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The Law Under George W. Bush

The War on Terror

<i>High Court Says Detainees Have Right to Hearing</i> David Savage	31
<i>War of Secrets: Judicial Restraint; The Imperial Presidency vs. The Imperial Court</i> Linda Greenhouse	35
<i>Two Out of Three Ain't Bad; Assessing the Supreme Court's Detainee Rulings</i> Peter Berkowitz	38
<i>No Blank Check</i> David Cole	41
<i>Tribunals to Weigh Detainees' Status: Setup is Response to Supreme Court Ruling on Rights</i> Charles Savage	43
<i>By Flouting War Laws, US Invites Tragedy</i> Erwin Chemerinsky	45
<i>Gitmo' Better Blues</i> Neal Katyal	47
<i>Memo Lists Acceptable 'Aggressive' Interrogation Methods</i> Toni Locy and John Diamond	50
<i>A Crucial Look at Torture Law</i> John Yoo	52
<i>Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive's Power</i> R. Jeffrey Smith	54
<i>A 'Torture' Memo and Its Tortuous Critics</i> Eric Posner and Adrian Vermeule	57
<i>Bush Pushes for Renewal of Antiterrorism Legislation</i> Richard W. Stevenson and Eric Lichtblau	59
<i>Repeal the Patriot Act</i> Andrew P. Napolitano	61

<i>The Patriot Act Without Tears</i> Andrew C. McCarthy	63
Executive Privilege	
<i>Justices' Ruling Postpones Resolution of Cheney Case</i> Linda Greenhouse	66
<i>At the Court, Inflating the White House's Power</i> Joan A. Lukey	69
<i>Refusal to Testify Has Precedent</i> Charles Lane	72
<i>Charlie McCarthy Hearings</i> Maureen Dowd	74
<i>President's Privilege; Why Bush Didn't Want Condoleeza Rice to Testify Before the September 11 Commission – and Why She's Going to do so Today</i> Terry Eastland	76
<i>Power Plays</i> Alexis Simendinger	78
The Social Conservative Agenda	
<i>A New Meaning for 'Bully Pulpit'</i> Susan Jacoby	82
<i>A Senator's Call to 'Win This Culture War'</i> David D. Kirkpatrick	84
<i>Winning While Losing</i> Richard W. Stevenson	87
<i>George W., Judicial Activist</i> Timothy Noah	89
<i>The Politics of Piety; Bush's Public Religiosity Connects with America – and That Will Win Him Votes</i> Charlotte Allen	91
<i>Look Left</i> Jonathan Chait	94

The Supreme Court as an Election Issue

<i>Fighting Over the Court: It's Tough to Make the Supreme Court into an Election Issue</i> William G. Ross	97
<i>Bush's Justice</i> Terry Eastland	100
<i>Admit the Obvious: It's a Political Process; Ideology Governs Judicial Confirmations. Let's Say So</i> David Greenberg	103
<i>Dismissed in Boston: Why Won't the Democrats Talk About Judges?</i> Dahlia Lithwick	106

Appointments

<i>The Right-Wing Assault; What's at Stake, What's Already Happened and What Could Yet Occur</i> Cass R. Sunstein	108
<i>Remarks by the President During Federal Judicial Appointees Announcement</i>	111
<i>Stop the Madness; In the Judicial Nominations War, Do Unto Others as You Would Have Them Do Unto You.</i> Stuart Taylor Jr.	113
<i>Checkmate in the Judges Game? For democracy's sake, President Bush should threaten a recess appointment, or two.</i> Randolph J. May	116
<i>Bush Bypasses Senate On Judge; Pickering Named To Appeals Court During Recess</i> Mike Allen and Helen Dewar	119
<i>Statement on Appointment of William H. Pryor Jr.</i>	122
<i>Understudies</i> Clay Risen	123
<i>Here's What Less Experience Gets You</i> Michael J. Gerhardt	126

<i>Activist, Schmactivist</i> Dahlia Lithwick	130
<i>The Case of the Gradually Disappearing Supreme Court</i> Stuart Taylor Jr.	132

THE WAR ON TERROR

High Court Says Detainees Have Right to Hearing

Los Angeles Times

June 29, 2004

David G. Savage

The Supreme Court on Monday ruled that the Constitution gives all people held under U.S. control a right to their day in court, rejecting President Bush's claim that the war on terrorism gives him, as commander in chief, the unchecked power to imprison "enemy combatants."

"We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens," Justice Sandra Day O'Connor wrote. Even in wartime, the Constitution "assuredly envisions a role for all three branches [of government] when individual liberties are at stake."

U.S. soldiers may capture enemy fighters on the battlefield and U.S. agents may seize suspected terrorists at home, but that is not the end of the matter, the justices said. Detainees still have a right to challenge the basis for holding them.

"The great writ of habeas corpus allows the judicial branch to play a necessary role in maintaining this delicate balance [between security and liberty], serving as an important check on the executive's power in the realm of detentions," O'Connor said.

In the high court's first review of the president's constitutional powers in the war on terrorism, the administration won on one key point. Five justices agreed that in the wake of the Sept. 11 attacks, Congress had given the president special powers to capture

and hold terrorists and their allies — including U.S. citizens who fight for the enemy.

But they also said all these detainees, including about 600 foreigners currently held at the U.S. naval base at Guantanamo Bay, Cuba, have a right to challenge the government's case against them.

Civil libertarians hailed Monday's decisions for upholding the principles of due process of law, and Pentagon officials scrambled to accommodate what was expected to be a flood of demands for hearings by detainees who said they were not fighting for the Taliban or Al Qaeda.

Although some legal experts said they were not surprised that the court insisted on protecting the rights of American citizens, they expressed delight that a solid majority of the court said even noncitizens captured abroad were entitled to a fair hearing.

"The United States can no longer hold detainees in a 'rights-free zone,' " said James Fellner of Human Rights Watch. "They can now have their day in court." The Bush administration's contention that it could hold foreigners at Guantanamo without regard for the protections of the Geneva Convention or the standards of international law, Fellner noted, has been roundly criticized abroad.

Despite the broad setback, the White House

and Justice Department said Monday that they were pleased the court had upheld the president's authority to detain "enemy combatants" as part of the war on terror.

In one ruling, *Rasul vs. Bush*, the court said 6-to-3 that the hundreds who were captured in Afghanistan and elsewhere and held at Guantanamo Bay have a right to challenge their imprisonment in an American court. In a second, *Hamdi vs. Rumsfeld*, the court ruled 8 to 1 that a U.S. citizen who was captured in Afghanistan and held in a military brig in South Carolina has a right to a lawyer and to a hearing before a judge.

In a third case, citing a technical error, the court failed to decide whether American Jose Padilla, arrested in Chicago, can be held by the military.

Despite their disagreements on the details, justices across the ideological spectrum said the principles of due process of law and respect for civil liberties cannot be swept aside by the president or his military commanders, even in wartime.

"The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive" branch, wrote conservative Justice Antonin Scalia in an opinion that also spoke for liberal Justice John Paul Stevens. "If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this court."

Scalia and Stevens agreed in the case of Yaser Esam Hamdi, a Louisiana-born man of Saudi parentage, that Hamdi should be freed unless the government intended to charge him with treason.

Justices David H. Souter and Ruth Bader Ginsburg also said Hamdi should be freed because the government did not have the authority to arrest and hold U.S. citizens without filing criminal charges.

Four others, led by O'Connor and joined by Chief Justice William H. Rehnquist, Anthony M. Kennedy and Stephen G. Breyer, said the government may hold U.S. citizens such as Hamdi who are captured as "battlefield detainees." Nonetheless, they must be given a lawyer and a hearing before a judge, the court said.

The Constitution says the government may not deprive a person of liberty without due process of law, and "Hamdi has received no process," O'Connor said.

Only Justice Clarence Thomas agreed with the administration's view that the president can order the arrest and the indefinite detention of Americans who he believes to be terrorists or enemy fighters.

In the Guantanamo case, the court said the hundreds of people being held there have a right to challenge their imprisonment before a judge. Administration lawyers had maintained these "enemy aliens" captured in wartime were outside the jurisdiction of the U.S. courts, in part because they were in Cuba.

Disagreeing, the high court said their location doesn't always matter. As long as the detainees are under the exclusive control of U.S. authorities, judges have the authority "to determine the legality of the executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."

The court did not say how this would work. The opinions do not suggest the detainees

are entitled to a full-blown trial in a federal court. Instead, they are likely to be given a hearing before a military judge at Guantanamo. However, a federal judge is likely to oversee the process to ensure its basic fairness.

In the case of Padilla, who is being held on suspicion of plotting with Al Qaeda to explode a radioactive “dirty” bomb, the court failed to decide whether an American citizen arrested within the United States can be held indefinitely by the military. In a 5-4 ruling, the court threw out the case and told his lawyer to start over in a different court.

Arrested at O’Hare airport, authorities took Padilla first to New York and then to a military brig in South Carolina. In Monday’s decision, the court said Padilla’s lawyers erred by filing a suit in New York rather than in South Carolina.

In the Hamdi case, five justices agreed that in the wake of Sept. 11, Congress had given the president special powers to arrest and hold U.S. citizens who are fighting for the enemy. They cited the resolution passed by Congress that, in effect, authorized the invasion of Afghanistan. It said the president may “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks.”

The court said this broad authorization allowed Bush to order the military to “detain, for the duration of hostilities, individuals legitimately determined to be Taliban combatants who engaged in armed conflict with the United States.”

It was not clear whether the president’s power to order indefinite detention applies only to citizens who were captured on foreign battlefields fighting for the enemy –

such as Hamdi – or, more broadly, to Americans who were arrested in the United States and accused of being allies of America’s enemies.

The answer may have to await further rulings. In Monday’s decision, Breyer joined O’Connor’s opinion that said the military may hold “battlefield detainees.” However, he dissented in the case of Padilla. Scalia also said that in the case of an American citizen, the government may hold him if it charged him with treason.

Their opinions suggest a majority of the justices do not believe the government may indefinitely hold Americans arrested within the United States.

But White House officials saw the ruling as endorsing their position on holding enemy combatants.

“The president’s most solemn obligation is to defend the American people, and we’re pleased that the Supreme Court upheld the president’s authority to detain enemy combatants, including citizens, for the duration of the conflict. The administration is committed to fashioning a process to review enemy combatant determinations in a way that addresses the court’s concerns and permits the president to continue to exercise his constitutional responsibility as commander in chief to protect the nation in times of war,” said White House spokeswoman Claire Buchan.

Sen. John F. Kerry of Massachusetts, the presumed Democratic presidential nominee, applauded Monday’s rulings as upholding American values. He also faulted the administration for not giving accused terrorists a lawyer and a hearing.

“With respect to detainees, it is vital to uphold the Constitution of the United States, to respect civil liberties and civil rights even as we protect our country,” Kerry said. “I would have wished this administration could have done ... what was in keeping with our values and the spirit of our country.”

War of Secrets: Judicial Restraint; The Imperial Presidency vs. The Imperial Judiciary

New York Times
September 8, 2002
Linda Greenhouse

In its aggressive conduct of the war on terrorism's domestic front, the Bush administration has encountered few obstacles from Congress or public opinion. Rather, it is federal judges, across the ideological spectrum, who have responded with skepticism, alarm or downright hostility in recent weeks to the administration's sweeping claims of unbridled executive authority to hold secret deportation hearings, label and incarcerate "enemy combatants" without access to lawyers or judges, and commingle activities of counterintelligence agents and criminal prosecutors.

While it is a fascinating and, in many quarters, unexpected development, it actually should come as no surprise to find the judiciary in a restraining role. The conflict now unfolding between the two branches has not only a historical dimension but an institutional one. Current trends within each branch may, in fact, have made the clash between the two inevitable: the imperial presidency versus the imperial judiciary.

Throughout American history, each institution has gone through cycles of muscle-flexing and relative passivity. Through some alignment of the stars, last Sept. 11 found both the White House and the Supreme Court in alpha mode. From its earliest days, the Bush administration has been animated by a belief that in relation to other Washington power centers, the White House must reclaim authority previous

occupants had lost. Compromise is seen as weakness. That stance helps explain the administration's seemingly counter-productive refusal to hand over various kinds of information demanded by Congress, as well as its aversion to a consultative foreign policy.

It may also explain the administration's so far self-defeating legal strategy in the terrorism-related cases, which seems to amount to driving headlong into a judicial roadblock. In a legal system that emphasizes nuance, the administration defends its positions categorically: no judicial review, no right to counsel, no public disclosure, no open hearings. Even judges whose every instinct is to defer to plausible claims of national security have recoiled. "If they would just go through the motions, suggest that they have some feel for due process, they would probably win instead of offending the judges," Professor Rodney A. Smolla of the University of Richmond School of Law said of the administration.

