

RESTORING OUR BROKEN JUDICIAL CONFIRMATION PROCESS

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I always cheer up immensely if an attack is particularly wounding because I think, well, if they attack one personally, it means they have not a single political argument left.

—Margaret Thatcher¹

It is a great honor to be the first Texan on the U.S. Senate Judiciary Committee since 1961,² as well as the first Texan chairman of the Senate Subcommittee on the Constitution since the subcommittee was first established in 1947.³ It is also a source of great frustration, however.

The Senate's judicial confirmation process is badly broken. On April 30, 2003, the bipartisan class of freshman senators of the 108th Congress sent a letter to Senate leadership declaring that "the judicial confirmation process is broken and needs to be fixed," and that "the United States Senate needs a fresh start."⁴ That same day, Senator Chuck Schumer of New York

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1 JAMES B. SIMPSON, *SIMPSON'S CONTEMPORARY QUOTATIONS* (1988), available at <http://www.bartleby.com/63/73/373.html> (last visited Dec. 11, 2003).

2 *History of the Committee on the Judiciary, United States Senate, 1816-1981*, S. Doc. No. 97-18, at 129 (1982). I am the seventh Texan member of the committee, and the first Texan Republican. I am preceded by Democrat Texan Senators Richard Coke (1885-1895), Horace Chilton (1897-1901), Charles Allen Culberson (1901-23), Thomas Connally (1936-45), Marion Price Daniel (1955-57), and William Arvis Blakley (1961).

3 My twelve predecessors as chairman of this subcommittee are Senators Chapman Revercomb (R-WV) (80th Cong.), Forrest C. Donnell (R-MO) (81st Cong.), Harley M. Kilgore (D-WV) (82nd Cong.), William Langer (R-ND) (83rd Cong.), Estes Kefauver (D-TN) (84th-87th Congs.), Birch Bayh (D-IN) (88th-96th Congs.), Orrin G. Hatch (R-UT) (97-99th Congs.), Paul Simon (D-IL) (100-103rd Congs.), George Hanks (Hank) Brown (R-CO) (104th Cong.), John Ashcroft (R-MO) (105-106th Congs.), Strom Thurmond (R-SC) (107th Cong.), and Russell Feingold (D-WI) (107th Cong.).

4 See Letter from Senators John Cornyn, Mark Pryor, Lisa Murkowski, Lindsey Graham, Elizabeth Dole, Saxby Chambliss, Norm Coleman, James Talent, Lamar Alexander, and John E. Sununu to Senators Bill Frist and Tom Daschle (Apr. 30, 2003), available at <http://cornyn.senate.gov/judiciaryletter.pdf>. See also Press Release, Office of

similarly wrote that “the judicial nomination and confirmation process [i]s broken and . . . we have a duty to repair it.”⁵ A few days later, Senator Dianne Feinstein of California concurred that the judicial selection process “is going in the wrong direction. The debate between the Senate and the Executive Branch over judicial candidates has become polarized and increasingly bitter.”⁶ ABA President Alfred P. Carlton, Jr. has concluded that, as the result of the Senate’s broken confirmation process, “[t]here is a crisis in our federal judiciary, constituting a clear and present danger to the uniquely American foundation of our tripartite democracy—an independent judiciary.”⁷ Even *The New York Times* editorial page—one of the nation’s most hostile opponents of President Bush’s well-qualified judicial nominees—has recognized that “the judicial selection process is broken.”⁸

In a recent article in another law journal,⁹ I noted that the Senate has long been plagued by unfortunate and unnecessary delay in its consideration of judicial nominees under Presidents of both parties, yet the problem has only grown worse in the current Senate. Today, a bipartisan majority of senators is ready and willing to consider nominees in a timely fashion and hold up-and-down votes after conducting a reasonable inquiry. But a partisan minority of senators is engaged in unprecedented filibusters to prevent such votes from being taken—in direct offense to the Constitution, the separation of powers, and judicial independence. The article concludes that filibusters of judicial nominees are the most virulent form of delay imaginable, and that they must be stopped.

Senator John Cornyn, Judicial Confirmation Process Needs “A Fresh Start” (Apr. 30, 2003), available at <http://cornyn.senate.gov/043003judicialfreshstart.html>. This letter will be reprinted in an upcoming issue of the *Harvard Journal of Law & Public Policy*.

5 See Letter from Senator Charles E. Schumer to President George W. Bush (Apr. 30, 2003), available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01655.html.

6 See Letter from Senator Dianne Feinstein to President George W. Bush (May 6, 2003), available at <http://feinstein.senate.gov/03Releases/r-lettertobushonjudicialimpasse.htm>.

7 Alfred P. Carlton Jr., *More and Faster—Now: The Crisis in the Federal Judiciary*, 89 A.B.A.J. 8 (2003).

8 *The Brawl Over Judges*, N.Y. TIMES, May 5, 2003, at A22.

9 See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J. L. & PUB. POL’Y (forthcoming 2003) (manuscript on file with author).

The current filibuster controversy reminds me of criticisms, made by myself and others, about Texas's system of selecting judges—a system with flaws that are actually rather mild by comparison. It has long been my view that partisan elections are not the right way to go for selecting judges, because it excessively politicizes the selection process.¹⁰ But whatever the problems the various states may have in their judicial selection systems, nothing compares to how badly broken the system of judicial confirmation is here in Washington, D.C. In Texas, we have debate and discussion, and that is always followed by a vote. Whatever else you might say about the process, we always finish it. We always hold a vote.¹¹ And of course, voting is precisely what we in the U.S. Senate were elected to do. Vote up or down, but, as the *Washington Post* admonished in a February editorial, “Just Vote.”¹² Filibusters represent the exact opposite view—never vote, just delay and obstruct, by any means necessary.

Filibusters are not the only problem with the Senate's judicial confirmation process, however. As a former judge, I have been deeply concerned that, throughout this past year, numerous special interest groups—groups that claim to champion civil rights and racial and religious equality—have supported the use of dangerous, divisive, and even unconstitutional arguments, as well as improper tactics like the filibuster, to deny confirmation to federal judicial nominees. What's worse, it disturbs me to see that such tactics are starting to become regular and accepted practice. I fear that civility has been lost in our judicial confirmation process.

For some nominees, their religious beliefs—about abortion and other personal matters—are being used against them, while for other nominees, their good names and reputations are being smeared through unfair stereotypes about Southerners and false and cruel charges of racism or racial insensitivity. Thankfully, to date, these divisive arguments have failed to convince a majority of senators to vote against a judicial nominee.¹³ But that only

10 See, e.g., *Voters Guide General Election '96 League of Women Voters*, FT. WORTH STAR-TELEGRAM, Oct. 20, 1996, at 1, available at 1996 WL 11346924.

11 I made this very point on the floor of the Senate earlier this year. See 149 CONG. REC. S3435-36 (daily ed. Mar. 11, 2003) (statement of Sen. Cornyn).

12 *Just Vote*, WASH. POST, Feb. 18, 2003, at A24.

13 Senator Santorum has been particularly active in opposing the use of religious tests to deny General Pryor an up-or-down vote on the floor of the United States Senate.

demonstrates just how toxic the current filibusters of judicial nominees really are. Unable to work within the traditional “Advice and Consent” framework and to convince a majority of senators to vote against this President’s judicial nominees, a partisan minority of senators has instead chosen to bypass the Constitution and to employ unprecedented filibusters to give effect to their destructive arguments. In short, they are using an illegitimate tool to achieve illegitimate ends. The use of unprecedented filibusters on the basis of inappropriate criteria is conduct unbecoming the great institution of the United States Senate.

By publishing this article, I hope to point out how far the process has fallen, and thus, how badly we need to restore civility to our broken judicial confirmation process. Part I describes the pervasive use of irrelevant and ridiculous criteria against judicial nominees. Parts II through IV document the use of religious beliefs and divisive stereotypes against three judicial nominees considered by the Senate this year: Arkansas lawyer J. Leon Holmes, Alabama Attorney General William H. Pryor, Jr., and Mississippi federal district judge Charles W. Pickering, Sr. Part V concludes the article by cataloguing the various vicious personal attacks deployed against this President’s judicial nominees by liberal special interest groups and even by some senators. All five parts share a common theme: our judicial confirmation process is badly broken, and we sorely need to restore civility to the debate over judicial nominations.

I.

The use of all manner of irrelevant and ridiculous criteria—offensive as well as just plain silly—now pervades the Senate confirmation process. Just this year, a partisan minority of senators filibustered the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit—causing Estrada to tragically, but understandably, withdraw his nomination from further consideration.¹⁴ What was their primary justification?

See, e.g., Rick Santorum, *Judges and Beliefs*, N.Y. TIMES, Aug. 5, 2003, at A14; Rick Santorum, *Confirming Judges, the Un-American Way*, CRISIS, Oct. 2003, at 61 (“Democrats’ introduction of an ideological abortion litmus test into the judicial confirmation process is an obvious surrogate for an unconstitutional religious test.”).

¹⁴ *See* Press Release, White House, Office of the Press Secretary, President’s Statement on Miguel Estrada, (Sept. 4, 2003), *available at*

They point out that the U.S. Justice Department has refused to produce confidential memoranda Estrada wrote while serving during the Bush and Clinton Administrations as an Assistant to the Solicitor General. Yet no previous judicial nominee has been denied confirmation, or a vote on the floor of the United States Senate, on such grounds.

To the contrary, since the beginning of the Carter Administration in 1977, the Senate has approved 67 federal courts of appeals nominees who had previously worked in the Justice Department.¹⁵ According to the White House, in *none* of those cases did the Senate request, or the Justice Department produce, internal deliberative materials created by the Department—and rightly so.¹⁶ Every living former Solicitor General—representing administrations of both parties—has condemned this demand for confidential Justice Department documents as a serious breach of attorney-client privilege and a dangerous threat to the Department’s ability to represent the United States government in federal court.¹⁷

What’s more, disclosure of such documents is not only harmful to the American people, but it is also wholly unnecessary to the Senate’s confirmation function. Former Solicitors General Seth Waxman and Drew Days, political appointees of President Clinton, supervised Estrada’s work. If Estrada was somehow too captive to extreme right-wing ideology to be able to serve in a judicial capacity, surely they would have noticed and would have pointed that out by now. Yet neither has raised any objection to his nomination. Quite the opposite: Numerous former colleagues in the Solicitor General’s office,

<http://www.whitehouse.gov/news/releases/2003/09/20030904-2.html>. Mr. Estrada’s letter requesting the President to withdraw his nomination can be found at http://www.vermontgop.org/estrada_yields.shtml (last visited Dec. 11, 2003).

¹⁵ See Letter from Alberto Gonzales, Counsel to President George W. Bush, to Senators Tom Daschle and Patrick Leahy 5-6 (Feb. 12, 2003), *available at* <http://www.usdoj.gov/olp/whcestradaletter.pdf>. Of the 67 nominees, seven worked as a Deputy Solicitor General or Assistant to the Solicitor General. These seven nominees were nominated by Presidents of each party and confirmed by Senates controlled by each party: Samuel Alito, Danny Boggs, William Bryson, Frank Easterbrook, Daniel Friedman, Richard Posner, and Raymond Randolph.

