:

> Be it resolved, that the Republican Conference opposes judicial activism, whereby life-tenured, unaccountable judges exceed their constitutional role of interpreting already enacted, written law, and instead legislate from the bench by imposing their personal preference or views of what is right or just. Such activism threatens the basic democratic values on which our Constitution is founded.[34]

There you have it. Our written Constitution and its separation of powers define both judicial power and judicial selection. They require judicial restraint as a qualification for judicial service and require Senate deference to a President's qualified nominees. The weeks and months ahead will provide opportunities to debate these principles and their application. Nothing less than ordered liberty is at stake. I know the Federalist Society will be right in the thick of that debate.

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33. Andrew Jackson, Farewell Address, *in* 2 THE STATESMAN'S MANUAL: THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES 947, 957 (Edwin Williams ed., New York, Edward Walker 1846).

34. On file with Author.