As for the courts, the Supreme Court is in an era of judicial supremacy reminiscent of the 1930's. The justices are invalidating federal laws at double the rate of the "activist" Warren Court, curbing Congressional authority, and propounding novel theories of immunity for the states from the reach of federal law. While the federalism revival may be Chief Justice William H. Rehnquist's most conspicuous achievement, the court's institutional boldness may be his legacy. "This is a court that says that judges are better able than the P.G.A. to define the

essence of golf,” said Walter E. Dellinger, acting solicitor general during the Clinton administration, in a wry reference to a case decided last year concerning a disabled professional golfer. “This is a court that decided a presidential election.”

How the Supreme Court will rule on the various terrorism-related controversies now making their way to its docket is, of course, unknown. But there is little doubt that the climate it has created has empowered judges to defend judicial prerogatives.

The judges of the United States Court of Appeals for the Fourth Circuit, the conservative Richmond, Va.-based court that the administration hand-picked by sending two American-born “enemy combatants” to military prisons in its jurisdiction, expressed doubt about what they called the administration’s “sweeping proposition” that “any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say-so.”

Not surprisingly, judges often display a special sensitivity when they perceive a challenge to the integrity of the legal system. Last year, for example, the Supreme Court struck down a federal law that barred lawyers paid by the Legal Services Corporation from making particular arguments on behalf of clients on welfare.

In the current terrorism cases, some judges appear to believe the administration needs nothing so much as a good civics lesson. Judge Gladys Kessler of Federal District Court here, ruling last month that the government had no right to conceal the identities of hundreds of people arrested after Sept. 11, said “the court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its

citizens.” Then she added: “By the same token, the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.”

Judge Kessler was particularly scathing in rejecting the administration’s argument that the names of defense lawyers had to remain secret for, among other reasons, their own protection. “It is worth noting that lawyers are a hardy brand of professionals” with a “long and noble history of fighting for the civil liberties and civil rights of unpopular individuals and political causes,” she said, adding, “the government assumes, without any support, that citizens do not understand the role of defense lawyers.”

“Maybe we’ve learned from our mistakes,” said Prof. David Cole of the Georgetown University Law Center, reflecting on the history of courts realizing after the fact that the trade-off of civil liberties for security in times of crisis was unnecessary. He said Vietnam and Watergate “taught us what secrecy can cover for.”

In addition, he explained “we’ve become a more rights-oriented society,” with a range of civil liberties groups “giving courts courage from knowing they’re not alone.” Not all such groups offer a traditional liberal view. The libertarian Cato Institute has been outspoken in its concern about an opportunistic growth of government power.

“No one can deny the fact that if the cycle of terrorist attack followed by government curtailment of civil liberties continues, America will eventually lose the key attribute that has made it great, namely, freedom,” Timothy Lynch, director of Cato’s project on criminal justice, wrote in a position paper. It concluded: “A free and

independent people should not expect supernatural powers from their president.”

Two Out of Three Ain't Bad
Assessing the Supreme Court's Detainee Rulings

The Weekly Standard
July 19, 2004
Peter Berkowitz

Given his constitutional role as commander in chief, with principal responsibility for the nation's security, the president might be expected to overreach occasionally in times of war, to place the energetic defense of the country ahead of the meticulous safeguarding of civil liberties. Equally, given its constitutional role as guardian of the fundamental laws of the land, the Supreme Court might be expected to patrol zealously the boundaries established by the Constitution for the protection of individual liberty, and occasionally even to go to an extreme to ensure that the executive respects them. And as a consequence of the wartime contest between the executive and the Court, as each seeks to advance the interests and uphold the honor of its constitutional office, one could reasonably hope that both national security and civil liberties would be given their due to the extent possible.

On the basis of the Court's decisions in the enemy combatant detention cases, handed down June 28, it is a pleasure to report that the system is working more or less as designed. In waging the war on terror, the executive branch has certainly pushed the legal limits of its prerogatives. And the Supreme Court has responded, pushing back, at times quite aggressively, in the opposite direction.

This is certainly not to suggest that the legal positions of the administration have been ideal, or that in *Hamdi v. Rumsfeld*, *Rumsfeld v. Padilla*, and *Rasul v. Bush* the Court achieved an optimal balance between

national security and civil liberties. To the contrary. The Bush administration, for example, suffered self-inflicted wounds when it refused to grant the detainees at Guantanamo Bay the adequate minimal process, well grounded in the laws of war, for determining whether the government had correctly classified them as enemy combatants. And in *Rasul v. Bush* a provoked Court struck back. It ruled that noncitizen or alien enemy combatants who have not set foot in the United States and are detained outside of the territorial jurisdiction of any U.S. federal court nevertheless have a right to challenge their detentions in any federal district court they please. Unfortunately, to reach this result the Court distorted its own cases, arrogating to itself a scope of review of military detentions it had not previously been thought to possess.

So, the Supreme Court now having spoken, there remains work to be done in hammering out the proper balance between waging the present war effectively and maintaining the rule of law scrupulously. This is particularly challenging as the nation confronts a shadowy adversary, himself ruthlessly indifferent to the distinction between lawful combatants and civilian noncombatants, who has at his disposal or is bent on obtaining weapons of great destructiveness. Still, the United States is at war, and the constitutional order holds.

Indeed, notwithstanding its overreaching, the Court's decisions vindicated the core

constitutional principle that there is no unreviewable executive power to detain individuals. To be sure, in none of the cases did the government deny the right to due process. What was at issue in all three was the degree of process due an individual designated by the military, or the president directly, as an enemy combatant. In essence, the government contended that it was enough to assert facts that, if true, would warrant such a designation. And the Court ruled, in sum, that individuals held as enemy combatants—whether citizens or aliens, whether held in the United States or abroad—had the right to challenge before an impartial tribunal the factual allegations on the basis of which they had been captured and incarcerated.

In *Hamdi v. Rumsfeld*, the court struck the balance nicely. Seized on the battlefield in Afghanistan in 2001, Yaser Esam Hamdi, a U.S. citizen, has been detained in the United States since April 2002 without formal charges or proceedings. This was necessary, argued the Bush administration, not only to prevent him from returning to fight with the enemy (the internationally recognized justification for the detention of enemy combatants) but also in order to subject him to extended interrogation that could yield precious information concerning al Qaeda's whereabouts, intentions, and capabilities. Hamdi's court-appointed counsel countered that indefinite military detention without charge or trial in a war that could last the detainee's lifetime violated his Fifth and Fourteenth Amendment due process rights, in particular the right of all persons detained in the United States to the writ of habeas corpus, the legal means by which a detainee asks a court to review the basis for his imprisonment.

Writing for a plurality and announcing the judgment of the Court, Justice O'Connor recognized the force of both parties'

arguments. Just as there is no bar to holding a U.S. citizen as an enemy combatant, she reasoned, so too being held as an enemy combatant should not prohibit a U.S. citizen from invoking his constitutional rights. While she rejected the notion that a citizen held in the United States as an enemy combatant was entitled to the full panoply of protections under the Constitution for citizens charged with criminal conduct, Justice O'Connor did rule that the government must give citizens alleged to be enemy combatants and held in the United States "a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."

The case of Jose Padilla, who came to the United States in May 2002 allegedly to lay the groundwork for a dirty bomb attack, presented an even stronger challenge to indefinite military detention without charge or trial. Padilla not only is a U.S. citizen but also was seized on U.S. soil. The Court, however, in a 5-4 opinion authored by Justice Rehnquist, declined to rule on the merits on the grounds that Padilla had failed to bring his challenge to the federal district court that had jurisdiction to hear it and, in bringing the suit against Secretary of Defense Rumsfeld, had failed to identify the correct respondent, namely, the commanding officer at the South Carolina Navy brig in which he was imprisoned.

How strange, therefore, that the Court ruled in favor of the detainees in *Rasul v. Bush*. In contrast to Padilla, they were alien enemy combatants not citizens, held outside the United States not inside the country, and they filed suit against the president rather than the commander at Guantanamo Bay. In fact, the Court seemed bent on sending a message to the administration regardless of the settled law that it needed to trample to do so.

Contrary to University of Chicago law professor Cass Sunstein, who argued in the New York Times that the Court in *Rasul* decided the issues before it in the “narrowest possible fashion,” the Court reached its result by silently and tendentiously overruling the controlling precedent. In *Johnson v. Eisentrager* (1950), the Court held that it is a precondition for the filing of a writ of habeas corpus by an alien detainee that he be held within the territorial jurisdiction of a U.S. court. In keeping with *Eisentrager*, the Supreme Court might have narrowly ruled that the Guantanamo Bay detainees have a right to challenge their detentions in U.S. courts because U.S. control over Guantanamo Bay, by longstanding agreement with Cuba, amounts to in all but name the exercise of sovereignty. In fact, in a 6-3 decision written by Justice Stevens, the Court appears to have ruled, extravagantly, that U.S. federal district courts may hear legal challenges from alien enemy combatants at Guantanamo Bay because U.S. courts have

jurisdiction wherever the U.S. military holds foreign enemy combatants inasmuch as U.S. courts have jurisdiction over the secretary of defense and his boss, the president.

The constitutional contest between the executive and the judiciary over how to balance the competing claims of security and liberty is by design perennial. At the same time, and also by design, there is only so much the executive and the judiciary, given their limited powers, can accomplish. It would be welcome, therefore, in the next round for the third branch, Congress, to step in and clarify not only the jurisdiction of federal courts in the case of alien enemy combatants held abroad, but also the details of the procedural protections due citizens wherever they are held as enemy combatants. Both the circumstances and the constitutional system call for this.

Peter Berkowitz teaches at George Mason University School of Law and is a fellow at Stanford's Hoover Institution.

No Blank Check

The Nation
July 19, 2004
David Cole

“A state of war is not a blank check for the President.” The Bush Administration’s claims “would turn our system of checks and balances on its head.” “If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion.” *Nation* readers have heard these kinds of things before—from me, the *Nation*’s editors, the ACLU and other usual suspects. But before now, not from Justice Sandra Day O’Connor, author of the first two quotes. And certainly not from Justice Antonin Scalia, author of the third.

These judicial soundbites only begin to suggest the magnitude of the loss the Bush Administration sustained in a pair of historic Supreme Court decisions, issued June 28, on its asserted power to detain “enemy combatants.” In the case that received the most complete treatment of the issues, that of US citizen Yaser Hamdi, the Bush Administration was able to persuade only a single Justice—Clarence Thomas—to adopt its position. And the passion of the decisions suggests that the Justices may well have been responding not only to the detention cases before them but also to the Justice Department’s August 2002 “torture memo,” which argued—along lines that eerily echo the government’s argument in the detention cases—that the President in wartime is above the law. As the Supreme Court has now formally reminded the Administration, it’s President Bush, not King George.

The extent of the Administration’s loss is brought into relief by comparison with earlier Supreme Court decisions in wartime. The Court has historically bent over

backward in deference to claims of national security, upholding the incarceration of more than 1,000 people for antiwar speech during World War I, and the detention of 120,000 Japanese and Japanese-Americans on the basis of race during World War II. The last time the Court confronted the claims of “enemy combatants,” during World War II, it refused foreign nationals incarcerated abroad any access to the courts, and upheld without opinion death penalties imposed in a secret trial on several would-be saboteurs captured here, writing its opinion only after the defendants had been executed.

This time, the Court pointedly refused to defer to the Administration during wartime. It ruled that foreign nationals held at Guantanamo have a right to file habeas corpus petitions in federal court to challenge the legality of their detentions. And in Hamdi’s case, it established that US citizens are entitled at a minimum to a fair hearing on whether they are “enemy combatants” before they can be held for a sustained period. The Court ducked the third case—that of Jose Padilla, a US citizen arrested at O’Hare airport—on jurisdictional grounds; his lawyers filed their challenge in the wrong court. But it is clear that when he refiles in the correct court, Padilla will be entitled to at least as much as Hamdi, and perhaps more.

The rulings do not mean that the detainees will necessarily be released anytime soon. The Court rejected, for example, the broadest challenge to the detention of US citizens. In the Hamdi case, a majority ruled that Congress’s authorization of the use of military force against Al Qaeda and those

who harbor them permits the executive to hold in military custody even US citizens who are fighting for the enemy against us.

But the rulings do make it likely that all the detainees will get some sort of hearing to assess their status. In Hamdi's case, the Court specified what process was due: notice of the charges and an opportunity to contest them before an impartial adjudicator. The Court did not reach the question of what process the Guantanamo detainees are due, because the only question before it was whether the detainees could even file a case in federal court. But there will be tremendous pressure now to give them what the Geneva Conventions require: a hearing before a military commission to determine their status.