¹⁶ See *id.*

¹⁷ See Letter from Seth P. Waxman, Walter Dellinger, Drew S. Days, III, Kenneth W. Starr, Charles Fried, Robert H. Bork, and Archibald Cox to Senator Patrick Leahy (June 24, 2002), *available at* <http://www.usdoj.gov/olp/solicitorsletter.pdf>. Mr. Dellinger served as Acting Solicitor General under the Clinton Administration.

including Waxman and Days, have written and spoken in praise of Estrada.¹⁸ Indeed, Estrada received the highest possible rating of “outstanding” in every possible category in performance evaluations he received while working for the Clinton Administration.¹⁹

Other arguments for opposing Estrada were even weaker by comparison. Some argued that Estrada does not deserve confirmation to the D.C. Circuit because he has no judicial experience, while others contended that he is too young to serve on a federal court of appeals—arguments that, if taken seriously by the United States Senate, would have prevented numerous current and former federal appellate judges from being confirmed.²⁰

There was at least one thing that Estrada was *not* criticized for: He lives and works in the greater Washington, D.C. area. Of course, judges of the D.C. Circuit – uniquely, among federal court of appeals judges – are not required to do so.²¹ Yet another nominee to the D.C. Circuit—Justice Janice Rogers Brown of the California Supreme Court—has been criticized by some senators, as well as the Congressional Black Caucus, because she does not currently live in the D.C. area. This, too, is an argument without basis—the current D.C. Circuit bench includes Karen LeCraft Henderson (formerly a U.S. District Judge for the District of South Carolina), David Sentelle (formerly a U.S. District Judge for the Western District of North Carolina), Harry Edwards (formerly a law professor at the

18 See Letter from Alberto Gonzales, Counsel to President George W. Bush, to Senators Tom Daschle and Patrick Leahy 3, 7 (Feb. 12, 2003), *available at* <http://www.usdoj.gov/olp/whcestradaletter.pdf>.

19 See *id.*

20 See, e.g., *Just Vote*, *supra* note 12 (“[Estrada] lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated.”); Letter from Alberto Gonzales, Counsel to President George W. Bush, to Senators Tom Daschle and Patrick Leahy 5 (Feb. 12, 2003) (noting that the Senate has confirmed 38 federal court of appeals nominees who, like Estrada, have Justice Department experience and no prior judicial experience), *available at* <http://www.usdoj.gov/olp/whcestradaletter.pdf>; John Cornyn, *Partisan Holdups Shouldn’t Bar Estrada Nomination*, SAN ANTONIO EXPRESS-NEWS, Feb. 22, 2003, at 11B (“Democrats also irresponsibly assert that Estrada has no judicial experience, even though the vast majority of the current D.C. circuit judges—both Republican and Democrat nominees—had no prior judicial experience before their appointment to the federal bench.”).

21 See 28 U.S.C. § 44(c).

University of Michigan), and Stephen Williams (formerly a law professor at the University of Colorado).²²

The use of irrelevant criteria unfortunately did not end with the Estrada filibuster. Although Democrat senators, recognizing the toxicity of their unprecedented tactics, suggested during the Estrada debate that they would use filibusters only to assert *procedural* objections during confirmation proceedings,²³ they immediately reversed course when it came time to oppose the nomination of my friend and former colleague, Texas Supreme Court Justice Priscilla Owen, to the U.S. Court of Appeals for the Fifth Circuit. They filibustered her nomination on numerous *substantive* grounds, after suggesting that they would *never* do so. What's more, the substantive grounds were utterly baseless.

Justice Owen's opponents tried to characterize her as a conservative judicial activist, by pointing out that other judges sometimes disagreed with her, and that that is somehow a sign of something wrong with Justice Owen. But that is ludicrous. Our state and federal appellate courts are comprised of numerous judges, precisely because the top courts only get the most difficult cases, and in tough, close cases, we expect our judges to disagree. There is nothing wrong with robust, healthy legal debate. It was also argued that some judges have criticized Justice Owen for rewriting statutes. But that too is normal. When judges in good faith try to read a statute that is less than perfectly clear, they may disagree. And when they do, they may naturally think that the other judge is rewriting the statute—after all, they disagree on what the statute means. This is, once again, our legal system properly at work.²⁴

²² See U.S. Court of Appeals for the District of Columbia, *Judges*, at http://www.cadc.uscourts.gov/court_offices/judges/judges.asp (last visited Dec. 11, 2003) (listing the court's judges and their prior experience).

²³ For example, Senator Durbin made the following remarks:

If [Estrada] is honest and cooperate in producing the information and answering the questions, he deserves a vote. . . . I went to a number of Democrats and said: Do you feel as I do? If he will disclose his legal memoranda, and if he will answer the questions that might arise from that, and perhaps a few that he avoided in the course of the hearing, would you vote to give him a vote? The answer was affirmative to a person; because, frankly, then we would know for whom we are voting.

149 CONG. REC. S2508 (daily ed. Feb. 14, 2003).

²⁴ As I noted in my introduction of Justice Owen at her second confirmation hearing held on March 13, 2003, this whole issue reminds me of the scene from the movie *Jerry Maguire*, when Cuba Gooding Jr. tells Tom Cruise: "See, man, that's the difference

Imagine what would happen if we really adopted this absurd new standard—that the Senate should not confirm judges who have previously been criticized by other judges. For example, consider how that absurd standard would apply to the justices who have served on our U.S. Supreme Court. In one 1989 decision, Justice John Paul Stevens criticized Justice Byron White for his “sojourn into judicial activism.”²⁵ In a 1985 decision, Justices White, Powell, O’Connor, and others were attacked by Justice Stevens for engaging in “judicial activism.”²⁶ In a 1971 opinion, Justices Black and Douglas sharply criticized Justices Brennan, Blackmun, and others, stating that the “plurality’s action in rewriting this statute represents a seizure of legislative power that we simply do not possess.”²⁷ These are harsh terms, to be sure, but only those who are utterly unfamiliar with how courts actually work would fail to realize that aggressive rhetoric is often a standard feature of judicial opinion writing—and not evidence of the need for judicial impeachments. Or do Justice Owen’s opponents believe that these justices, too, are unfit for the bench?

I mention these particular statements in U.S. Supreme Court decisions because they bear a rather remarkable resemblance to the most famous statement Justice Owen’s opponents have attempted to use in their efforts to impeach her qualifications for the Fifth Circuit. In a series of cases, the Supreme Court of Texas was called upon to interpret a Texas law generally requiring that one parent be notified before a minor can obtain an abortion.²⁸ Owen’s opponents alleged that, in one such case, then-Justice Alberto Gonzales (now Counsel to President Bush) accused her of committing “an unconscionable act of judicial activism” in her interpretation of the parental notification law.²⁹ As I have described above, however, this is precisely the kind of

between us. You think we’re fighting, I think we’re finally talking!” JERRY MAGUIRE (Sony Pictures 1996). Those who have emphasized critical quotes about Justice Owen from other justices on the Texas Supreme Court think that they are fighting, but actually, the justices are just talking—they are just judging, as they are supposed to do.

25 *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 663 (1989) (Stevens, J., dissenting).

26 *New Jersey v. T.L.O.*, 469 U.S. 325, 375 (1985) (Stevens, J., dissenting).

27 *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 383 (1971) (Black, J., dissenting).

28 See TEX. FAM. CODE § 33.003.

29 See *In re Doe*, 19 S.W.3d 346, 366 (Tex. 2000).

aggressive rhetoric that U.S. Supreme Court justices use to express strong disagreement with their brethren. It is hardly reasonable grounds for denying a nominee a confirmation vote. What's more, these opponents completely misread the Gonzales opinion. In fact, Justice Gonzales was not even referring to Justice Owen or her dissenting opinion when he made that statement. He was simply defending himself and the majority against allegations that they had engaged in judicial activism. As Gonzales himself later explained:

Some members accused others of trying to impose their own personal ideology, and I wanted to reassure my colleagues that that was not going on. . . . The fact that [Justice Owen] and I may have disagreed on a particular case doesn't mean that she is somehow unfit or unqualified to serve on the court . . . Quite the contrary. I think she would make a great judge on the Fifth Circuit.³⁰

C. Boyden Gray, former counsel to President George H.W. Bush, noted:

The interest groups wrongly interpret the [statement of Gonzales] to mean that Justice Gonzales was charging other members of the Court with engaging in inappropriate judicial activism. But that reading ignores the subsequent sentences, as well as the broader context of Judge Hecht's accusations against the majority of the Court for engaging in judicial activism. Rightly read, Justice Gonzales's concurrence does not charge any other Justice with being judicial activists; it simply denies Justice Hecht's allegations that the majority was interpreting the Parental Notification Act in light of their political or ideological commitments.³¹

Owen's opponents also fail to point out that, in Texas, parental notification appeals arrive at the state supreme court *only* after two lower courts have already rejected a minor's claim for a judicial waiver of the parental notification requirement; that in a *majority* of those appeals to the state supreme court,

³⁰ See S.C. Gwynne, *Is "Al Gonzales" Spanish for "Stealth Liberal?"*, TEX. MONTHLY, June 2003, at 104, 165-66. See also Terry Eastland, *Judicial Snag on Choice*, WASH. TIMES, July 23, 2002, at A18 (analyzing opinions in *In re Jane Doe* case and concluding that Gonzales was not referring to Owen), available at 2002 WL 2914703; C. Boyden Gray, *Priscilla Owen: A Restrained, Principled Jurist*, at 16-17, available at http://committeeofjustice.org/contents/reading/priscilla_owen_brief.pdf (same).

³¹ Gray, *supra* note 30, at 17.

Owen voted in favor of judicial waiver despite denials by the lower courts; and that two other justices actually dissented more frequently than she did—hardly the record of an activist judge ignoring the law in order to further a pro-life agenda.³²

Justice Owen's disagreements with colleagues in other cases identified by her Senate opponents are equally unconvincing as grounds for opposing her nomination. For example, some members accused Justice Owen of being insensitive to injured workers, because of her views in cases like *Sonnier v. Chisholm Ryder-Co.*³³ For good measure, some senators pointed out that I was in the majority in that case and disagreed with Justice Owen, who dissented. But the case in no way demonstrates that I somehow sympathize with injured workers to any different degree than does Justice Owen. As human beings, we all do—I certainly know that Justice Owen does. But as judges, we have to interpret the law as best as we can. The *Sonnier* case, and the disagreement amongst the justices in that decision, essentially involved whether a tomato chopping machine is real property or personal property under Texas law—a question of statutory construction that is the staple of so many cases across the country, nothing more, nothing less. The legal controversy in that case reminds me of the famous U.S. Supreme Court case, *Nix v. Hedden*, involving the question whether a tomato is a fruit or a vegetable, for purposes of construing a federal tariff law.³⁴ As a matter of the botanical sciences, a tomato is a fruit. Yet in common parlance, a tomato is a vegetable. And there was little textual indication which meaning—common or scientific—was actually intended. *Nix v. Hedden* is frequently taught in our law schools to demonstrate the difficulties of construing complex statutes and laws. It presents a genuinely challenging matter of law—hardly an ideological issue, and hardly the kind of issue that determines whether one is fit or unfit to serve as a judge.

Justice Owen was also criticized for insensitivity to employment discrimination claims because she dissented in cases like *Quantum Chemical Corp. v. Toennies*.³⁵ Put simply, the

³² See John Cornyn, *The Real Priscilla Owen*, AUSTIN AM.-STATESMAN, Mar. 13, 2003, at A13.

³³ See 909 S.W.2d 475 (Tex. 1995).