The broader significance of the rulings lies in their ringing rejection of the argument that to defeat terrorism, the executive must have unfettered discretion. Since September

11, the Administration has repeatedly insisted that citizens (and indeed the world) should just "trust us." George W. Bush has done more than perhaps anyone to demonstrate the poverty of that theory. We've been asked to trust him about weapons of mass destruction in Iraq, torture of detainees, the designation of enemy combatants, alleged relationships between Al Qaeda and Iraq, and the privacy and liberty of American citizens. With any luck, the Supreme Court's message—that we trust checks and balances, not imperial presidents—will be heard far and wide.

David Cole (cole@law.georgetown.edu), The Nation's legal affairs correspondent, is the author of Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism.

**Tribunals to Weigh Detainees' Status
Setup is Response to Supreme Court Ruling on Rights**

The Boston Globe
July 8, 2004
Charles Savage

The Bush administration announced yesterday a new tribunal before which each accused terrorist at Guantanamo Bay may challenge his designation as an enemy combatant, unveiling its response to last week's Supreme Court ruling that opened courthouse doors to the military prisoners who have been held without trial for two years.

All of the roughly 595 detainees held in Guantanamo will be informed by July 17 of their opportunity to come before the new Combatant Status Review Tribunal, made up of three military officers who will vote on whether the prisoner really was an Al Qaeda or Taliban fighter, according to a four-page order issued by Deputy Defense Secretary Paul D. Wolfowitz.

Any detainee who is found not to have been an enemy combatant will be sent home, a Defense Department statement said. But the likelihood of that happening appeared remote. A companion "fact sheet" noted that each detainee's status has already been reviewed several times by military officials, although not previously by a tribunal.

In many respects, the tribunals resemble the hearings called for by the Third Geneva Convention, which says captured fighters should be given prisoner of war protections unless a "competent tribunal" determines they are not entitled to that status.

International law specialists and human rights advocates have bitterly criticized the Bush administration for two years, since it

declared that the Guantanamo detainees broke the laws of war and so are not entitled to POW status. Officials did so without granting detainees hearings to rebut the evidence against them.

A key privilege of POW status is the right to be free from coercive interrogations, which has received much greater attention since the Abu Ghraib prisoner abuse scandal in Iraq.

The Center for Constitutional Rights quickly denounced the proposal because it does not give detainees a right to a lawyer or ensure that coerced interrogation statements would not be used against them. The center represented detainees who won a lawsuit against the Bush administration in last week's *Rasul v. Bush* decision, in which the Supreme Court held that civilian courts have jurisdiction to hear challenges to prisoners' continued detention without trial.

"The Supreme Court upheld the rule of law over unchecked executive authority," said Rachel Meeropol, an attorney for the center. "The review procedures for the detainees set up by the Department of Defense are inadequate and illegal, and they fail to satisfy the court's ruling."

The tribunal will consist of three military officers who have had no prior dealings with the detainee, at least one of whom must be a lawyer. Detainees will be assigned a "personal representative" to review the government's evidence against them and assist in preparing their rebuttals, although

that officer does not have to be a lawyer, the order says.

Detainees will be allowed to call and question witnesses “if readily available” and present evidence to rebut the accusation that they are Taliban or Al Qaeda fighters, but the tribunal must presume the government’s evidence is correct unless the detainee can prove otherwise. Hearsay evidence and records of interrogations may be used against detainees.

Wolfowitz’s order does not preclude the right by detainees to file a separate challenge to their detention in civilian court, and military officials said detainees would also be informed that each “has a right to seek review in US courts.”

But the tribunals foreshadow the government’s likely defense to such a civilian court challenge. The administration’s “fact sheet” says the rules were drawn up to “reflect the guidance the Supreme Court provided in its decisions last week.”

Although the 6-to-3 decision in the Guantanamo case found only that US courts have jurisdiction to hear challenges, the court issued a companion decision in the case of Yaser Esam Hamdi, a US citizen who has been held without trial in a South Carolina brig as an “enemy combatant” since being captured in Afghanistan.

Justice Sandra Day O’Connor, writing for a four-vote plurality in that case, found that the government must give Hamdi greater safeguards to rebut the evidence against him before it could legally hold him as an enemy combatant. Her opinion said he must have a lawyer, but also suggested that a military tribunal might be sufficient to meet his right to due process.

“The Supreme Court recognized the military’s need for flexibility, and indicated that that streamlined process might provide all the procedures that were sufficient even for a US citizen,” a senior defense official said.

By Flouting War Laws, US Invites Tragedy

Los Angeles Times
March 25, 2003
Erwin Chemerinsky

On Sunday, Secretary of Defense Donald Rumsfeld quickly invoked international law in condemning Iraq's treatment of American prisoners of war and its use of civilians as human shields. As soon as the Americans were shown on television, Rumsfeld denounced Iraq for violating the Geneva accords, which govern the treatment of prisoners of war.

But Rumsfeld's hypocrisy here is enormous. For two years, the Bush administration has ignored and violated international law and thus has undermined the very legitimacy of the treaties and principles that constitute the law of nations. Though we all hope, of course, for the quick and safe return of the American prisoners of war, the fact is that – unfortunately – Iraq and other nations may feel much freer today to violate international law in the way they treat war captives and the way they wage war.

One clear violation by the United States is taking place in Guantanamo Bay, where for the last 15 months the U.S. has held more than 600 captives in clear violation of international law.

Under the third Geneva Convention, those who were caught in Afghanistan are deemed prisoners of war if they were fighting for the Taliban. International law prescribes the way they can be questioned, how they are to be treated and when they are to be repatriated. The U.S. government has ignored all of these requirements.

Rumsfeld has asserted that those held in Guantanamo are "enemy combatants" and

thus the rules for prisoners of war do not apply. International law draws a distinction

between "prisoners of war," who were soldiers fighting for a nation, and "enemy combatants," who were not acting on behalf of a country; enemy combatants are accorded fewer protections than prisoners of war. Under well-established principles of international law, only those who fought for Al Qaeda and not the Taliban government are enemy combatants. The Geneva accords are clear that there must be a "competent tribunal" to determine whether a person is a prisoner of war or an enemy combatant.

More than a year ago, Secretary of State Colin Powell expressly recognized this but nothing has been done despite the requirements, however ambiguous, in treaties ratified by the U.S.

Several months ago, top-level administration officials were quoted as saying they knew many prisoners were being held in Guantanamo by mistake because of inaccurate intelligence from foreign governments and because of arrests made in the heat of battle. Therefore, individuals continue to be held even though it is known that they did not participate in terrorism and have no useful information, and even though it is a clear violation of international law to continue to detain them.

Many of these individuals have been held in solitary confinement, some for as long as 15 months, with no charges brought against them and no end in sight. For a time, many were held in small cages. They have not been allowed to speak to an attorney, and

they have had virtually no outside contact. This treatment violates basic principles of human rights law. About 25 of the detainees have attempted suicide.

Several lawsuits have been brought on behalf of these detainees, claiming that the U.S. is violating international law. Washington has successfully moved to dismiss each of these and has persuaded judges that no court has jurisdiction to hear such claims. This too violates international law because the International Covenant on Civil and Political Rights states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention." The treaty also provides that "[n]o one shall be subjected to arbitrary arrest and detention."

Rumsfeld has criticized Iraq's use of civilians as shields against attack at military and political facilities. Although he is right that this is despicable behavior, he cannot legitimately invoke international law to govern how a war should be fought when the war itself is a clear violation of international law. Nothing in international law authorizes a preemptive war to overthrow a government and disarm it. Our war in Iraq fits in none of the prescribed situations where it is lawfully permissible.

There are enormous costs to such behavior. The United States cannot expect other nations to treat our prisoners in accord with international law if we ignore it. If the United States wants other nations to live by the rule of law, it too must do so.

Gitmo' Better Blues

Slate Magazine
March 19, 2004
Neal Katyal

The rush to create the fig leaf of justice at Guantanamo Bay has begun. Next month, the Supreme Court will review the Bush administration's claim that no one at Guantanamo is entitled to civilian court adjudication of their detentions. On the eve of the Supreme Court deadline for filing its brief defending that policy, the administration announced a newly minted procedure for annual reviews of detentions. The irony of this and other actions (including the decision announced the day before another Supreme Court filing deadline, to allow Jose Padilla, the alleged dirty bomber, access to a lawyer) should not be lost: By modifying its policies in the past months, the administration has made the definitive case for civilian review of Guantanamo. The only due process that's happened there came only after the Supreme Court agreed to hear the case.

But don't let these initiatives lull you into thinking that the administration has suddenly decided to follow the rule of law. The most dramatic step "and one likely to be trumpeted by the government at oral argument" was their decision to bring the first charges against detainees: charges based on the offense of conspiracy, to be heard by the first military commission since World War II. As some readers of *Slate* know, I am a big fan of the conspiracy doctrine in general. But despite the tremendous merits of our civilian conspiracy law, these military charges are unconstitutional, inconsistent with international law, and unwise.

They will demonstrate what critics of the military tribunals have been saying all along: that the administration has sought to create an end run around guarantees of fundamental rights enshrined in our Constitution and universally accepted agreements such as the Geneva Conventions.

There are three main problems with the conspiracy indictments at Guantanamo. The first is their targets. One would have thought that, having decided to rock the constitutional order and flout international law, the administration would have at least reserved the military tribunals for the worst offenders "Osama Bin Laden and the like. Instead, charges have been filed against, if the prosecutor's claims prove accurate, someone armed with a TV camera (a videographer of the Cole bombing) and Bin Laden's accountant" both of whom also allegedly served as his bodyguards. While glorifying the Cole bombing and moving al-Qaida money are certainly bad acts, if there were any evidence that these two men actually engaged in serious war crimes, it would be in the indictment. It's not. Instead, the government can only allege the amorphous crime of aiding of al-Qaida.

Contrast these vague indictments with the position of Assistant Attorney General Herbert Wechsler during World War II. Wechsler, perhaps the most important 20th-century scholar of American criminal law, deplored a Pentagon proposal to file conspiracy charges against Germans who were not prime leaders. To Wechsler, such charges could not be based on ideas drawn

from American conspiracy law without proof of personal participation in a specific crime. In the absence of such proof, he said, the force of the broad criminal charge against the leaders may be seriously weakened in the eyes of the world, especially if too many individuals are included in it. Today there is no Wechsler in the administration advising restraint striking, in light of America's recent experience with the Independent Counsel Act, another device that encouraged overzealousness at the price of balance and fairness. Fairness and process, of course, can give way in an emergency or when the matter concerns Bin Laden or his close associates. But a cameraman and an accountant, even if they double as bodyguards, just don't come close.

The second problem is in the substance of the conspiracy charges. The Department of Defense, bowing to the will of the prosecutors, defined the offense of conspiracy in the broadest terms possible. This definition is similar to the one the United States proposed to use at Nuremberg, with disastrous results. When the Americans proposed it then, it was roundly criticized by our allies. And when a variant of it was used at trial, the Nuremberg judges ruled that there could be no such offenses as conspiracy to commit war crimes or conspiracy to commit crimes against humanity. Even U.S. Attorney General Francis Biddle, who sat as a judge, wanted to throw out the conspiracy charges altogether. The result of the Nuremberg ruling was to confine conspiracy only to very limited acts and only against high-level German officials, directly involved in specific acts of aggression. This glaring deficiency will pose problems because the Supreme Court has acknowledged that military commissions can, at most, only try violations authorized by Congress or international law, and the current conspiracy charges do not fit either category.

To make matters worse, the conspiracy charges in both of the indictments are based largely on conduct that occurred before 9/11, yet military commissions can only adjudicate violations of the laws of war. It is a tremendous stretch to argue that this war began in 1999 or 1989. Again, Wechsler is instructive: Atrocities committed prior to a state of war...are not embraced within the ordinary concept of crimes punishable as violations of the laws of war.

There are good reasons why the laws of war, unlike American civilian law, place powerful limits on the conspiracy doctrine. Recall that the civilian offense is based largely on a theory of deterrence "that draconian punishments will scare people into avoiding association with criminal organizations. But these arguments fail with respect to the military proceedings at Guantanamo. For one thing, the idea that other would-be war criminals are watching the proceedings at Guantanamo and modifying their conduct is far-fetched, especially if, as the Pentagon has asserted, the proceedings may be closed to public view. For another, deterrence works best when the perceived costs of the action exceed the perceived benefits, and it is very difficult to make a claim that the speculative risk of punishment in U.S. military courts would change the calculus of future war criminals (particularly when military operations against them are already ongoing). This isn't to say that there is no upside to conspiracy charges, only that the benefits are more attenuated than they are in ordinary criminal cases and eroded by serious risks of error. And if there are cases in which the advantages of a conspiracy charge become apparent, then the administration is free to use the civilian offense of conspiracy "one written into law by Congress instead of drafted by a Pentagon bureaucrat" in a standard criminal action.