³⁴ See 149 U.S. 304 (1893).

³⁵ See 47 S.W.3d 473 (Tex. 2001).

claim is absurd. In that case, the justices of the Texas Supreme Court disagreed on a rather thorny matter of employment discrimination law that, at least until recently, had badly split the federal courts of appeals. Justice Owen took the view adopted by numerous federal appellate judges like Judge Diana Motz of the U.S. Court of Appeals for the Fourth Circuit³⁶—a Clinton appointee approved with the unanimous consent of the Senate.³⁷ Of course, Justice Owen’s opponents do not criticize Judge Motz for bearing a similar hostility to plaintiffs in employment discrimination cases.

These false arguments are simultaneously amusing and aggravating to dispatch. But what really concerns me, far more than these irrelevant considerations, is the divisive and destructive use of religious views and divisive stereotypes to deny qualified jurists an up-or-down vote on the floor of the United States Senate. This past year, I have expressed precisely these concerns with respect to the treatment of at least three of this President’s judicial nominees—J. Leon Holmes, nominee to the Eastern District of Arkansas; Alabama Attorney General William H. Pryor, Jr., nominee to the U.S. Court of Appeals for the Eleventh Circuit; and most recently, U.S. District Judge Charles W. Pickering, Sr., a Mississippi nominee to the U.S. Court of Appeals for the Fifth Circuit. I spoke out against the use of unconstitutional religious tests, unfair stereotypes about Southerners, and baseless and cruel charges of racism at the May 1, July 23, and October 2 executive business meetings of the Senate Judiciary Committee, during which each of these nominations was debated and ultimately approved on 10-9 party-line votes.

I am pleased and honored that the *Texas Review of Law & Politics* has seen fit to reproduce the substance of my comments during those three committee meetings here, for this is an important subject that deserves greater attention and scrutiny. The American people hold a wide variety of opinions on a number of important subjects. Those subjects are hotly debated,

³⁶ See *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995). The rule in *Fuller* was abrogated by the U.S. Supreme Court earlier this year in *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003). But that of course in no way diminishes the point that, prior to *Desert Palace*, a good faith argument could be made, and was in fact made, by respected lower court judges in support of the legal rule adopted in decisions like *Fuller*.

³⁷ See 140 CONG. REC. S6937 (1994).

and deserve to be hotly debated, through the democratic process and through our elected representatives in the Congress, the White House, and throughout the states. However, when it comes to our federal judiciary, I believe that the American people are in solid agreement on at least three basic principles. First, vacancies on our federal bench (especially those designated as “judicial emergencies”³⁸) must be filled, and our federal courts must be staffed, with well-qualified jurists committed to interpreting the law as it is written, and not as they would write it to suit their own personal preferences. They should know the difference between behaving judicially and behaving politically. Second, judicial nominees who, after a reasonable inquiry, are supported by a majority of senators deserve an up-or-down vote on the floor of the United States Senate. It should take months, not years, for such votes to occur. And third, federal judicial nominees, who represent our nation’s finest legal minds, should not have their personal religious views about abortion or other matters used against them, nor should they be stereotyped as racist Southerners or anything else.³⁹ In

³⁸ See The Federal Judiciary, *Revised Definition for Judicial Emergencies*, at <http://www.uscourts.gov/vacancies/emergencies.htm> (last visited Dec. 11, 2003). For a list of vacancies currently designated as judicial emergencies, see The Federal Judiciary, *Judicial Emergencies*, at <http://www.uscourts.gov/vacancies/emergencies2.htm> (Dec. 11, 2003); Office of Legal Policy, U.S. Department of Justice, *Nominations*, at <http://www.usdoj.gov/olp/nominations.htm> (last modified Dec. 17, 2003).

³⁹ Some dispute these charges by pointing out that Senate Democrats have approved many of this President’s nominees who are avowedly pro-life because of their faith, or who hail from the South, and thus cannot reasonably be accused of discriminating on the basis of religious views about abortion or against Southerners. The argument, however, has never been that *all* of the President’s nominees are being stopped who are religiously pro-life or who are Southerners. Rather, the argument is simply that it is wrong to stop *even one* nominee because of his religious views or because of unfair stereotypes. By analogy, it has long been settled that an employer has engaged in unlawful employment discrimination under Title VII of the Civil Rights Act of 1964 if “[t]he employer simply treats *some* people less favorably than others because of their race, color, religion, sex, or national origin”; it has never been the case that an employer must discriminate against *every* member of a protected class in order to be held liable under Title VII. *Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977) (emphasis added). *Cf.* Press Release, The Catholic League, *Religious Test for Catholic Judges Remains* (Aug. 6, 2003), available at http://www.catholicleague.org/03press_releases/quarter3/030806_pryor.htm.

No one has ever said that the Senate Judiciary Committee is bigoted against *all* Catholic nominees for the federal bench. . . . What has been said, by the Catholic League et al., is that a *de facto* religious test is being applied to Catholic candidates who accept the Church’s teachings on abortion. . . . In short, the more open a Catholic nominee is about his prolife views, the more likely he will be defeated. Ergo, the litmus test remains.

Id. (statement of William Donohue, President, The Catholic League).

short, we must restore civility to our broken judicial confirmation process.

II.

On May 1, the Senate Judiciary Committee considered the nomination of J. Leon Holmes to serve as U.S. District Judge for the Eastern District of Arkansas. Holmes is supported by both of his home state senators, both of whom are Democrats. The junior Senator from Arkansas has said that, “[w]henever you talk to lawyers in Arkansas about Leon Holmes, there is one word that keeps coming up . . . ‘integrity.’”⁴⁰ The senior Senator from Arkansas has similarly said that Mr. Holmes and his family “have already made and . . . will make all Arkansans very proud.”⁴¹ The Committee ultimately voted to send his nomination to the entire Senate. That approval was based on a party-line vote, however. No committee Democrat voted in favor of Holmes. Why?

By the time the committee met on May 1 to vote on his nomination to the federal bench, it was well known that Holmes is a pro-life Roman Catholic, personally opposed to abortion as a matter of his faith.⁴² Unfortunately, that became an issue in the

⁴⁰ *Hearing on the Nomination of Edward C. Prado, to be Circuit Judge for the Fifth Circuit, Richard D. Bennett, to be District Judge for the District of Maryland, Dee D. Drell, to be District Judge for the Western District of Louisiana, J. Leon Holmes, to be District Judge for the Eastern District of Arkansas, Susan G. Braden, to be Judge for the Court of Federal Claims, and Charles F. Lettow, to be Judge for the Court of Federal Claims: Hearing Before the Senate Comm. on the Judiciary, 108th Cong. 23 (2003)* (statement of Sen. Pryor) (Mar. 11, 2003).

⁴¹ *Id.* at 21 (statement of Sen. Lincoln) (Mar. 11, 2003).

⁴² Some have countered that not all Catholics oppose abortion. But that is hardly the point. As a practicing Catholic, Holmes opposes abortion on religious and moral grounds—what *others* may believe personally is beside the point. Moreover, Holmes is hardly outside the mainstream of the Catholic Church in holding that religious belief. The Catechism of the Catholic Church clearly states:

From its conception, the child has the right to life. Direct abortion, that is, abortion willed as an end or as a means, is a ‘criminal’ practice, gravely contrary to the moral law. The Church imposes the canonical penalty of excommunication for this crime against human life. Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law: You shall not kill the embryo by abortion and shall not cause the newborn to perish. God, the Lord of life, has entrusted to men the noble mission of safeguarding life, and men must carry it out in a manner worthy of themselves. Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes.

American Life League, *Catechism of the Catholic Church: Abortion*, available at <http://www.all.org/issues/catechism.htm> (last visited Dec. 11, 2003).

fight over his confirmation. According to an April 22 statement by William Donohue, president of the Catholic League for Religious and Civil Rights:

Holmes is a man of deep religious conviction. He is pro-life and is fully supportive of the teachings of the Roman Catholic Church. In the eyes of some, this is a red flag. They seize upon a flip comment he made 23 years ago (for which he has apologized) about abortion. What really irks his critics is that he will not apologize for his pro-life convictions. This notwithstanding the fact that Holmes has already said that only a constitutional amendment could overturn *Roe v. Wade*.⁴³

It is widely believed that Holmes is not a judge today largely because he is a vigorous opponent of abortion. Yet Holmes is clearly committed to following the law, including *Roe v. Wade*, notwithstanding his personal religious views. That is why those who know Holmes best—numerous Arkansas citizens and lawyers, both pro-choice and pro-life—support his nomination, precisely because they are convinced that, as a judge, he would be unswervingly committed to the law, and would be able to set aside his personal religious views in order to fulfill his professional duties. So, if there is no reason to object to Holmes's beliefs as a lawyer, what is left? His beliefs as a man of faith?

Holmes is also being denied confirmation because of a religious article he co-authored with his wife, Susan Holmes, in

This statement of the official position of the Catholic Church, which characterizes abortion as an "abominable crime," is also within the mainstream of many other recognized and established American religions. For example, on June 14, 2000, the Southern Baptist Convention adopted a statement, entitled *The Baptist Faith and Message*. Section 15 of that statement admonishes that believers "should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death." First Baptist Church, Martin, TN, *The Baptist Faith and Message: XV. The Christian and the Social Order*, available at <http://www.utm.edu/martinarea/fbc/bfm/15.html> (last visited Dec. 11, 2003). Similarly, at the Sixth General Assembly of the Presbyterian Church in America, held in Grand Rapids, Michigan on June 19-23, 1978, it was agreed that "[a]bortion, in distinction from miscarriage, is the intentional killing of an unborn child between conception and birth. . . . Scripture leaves no doubt about the continuity of personhood which includes the unborn child [T]he intentional killing of an unborn child between conception and birth, for any reason at any time, is clearly a violation of the Sixth Commandment." *Report of the Ad Interim Committee on Abortion*, (June 19-23, 1978), available at <http://www.prolifeforum.org/churches/statements/pca6thga.asp> (last visited Dec. 11, 2003).

⁴³ Press Release, Catholic League For Religious and Civil Liberties, Catholicism on Trial: Religious Test Applied to Judicial Nominee (Apr. 22, 2003), available at http://www.catholicleague.org/03press_releases/quarter2/030422_holmes.htm.

the *Arkansas Catholic*, about the respective roles of husband, wife, and Christ in the Catholic Church.⁴⁴ A number of senators have cited this article to support the claim that Leon Holmes is a sexist who does not belong on the federal bench. But let's be very clear about what that article did and did not do, and what it did and did not say. The article analyzed religious, not legal, texts. It reflected religious, not legal, convictions. In short, the article has no relevance to, and no bearing whatsoever on, Holmes's character as a lawyer, as opposed to his character as a man of the Catholic faith. Holmes's opponents fundamentally misunderstand and have thus unsurprisingly mischaracterized this article. As Susan Holmes subsequently explained in her April 21 letter to the committee, although "[s]ome have suggested that in this article we advocated that women would be subservient to their husbands," in fact, "[n]othing could be further from the truth."⁴⁵

In retrospect, the committee debate over the Holmes nomination opened a new and ugly chapter in the Senate's judicial confirmation wars. In subsequent months, the role of religion in the judicial confirmation process would become a major topic of discussion across Washington and indeed across America. Yet it seems clear that the seeds of that debate were planted during that May 1 committee meeting, and the events that preceded it.⁴⁶ Americans of all faiths agree that one's religious views should have no place in a Senate confirmation proceeding, and in fact, the Constitution mandates that senators refrain from applying religious tests when deciding whom to confirm to federal office. And so, during that May 1 debate, I expressed my hope that

the day will never come when someone will be disqualified from judicial service because of their religious convictions. . . .

⁴⁴ See Leon & Susan Holmes, *Gender Neutral Language*, ARK. CATHOLIC, Apr. 12, 1997, at 10.

⁴⁵ See Letter from Susan Holmes to Senators Barbara Boxer, Maria Cantwell, Hillary Clinton, Susan Collins, Elizabeth Dole, Dianne Feinstein, Kay Bailey Hutchison, Mary Landrieu, Blanche Lincoln, Barbara Mikulski, Lisa Murkowski, Patty Murray, Olympia Snowe, and Debbie Stabenow (July 16, 2003).

⁴⁶ For example, during the 107th Congress, before I joined the U.S. Senate, liberal special interest groups used a 1984 speech Judge Charles Pickering delivered before the Mississippi Baptist Convention to defeat his nomination to the U.S. Court of Appeals for the Fifth Circuit. See 148 CONG. REC. S1965-67 (Mar. 15, 2002) (statement of Sen. Hatch).

I just wanted to note my own concern [T]he more it sunk in what was being said and the more I looked into it, the more concern I had about potential for religious disqualification for people to serve on the bench. I just hope that day will never come.

Unfortunately, subsequent debates over other judicial nominees gave observers only greater cause for concern.

III.

After numerous delays, the Senate Judiciary Committee finally considered and voted on the nomination of William H. Pryor, Jr., to the U.S. Court of Appeals for the Eleventh Circuit, at its July 23 executive business meeting. It was, unfortunately, a heated debate about a number of subjects—religion foremost among them.

General Pryor is both a personal friend and a former fellow state attorney general, so I am personally acquainted with his deep commitment to the rule of law, above all else. So when some committee members began to argue that General Pryor should not be confirmed to the Eleventh Circuit because of his prior statements criticizing *Roe v. Wade* and his “deeply held personal beliefs” against abortion⁴⁷—as they had previously argued in opposition to Holmes, another devout Catholic who personally opposes abortion on religious grounds⁴⁸—I had to respond.

⁴⁷ See, e.g., *Hearing on the Nomination of William H. Pryor, Jr., to be Circuit Judge for the Eleventh Circuit, and Diane M. Stuart, to be Director of the Violence Against Women Office for the Department of Justice: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 56 (2003) (statement of Sen. Schumer) (June 11, 2003) (“You feel this so passionately, and you have said repeatedly abortion is murder . . . Many people believe abortion is wrong, but when you believe it is murder, how can you square that with or how can you give comfort to women throughout America that you can be fair and dispassionate?”); *id.* at 28 (statement of Sen. Schumer) (June 11, 2003) (“[I]n General Pryor’s case, his beliefs are so well known, so deeply held that it’s very hard to believe, very hard to believe that they’re not going to deeply influence the way he comes about saying ‘I will follow the law.’ And that would be true of anybody who had very, very deeply held views.”); *id.* at 29–30 (statement of Sen. Schumer) (June 11, 2003) (“[B]ased on the comments Attorney General Pryor has made on this subject, I’ve got some real concerns that he can’t [set aside his personal views] because he feels these views so deeply and so passionately.”); *id.* at 104 (statement of Sen. Kennedy) (June 11, 2003) (“I think the very legitimate issue in question, with your nomination, is whether you have an agenda; that many of the positions which you have taken reflect not just an advocacy but a very deeply held view.”).

⁴⁸ See, e.g., *Executive Business Meeting of the Senate Comm. on the Judiciary*, 108th Cong. 11 (2003) (statement of Sen. Schumer) (May 1, 2003) (“[A] person can have deep religious

As I explained during the debate, I have long been troubled by the notion put forth by some that a nominee's personal views, religious or otherwise, on political issues should determine whether or not they are fit to serve as a judge. I firmly believe that, when you place your hand on the Bible and swear an oath to uphold the law as a judge, you change. You learn very quickly the awesome responsibility of a judge, which is to put aside all thoughts of personal views, and instead to faithfully interpret and apply the written law and judicial precedents issued by higher courts. So I believe that it is unfair to say that someone is unfit to be a judge solely because of some personal political view that the individual happens to hold.

Moreover, I believe that it is especially unfair to deny confirmation to someone just because they have criticized *Roe v. Wade*. In fact, numerous legal scholars and jurists across the political spectrum, both pro-choice and pro-life, have publicly criticized *Roe*. Justice Ruth Bader Ginsburg has described *Roe* as “[h]eavy-handed judicial intervention” that “was difficult to justify.”⁴⁹ That did not stop President Clinton from nominating her to the Supreme Court, or the Senate from confirming her by overwhelming margins.⁵⁰ Alan Dershowitz has described *Roe* as a case of “judicial activism” in an area “more appropriately left to the political processes.”⁵¹ Cass Sunstein—who regularly counsels Democrat senators on the judicial confirmation process—has written that there are “notorious difficulties” with the *Roe* decision.⁵² Edward Lazarus, a liberal legal commentator

beliefs. That is fine, but when their views seem so extreme and seem to shade their perception of the world, wherever those extreme views come from, that is wrong. And that is what has happened here with Judge Holmes.”).

49 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385 (1985).

50 139 CONG. REC. S10163 (1993). Her overwhelming 96-3 Senate confirmation vote is particularly remarkable in light of some *non-mainstream legal* positions previously propounded by now-Justice Ginsburg, such as her previously expressed belief in a constitutional right to prostitution and bigamy. See Ruth Bader Ginsburg & Brenda Feigen Fasteau, *Report of Columbia Law School Equal Rights Advocacy Project: The Legal Status of Women Under Federal Law*, at 72 (1974) (“Prostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions.”); *id.* at 190-91 (criticizing bigamy law as “of questionable constitutionality since it appears to encroach impermissibly upon private relationships”). Under standards currently being applied by some senators, Justice Ginsburg might never have been confirmed to the U.S. Supreme Court.

51 ALAN DERSHOWITZ, *SUPREME INJUSTICE* 196 (2001).

52 Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 617 (1990).

and former law clerk to Justice Blackmun, the author of *Roe*, has said that, “[a]s a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible,” a decision that is, “at its worst, disingenuous and results-oriented.”⁵³ Just this year, *The New Republic*’s legal commentator, Jeffrey Rosen, wrote that *Roe* is “hard[] to locate in the text or history of the Constitution” and is based on “an unprincipled and unconvincing constitutional methodology.”⁵⁴

If it is okay for liberals and pro-choice commentators to engage in intellectual discourse and criticism of Supreme Court decisions like *Roe*, it should certainly be okay for such a distinguished attorney as General Pryor, who has proven on numerous occasions his ability to fulfill his professional duties and enforce Supreme Court decisions like *Roe*, to do so. Most notably, as state attorney general, he interpreted Alabama’s partial birth abortion law narrowly to comply with the Supreme Court’s recent decision in *Stenberg v. Carhart*.⁵⁵

The unfair treatment of General Pryor’s nomination to the federal bench is particularly clear when contrasted with another sensitive issue of personal and religious belief, involving another nominee: the death penalty, and President Clinton’s nomination of Janet Reno to serve as Attorney General of the United States. Reno is personally opposed to the death penalty—an issue that was extensively discussed by the Democrat-controlled Senate Judiciary Committee in 1993. But

53 Edward Lazarus, *The Lingering Problems with Roe v. Wade, and Why the Recent Senate Hearings on Michael McConnell’s Nomination Only Underlined Them*, FINDLAW’S WRIT, Oct. 03, 2002, available at <http://writ.news.findlaw.com/lazarus/20021003.html>.

54 Jeffrey Rosen, *Kennedy Curse*, THE NEW REPUBLIC, July 21, 2003, at 15.

55 See Press Release, Office of the Alabama Attorney General, Pryor Announces Dismissal of Challenge to State Law Banning Late-Term Abortions (Oct. 31, 2000), available at <http://www.ago.state.al.us/news/103100.htm>. The press release stated:

The Attorney General acknowledged that a separate state law prohibiting partial birth abortion would be held unconstitutional under the June decision by the Supreme Court in *Stenberg v. Carhart* invalidating Nebraska’s partial birth abortion law. “While we do not agree with the Supreme Court in this case, we are obligated to obey it until it is overruled or otherwise set aside,” he stated. Pryor noted that, under the *Stenberg* ruling, Alabama’s partial-birth abortion ban is unconstitutional based on two reasons—that it does not contain a health exception, and that [its] definition could be construed to cover the dilation and evacuation abortion procedure. “The Legislature still has the option to propose a new law in a form that could pass constitutional muster under the *Stenberg* ruling,” he added.

Id.

she promised the committee that her personal views would not interfere with her professional duty to enforce the law.⁵⁶ And the Senate confirmed her by a *unanimous* vote.⁵⁷

Unless senators are prepared to vote against all of these individuals—and again, members of the Senate overwhelmingly voted to confirm Justice Ginsburg, and voted unanimously to confirm Janet Reno—then I am left to wonder why some people are picking on General Pryor. It cannot be simply because he has criticized *Roe*—because in fact, lots of people have. And the record clearly demonstrates that, as a federal court of appeals judge, General Pryor would dutifully enforce the *Roe* decision, just as these other critics of *Roe* would.

So what is it, then? I am forced to wonder whether it is because General Pryor holds certain *religious* beliefs about the issue of abortion; religious beliefs that are held by millions of Americans in all 50 states; religious beliefs that—as his professional record has demonstrated time and time again—will not prevent General Pryor from interpreting and applying law and precedent faithfully as a federal judge. I hope that is not what is going on, but I fear it may be, and that is a truly dangerous line to cross.

The Religious Test Clause contained in Article VI of the U.S. Constitution specifically instructs that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁵⁸ Further, our consciences should tell us that it is wrong to use religious beliefs against a person. Others have pointed out that the Religious Test Clause was designed to prohibit Congress from utilizing the kinds of tests that Parliament imposed when it approved the first Test Act of 1673 and the second Test Act of 1678. According to one historical account, the first act insisted that all civil and military officers of the English crown take oaths of supremacy, allegiance, and nonresistance, and to formally renounce the Catholic doctrine of transubstantiation. Those requirements

⁵⁶ See *Nomination of Janet Reno to be Attorney General of the United States*, S. HRG. 103-513, at 43-45, 75-76 (1993). See also David Johnston, *Senate Panel, 18-0, Backs Attorney General Nominee*, N.Y. TIMES, Mar. 11, 1993, at A21.

⁵⁷ See 139 CONG. REC. S2736 (1993). The vote was 98-0.

⁵⁸ U.S. CONST. art. VI, cl. 3.

were extended to members of Parliament by the second act.⁵⁹ It seems clear that General Pryor would be able to obtain a vote on the floor of the United States Senate if only he would renounce Catholic doctrine against abortion; yet it seems equally clear that the Religious Test Clause prohibits precisely this kind of requirement for federal office.⁶⁰

I worry that we are starting to see a dangerous trend in recent confirmation proceedings: a trend in which an individual's personal religious views—whether they be on abortion, the death penalty, or any other subject matter—will be used against him in a confirmation proceeding, regardless of his ability to distinguish personal and religious views from professional duty; a trend in which the religiously devout are uniquely presumed incapable of behaving judicially rather than politically; a trend in which committed followers of faith are no longer allowed to serve on the federal bench.