The third and final problem with the Guantanamo tribunals lies in the procedural rules. American criminal law has been able to develop a vibrant offense of conspiracy only because of its strong commitment to criminal procedural guarantees. So, while charges can be somewhat vaguer in a civilian conspiracy trial and hearsay evidence may be admitted, the standard checks on prosecutorial and judicial abuse exist: indictment by a grand jury, the right to a jury trial, the right to confront witnesses, the right to obtain exculpatory evidence, and so on. Those of us who defend a broad substantive offense of conspiracy treat these procedural rights as preconditions before such a wide-ranging offense could be established. Yet the military tribunals offer no such guarantees.

The administration thus gives birth to a legal Frankenstein. It picks its jurisdictional theory that no one can have civilian review from 1950, before we had earth-shattering developments in international law (e.g., the Geneva Convention's ratification and its worldwide acceptance) and domestic military law (the 1951 Uniform Code of Military Justice). It picks its procedural theory from the same time period "before the massive revolution in procedural rights in American criminal trials. And it derives its substantive law "the offense of conspiracy "from no real time period at all: it's inspired by cases brought in the 1970s against organized crime. This mix-and-match cannot produce even the closest approximation to fairness.

The chief criticism of the tribunals has always been that the president cannot have the unilateral power to define offenses, pick prosecutors, select judges, authorize charges, select defendants, and then strip the civilian courts of all powers to review tribunal decisions. This principle goes all the way back to the Declaration of

Independence, which listed, among the founders' complaints against King George, that he has affected to render the Military independent of and superior to the Civil Power; depriv[ed] us, in many Cases, of the benefits of trial by jury; made Judges dependent on his Will alone; and transport[ed] us beyond Seas to be tried for pretended Offences. For these reasons, the Supreme Court said during the Civil War that if tribunals are ever appropriate, it is up to Congress to define how and when they are to be used. The current administration has argued that this constitutional history and structure is not relevant because military necessity permitted it to act without explicit congressional authorization.

But charges aren't being brought against planners of the Sept. 11 attacks or other terrorist atrocities. Instead, the president is using these tribunals against minor offenders, where the claim of military necessity is weak. To boot, charges are being brought nearly two and a half years after Sept. 11, dramatically undermining the arguments for avoiding congressional delay. And if the administration prevails at the Supreme Court, the rules for the military commissions "from the definition of substantive offenses to the procedural rules and review guidelines" will be slanted even more in favor of the prosecution than they already are.

Times of crisis demand special responses. But when the crises are long in scope, without a definitive end, and when time permits national deliberation and decision-making, both constitutional and pragmatic values are best served by having our nation's representatives and judges consider that response not resorting solely to executive decree. The conspiracy charges are the most dramatic step yet in the slide down a dangerous anticonstitutional spiral.

Memo Lists Acceptable 'Aggressive' Interrogation Methods

USA Today

June 28, 2004

Toni Locy and John Diamond

The Justice Department spelled out specific interrogation methods that the CIA could use against top al-Qaeda members in a still-classified August 2002 legal memo, issued as the spy agency pressed terrorism suspects about possible strikes on the anniversary of the Sept. 11 attacks, current and former Justice officials said.

CIA officials had demanded specific guidance for handling "high-value al-Qaeda captives," said a former Justice official who worked on the memo. The techniques discussed were "aggressive" but "lawful," the former official said. A current Justice official who knows the memo's contents said it specifically authorized the CIA to use "waterboarding," in which a prisoner is made to believe he is suffocating.

The memo has not been made public in the ongoing investigations of abuse of prisoners by military and intelligence officials. Because the document is classified, the former and current Justice officials spoke on condition of anonymity. The memo is far more detailed and explicit than another August 2002 document generated by Justice's Office of Legal Counsel concerning U.S. obligations under anti-torture law. That document has been made public.

Initially, the Office of Legal Counsel was assigned the task of approving specific interrogation techniques, but high-ranking Justice Department officials intercepted the CIA request, and the matter was handled by top officials in the deputy attorney general's office and Justice's criminal division.

The CIA has consistently refused to discuss its interrogation techniques, and it declined to comment on the Justice Department memos Sunday.

In what was viewed as an attempt to limit political damage from the abuse controversy, the administration last week made public 258 pages of previously classified documents. The Justice Department disavowed much of its August 2002 guidance to the White House as an overly broad assertion of presidential power.

Although the classified Justice Department memo to the CIA that same month still stands, the agency has quietly suspended its use of the harsher interrogation methods, said a former CIA field officer with knowledge of current CIA practices, confirming an account in Sunday's *Washington Post*.

White House counsel Alberto Gonzales said the thrust of the publicly released documents was that President Bush insisted on humane treatment of all prisoners, even though legal opinions from Justice and the Pentagon said there was wide latitude in wartime within the limits of anti-torture laws and treaties.

It is a point the Bush administration emphasized as the president faced repeated expressions of concern during his trip to Europe. "It's absolutely clear that the president never, in any way, condoned the use of torture," Secretary of State Colin Powell said Sunday on CBS' *Face the Nation*.

But disclosure of the detailed memo to the CIA suggests there are more documents still closely held by the Bush administration that show high-level officials seeking to push the limits of the law to get warning of terrorist attacks.

The Senate last week defeated a measure to demand that the White House disclose all

relevant interrogation documents. Gonzales argues that disclosing specific interrogation techniques will help the nation's enemies defeat those methods. But the CIA is likely to come under more pressure to disclose more about its interrogation methods: A CIA contract employee, David Passaro, was indicted last week in the beating of an Afghan detainee who later died.

A Crucial Look at Torture Law

Los Angeles Times

July 6, 2004

John Yoo

Among the Justice Department memos released recently by the Bush administration, the one that generated the most criticism, dated Aug. 1, 2002, considered the definition of torture under federal criminal laws.

Its critics have attacked the differences between the memo's conclusions and the definition of torture in the 1984 Convention Against Torture. They've attacked its discussion of possible defenses against prosecution and of the scope of the commander in chief's power. Most of all, they have attacked the fact that it did not consider policy or moral issues.

The Justice Department's Office of Legal Counsel, in which I served, produced the memo. It is important to understand the memo's function so that future administrations may receive such candid advice on the most delicate and important kinds of legal questions.

First, there is a clear and necessary difference between law and policy. The memo did not advocate or recommend torture; indeed, it did not discuss the pros and cons of any interrogation tactic. Rather, the memo sought to answer a discrete question: What is the meaning of "torture" under the federal criminal laws? What the law permits and what policymakers chose to do are entirely different things. Second, there was nothing wrong—and everything right—with analyzing a law that establishes boundaries on interrogation in the war on terrorism. Unlike previous wars, our enemy now is a stateless network of religious

extremists. They do not obey the laws of war, they hide among peaceful populations and launch surprise attacks on civilians. They have no armed forces per se, no territory or citizens to defend and no fear of dying during their attacks. Information is our primary weapon against this enemy, and intelligence gathered from captured operatives is perhaps the most effective means of preventing future attacks.

An American leader would be derelict of duty if he did not seek to understand all his options in such unprecedented circumstances. Presidents Lincoln during the Civil War and Roosevelt in the lead-up to World War II sought legal advice about the outer bounds of their power—even if they did not always use it. Our leaders should ask legal questions first, before setting policy or making decisions in a fog of uncertainty.

Third, there are no easy legal answers about torture, despite the moral certitude displayed by the administration's critics. The Reagan and first Bush administrations developed a strict test for torture—the "specific intent" to inflict "severe physical or mental pain or suffering"—that was adopted by Congress and the Clinton administration in 1994. It uses words rare in the federal code, no prosecutions have been brought under it, and it has never been interpreted by a court.

As a result, the 2002 memo looked to other federal laws, domestic and international judicial decisions, legislative history and presidential and diplomatic records, which reinforced the conclusion that the United States intentionally defined torture strictly.

It is easy now for critics to claim that the work was poor; they haven't produced their own analyses or confronted any of the hard questions. For example, would they say that no technique beyond shouted questions could be used to interrogate a high-level terrorist leader, such as Osama bin Laden, who knows of planned attacks on the United States?

Lawyers who must answer such questions must also explain possible defenses. For example, if a police officer were to ask when the use of force is allowed, a lawyer would first explain that killing constitutes murder or manslaughter, but he should also explain when self-defense or necessity would permit the use of force without criminal sanctions.

Self-defense and necessity are long-accepted defenses to criminal prosecution, and Congress chose not to preclude them in its statute barring torture, despite language in the Torture Convention to the contrary. Similarly, precedent and history support the idea that the president, as commander in

chief, may have to take measures in extreme wartime situations that might run counter to Congress' wishes. To ignore these issues would deny policymakers a view of the entire playing field.

Our system has a place for the discussion of morality and policy. Our elected and appointed officials must weigh these issues in deciding on how it will conduct interrogations. Ultimately, they must answer to the American people for their choices. A lawyer must not read the law to be more restrictive than it is just to satisfy his own moral goals, to prevent diplomatic backlash or to advance the cause of international human rights law.

However valid those considerations, they simply do not rest within the province of the lawyer who must make sure the government understands what the law permits before it decides what it should do.

John C. Yoo is a visiting scholar at the American Enterprise Institute.

**Slim Legal Grounds for Torture Memos
Most Scholars Reject Broad View of Executive's Power**

The Washington Post

July 4, 2004

R. Jeffrey Smith

Academic seminars including University of California law professor John Yoo are no longer apt to be dry discourses on the primacy of executive branch power. At an American Enterprise Institute session here last week, a heckler shouted that Yoo should apologize for drafting Bush administration memos that, in the critic's words, condoned torture.

The questioner was ruled out of order, so Yoo had no opportunity to say again that he feels the claim is a distortion of his legal views. But there is little question that Yoo and his former colleagues in the government – a group of conservative legal scholars who maintain that President Bush has broad power to pursue the war on terrorism – are caught in a discomfiting spotlight.

The latest in a series of setbacks was the Supreme Court's rejection on Monday of the claim that Bush can detain enemy combatants without independent review. The court spurned the administration's request that it defer to the president's discretion and insisted on what it depicted as a more careful balancing of national security needs and individual rights, a test it said is relevant even in wartime.

Some legal scholars argue that the courts' decisions – in combination with the administration's repudiation last week of an internal memo arguing that the president has the power to sanction torture – amount to a permanent rebuke of the expansive view of presidential power that has underpinned numerous Bush administration policies, including an executive order establishing

military tribunals that are not subject to judicial review.

Georgetown University law professor David Cole, a longtime critic of the administration, called the court opinions in particular a rejection of "this claim of unchecked presidential authority which has been advocated in so many areas since September 11" and said, "This is really quite remarkable." Neal K. Katyal, a counsel to some of the military lawyers defending detainees at Guantanamo Bay, Cuba, said he believes recent events mean "the administration's legal war on terror is utterly repudiated."

But Viet Dinh, a colleague at Georgetown and former assistant attorney general who played a key role in drafting the administration's USA Patriot Act, said a more narrow legal shift was possible.

"I would not say [the Supreme Court decisions were] . . . a victory for the executive branch," Dinh said to laughter at a Georgetown symposium last week. But he and Yoo have expressed optimism that some powers asserted by the administration – such as the right of the president to decide which individuals are enemy combatants based on evidence that might not be admissible in court – may be preserved in new hearings on individual detainees.

Their legal philosophy about presidential powers, however, is supported at present by only a minority of legal scholars, a circumstance that became clear from the storm of criticism that erupted after the

disclosure this month of two memos produced by Yoo and others in the Justice Department's Office of Legal Counsel.

An August 2002 memo, provoked by a CIA request for interrogation guidance, suggested that the president's commander-in-chief authorities meant that those acting at his direction would be immune from prosecution for torture. That memo drew on a January 2002 memo that suggested, over the opposition of the State Department's legal adviser, that the president could suspend the application of international protections for detainees.

Taken together, the memos presented a legal groundwork for aggressive questioning of foreign detainees. On June 22, White House counsel Alberto R. Gonzales publicly discredited the memo, an extremely rare event for such opinions.

Gonzales called it "irrelevant and unnecessary to support any action taken by the president." At the same time, however, he said the legal analysis "underpinning the president's decisions" on detainees is not being reevaluated, making it clear that the White House is sticking with its expansive views of Bush's authority.

Yoo, a former law clerk to Supreme Court Justice Clarence Thomas and principal author of the August memo, is a well-known advocate of strong presidential powers. He was deputy head of the Office of Legal Counsel from 2001 to 2003. But others who worked on the memos, including Jay S. Bybee, who headed the office during roughly the same period and who is now a federal appellate judge, shared Yoo's views on presidential authority, as did Gonzales.

Yoo, who declined to comment on how the memos were drafted, said they do not represent "majority views among

international law academics." He said their depiction of presidential authority instead was "squarely within the practices of the government" and past decisions by the Supreme Court – a view his critics contest.