The federal courts themselves have firmly and consistently rejected the use of religious tests against judges as violative of the Religious Test Clause. To take just one example: In *Feminist Women's Health Center v. Codispoti*, the plaintiffs tried to remove a judge from a federal appellate panel because of his “fervently-held religious beliefs” against abortion.⁶¹ The Ninth Circuit repudiated that recusal motion as offensive to the Religious Test Clause.⁶² The decision is a short one, and worth reproducing in its entirety here:

⁵⁹ See Hugh Hewitt, *The Catholic Test*, WEEKLY STANDARD, Aug. 5, 2003 (citing NORMAN DAVIES, *THE ISLES* (1999)), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/956qpnnx.asp>.

⁶⁰ See also Hugh Hewitt, *The Catholic Test, Part 2*, WEEKLY STANDARD, Aug. 7, 2003, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/963mcxzo.asp> (cont'd on next page).

Substitute the demand for a repudiation of “the belief of the immorality of abortion” with the demand for a repudiation of “the belief in transubstantiation” and you have the perfect analogy. Service in government is predicated in both instances upon an abandonment of a central religious teaching—a religious test, supposedly prohibited by Article VI.

Id.

⁶¹ See *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 399, 340 (9th Cir. 1995).

⁶² Although this order was apparently issued as a single-judge order, the Ninth Circuit certainly could have issued a contrary ruling had it disagreed with Judge Noonan's judgment or reasoning, yet it did not do so in this case. See, e.g., *Aronson v. Brown*, 14 F.3d 1578, 1582-83 (Fed. Cir. 1994) (“[A]ppellate courts have reviewed charges that a member of the same appellate court should have recused or be disqualified in a particular case. . . . [W]hen a judge's qualification has been challenged,

ORDER

NOONAN, Circuit Judge.⁶³

The Constitution of the United States, Article VI, provides: “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The plaintiffs in this petition for rehearing renew their motion that I recuse myself because my “fervently-held religious beliefs would compromise [my] ability to apply the law.” This contention stands in conflict with the principle embedded in Article VI.

It is a matter of public knowledge that the Catholic Church, of which I am a member, holds that the deliberate termination of a normal pregnancy is a sin, that is, an offense against God and against neighbor. Orthodox Judaism also holds that in most instances abortion is a grave offense against God. The Church of Jesus Christ of Latter-Day Saints proscribes abortion as normally sinful. These are only three of many religious bodies whose teaching on the usual incompatibility of abortion with the requirements of religious morality would imply that the plaintiffs’ business is disfavored by their adherents. See Theresa V. Gorski, *Kendrick and Beyond: Re-establishing Establishment Clause Limits on Government Aid to Religious Social Welfare Organizations*, 23 *Colum.J.L. & Soc.Probs.* 171 (1990). If religious beliefs are the criterion of judicial capacity in abortion-related cases, many persons with religious convictions must be disqualified from hearing them. In particular, I should have disqualified myself from hearing or writing *Johnston v. Koppes*, 850 F.2d 594 (9th Cir. 1988), upholding the constitutional rights of an advocate of abortion.

True, the plaintiffs qualify my beliefs as “fervently-held” as if to distinguish my beliefs from those that might be lukewarmly maintained. A moment’s consideration shows that the distinction is not workable. The question is whether incapacitating prejudice flows from religious belief. The

[a federal court] has not only the authority but also the responsibility to undertake such review.”) (collecting cases).

63 John T. Noonan, Jr., was nominated to the U.S. Court of Appeals for the Ninth Circuit by President Ronald Reagan in 1985. His writings in other areas have received significant recognition and praise from Senate Democrats. Most notably, Senator Schumer invited Judge Noonan to testify as the lead expert witness before the Senate Judiciary Committee at an October 1, 2002 hearing. See *Narrowing the Nation’s Power: The Supreme Court Sides with the States*, S. HRC. 107-970 (2002). Senator Schumer praised Judge Noonan for publishing a “thoughtful and nuanced treatise” on the Supreme Court’s recent federalism jurisprudence. See *id.* at 1 (citing John T. Noonan). Moreover, Senator Schumer concurred in the view that “the Ninth Circuit and the country are better off today for Judge Noonan’s service.” *Id.* at 6.

question is to be judged objectively as a reasonable person with knowledge of all the facts would judge. *Moideen v. Gillespie*, 55 F.3d 1478, 1482 (9th Cir. 1995). As long as a person holds the creed of one of the religious bodies condemning abortion as sinful he must be accounted unfit to judge a case involving abortion; the application of an objective, reasonable-person standard leads inexorably to this conclusion if the plaintiffs' contention is supportable. No thermometer exists for measuring the heatedness of a religious belief objectively. Either religious belief disqualifies or it does not. Under Article VI it does not.

The plaintiffs may object that the disqualification applies only to cases involving abortion; they are not disqualifying Catholics, Jews, Mormons and others from all judicial office. This distinction, too, is unworkable. The plaintiffs are contending that judges of these denominations cannot function in a broad class of cases that have arisen frequently in the last quarter of a century. The plaintiffs seek to qualify the office of federal judge with a proviso: no judge with religious beliefs condemning abortion may function in abortion cases. The sphere of action of these judges is limited and reduced. The proviso effectively imposes a religious test on the federal judiciary.

The plaintiffs' motion of recusal is denied.⁶⁴

I would also point out that, in this case, the Ninth Circuit's earlier ruling against the plaintiffs was unanimous, and the decision was authored by a Carter appointee.⁶⁵ So the case stands for two important propositions: first, that using religious tests against judges is always wrong, whether it is based on their views on abortion, the death penalty, or any other issue; and second, that judges do in fact rule on the basis of law, and not on the basis of their personal beliefs—contrary to the claims of some that ideology dominates the business of judging.

I worry that the current treatment of General Pryor is even more egregious than the failed attempt to recuse Judge Noonan in *Feminist Women's Health Center*. It is not just about excluding the religiously devout from ruling in particular federal cases. Now, it is about excluding the religiously devout from serving on the federal judiciary altogether. Moreover, unlike the Ninth

⁶⁴ *Feminist Women's Health Ctr.*, 69 F.3d at 400-01.

⁶⁵ See *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863 (9th Cir. 1995).

Circuit case, the use of religion against General Pryor appears to be working, at least for now.

To be sure, General Pryor's opponents are not so inartful as the litigants in *Feminist Women's Health Center*, who made specific reference to Judge Noonan's "fervently-held *religious* beliefs" against abortion in an attempt to recuse him from the case.⁶⁶ General Pryor's opponents generally do not explicitly mention his religion—as some did during the earlier debate on the Holmes nomination.⁶⁷ Usually, they instead use the more ambiguous phrase "deeply held personal beliefs," and similar terminology, rather than make explicit reference to his religious views.⁶⁸ But both the point and the effect, many in the religious community fear, are the same. As Nathan J. Diament, Director of Public Policy for the Union of Orthodox Jewish Congregations of America, articulated in an August op-ed, "there is a basis for this allegation" that General Pryor and other judicial nominees are in fact being opposed because of their religious views:

It is a new catch phrase that has crept into the already overcharged questioning of candidates in the confirmation context—"deeply held personal beliefs."

This catch phrase first arose in the context of the Judiciary Committee's confirmation hearings for John Ashcroft as U.S. attorney general. Along with being a staunch political conservative, Ashcroft was known to be deeply religious. Liberal opposition groups, and the Democratic senators responsive to them, not only raised questions about Ashcroft's record as governor and senator on a range of policy issues, but inquired whether in light of his "deeply held personal beliefs" he would be able to fulfill the responsibilities of his office and enforce laws that might conflict with those beliefs.

Many Americans with a traditionalist religious orientation—whether Orthodox Jewish, evangelical Protestant or orthodox Roman Catholic—pricked up our ears when this question was asked. When we raised our concerns to the senators lining up to oppose Ashcroft, they of course protested they would never stoop to such bigotry. . . .

⁶⁶ *Feminist Women's Health Ctr.*, 69 F.3d at 340 (emphasis added).

⁶⁷ See *supra* note 48.

⁶⁸ See *supra* note 47.

But then came last year's consideration of the judicial nomination of Professor Michael McConnell. McConnell was acknowledged to be a scholar of the first rank and deserving of confirmation. Among his prolific writings and advocacy efforts—mainly in support of pro-life causes and a more accommodationist approach to church-state issues—McConnell revealed himself to be deeply religious as well. And so the liberal advocacy groups, and their Senate partners, again deployed the question of whether as a judge McConnell could enforce laws conflicting with his “deeply held personal beliefs.”

McConnell was confirmed, it seems, only on the strength of his reputation among his liberal law professor colleagues. Now the catch phrase has been deployed with regard to William Pryor, a devout Catholic, and rumored to be raised regarding judicial nominee Leon Holmes from Arkansas, another openly devout Catholic. To those of us in the traditionalist religious communities there seems to be a disturbing pattern emerging.⁶⁹

I hope we will not allow the use of religious tests to become a permanent practice in this body. I hope that we will follow the path of the federal courts, which have forbidden such tests in their own institutions in faithful adherence to the requirements of the Constitution. All people, including judges, have personal, religious views about all sorts of things, including the death penalty, welfare, and yes—abortion. But exceptional jurists, who have proven that they can put aside their personal religious views and fulfill their professional duties, do not deserve to be treated the way General Pryor has been treated. Indeed, no one should be denied an up-or-down vote on the floor of the United States Senate because of his religious beliefs.

IV.

The absence of civility and the use of inappropriate and divisive judicial confirmation standards was again evident during the October 2 committee debate and vote on the nomination of Charles W. Pickering, Sr., U.S. District Judge for the Southern

⁶⁹ Nathan J. Diament, *Why ask about religion?*, ARK. DEMOCRAT GAZETTE, Aug. 21, 2003, available at http://www.committeeforjustice.org/contents/news/news082103_arkansas.shtml.

District of Mississippi, to serve on the U.S. Court of Appeals for the Fifth Circuit.

During that debate, I recounted the unfair treatment and the inappropriate use of religious views against Holmes and General Pryor in earlier committee meetings. I noted that, like Holmes and General Pryor, Judge Pickering is a deeply religious man. He is also a man of the South. And he clearly is qualified to serve on the federal bench. Yet I believe that Judge Pickering has become the target of a special interest group campaign of implicit negative stereotyping against Southerners, a sinister and divisive tactic that I hope will never gain a stronghold amongst a majority of members of the United States Senate.⁷⁰

Many of Pickering's opponents have accused Pickering, either implicitly or explicitly, of being a racist. Just recently, the Democratic Senatorial Campaign Committee reportedly sent an electronic fundraising solicitation to prospective donors explicitly calling Pickering a "racist."⁷¹ Only slightly more subtly, another Democrat senator complained that "renominate Judge Pickering—especially in the wake of the Trent Lott affair—is a thumb in the eye of the black community."⁷² *New York Times* columnist Maureen Dowd has written that Judge Pickering has a "soft-spot for cross-burners."⁷³

Exhibit A in the Democrat case that Pickering is a racist is his handling of *United States v. Swan*, a criminal case involving a despicable act of cross-burning at the residence of Brenda and Earl Polkey, an interracial couple. Judge Pickering's opponents claim that his conduct in the *Swan* case in 1994 proves that

70 According to some supporters of the President's judicial nominees, Southerners have noticed this trend and have taken to the ballot box to express their opposition to such tactics. See, e.g., Sean Rushton, *Judge Pickering's Revenge* (Nov. 6, 2003), at <http://www.nationalreview.com/comment/rushton200311060941.asp> ("In a region where 'racist' is a deeply meaningful and serious charge, many were outraged by its casual use by Democrats and the elite media to smear a man of Charles Pickering's standing. Some saw the accusation as Yankee shorthand for Mississippian, religious, and conservative, and regarded the Left's tone and tactics as a sign of what the national Democratic party really thought of them."); *Southern Discomfort*, WALL ST. J., Nov. 6, 2003, at A14 ("National liberal Democrats claim these popular Southerners are too 'extreme,' which is another way of saying 'drop dead' to the entire South. On Tuesday's evidence, the South is returning the compliment.")

71 See Katherine Mangu-Ward, *Picking on Pickering: Democratic fundraisers trash a judge's reputation*, WEEKLY STANDARD, Dec. 1, 2003.

72 Nat Hentoff, *The Ordeal of Charles Pickering*, Oct. 17, 2003 [hereinafter *The Ordeal of Charles Pickering*], available at <http://www.villagevoice.com/issues/0343/hentoff.php>.

73 Maureen Dowd, *The Class President*, N.Y. TIMES, Jan. 22, 2003, at A21.

Pickering is racially insensitive. As one senator argued, “why anyone would go the whole 9 yards, and then some, to get a lighter sentence for a convicted cross-burner is beyond me. Why anyone would do that in 1994, and in a state with Mississippi’s sad history of race relations, is simply mind-boggling.”⁷⁴

Others who have reviewed the *Swan* case, however, have arrived at precisely the opposite conclusion—namely, that Judge Pickering acted legitimately and appropriately. Like many other judges, Pickering has long been concerned about disproportionality in federal sentencing. And in *Swan*, Judge Pickering was concerned that the penalty demanded by the Justice Department against a mere accomplice to the cross-burning act was disproportionately severe, especially in comparison to the complete lack of prison time imposed against the ringleader.

Numerous press accounts closely examining the *Swan* case have concluded that Pickering acted out of a sense of proportionality and fairness—and certainly not out of racial insensitivity.⁷⁵ In the *Village Voice*—hardly a bastion of conservative commentary—liberal columnist Nat Hentoff wrote that, “in some 50 years as a reporter, I have seldom seen such reckless, unfair, and repeated attacks on a person” as those “by Democrats on the Senate Judiciary Committee” against Judge Pickering.⁷⁶ As Hentoff pointed out, the ringleader of the cross-burning affair, then-seventeen-year-old Jason Branch, received *no jail time*, pursuant to a plea agreement with the Clinton Justice Department. By contrast, the Justice Department originally sought a seven-and-a-half year sentence against accomplice Daniel Swan, who refused to plead guilty—even though it was Branch, and not Swan, who deserved the harshest penalty.⁷⁷ Indeed, as the *New York Times* reported, “Mr. Branch . .

⁷⁴ See Bill Rankin, *The Cross-Burning Trial: AJC review shows fairness, not bias, at root of ruling*, ATLANTA J.-CONST., Mar. 9, 2003 at 1E.

⁷⁵ See, e.g., Byron York, *The Cross Burning Case: What Really Happened* (Jan. 9, 2003) [hereinafter *The Cross Burning Case*], at <http://www.nationalreview.com/york/york010903b.asp>; Byron York, *The Cross Burning Case: What Really Happened, Part II* (Jan. 13, 2003) [hereinafter *The Cross Burning Case II*], at <http://www.nationalreview.com/york/york011303.asp>.

⁷⁶ Nat Hentoff, *A Judge’s Life: The Final Reckoning* (Oct. 30, 2003) [hereinafter *A Judge’s Life*], at <http://www.villagevoice.com/issues/0345/hentoff.php>.

⁷⁷ Nat Hentoff, *A Judge Who Did Justice* (Oct. 24, 2003) [hereinafter *A Judge Who Did Justice*], at <http://www.villagevoice.com/issues/0344/hentoff.php>.

. admitted shooting a rifle into the Polkeys' window a few months before. . . . Mr. Branch not only fired into the house but vowed to drive the Polkeys from the area and had a history of fighting with blacks at school." The *Times* also quoted Judge Pickering's explanation that "Swan was an intoxicated young man on the night of the event who had never before indicated racial prejudice. I thought this was the worst case of disparate sentencing that had come before me during my time on the bench." Moreover, the *Times* further reported that, following that case, "Mr. Branch has since had several run-ins with the law, but Mr. Swan has never been in trouble since getting out of prison."⁷⁸ Similarly, "a review of the [*Swan*] case by *The Atlanta Journal-Constitution*, part of the newspaper's broad look at Pickering's record on the bench, finds that the judge apparently acted out of a concern for fairness." The *Journal-Constitution's* headline could not have announced its conclusion more clearly: "ACJ review shows fairness, not bias, at root of ruling."⁷⁹

In light of these press accounts, Democrat arguments that Judge Pickering displayed racism in his handling of the *Swan* case, or at least a disturbing sympathy with racist cross-burners, are reckless at best and deliberately dishonest at worse. In fact, the record demonstrates that Judge Pickering was not seeking leniency for Swan out of racial insensitivity, but rather out of a desire to focus the harshest punishment on the most egregious wrongdoer, Branch. At one point in the case, Judge Pickering issued a memorandum stating that "[i]t was clearly established that the juvenile [Branch] had racial animus. . . . The court expressed both to the government and to counsel for the juvenile serious reservations about not imposing time in the Bureau of Prisons for the juvenile defendant." And when it came time to sentence Swan, Judge Pickering opined that "[t]he recommendation of the government in this instance is clearly the most egregious instance of disproportionate sentencing recommended by the government in any case pending before this court. The defendant [Swan] clearly had less racial animosity than the juvenile [Branch]."⁸⁰

⁷⁸ *Id.*

⁷⁹ See Rankin, *supra* note 74.

⁸⁰ *The Cross Burning Case*, *supra* note 75.

In other words, Judge Pickering wanted to punish the true culprit in the cross-burning case, Branch, even more harshly than did the Clinton Justice Department. And the Justice Department's own lawyers effectively admitted as much. With regard to the Swan sentence, Jack B. Lacy, Jr., one of the Justice Department prosecutors involved in the *Swan* case, admitted that he "personally agreed with the judge that the sentence is draconian."⁸¹ And Brad Berry, another Justice Department prosecutor in *Swan*, conceded that "[p]erhaps the government should have been more tough—should have asked for a more stringent or stronger or longer sentence for the other defendants in this case."⁸²

If anything, then, Judge Pickering's conduct in the *Swan* displayed exemplary sensitivity in focusing scarce law enforcement and prison resources on the worst racists in our society, rather than allowing Justice Department mistakes during the Clinton Administration to result in injustice and a waste of the government's precious civil rights resources. Far from demonstrating sympathy with cross-burning, Judge Pickering sentenced accomplice Swan to twenty-seven months in jail—in stark contrast to the *zero* jail time sought by the Clinton Administration for the *leading* cross-burner.

In light of all of this reporting, it strikes me as grossly unfair and dangerously divisive for the Democratic Senatorial Campaign Committee and other opponents of his nomination to call Judge Pickering a "racist."⁸³ Judge Pickering demonstrated a laudable commitment to civil rights in the *Swan* case. At the sentencing hearing, Judge Pickering told Swan:

You're going to the penitentiary because of what you did. And it's an area that we've got to stamp out; that we've got to learn to live, races among each other. And the type of conduct that you exhibited cannot and will not be tolerated. . . . You did that which does hinder good race relations and was a despicable act I would suggest to you that during the time you're in the prison that you do some reading on race

81 Neil A. Lewis, *A Judge, a Renomination and the Cross-Burning Case That Won't End*, N.Y. TIMES, May 28, 2003, at A16.

82 *The Cross Burning Case II*, *supra* note 75.

83 See Mangu-Ward, *supra* note 71.

relations and maintaining good race relations and how that can be done.⁸⁴

This statement flatly contradicts claims that Judge Pickering is soft on cross-burning.

Moreover, careful reporting by the *Atlanta Journal-Constitution* has uncovered that “Pickering—like many other federal judges who face rigid U.S. sentencing rules—has gone out of his way many times to reduce prison sentences in cases where he thought the result would be unreasonable. And many of the defendants who benefited are black.” It went on:

William Moody, an African-American drug defendant, was arrested in 2000, seven years after his indictment. Authorities could not find him because he was living in New York, holding a steady job and supporting his family. Upon learning about Moody’s apparent turnaround, Pickering delayed his sentencing a year, allowing his continued good behavior to be used as a basis for punishment with no prison time.

Five years earlier, in a large-scale cocaine case, Pickering learned moments after sentencing black defendant Richard Evans to 12 1/2 years in prison that prosecutors were recommending he sentence a more culpable co-defendant, also an African-American, to no more than nine years. Pickering quickly vacated Evans’ sentence and later sent him to prison for 10 years—five months less than what the co-defendant received.

“He has tried to treat people fairly,” said Lloyd Miller, a U.S. probation officer who prepared sentencing reports in Pickering’s courtroom for more than a decade. “It didn’t matter whether you were black or white, whether you were a pauper or if you had money.”

Pickering, who would not comment for this article pending a vote on his renomination, has said that in almost all the criminal cases that came before him involving nonviolent first offenders, he has tried to lessen their sentences.

“I have consistently sought to keep from imposing unduly harsh penalties on young people whom I did not feel were hardened criminals,” Pickering wrote in a letter to Senate Judiciary Chairman Orrin Hatch (R-Utah) following his combative confirmation hearings last year.

84 *The Cross Burning Case*, *supra* note 75.

. . . [T]here is substantial evidence, both from his civic life and judicial record, to believe that he does not cater to white people's particular interests.

In a 1999 essay on race relations in the *Jackson Clarion-Ledger*, Pickering addressed racial bias in the courts, empathizing with black, not white, concerns. He counseled whites who were angry about the recent acquittal of a black murder suspect to look at the justice system from a black perspective.

White Mississippians may not realize that African-Americans are treated differently by the system, he wrote, but "it is the truth and a most disturbing one if you are black."

As a judge, Pickering has thrown out only two jury verdicts, both times because he felt the verdicts were biased against minority plaintiffs.

In one of the cases, in 1993, an African-American woman was injured at a restaurant. The jury awarded the woman only what the restaurant argued she should receive. Pickering ordered a new trial, and the second jury awarded the woman a larger judgment.⁸⁵

Hentoff has likewise documented Pickering's acts of fairness on behalf of black defendants:

I have copies of letters from four lawyers in Hattiesburg, Mississippi, who represented, in four different cases, black defendants in Pickering's court. In each case, Judge Pickering made a considerable downward departure from federal sentencing guidelines. And these are not at all the only four such cases of black defendants getting reduced sentences from him.

In one of the four cases, the defendant, a first-time offender, had been on drugs since he was eight. Pickering gave him a sentence light enough to let him get rehabilitation services in prison. The black defendant's lawyer said "this may have been a positive life-changing experience" for his client.⁸⁶

This nation, both North and South, has for too long suffered from the scourge of racism. We have made a great deal of progress so far, and must continue to do so. But as we condemn racism with all of our might, we must also condemn false charges of racism, because every false charge of racism discredits every true charge of racism, and that hurts us all.