The legal ideas supporting the August memo are part of a broad philosophy holding that international laws such as the Geneva Conventions and the Convention Against Torture are rules that states need not apply in absolute terms. Advocates claim that treaties are more like contracts subject to "situational" adherence than norms of conduct binding on every state, said David B. Rivkin Jr., a White House lawyer in the Reagan administration who now works at Baker and Hostetler in Washington.

"It's a minority viewpoint," said Rivkin, who shares it. "If you line up 1,000 law professors, only six or seven would sign up to it." He said some of its adherents are associated with the Federalist Society, a conservative legal group formed to combat what its Web site calls "orthodox liberal ideology" and judicial interpretations that fail to safeguard individual prerogatives. Both Yoo and Bybee, as well as Attorney General John D. Ashcroft, are close to the society and frequently speak at its meetings, as are other lawyers appointed to senior Bush administration posts at the Defense Department, Justice Department and White House.

But criticism of the memos' claims of presidential powers has come from a wide range of legal scholars, including past heads of the Justice Department Office of Legal Counsel and chief legal advisers to the State Department under Republican and Democratic presidents.

Douglas W. Kmiec, a Pepperdine University law professor who directed the legal counsel's office under presidents Ronald

Reagan and George H.W. Bush from 1985 to 1989, termed the August 2002 memo “unrefined” and said its depiction of presidential authorities ran “the risk of being misunderstood.” He said it failed in particular to state clearly that anti-torture laws could be superseded only “in grave or unforeseen or imminent” crises that do not exist at present.

Abraham D. Sofaer, a State Department legal adviser from 1985 to 1990, said he also considers the August 2002 memo flawed. “We in the Reagan and Bush administrations intended that deliberate violations of the Convention [Against Torture] should lead to the criminal prosecution,” said Sofaer, who testified for the executive branch during Senate hearings on the convention’s ratification.

Sofaer said he believes the notion of “inherent” presidential authority to ignore the treaty is vague and has little basis.

Walter Dellinger, who directed the Office of Legal Counsel in the Clinton administration, said the memo’s assertion of presidential authority “goes beyond anything OLC has ever stated” and omitted any reference to a

key Supreme Court decision that acknowledges congressional power to enact laws that limit presidential authority. That decision, barring President Harry S. Truman from seizing steel mills to stop a strike during the Korean War, was specifically cited by the Supreme Court last week in its rulings on foreign detainees.

Congress has mostly been silent on these issues. But five Republican senators bolted from their party June 24 to pass a measure limiting U.S. interrogation techniques to those that the United States would consider legal for other nations to use. It urged the prompt prosecution or release of detainees to avoid their “indefinite detention . . . which is contrary to the legal principles and security interests of the United States.”

The Defense Department had opposed the measure sponsored by Sen. Patrick J. Leahy (D-Vt.), saying it would insert Congress “inappropriately into the executive function of conducting the war on terrorism” and potentially diffuse the “national focus on protecting Americans.” But this view was rejected by Republicans who have been highly critical of detainee abuses.

A 'Torture' Memo and Its Tortuous Critics

The Wall Street Journal

July 6, 2004

Eric Posner and Adrian Vermeule

Recent weeks have seen a public furor over a Justice Department memorandum that attempted to define the legal term "torture," as used in federal statutes and treaties, and that pointed to constitutional questions that would arise if statutory prohibitions on torture conflict with the president's powers as commander in chief. An article in the *New York Times* quoted legal academics who criticized the memorandum's authors for professional incompetence, and for violating longstanding norms of professional practice and integrity in the Justice Department's Office of Legal Counsel (OLC). Neither charge is justified.

The academic critics have puffed up an intramural methodological disagreement among constitutional lawyers into a test of professional competence. Although we disagree with some of the memo's conclusions, its arguments fall squarely within the OLC's longstanding jurisprudence, stretching across many administrations of different parties, which emphasizes an expansive reading of presidential power.

The academic critics say that the memorandum counsels an unduly narrow interpretation of "torture" in federal law, and that it urges an overly sweeping conception of the commander-in-chief power; the critics even complain of the memorandum's failure to cite or emphasize specific precedents – notably the *Youngstown* decision of 1953, in which the Supreme Court rejected Truman's attempt to seize domestic steel mills for the Korean war effort.

But the memorandum's arguments are standard lawyerly fare, routine stuff. The definition of torture is narrow simply because, the memorandum claims, the relevant statutory texts and their drafting histories themselves build in a series of narrowing limitations, including a requirement of "specific intent." The academic critics disagree, but there is no foul play here.

As for the constitutional arguments, the memo explicitly limits their context to the interrogation (1) outside the U.S. (2) of identified enemy combatants (3) concerning the enemy's plans of attack. The logic of the arguments might be stretched further, but need not be, and it is routine for executive-branch lawyers to proceed one step at a time, just as courts do. Everyone, including even the most strident of the academic critics, agrees that Congress may not, by statute, abrogate the president's commander-in-chief power, any more than it could prohibit the president from issuing pardons. The only dispute is whether the choice of interrogation methods should be deemed within the president's power, as the memo concludes. That conclusion may be right or wrong – and we, too, would have preferred more analysis of this point – but it falls well within the bounds of professionally respectable argument.

The Justice Department memorandum came out of the OLC, whose jurisprudence has traditionally been highly pro-executive. The office has, for example, a notoriously expansive view of the president's right to unilaterally send military forces to other

countries in order to protect American citizens and property, without a declaration of war by Congress. OLC opinions that justify Bill Clinton's intervention in Kosovo and George H.W. Bush's intervention in Somalia are no less one-sided than the recent memo on interrogation. A Clinton-era opinion argued that a bill limiting the president's ability to place military forces under U.N. control would violate the president's commander-in-chief power.

Not everyone likes OLC's traditional jurisprudence, or its awkward role as both defender and adviser of the executive branch; but former officials who claim that the OLC's function is solely to supply "disinterested" advice, or that it serves as a "conscience" for the government, are providing a sentimental, distorted and self-serving picture of a complex reality.

There is an important intellectual context behind the academic critics' complaints. An older generation of legal academics developed something like a consensus in favor of enhanced congressional power over foreign affairs; support for the War Powers Act; and a favorable attitude towards Youngstown and other decisions that restrict presidential power. That conventional view has been challenged in recent years by a dynamic generation of younger scholars who emphasize constitutional text, structure and history rather than precedent, and who argue for an expansive conception of presidential power over foreign affairs, relative to Congress.

Among this rising generation are legal scholars who have recently held office in the

Justice Department, including John Yoo at Berkeley. The memorandum thus focuses not on restrictive Supreme Court precedents, but on the constitutional text, the structure of foreign affairs powers and the history of presidential power in wartime. From this perspective, the academic critics' complaints have a distinct methodological valence, one with intellectually partisan overtones.

The critics also argue that the Justice Department lawyers behaved immorally by justifying torture. Although it is true that they did not, in their memorandum, tell their political superiors that torture was immoral or foolish or politically unwise, they were not asked for moral or political advice; they were asked about the legal limits on interrogation. They provided reasonable legal advice and no more, trusting that their political superiors would make the right call. Legal ethics classes will debate for years to come whether Justice's lawyers had a moral duty to provide moral advice (which would surely have been ignored) or to resign in protest.

For our part, we find it hard to understand why people think that the legal technicians in the Justice Department are likely to have more insight into the morality of torture than their political superiors or even the man on the street. But whatever one's views on the use of torture on the battlefield, the memorandum is not "incompetent" or "abominable" or any more "one-sided" than anything else that the Justice Department has produced for its political masters.

Messrs. Posner and Vermeule are professors at the University of Chicago Law School.

Bush Pushes for Renewal of Antiterrorism Legislation

The New York Times

April 18, 2004

Richard W. Stevenson and Eric Lichtblau

President Bush on Saturday kicked off a concerted effort to pressure Congress to extend expiring provisions of the antiterrorism law passed after the attacks of Sept. 11, 2001, saying that failing to keep them in force would leave the nation vulnerable.

Mr. Bush used his weekly radio address to renew and amplify a demand he first made in his State of the Union address in January, calling on the House and Senate to act to extend provisions of the USA Patriot Act that will otherwise expire at the end of next year. The provisions include making it easier for law enforcement and intelligence agencies to share information about suspected terrorists, expanding the use of wiretaps and search warrants and allowing the government to track who is sending e-mail to or receiving it from suspected terrorists.

“To abandon the Patriot Act would deprive law enforcement and intelligence officers of needed tools in the war on terror, and demonstrate willful blindness to a continuing threat,” Mr. Bush said.

The White House’s renewed focus on the issue comes after weeks in which the independent commission investigating the attacks assailed the F.B.I. and C.I.A. – and to some degree the Bush administration – for failing to do more to identify and head off the terrorist threat. The commission focused attention on a number of shortcomings that impeded intelligence and law enforcement agencies from acting more aggressively, including a wall that hindered

sharing a lot of information about suspected terrorists.

In raising the issue again now, Mr. Bush is hoping to emphasize to the nation the steps he took after the attacks to ensure that terrorists could never again operate so freely within the United States, administration officials said. The White House has also been considering other steps in advance of the commission’s recommendations this summer, including an overhaul of the nation’s intelligence agencies.

Though the Patriot Act passed Congress with broad bipartisan support soon after the attacks, it has subsequently become one of the most heatedly debated pieces of legislation to come out of Capitol Hill in decades.

Civil libertarians in particular have fought hard to have it scaled back or repealed, asserting that it went too far in sacrificing individual rights in a rush to ensure that law enforcement had broad powers to identify and track potential terrorists. But even some Republicans who support the White House’s desire for robust legal powers for the fight against terrorism said the law needed to be reviewed carefully, and neither the House nor the Senate is scheduled to consider extending the expiring provisions anytime soon.

But Mr. Bush suggested on Saturday that opponents of the bill were deluding themselves about the degree of the terrorist threat and risked leaving law enforcement

and intelligence officials handcuffed in their ability to thwart terrorists.

“Key elements of the Patriot Act are set to expire next year,” Mr. Bush said. “Some politicians in Washington act as if the threat to America will also expire on that schedule.”

Among those members of Congress critical of the act has been Senator John Kerry of Massachusetts, Mr. Bush’s Democratic rival in the presidential race. While supporting some of the act’s main provisions, including those allowing greater sharing of intelligence and law enforcement information, Mr. Kerry has criticized Mr. Bush and Attorney General John Ashcroft as using the legislation to limit civil liberties.

In a statement issued Saturday after Mr. Bush’s remarks, Mr. Kerry said, “The radio address glosses over the fact that there has been more than sufficient legal authority for intelligence sharing.”

He added, “Senior Bush administration officials simply failed to exercise leadership and make certain that their agencies actually did cooperate with each other.”

Anthony Romero, executive director of the American Civil Liberties Union, a leading opponent of the legislation, said he believed the White House was trying to distract voters from the counterterrorism failings

raised in recent weeks by the Sept. 11 commission hearings.

“President Bush is clearly fighting a defensive battle for the Patriot Act,” Mr. Romero said. “This comes on the heels of the 9/11 commission and on the heels of progress seen in Congress by Republicans and Democrats who say that the Patriot Act went too far.”

But on Capitol Hill, even some Republicans want to proceed cautiously.

“I think it’s important to re-enact the Patriot Act, but there has to be more balance between enforcement power and civil rights,” Senator Arlen Specter, the Pennsylvania Republican who sits on the judiciary committee, said in an interview on Friday.

Mr. Specter said an area of deep concern was a section of the act that gives the F.B.I. greater power to demand records from businesses and institutions like libraries.

“There has to be refinement on access to library records” before he would support the legislation’s renewal, he said. “If you’re talking about someone getting access to books on bomb-making, that’s O.K. But I don’t think they should have carte blanche on library books.”

Repeal the Patriot Act

The Wall Street Journal

March 10, 2004

Andrew P. Napolitano

Earlier this week when President Bush asked Congress to re-enact the portions of the Patriot Act that are due to expire at the end of next year, he provoked a critical review of this controversial law. Those who believe that our freedoms are guaranteed and cannot be legislated away by Congress remain committed to the repeal – not the renewal – of this overreaching legislation.

The Constitution prohibits invasions of privacy by the government by denying it the power to engage in unreasonable searches and seizures absent a warrant issued upon probable cause. Prior to Sept. 11, 2001, we could actually enjoy that right. But in October 2001, the Patriot Act changed all this. In addition to other violations of the Constitution which it purports to sanction, the Act authorizes intelligence agencies to give what they obtain without probable cause to prosecutors; and it authorizes prosecutors to use the information thus received in ordinary criminal prosecutions. Even worse, the custodians of the records are now prohibited from telling you that your records were sought or surrendered.