⁸⁵ *Id.*

⁸⁶ *A Judge Who Did Justice*, *supra* note 77.

Judge Pickering has been praised and supported by those who know him best—by those who have worked by his side, and seen him fight racism in his home state of Mississippi. My fellow Southerners who have reviewed the record carefully agree. All six Mississippi statewide officeholders, including five Democrats, have stated that Judge Pickering’s “record demonstrates his commitment to equal protection, equal rights and fairness for all.”⁸⁷ Senator John Breaux has applauded Pickering’s lifelong campaign against racism, and his numerous “acts of courage.”⁸⁸ Senators Zell Miller and Saxby Chambliss have written that “Pickering’s critics have and will continue to unfairly label him a racist and segregationist,” but that “nothing could be further from the truth.”⁸⁹ Senator Lamar Alexander has spoken extensively on behalf of Judge Pickering on the floor of the United States Senate, stating:

The Fifth Circuit played a crucial role in desegregating the South. Judges Tuttle, Rives, Brown, and Wisdom were real heroes at that time. Crosses were burned in front of their homes. I will have more to say about this, but Judge Pickering is a worthy successor to the court of Judges Wisdom, Tuttle, Rives, and Brown.

While those judges were ordering the desegregation of Deep South schools, while crosses were being burned in front of their homes, Judge Pickering was enrolling his children in those same newly desegregated schools, and Judge Pickering in his hometown was testifying in court against Sam Bowers, the man the Baton Rouge Advocate called the “most violent living racist,” at a time when people were killing people based on race.

Many of my generation have changed their minds about race in the South over the last 40 years. That is why the opposition to Judge Pickering to me seems so blatantly unfair.

⁸⁷ Letter of Mississippi Governor Ronnie Musgrove, Secretary of State Eric Clark, Attorney General Mike Moore, Insurance Commissioner George Dale, and Agriculture Commissioner Lester Spell, to Senators Bill Frist and Tom Daschle (Sept. 24, 2003), in ROLL CALL, Oct. 2, 2003, at 4.

⁸⁸ Paul Kane, *Pickering Allies See Progress*, ROLL CALL, Sept. 29, 2003, at 1.

⁸⁹ Zell Miller & Saxby Chambliss, *Give Court Nominees Their Day in Senate*, ATLANTA J.-CONST., May 1, 2003, at 17A. Shortly after the October 2 meeting, our committee chairman, Senator Orrin Hatch, published a strong op-ed defending Judge Pickering against these scurrilous charges of racism and racial insensitivity. See Orrin G. Hatch, *Judicial nominee’s critics mislead—it’s time to vote*, ST. PAUL PIONEER PRESS (Minnesota), Oct. 17, 2003, at 19A.

He hasn't changed his mind. There is nothing to forgive him for. There is nothing to condemn. There is nothing to excuse. He was not a product of his times. He led his times. He spoke out for racial justice. He testified against the most dangerous of the cross burners. He did it in his own hometown, with his own neighbors, at a time in our Nation's history when it was hardest to do. He stuck his neck out for civil rights.⁹⁰

Phillip West, chairman of the Mississippi legislative black caucus, has said that "Judge Pickering's record of working with both races and working for racial reconciliation in past and present years is beyond what many whites . . . in positions of leadership have done in our state."⁹¹ Judge Damon Keith of the U.S. Court of Appeals for the Sixth Circuit, an African-American, has written to Senator Leahy about Pickering's efforts in support of the appointment of Judge Ann Williams, the first African-American judge on the U.S. Court of Appeals for the Seventh Circuit, stating that, knowing Pickering's "temperament, fairness, and sense of compassion . . . I recommend Judge Charles W. Pickering, Sr. to you without reservation. . . . [Pickering believes] all men are created equal."⁹² Reverend Kenneth Fairley, Senior Pastor of Mount Carmel Ministries, has written that "I served as president of the Forrest County branch of the NAACP. . . . I currently serve as a State Coordinator for the Rainbow Coalition under the leadership of Reverend Jesse Jackson. . . . I wholeheartedly support Judge Pickering in his judgeship and request the United States Senate to ratify his appointment."⁹³

Even the *New York Times* has acknowledged that "Blacks at Home Support a Judge Liberals Assail,"⁹⁴ reporting from Laurel, Mississippi that

90 149 Cong. Rec. S13547 (Oct. 30, 2003) (statement of Sen. Alexander). Senator Alexander also inserted two notable documents into the record: "a Klan newsletter from 1967 criticizing Pickering for cooperating with the FBI," and "Bowers' own Motion for Recusal filed in Federal court, asking Pickering to remove himself from hearing a case involving Bowers because of Pickering's previous testimony against Bowers and taking credit for defeating Judge Pickering in a statewide race for attorney general." *Id.* at S13548-50.

91 *The Ordeal of Charles Pickering*, *supra* note 72.

92 *A Judge's Life*, *supra* note 76.

93 *Id.*

94 David Firestone, *Blacks at Home Support a Judge Liberals Assail*, N.Y. TIMES, Feb. 17, 2002, § 1, at 22.

here on the streets of his small and largely black hometown, far from the bitterness of partisan agendas and position papers, Charles Pickering is a widely admired figure of a very different present.

In funeral parlors and pharmacies, used-car lots and the City Council chambers, the city's black establishment overwhelmingly supports his nomination to the United States Court of Appeals for the Fifth Circuit, which is heading toward a contentious vote in the Senate in the first major judicial battle of the Bush administration.

Though few black residents here subscribe to Judge Pickering's staunchly Republican politics, many say they admire his efforts at racial reconciliation, which they describe as highly unusual for a white Republican in the state.

....

"I can't believe the man they're describing in Washington is the same one I've known for years," said Thaddeus Edmonson, a former local president of the N.A.A.C.P. who is now president of the seven-member Laurel City Council and one of its five black members. "If those people who are voting against him because of some press release would just come down here and talk to the people who know him, I think they would have a very different opinion."

The judge's widespread popularity in his hometown has been frustrating to the many civil rights and abortion rights groups that have worked to portray him as an ideological relic of the Old South.

But perhaps the most compelling views of all have been expressed by Charles Evers. He is the brother of the slain civil rights leader Medgar Evers, and he has known Judge Pickering for over thirty years. He is intimately familiar with Judge Pickering's numerous actions throughout his career aimed at fighting racism, often at a deep personal cost to himself, as well as what life was like in Mississippi throughout Judge Pickering's life. Mr. Evers is right on point when he writes:

As someone who has spent all my adult life fighting for equal treatment of African-Americans, I can tell you with certainty that Charles Pickering has an admirable record on civil rights issues. He has taken tough stands at tough times in the past, and the treatment he and his record are receiving at the hands of certain interest groups is shameful. . . . Those in Washington and New York who criticize Judge Pickering are

the same people who have always looked down on Mississippi and its people, and have done very little for our state's residents.⁹⁵

Because of his strong pro-civil rights record throughout his life, it was expected that, during the October 2 debate, Judge Pickering would enjoy strong and enthusiastic support from many members of the committee, including myself. My distinguished colleague and fellow Senate freshman, Senator Lindsey Graham, made an especially impassioned speech on behalf of Judge Pickering, one that literally brought tears to the eyes of some in the committee room that morning. His statement, which was largely directed specifically at committee Democrats, is worth quoting at length:

If I thought that Judge Pickering somehow condoned cross burning, it would be the easiest decision in the world to vote no. And if you really believe that, then you're absolutely right, you should vote no. . . .

The truth is, the man's been under siege for a couple of years now, and I can only imagine what he and his family went through. It's been total hell. There's nothing worse you can say about somebody other than they're [sic] a racist. And there's nothing worse you can say about a southern white person than that they're [sic] a racist. We have to live with that all the time, and it's our own fault to a certain extent.

In my state, 31-percent African American, we're a long way away from South Carolina being where it should be. The incomes in my state of African Americans are dramatically lower than the population as a whole. So I don't want anyone to leave this room today thinking that we've fixed our racial problems in the South. We have not.

But I tell you, you need to look at your own states and see if you've fixed them in your state. There's a long way to go, and beating on this good man is not going to make us a better nation.

The reason we're here is that you all have chosen a handful of nominees—and there are not many, but one is too many—and you've used the tactic of stopping them from having a vote up or down on the floor. And we will respond in the future, and the country will be the great loser.

⁹⁵ James Charles Evers, *A Brave Judge's Name Besmirched*, WALL ST. J., Feb. 7, 2002, at A16, available at <http://www.opinionjournal.com/extra/?id=95001845>.

What's happening is going to doom the future of the U.S. Senate, because if you think the people on my side of the aisle, when there's a Democratic president, are going to sit back and not do the same thing—that's just naive.

This is history being made in the United States Senate. This is horrible history. It's happening on our watch. God, I wish I could fix it. But I don't see it being fixed.

Senator Schumer said let the fight begin. The fight has begun, and the fight needs to be taken to its logical conclusion. We need to break these filibusters, we need to bring reason back to the table, and we need to stop taking good men and women who are well qualified by the bar association and saying that they are racists.

Do you know what it must have been like in 1967 to get on the stand and testify against the Ku Klux Klan in Mississippi? Do you have any idea what courage that took? Shame on you.⁹⁶

V.

It is a great disservice to the American people that the Senate Judiciary Committee has become one of the most partisan and hostile committees in Congress. It certainly does not have to be that way. Within the committee's jurisdiction are some of the most controversial social issues that divide Americans. So naturally, one should expect vigorous debate in that committee on a regular basis. And of course, in a free and democratic society, debate and discussion are certainly welcome. What is not welcome, however, are these unprecedented filibusters of judicial nominations, based on unfair stereotypes and religious views of nominees. And what is sorely needed is a restoration of civility to the Senate's broken judicial confirmation process.

Readers need not take my word for it that these problems are real and serious. Those who condemn the treatment of Judge Charles Pickering as unjustified race-baiting by partisans who have no respect for the South include civil rights activist Charles Evers.⁹⁷ Likewise, religious discrimination, particularly against Catholics, continues to be a very real problem in American politics. According to a recent report of the Pew Forum on

⁹⁶ Byron York, *Lindsey Graham's Pickering Moment* (Oct. 3, 2003), at www.nationalreview.com/york/york200310030858.asp.

⁹⁷ See James Charles Evers, *A Brave Judge's Name Besmirched*, WALL ST. J., Feb. 7, 2002, at A16, available at <http://www.opinionjournal.com/extra/?id=95001845>.

Religion & Public Life, approximately one in ten Americans still say they would not vote for a Catholic for President.⁹⁸ And according to many in the religious community, religion is now being used against judicial nominees. Those who condemn the treatment of Holmes and General Pryor as violative of the Constitution's Religious Test Clause include the Catholic League for Religious and Civil Rights (the nation's largest Catholic civil rights organization, dedicated to defending individual Catholics and the institutional Church from defamation and discrimination),⁹⁹ the Knights of Columbus (the world's largest Catholic fraternal service organization),¹⁰⁰ Archbishop Charles J. Chaput of Denver,¹⁰¹ Ray Flynn (president of Your Catholic Voice, and the former Democratic mayor of Boston and U.S. Ambassador to the Vatican),¹⁰² and the Union of Orthodox Jewish Congregations of America.¹⁰³

I close by reiterating that I am deeply troubled and concerned about how hostile and destructive the Senate's judicial confirmation process has become. The religious tests and destructive stereotypes described in this article are strong and substantial evidence of a dangerous pattern in American politics. And the problem seems only to be getting worse, not better.

98 See Pew Forum on Religion & Public Life, *Religion and Politics: Contention and Consensus*, available at <http://pewforum.org/docs/index.php?DocID=26> (last visited Dec. 11, 2003).

99 See Press Release, Catholic League, Catholicism on Trial: Religious Test Applied to Judicial Nominee (Apr. 22, 2003), available at http://www.catholicleague.org/03press_releases/quarter2/030422_holmes.htm ("Holmes' critics are doing what the Constitution expressly prohibits—they are applying a religious test to his nomination. That they are doing it in a back-door manner makes it all the more contemptible.") (statement of William Donohue, president, Catholic League).

100 See Press Release, Knights of Columbus, Knights of Columbus Adopts Resolutions on Judicial Nominations, 'Homosexual' Marriage (Aug. 8, 2003), available at <http://www.kofc.org/news/releases/detail.cfm?id=11> ("condemn[ing] efforts to deny Catholics the opportunity to serve on the federal bench because of their 'deeply held beliefs'" and announcing a "resolution that called such efforts a *de facto* and unconstitutional religious test for public office").

101 See Archbishop Charles J. Chaput, *Some Things Change, Some Things Really Don't*, DENVER CATHOLIC REGISTER, July 30, 2003, available at http://www.archden.org/archbishop/docs/7_30_03_pryor_anticatholic.htm (condemning the birth of "a new kind of religious discrimination . . . at the Capitol, even among elected officials who claim to be Catholic").

102 See Press Release, Your Catholic Voice, No Catholic Judges Need Apply (June 16, 2003), available at <http://www.catholic.org/prwire/headline.php?ID=636> ("To deny Bill Pryor a seat on the Appeals Court because he is a faithful Catholic is anti-Catholic bigotry pure and simple. . . . I pray we haven't reached the day in the United States when faithful Catholic lawyers cannot serve on the bench because they are faithful prolife Catholics.").

103 See *supra* note 69 and accompanying text.

During prior Administrations of both parties, the Senate sometimes took too long to deliberate on nominees. But the current situation is far, far worse. Today, senators are not merely delaying nominees; they are destroying them—destroying their names and their reputations, and doing so by any means necessary. Nothing seems beyond the pale anymore; every conceivable line has been crossed.

At a fundraiser, one senator launched a categorical attack on President Bush's judicial nominees by calling them "mean people ... [who] have this sort of little patina of philosophy but underneath it all is meanness, selfishness and narrow-mindedness."¹⁰⁴ That same senator also accused D.C. Circuit nominee Janice Rogers Brown, during her confirmation hearing, of "want[ing] to turn back the clock . . . not just by a few years, but by a century or more"—never mind that Justice Brown, a distinguished African-American jurist, grew up in segregated Alabama and is all too personally and painfully familiar with life under *Plessy v. Ferguson*.¹⁰⁵ Another senator called her views "despicable"¹⁰⁶—never mind that a higher percentage of California voters supported her than any other California Supreme Court justice on the ballot in the 1998 election,¹⁰⁷ never mind that even the *San Francisco Chronicle* endorsed her retention,¹⁰⁸ and never mind that at least one

104 Beth Shapiro, *Clinton: Bush Using Gay Marriage To Cover Up Mishandling War & Economy* (Oct. 14, 2003), at <http://www.365gay.com/newscontent/101403clintonmarriage.htm>.

105 See Bob Parks, *Black Writer Speaks Out About Janice Rogers Brown* (Oct. 27, 2003), at <http://www.chronwatch.com/featured/contentDisplay.asp?aid=4841>.

106 Mike McKee, *Hostile Reception; Democrats Rip Brown's Record in Sign that Filibuster Is In Store*, THE RECORDER, Oct. 23, 2003.

107 See S.F. CHRON., Nov. 5, 1998, at A26. With 100% of precincts reporting, Justice Brown received support from 76% of California voters, while Chief Justice Ronald George received 75%, Justice Stanley Mosk 70%, and Justice Ming Chin 69%. *Id.*

108 *Vote for Independent Court*, S.F. CHRON., Sept. 27, 1998, at A6.

It takes judges with a deep respect for the law, and a willingness to set aside their personal views when making decisions. It takes judges with fearlessness, with a sense of confidence that the 'right' outcome will not always be the most popular. Californians have a chance to cast a vote for an independent judiciary on November 3 by retaining four Supreme Court justices who . . . have all demonstrated a commitment to sound decision making. . . . If you don't like a law—or if it conflicts with the state constitution—change it. The judiciary's job is to make sure that laws are applied fairly. George, Chin, Mosk and Brown have approached this duty with diligence and integrity. They should be retained.

Id.

prominent study of judicial philosophy rates Justice Brown as slightly to the left of the average federal appellate judge.¹⁰⁹ Another senator suggested on the floor of the U.S. Senate that Miguel Estrada is “scary” and a “kook.”¹¹⁰ Most recently, a Democrat member of the Judiciary Committee described the filibustered nominees as “Neanderthal[s]” and “turkey[s].”¹¹¹

Liberal special interest groups have been, if anything, even more vicious. A representative of the National Organization for Women (NOW) recently called Judge Pickering a “racist,” a “bigot,” and “a woman-hater,”¹¹² while another NOW official called Bush nominees “misogynist extremists.”¹¹³ And a new low in Senate judicial confirmation politics was reached when *The Black Commentator*, an Internet-based magazine claiming to provide “[c]ommentary, analysis and investigations on issues affecting African Americans,” published a cartoon depicting Justice Brown, alongside U.S. Supreme Court Justice Clarence Thomas, Secretary of State Colin Powell, and National Security

109 A study published by three political science professors in *Judicature* made the following conclusion:

Should Bush seek to choose, in the word of Senator Charles Schumer, a ‘consensus’ nominee as a means of gaining support from Democratic Senators, one may contemplate that Judge Brown’s history of judicial decision making might make her likely to receive approval. Our study suggests that Janice Rogers Brown has a record that is somewhat to the left of the mean ideology of U.S. appellate court decision making.

Kenneth L. Manning et al., *George W. Bush’s potential Supreme Court nominees: what impact might they have?*, JUDICATURE, May-June 2002, at 278, 284. See also *id.* at 282 (concluding that Justice Brown ruled to the left of the “U.S. court of appeals average” in general, as well as in the specific areas of “Criminal justice” and “Civil rights and liberties”); *id.* at 283 (“[H]er decision rate is somewhat to the left of the appellate court mean. . . . Janice Brown . . . was 13 percent more likely than the appellate average to take the liberal side.”); *id.* at 284 (“[T]he odds ratio for Judge Brown’s composite ideology indicates that she was 93 percent as likely to render a conservative decision when compared to the average for the court of appeals. . . . Judge Brown tended to take the liberal position on issues more frequently than the appellate court average.”). See also Clint Bolick, *Judge This Justice Fairly*, LEGAL TIMES, Oct. 20, 2003, at 54, available at <http://www.law.com/jsp/dc/pubarticleDC.jsp?id=1066605401681> (“A careful examination of her judicial opinions will reveal that, more than perhaps any previous Bush administration nominee, Justice Brown transcends the ideological divide despite efforts to pigeonhole her.”); Nat Hentoff, *Due process denied: Justice Brown is being selectively prosecuted*, WASH. TIMES, Nov. 24, 2003, at A23.

110 149 CONG. REC. S2406 (daily ed. Feb. 13, 2003) (statement of Sen. Harkin).

111 Andrew Mollison, *Democrats block 3 Bush nominees*, ATLANTA J.-CONST., Nov. 15, 2003, at C6.

112 Michael Rowett, *Senators Called on to Thwart Bush Pick*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 10, 2003, at 15.

113 *Fili-bluster* (Nov. 14, 2003), at http://www.motherjones.com/news/dailymojo/2003/11/we_603_02e.html.

Adviser Condoleeza Rice, all in an extremely negative and offensive light, complete with racist caricatures based on exaggerated physical traits.¹¹⁴ At her October 22 confirmation hearing, Justice Brown responded to the cartoon with grace and poignancy:

I was not going to make an opening statement, but something has come up that I think I should respond to. I was not going to bring up that cartoon, but since a lot of people have, there is something I would like to say.

The first thing that happened was that I talked to my judicial assistant yesterday. Her voice sounded very strange, and I said to her, “What’s wrong? What’s happening?”

And I realized that she sounded strange, because she was choking back tears. When I asked her what was wrong, she really started to cry.

She’s a very composed, very calm woman. And she started to cry.

And she said, “Oh judge, these horrible things—you haven’t seen what they’ve done.”

I, of course, was not there to comfort her. I’ve been here meeting with anybody who would meet with me.

But while I’ve been having those meetings, people have said to me: “Well, you know, it’s not personal, it’s just politics, it’s not personal.”

And I just want to say to you that it is personal, it’s very personal—to the nominees, and to the people who care about them.

I have dealt with hatred and bigotry in my life. And I can’t tell you how distressing I find it, to see this cartoon, which is intended to be so demeaning to a group of black people, and to know that it was circulated by other black people.

But like the other senators have noted, I have always argued that the First Amendment permits this kind of expression, no matter how offensive. And I haven’t changed my mind just because it’s been directed to me.

I had not seen the cartoon when I was talking to her, and I asked my husband, “Well, what is it? What does it say?”

And he said, “Well, there’s Colin Powell.”

And I said, “Colin Powell is in this cartoon?”

And he said, “Yes, and Condoleeza Rice.”

114 The original *Black Commentator* cartoon is posted at http://www.blackcommentator.com/54/54_cartoon_female_clarence_pf.html (last visited Dec. 11, 2003).

I said, “I’m in a cartoon with Colin Powell and Condoleeza Rice? Wow! I’m in good company.”

So I am going to look at this as an unwitting compliment to me, and not focus on the vicious motivation for it, and that’s all I wanted to say.

Following the hearing, did *The Black Commentator* recant its racist and offensive attack? Hardly. *The Black Commentator* responded by going even further, stating that “Janice Brown is a Jim Crow-era judge, in natural blackface,” and calling her “scary,” and a “troglodyte.”¹¹⁵ That is how far the politics of judicial confirmations in the United States Senate has disintegrated. To be sure, committee Democrats generally disavowed and condemned the *Black Commentator* cartoon. Even so, by calling her views “despicable” and the like, they create an atmosphere which gives legitimacy to special interest group comments and cartoons like those of the *Black Commentator*.

These comments and cartoons are vicious and wrong, and do a real disservice to the Senate, to the judicial confirmation process, and to the American people. If this pattern of destruction and obstruction continues for much longer, the nation’s top legal minds—people who have worked hard all their lives to achieve professional success, many of whom have overcome great personal obstacles in their lives, and all of whom deserve respect—will simply stop accepting nominations to the federal bench. And all Americans will lose as a result. We are on an extremely dangerous course, and we must change direction now. The Senate’s judicial confirmation process is indeed badly broken. We must restore civility to the debate over judicial nominations. And we desperately need a fresh start, now more than ever.

¹¹⁵ See *Janice Brown Worse than Clarence Thomas* (Oct. 23, 2003), at http://www.blackcommentator.com/61/61_cover_rogers.html.