This is more than just academic. If the government can get evidence against you from your financial institution under the guise of national security – i.e., without a showing of probable cause – but use it in a criminal case against you, then the Constitution's guarantees have been shredded. But you know that already.

What most Americans don't know is that on Dec. 13, 2003, the right to privacy suffered

another serious blow. On that day, after the capture of Saddam Hussein, President Bush signed into law the Intelligence Authorization Act for Fiscal Year 2004. This statute expands the term "financial institution" so as to include travel agencies and car dealers, casinos and hotels, real estate and insurance agents and lawyers, news stands and pawn brokers, and even the Post Office.

Now, without you knowing it, the Justice Department can learn where you traveled, what you spent, what you ate, what you paid to finance your car and your house, what you confided to your lawyer and insurance and real estate agents, and what periodicals you read without having to demonstrate any evidence or even suspicion of criminal activity on your part. And the government can now, for the first time in American history, without obtaining the approval of a court, read your mail before you do, and prosecute you on the basis of what it reads. (Of course, if the government doesn't prosecute you, you'll likely never even know that it has invaded your privacy.)

None of this was supposed to have happened. The tools Congress gave to intelligence agencies are only constitutional when used just for intelligence purposes – like watching or deporting foreign spies – and only against genuine foreign threats. When criminal prosecution is implicated, the Constitution's protections are triggered.

Most Americans don't want the government to know of their personal behavior, not

because we have anything to hide, but because without probable cause, without some demonstrable evidence of some personal criminal behavior, the Constitution declares that our personal lives are none of the federal government's business.

Government is not reason or eloquence, George Washington once said, it is force. That's why we have a Constitution: to restrain the government's exercise of force so we can be a free people. Government surveillance undermines freedom because it is natural to hesitate to exercise freedom when the government is watching and recording. Numerous Supreme Court decisions have underscored this by holding that freedom needs breathing room. With the government's eyes in our hotel rooms, lawyers' offices and mailboxes, freedom will suffocate.

In his famous dissent in *Olmstead*, Justice Brandeis called privacy – which he defined as “the right to be let alone” – “the most comprehensive of rights and the right most valued by civilized men.” Brandeis argued that the framers knew that Americans wanted protection from governmental intrusion not only for their property but also for their thoughts, ideas and emotions. Many current members of Congress and the Justice Department, it would appear, disagree, since they have continued their inexorable erosion of this most basic right.

Mr. Napolitano, a judge of the Superior Court of New Jersey from 1987 to 1995, is the senior judicial analyst with the Fox News Channel

The Patriot Act Without Tears

National Review

June 14, 2004

Andrew C. McCarthy

It was mid-August 2001, the last desperate days before the 9/11 terrorist attacks. Desperate, that is, for an alert agent of the FBI's Foreign Counterintelligence Division (FCI); much of the rest of America, and certainly much of the rest of its government, blithely carried on, content to assume, despite the number and increasing ferocity of terrorist attacks dating back nearly nine years, that national security was little more than an everyday criminal-justice issue.

* * *

By October 2001, the world had changed—and the USA Patriot Act was passed. So patent was the need for this law that it racked up massive support: 357-66 in the House, 98-1 in the Senate. In the nearly three years since, however, it has been distorted beyond recognition by a coalition of anti-Bush leftists and libertarian extremists, such that it is now perhaps the most broadly maligned—and misunderstood—piece of meaningful legislation in U.S. history. If our nation is serious about national security, the Patriot Act must be made permanent; instead, it could soon be gone—and the disastrous “intelligence wall” rebuilt.

* * *

Besides paving the way for agents to pool critical information, Patriot has been invaluable in modernizing investigative tools to ensure that more information is actually captured. While the critics' persistent caviling misleadingly suggests that these tools are a novel assault on privacy rights, for the most part they merely

extend to national-security intelligence investigations the same methods that have long been available to law-enforcement agents probing the vast array of federal crimes, including those as comparatively innocuous as health-care fraud.

Among the best examples is the so-called “roving” (or multi-point) wiretap. As the telephony revolution unfolded, criminals naturally took advantage, avoiding wiretap surveillance by the simple tactic of constantly switching phones—which became especially easy to do once cellphones became ubiquitous. Congress reacted nearly 20 years ago with a law that authorized criminal agents to obtain wiretaps that, rather than aim at a specific telephone, targeted persons, thus allowing monitoring to continue without significant delay as criminals ditched one phone for the next. Inexplicably, this same authority was not available to intelligence agents investigating terrorists under FISA. Patriot rectifies this anomaly.

On the law-enforcement side, Patriot expands the substance of the wiretap statute to account for the realities of terrorism. Most Americans would probably be surprised to learn that while the relatively trivial offense of gambling, for example, was a lawful predicate for a criminal wiretap investigation, chemical-weapons offenses, the use of weapons of mass destruction, the killing of Americans abroad, terrorist financing, and computer fraud were not. Thanks to Patriot, that is no longer the case.

Analogously, Patriot revamped other telecommunications-related techniques.

Prior law, for example, had been written in the bygone era when cable service meant television programming. Owing to privacy concerns about viewing habits, which the government rarely has a legitimate reason to probe, federal law made access to cable-usage records practically impossible—creating in service providers a fear of being sued by customers if they complied with government information requests. Now, of course, millions of cable subscribers—including no small number of terrorists—use the service not only for entertainment viewing but for e-mail services.

While e-mail-usage records from dial-up providers have long been available by subpoena, court order, or search warrant (depending on the sensitivity of the information sought), cable providers for years delayed complying with such processes, arguing that their services fell under the restrictive umbrella of prior cable law. This was not only a potentially disastrous state of affairs in terrorism cases, where delay can cost lives, but in many other contexts as well—including one reported case in which a cable company declined to comply with an order to disclose the name of a suspected pedophile who was distributing child pornography on the Internet even as he bragged online about sexually abusing a young girl. (Investigators, forced to pursue other leads, needed two extra weeks to identify and apprehend the suspect.) Recognizing that it made no sense to have radically different standards for acquiring the same information, Patriot made cable e-mail available on the same terms as dial-up.

Patriot also closed other gaping e-mail loopholes. Under prior law, for example, investigators trying to identify the source of incriminating e-mail were severely handicapped in that their readiest tool, the grand-jury subpoena, could be used only to

compel the service provider to produce customers' names, addresses, and lengths of service—information often of little value in ferreting out wrongdoers who routinely use false names and temporary e-mail addresses. Patriot solved this problem by empowering grand juries to compel payment information, which can be used to trace the bank and credit-card records by which investigators ultimately establish identity. This not only makes it possible to identify potential terrorists far more quickly—and thus, it is hoped, before they can strike—but also to thwart other criminals who must be apprehended with all due speed. Such subpoenas, for example, have been employed repeatedly to identify and arrest molesters who were actively abusing children. The Justice Department reports that, only a few weeks ago, the new authority prevented a Columbine-like attack by allowing agents to identify a suspect, and obtain his confession, before the attack could take place.

* * *

Palpably, the Patriot Act, far from imperiling the Constitution, went a long way toward shoring up the perilous state of national security that existed on the morning of 9/11. That is why it is so excruciating to note that, despite all we have been through, we will be transported right back to that precarious state if Congress fails to reauthorize Patriot. Because of intense lobbying by civil-liberties groups instinctively hostile to anything that makes government stronger—even in the arena of national defense, where we need it to be strong if we are to have liberties at all—Patriot's sponsors had to agree, to secure passage, that the act would effectively be experimental. That is, the information sharing, improved investigative techniques, and several other provisions were not permanently enacted into law but are

scheduled to “sunset” on December 31, 2005. Dismayingly, far from grasping the eminent sense in making these improvements permanent, the alliance of Democratic Bush-bashers and crusading Republican libertarians is actually pushing a number of proposals to extend the sunset provision to parts of Patriot that were not originally covered.

At a time when the 9/11 Commission’s public hearings highlight intelligence lapses and investigative backwardness—and when al-Qaeda publicly threatens larger-than-ever

attacks while continuing to fight our forces and allies on the battlefield and in murderous attacks throughout the world—it is remarkable that elected officials would have any priority other than making the Patriot Act permanent.

Mr. McCarthy, who led the prosecution of Sheik Omar Abdel Rahman and eleven others in connection with the 1993 World Trade Center bombing, is a consultant at the Investigative Project in Washington, D.C., and a contributor to National Review Online.

EXECUTIVE PRIVILEGE

Justices' Ruling Postpones Resolution of Cheney Case

The New York Times

June 25, 2004

Linda Greenhouse

The Supreme court held Thursday that a lower court had acted “prematurely” when it rejected a request from Vice President Dick Cheney to block disclosure of records from his energy policy task force.

In a vote of 7-to-2, the court sent the case back to a federal appeals court, a decision that will defer any resolution of the politically sensitive lawsuit until after the November elections. The lawsuit had the potential to embarrass the administration, especially given Mr. Cheney’s former role as chief executive of Halliburton and the close ties of other administration members to the energy industry.

In telling the appeals court to be “mindful of the burdens imposed on the executive branch in any future proceedings,” Justice Anthony M. Kennedy’s majority opinion, implicitly but not definitively, rejected the Bush administration’s position that the vice president’s activities should not be subject to pretrial discovery at all. Two members of the seven-justice majority, Justices Clarence Thomas and Antonin Scalia, would have accepted the administration’s argument that the Supreme Court itself should block discovery at this point.

The dissenting justices, Ruth Bader Ginsburg and David H. Souter, said the Supreme Court should have permitted the case to proceed in the district court. In her dissenting opinion, which Justice Souter signed, Justice Ginsburg said the lower courts could have handled the case under

procedures that would “accommodate separation-of-powers concerns.”

Two organizations, the conservative Judicial Watch and the liberal Sierra Club, sued Mr. Cheney and his National Energy Policy Development Group to force it to comply with an open-government law, the Federal Advisory Committee Act. The lawsuit has been stalled at a preliminary phase for more than two years. The pretrial discovery dispute that the Supreme Court’s decision keeps alive was generated by uncertainty over whether the task force was covered by the disclosure law in the first place.

The Federal Advisory Committee Act does not apply to committees composed entirely of federal officials. With its membership composed of the vice president, six cabinet secretaries and four other government officials, the energy task force appeared to fall outside the law’s coverage.

But the plaintiffs argued that officials of Enron and other private energy companies had played such an active role in the group’s deliberations that they should be considered as de facto members, bringing the task force within the disclosure law.

The United States Court of Appeals for the District of Columbia Circuit ruled that the plaintiffs were entitled to enough discovery to show whether that was in fact the case.

As it went to the Supreme Court, the case, *Cheney v. United States District Court*, No.03-475, was a mix of high-stakes politics

and complex issues of federal jurisdiction. It was clear that the justices, while resolving the jurisdictional questions, were fully aware of the broader context as well.

While the appeals court had ruled that the Bush administration had to include a claim of executive privilege as part of any effort to block discovery, Justice Kennedy said that was incorrect as a matter of law and not sensitive enough to the constitutional separation of powers.

“Executive privilege is an extraordinary assertion of power not to be lightly invoked,” Justice Kennedy said, adding, “Once executive privilege is asserted, coequal branches of the government are set on a collision course.” A court should “explore other avenues short of forcing the executive to invoke privilege,” he said.

While pretrial discovery issues are not ordinarily subject to appeal, “this is not a routine discovery dispute,” Justice Kennedy said. He said the court going back to John Marshall had recognized the special position of president and vice president. While these officials were not “above the law,” Justice Kennedy said, it did mean that courts should recognize “the paramount necessity of protecting the executive branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.”

The appeals court had relied for its analysis in part on the Supreme Court’s 1974 decision in *United States v. Nixon*, which rejected Nixon’s claim of executive privilege and ordered him to turn over the Watergate tapes to the special prosecutor. But there were “fundamental differences” between the cases, Justice Kennedy said. The Nixon case was a criminal case; this is a civil suit.

“The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*,” Justice Kennedy said, indicating that the interests to be served in the suit against Mr. Cheney were much less pressing.

In her dissenting opinion, Justice Ginsburg said there was no indication that the federal district court would ignore the majority’s separation-of-powers concerns as discovery proceeded. She noted that the trial judge had invited the administration to make specific objections and in other ways limit the government’s exposure. She said she would “allow the district court, in the first instance, to pursue its expressed intention tightly to rein in discovery” if the government, instead of resisting all discovery, requested it to do so.

It could now be many months before the lower courts sort out the next phase of the lawsuit. The majority suggested that the court of appeals might reconsider its precedent holding that private citizens acting as “de facto” members of a government panel can bring the group within the coverage of the disclosure law.

Administration officials said that the ruling vindicated their position and protected the president’s ability to seek confidential advice.

Shannen W. Coffin, a former deputy assistant attorney general, who handled the case in district court, said that the decision was a “huge victory for executive authority” that would help the White House regain legal prerogatives in the courts.

At the same time, by returning the case to the lower courts, the ruling kept alive for

Democrats the secrecy issue they had seized on.

“George Bush and Dick Cheney have forgotten that the White House belongs to America, not Enron, and they owe it to the public to disclose this information,” Phil Singer, a spokesman for Senator John Kerry,

the presumptive Democratic presidential nominee, said in a statement.

The majority opinion was joined by Chief Justice William H. Rehnquist and Justices Sandra Day O’Connor, Stephen G. Breyer and John Paul Stevens, who also wrote a concurring opinion.

At the Court, Inflating the White House's Power

The Washington Post

July 4, 2004

Joan A. Lukey

On this Fourth of July, it is somehow fitting that we are awash in a sea of important Supreme Court decisions addressing fundamental constitutional issues. Yet, the ruling that may prove to be the most critical of all seems to be garnering the least attention.

I'm referring to *Cheney v. U.S. District Court for the District of Columbia*, the case in which two public interest groups are striving to gain access to the records of President Bush's energy task force, chaired by Vice President Cheney. Ten days ago, the high court sent the case back to the Court of Appeals for the District of Columbia with instructions that essentially rewrote 50 years of judicial history.

You're probably thinking: What on earth is she talking about? In the last week and a half, we've had decisions on U.S. citizens who are considered enemy combatants and on the rights of Guantanamo Bay detainees. How could an opinion with which the justices put off making a final decision until after the presidential election possibly be so important? Well, think again. With this decision, the Supreme Court has just re-landscaped the constitutional terrain between the White House and the judiciary in a manner that seems to hand off a portion of the judiciary's power to the executive branch.

Understanding the difference between "executive privilege" and "executive powers" is the key to understanding the Cheney decision. So bear with me here. "Executive privilege" is the doctrine under

which the president contends that he does not have to turn over, in judicial or other proceedings, evidence concerning his performance of his executive branch duties. "Executive powers" are those powers assigned in the Constitution to the president, rather than Congress or the courts.

In a nutshell, here's what happened: Throughout the Cheney litigation, the administration took the novel position that it would not assert "executive privilege" as grounds for withholding the information sought by the Sierra Club, the liberal environmental group, and by the conservative Judicial Watch. Instead, the White House insisted on relying on the somewhat amorphous (some might even say squishy) notion that the task force documents were protected because the vice president was operating pursuant to his "executive powers."

The administration therefore took the position that if it did not assert executive privilege and the vice president was carrying out the duties conferred on the executive by the Constitution, the documents relating to those duties did not have to be turned over – and the courts did not have the right to review that decision. But is it indeed the case that the courts cannot review an executive decision to withhold documents produced in the performance of executive duties? Until the Supreme Court's ruling 10 days ago, constitutional scholars would have said the answer was clear. If an administration wanted to withhold information pertaining to domestic policies

in the midst of a lawsuit, its only viable option was to invoke “executive privilege” and take its chances with judicial review, meaning the courts would decide whether the privilege was properly claimed.

Only in those relatively rare instances where the shrouded information related to defense or international affairs could an administration avoid invoking executive privilege (and the consequent judicial review). Those areas were perceived to fall so squarely within a president’s powers that no other branch, including the judiciary in the context of a lawsuit, had the right to second-guess the president. (And since suits pending in our courts are much more likely to relate to domestic matters than defense or foreign affairs, a president who wanted to withhold documents typically had to assert the privilege and await a judicial determination.)

It comes as no surprise that the administration did its darndest in the Cheney case to avoid asserting executive privilege. But, the District Court and the Court of Appeals apparently read the same cases that I did, and therefore reached the same conclusion: Energy is a domestic matter, and it was therefore incumbent on the vice president to invoke executive privilege and submit the information being withheld to the courts for review. Alternatively, he could simply produce the information to the plaintiffs.

The high court clearly disagreed. In one quiet little line, on the 20th page of a 21-page majority opinion, the seven justices in the majority undid decades of evolving doctrine with this: “[the Court of Appeals] labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” Translation: The administration need not

invoke a doctrine that would subject the decision to withhold information to judicial review, even regarding matters of domestic policy.

With barely a nod to precedent (except to explain why the Nixon tapes case, which came out the other way, wasn’t similar at all), the majority endorsed the administration’s position on this point, pretty much lock, stock and barrel. If the White House wants to withhold information when members of the public seek it, the White House may simply do so. No claim of executive privilege is required. And if there is a process for judicial review in the absence of a privilege claim, I’m not seeing it.

The history of the doctrine of executive privilege, coupled with the current administration’s reputation for a lack of openness, casts this decision in a particularly ironic light. Although the evolution of executive privilege is generally believed to have begun with President Dwight Eisenhower’s 1954 dispute with a congressional committee investigating the Defense Department, most of the contextual evolution of executive privilege and executive powers occurred during the Nixon years, particularly in the Watergate era.

When President Richard Nixon, who was renowned for his penchant for secrecy, sought to assert an absolute, non-reviewable executive privilege as justification for withholding his Oval Office tapes, his efforts were thwarted in 1974 by a Supreme Court that retorted that the president could not remove from the Court the “province and duty . . . to say what the law is.” Even so, Chief Justice Warren E. Burger was careful to note, the decision requiring Nixon to turn over the tapes would likely have been quite different if the subpoenaed materials had contained “military or diplomatic

secrets,” for which “the courts have traditionally shown the utmost deference” to the president.

Almost exactly 30 years later, the court has reached the opposite conclusion regarding the right to withhold documents by an administration that some consider as secretive as Nixon’s. I find this particularly ironic, given the anecdotal evidence that no administration has shrouded itself in executive privilege more frequently, or for a broader variety of reasons, than has the current one. One feels compelled to ask: Of all times, why is the court doing this now?

As Boston Globe reporter Anne E. Kornblut wrote on Feb. 11, 2002, “During his first year in office, Bush has delayed the release of presidential papers from the Reagan White House, imposed limits on public access to government documents, refused to share revised data from the 2000 Census, and shielded decades-old FBI records from scrutiny.”

Make no mistake: The White House’s assertion of executive powers in the Cheney case is novel. No previous president, when confronted with a judicial demand for

documents related to a domestic issue, has ever responded with a claim of executive power. That the Supreme Court has accepted that assertion is stunning. The majority has excused the administration from complying with the only process that assures the courts the right of review when an administration refuses to honor a subpoena and has accepted the argument that the vice president was acting under his executive powers, a realm into which the judiciary cannot intrude. Against the backdrop of this decision, the question now is this: If the vice president is ordered by the lower courts to reveal documents, will the administration honor such orders?

Or, has the balance of power in the realm of executive secrecy now truly shifted to a new final arbiter?

Joan Lukey is a senior partner at Wilmer Cutler Pickering Hale and Dorr LLP in Boston. In the 1980s, as a Massachusetts special assistant attorney general, she represented the administration of Michael Dukakis in its unsuccessful efforts to establish executive privilege in the commonwealth.

Refusal to Testify Has Precedent

The Washington Post

March 27, 2004

Charles Lane

The White House's refusal to permit national security adviser Condoleezza Rice to testify publicly and under oath before the commission investigating the Sept. 11, 2001, terrorist attacks is not unprecedented in the practices of both the Bush administration and previous administrations, according to legal analysts and a report by the research arm of the Library of Congress.

Presidential advisers and other White House staff members have on occasion testified about policy matters before congressional committees since the end of World War II – but far less frequently than Cabinet secretaries, who are subject to Senate confirmation.

Whatever their political or other motivations may have been, presidents have generally cited the separation of powers, and the need for confidential and candid executive deliberations, in explaining their resistance to testimony by those White House staff members who, like Rice, serve the president and are not confirmed by the Senate.

But these distinctions and justifications remain relatively undefined and have never been ruled on by the Supreme Court. Such a court battle would probably occur only if the commission sent Rice a subpoena, as some members have suggested, and she resisted it.

Historically, clashes over White House staff testimony have been settled through compromise between the executive and legislative branches, with each side vying for advantage in the same forum where the

dispute over Rice is being played out: the court of public opinion.

“It depends on the situation and the politics and the leverage Congress has and how embarrassing it is for the president not to comply,” said Louis Fisher, senior specialist in separation of powers at the Congressional Research Service.

In a letter Thursday to Thomas H. Kean and Lee H. Hamilton, the chairman and vice chairman of the National Commission on Terrorist Attacks Upon the United States, Counsel to the President Alberto R. Gonzales articulated the “principles” he said make it impossible for Rice to offer anything more than a second private question-and-answer session with the commission. Rice was interviewed privately, and not under oath, on Feb. 7.

“In order for President Bush and future presidents to continue to receive the best and most candid possible advice from their White House staff on counterterrorism and other national security issues, it is important that these advisers not be compelled to testify publicly before congressional bodies such as the Commission,” Gonzales wrote.

This is the second time the White House has taken such a position in an election-year battle over congressional access to a key White House anti-terrorism official. Tom Ridge, then the White House's homeland security director, refused to testify before the Senate Appropriations Committee in 2002 but ultimately appeared for public

“informal” sessions before two House committees.

President Jimmy Carter’s White House appears to have taken a similar position. An internal 1979 directive advised staffers that they had “immunity” from compelled congressional testimony because of separation of powers, according to a 2002 report by the Congressional Research Service.

The main exception, historically, appears to be in cases of alleged wrongdoing. When scandal strikes, White House aides testify.

Several Nixon White House aides testified before the Senate Watergate committee, as did Carter’s national security adviser, Zbigniew Brzezinski, during the Senate’s investigation of alleged lobbying by the president’s brother, Billy Carter, on behalf of Libya.

President Bill Clinton’s national security adviser, Samuel R. “Sandy” Berger, testified before a Senate committee investigating the Clinton campaign’s fundraising practices in 1996. Berger, as deputy national security adviser, testified on Haiti policy in May 1994, but that testimony was behind closed doors.

So it ultimately may be important whether the current commission, created by Congress to “make a full and complete accounting of the circumstances surrounding the attacks, and the extent of the United States’ preparedness for, and immediate response to, the attacks” and to recommend “corrective measures,” is conducting a probe similar to investigations of such scandals.

Charlie McCarthy Hearings

The New York Times

April 1, 2004

Maureen Dowd

Following is the text of a letter sent yesterday to Thomas H. Kean and Lee H. Hamilton of the Sept. 11 commission from Alberto R. Gonzales, counsel to President Bush.

While we continue to hold to the principles underlying the Constitutional separation of powers, that the appropriate and patriotic action for the Commission is to shut down and stop pestering us, the President is prepared, in the interest of comity and popularity, to testify, subject to the conditions set forth below.

The President at all times, even on trips to the men's room, will be accompanied by the Vice President.

The Commission must agree in writing that it will not pose any questions directly to the President. Mr. Bush's statements will be restricted to asides on Dick Cheney's brushoffs, as in "Just like he said," "Roger that" and "Ditto."

Another necessary condition, in keeping with the tenets of executive privilege: Mr. Cheney will require that the Commission observe the rules of his favorite show from the Eisenhower Administration, "What's My Line?" The panelists, in the manner of Dorothy Kilgallen and Bennett Cerf, must try to guess what the President and Vice President didn't know and when they didn't know it through questions that elicit a "yes" or "no."

After 10 "no" answers, the panel will not be allowed to question Mr. Cheney or anyone else in the Administration ever

again. In the mystery-guest round, Richard Ben-Veniste, Bob Kerrey and other Democrats on the Commission will be blindfolded.

(Or Mr. Cheney is willing to follow the precedent of Garry Moore and Bess Meyerson, using "I've Got A Secret" rules: The Vice President will whisper a secret about the Administration's inadequate response to terrorism in the President's ear and each panelist will have 30 seconds to question Mr. Cheney in an attempt to guess the secret, which he will not reveal even if they guess right.)

As an additional accommodation, the President and Vice President have now agreed to take a "pinkie oath," looping little fingers with each other, while reserving the right to cross the index and middle fingers of their remaining hands and hide them behind their backs.

We must deny your request that Mr. Cheney bring along a PowerPoint presentation depicting who was in and out of the loop, in accordance with separation-of-PowerPoint principles. The Vice President has decreed that the loop of influence is under the cone of silence.

The White House is taking the extraordinary step of bowing to public opinion – even though Mr. Cheney states that he doesn't give two hoots about public opinion. Therefore, the Vice President will only entertain questions about negligence in fighting terrorism concerning the critical period between Jan. 21, 1993, and Jan. 20, 2001. As President Bush stated on Tuesday,

March 30, the Commission must gain “a complete picture of the months and years before Sept. 11.”

The Vice President will not address any queries about why no one reacted to George Tenet’s daily “hair on fire” alarms to the President about a coming Al Qaeda attack; or why the President was so consumed with chopping and burning cedar on his Crawford ranch that he ignored the warning in an Aug. 6, 2001, briefing that Al Qaeda might try to hijack aircraft; or why the President asked for a plan to combat Al Qaeda in May and then never followed up while Richard Clarke’s aggressive plan was suffocated by second-raters; or why the President was never briefed by his counterterrorism chief on anything but cybersecurity until Sept. 11; or why the Administration-in-amber made so many cold war assumptions, such as

thinking that terrorists had to be sponsored by a state even as terrorists had taken over a state; or why the President went along with the Vice President and the neocons to fool the American public into believing that Saddam had a hand in the 9/11 attacks; or why the Administration chose to undercut the war on terrorism and inflame the Arab world by attacking Iraq, without a plan to protect our perilously overextended forces or to exit with a realistic hope that a democracy will be left behind.

The Commission must not, under any circumstances, ask the Vice President why American soldiers and civilians in Iraq are being greeted with barbarous infernos rather than flowery bouquets.

Finally, we request that when the President finishes with this painful teeth-pulling visit, the Commission shall offer him a lollipop.

**President's Privilege;
Why Bush Didn't Want Condoleezza Rice to Testify Before the September 11 Commission
– and Why She's Going to do so Today**

The Daily Standard

April 8, 2004

Terry Eastland

To allow National Security Adviser Condoleezza Rice to testify under oath before the September 11 commission today, President Bush had to stand down from a claim of executive privilege. Bush was right to do that, but let's give the privilege its due.

Bush has described executive privilege as a "principle" of separation of powers. That's an all too brief way of putting it. The framers of the Constitution understood that there are three kinds of power—legislative, executive and judicial—and that good government lies in the distribution of at least the bulk of each kind of power to (respectively) Congress, the president and the courts.

So in the Constitution, we find the different powers "separated" into branches, with each branch structured in such a way as to enable it to carry out its different task. Regarding the two elective branches, the president is to provide the "energy" that government needs for laws to be administered and—a point relevant at the moment—wars to be fought, while Congress is to provide the "deliberation" required for the enactment of necessary legislation.

The framers understood that the elective branches might clash. Indeed, you could say that clashes between the two are inevitable. After all, a Congress that wants from a president information that it regards as necessary to its legislative task is within its rights to insist that he give it up. And a president who wants to maintain his ability to carry out his executive function is equally

within his rights to assert a privilege to hold back the information.

Bush justified his claim, as past presidents have, by citing the need for receiving confidential and candid advice from staff members: "A president and his advisers, including his adviser for national security affairs, must be able to communicate freely and privately, without being compelled to reveal those communications to the legislative branch." It would be nice to have a tidy solution when the two branches so fundamentally disagree. But the framers failed to provide one. Not that they could have, for disputes between branches can't be governed by rules drawn up in advance. As University of Texas political scientist Jeffrey Tulis has observed, "There is no formula independent of political circumstance with which to weigh such competing institutional claims." Ordinarily, things are worked out through some sort of compromise acceptable to both branches.

In February, the commission interviewed Condoleezza Rice in private. She wasn't under oath, and the interview wasn't recorded. When the commission asked her to return for a public interview under oath, the president's lawyers countered by offering her for another private interview that would be recorded and then transcribed and made public. But the commission stood its ground, and the president yielded.

"Political circumstances" surely affected Bush's change of mind. Consider that if there is one case in which the national

security adviser's public testimony before Congress is absolutely essential, it would have to be the one at hand. For here we have a body created by Congress and sanctioned by the president himself that's probing what went wrong before the September 11 attacks and what changes should be made.

Consider, too, that the commission has demonstrated that it isn't embarked on some effort to undermine executive power. In return for her public, sworn testimony, the commission was willing to agree not to request any additional testimony of that kind from Rice or other White House aides, nor to regard her appearance as setting a precedent for making future requests for such testimony.

Though Bush won't concede the point, his claim of privilege wasn't helped by another "political circumstance"—Rice's frequent

media appearances in which she sought to rebut a former counterterrorism aide's criticism of the administration. Had Rice stayed off television, the president's assertion of the need for strictly private communications with his advisers would have been more persuasive.

When Rice takes her seat today before the commission, the debate will shift from what the president's spokesman calls "process" to "substance"—from the dispute over executive privilege to the issues involving September 11. Yet given our government of separated powers, process questions inevitably will return, with this president and this Congress and with future ones. Executive privilege will be back.

Terry Eastland is publisher of The Weekly Standard. This article appeared originally in the Dallas Morning News.

Power Plays

The National Journal

April 17, 2004

Alexis Simendinger

When Condoleezza Rice took her place at the bright-red witness table in front of the 9/11 commission last week and raised her hand to take a public oath to tell the truth, the president's foreign-policy adviser became the neatly dressed embodiment of the limits of a president's power to do exactly as he pleases.

* * *

In March, to avoid testifying while still counterpunching, Rice had done everything but appear on the Home Shopping Network to defend the White House. Constitutional principle began to pale under the TV lights, so Bush instructed White House Counsel

Alberto Gonzales and other aides to steer the administration out of the mess. "We addressed many of the concerns the president had," Card said. "It was a compromise that we were not looking for. When you have executive privilege, you are not looking for an excuse to give it up."

There's a small irony in Bush's embrace of what Card called "the reality" of "the tug of immediate gratification": That's exactly what Bush found disquieting about the reactions of the investigation-plagued Clinton White House to congressional and independent-counsel demands for all manner of behind-the-scenes staff advice and communication to the president.

As far back as Bush's 2001 transition, "there was a recognition, and I think it was kind of a sad recognition, that the previous administration allowed for the erosion of some executive authority," Card said. "And

I'm not casting aspersions on them, because the dynamics of the moment do have an impact."

Card said Bush was determined, as president, to undo the damages of the Clinton era and leave the presidency stronger for his efforts: "The president wanted to restore, not just accept ... the executive authority that presidents had traditionally been able to exercise."

Asserting Power, Whetting Appetites

Bush has had a notable run at flexing his executive muscles for more than three years. He took the nation to war in Afghanistan and Iraq and called up the military Reserves under his authority as commander-in-chief. Bush controlled U.S. intelligence about Iraq's alleged weapons of mass destruction and required the nation to trust his instincts about the virtues of toppling Iraq's government. He declared war on terrorism worldwide and said he had the sole authority to incarcerate U.S. citizens – most prominently, Jose Padilla – without charge or legal representation, if the government designated them as "enemy combatants" in that war.

Bush used the power of his pen to issue executive orders reconsidering some of his predecessor's safety and environmental regulations, and he is using the Office of Management and Budget to scrutinize (some critics assert OMB is manipulating) the scientific rationale for regulating business and industry. Bush also used executive orders to create new federal offices in response to the terrorist attacks of 2001, as

well as a White House office devoted to helping faith-based and community organizations. And when the president couldn't get Congress to back his plan to make federal dollars flow to those religiously leaning organizations, he used an executive order to command the federal government to go as far as possible without new legislation.

When the Senate blocked confirmation of judicial nominees that Democrats found too conservative, Bush used his decree to temporarily fill two vacancies on the bench by taking the unusual step of recess-appointing judges who had been blocked. In another matter, the president said he would rather go to court than allow the General Accounting Office or Congress to compel the White House to surrender documents and other details of his energy task force, chaired by the vice president. Bush has also seized on executive discretion to remove or withhold government information from the public – with little accountability, as it happens – on the basis of national security. And Bush has asserted by executive order that he, along with former presidents and their heirs or family members, should be able to invoke executive privilege to block the government's release of presidential papers under provisions of Watergate-era reform law.

Because of Bush's assertive use of his unilateral powers during his term, the constitutionally mandated checks on his authority have come knocking on the Oval Office door – via Congress, the courts, and, in an election year, the voters. On April 27 and 28, the U.S. Supreme Court is scheduled to hear oral arguments in three cases that go to the heart of the executive's power under the Constitution: *Cheney v. U.S. District Court for the District of Columbia* (the energy task force records dispute); *Rumsfeld v. Padilla*; and *Hamdi v. Rumsfeld* (another

enemy-combatant challenge). Bush can declare that Padilla can be held indefinitely in a military lockup because Padilla allegedly conspired with a terrorist group, but the Supreme Court will affirm or deny that power.

"The administration has been vigorous in reasserting the constitutional powers of the presidency," wrote John Yoo, a former deputy assistant attorney general under John Ashcroft in Justice's Office of Legal Counsel, in an e-mail response to a reporter's question. "This extends from the president's war powers, to claims of executive privilege, to efforts to preserve executive discretion in the operations of government... Even should the administration lose these cases, it will still have several achievements to point to in the effort to restore presidential power, most notably in foreign affairs." Yoo, who is now a visiting scholar at the American Enterprise Institute, offered examples such as Bush's decision to withdraw the United States from the International Criminal Court, and to terminate the Antiballistic Missile Treaty with Russia, without seeking congressional approval.

But if Bush is fond of invoking the long view on the issue of presidential prerogatives when it suits his purposes, he is hardly an absolutist, as the investigations into the terrorist attacks of 9/11 and their aftermath have made clear. Perhaps he will regret this course of action. Buying itself short-term tension relief, the White House opted to compromise with the commission by allowing Bush and Cheney to testify, permitting the commission to privately view classified documents of presidential briefings, and yielding on the issue of allowing the president's national security adviser to testify.

* * *

Both Card and Gonzales argue that the challenges to Bush's exercise of power are a reflection of the constitutional separation of powers, not a unique reaction to Bush's leadership. "Every president has had to go through this," said the chief of staff, who has served three presidents. "When I was in the Reagan White House, President Reagan went through it on Iran-Contra and depositions... And then former President Bush had the same challenges."

The president's counsel, who was a Texas Supreme Court judge before Bush brought him to Washington, said history suggests there has always been a "dance" between the president and Congress about the limits of power. "It goes through cycles," said Gonzales, known inside the White House as "the judge." "In this particular point in time, we have a strong-willed president, we have an evenly divided Congress, we are in a time of war; and some would say those circumstances lead to, certainly, a perception of a shift to the executive branch."

"This is not a story about Bush," agrees William G. Howell, an assistant professor of government at Harvard University and author of the 2003 book *Power Without Persuasion: The Politics of Direct Presidential Action*. "More and more, we see presidents acting unilaterally, and that's absolutely true of Bush." The downside is that presidents may find it difficult to drive their legislative agendas through the gridlock of an increasingly decentralized and partisan Congress, Howell said, but the benefit to a president is that when the chief executive decides to seize the national agenda, Congress "has a hard time taking apart his unilateral action."

Bush has prospered by having a Republican majority of both houses of Congress, but even some loyal members of his own party

find that the president and his aides hoard information when it's to their benefit, or they work to prevent disclosure by not sharing their intentions.

* * *

In many ways, congressional Democrats are torn — they're unhappy with Bush's penchant for what they consider secrecy, and they're somewhat relieved that they were cut out of Republicans' Iraq discussions. If creating a stable democracy in Iraq is not an achievable goal, Democrats want to distance themselves and their party from any unpopular outcome. It's too soon to write the history of Bush's attack on Iraq, but the president's "my-way" posture throughout his assault could hurt him if he comes to need the friends he previously shunned.

Angst Over Iraq

If a public consensus builds, either before or after Election Day, that Bush exceeded his authority only to achieve a failed or tragic outcome in Iraq, public outcry might compel Congress to adopt new checks on executive authority — which would amount to the dramatic undoing of Bush's efforts to expand executive authority. This scenario is hypothetical, but the aftershocks from Vietnam and Watergate loom large as lessons.

John Samples, director of the Center for Representative Government at the libertarian Cato Institute, said that "one of the things that might come out of [Iraq] is the sense, the idea, that the president has enormous power to take us to war. And if [the decision to go to war] turns out to be wrong or a mistake, then it has to, in my view, usefully lead us to re-evaluate whether we want that much discretion in a president and whether

we can figure out ways to constrain [future presidents] in an effective way.”

* * *

Card discounts the suggestion that Bush’s style of leadership and reliance on unilateral authority – his penchant for swift action

rather than long analysis, his impatience with recriminations, and his desire to control information by keeping it tightly held – is undercutting public appreciation for that leadership. “I think the president is actually admired for his leadership and maybe not always respected for the policy that follows it,” he conceded.

THE SOCIAL CONSERVATIVE AGENDA

A New Meaning for 'Bully Pulpit'

Los Angeles Times

April 12, 2004

Susan Jacoby

One of the pious maxims of American politics for the last 40 years has been that a candidate should never be attacked on religious grounds. This stricture is eminently fair insofar as private faith is concerned. But when personal faith begins to determine public policy, then the issue becomes fair game.

When John F. Kennedy was running in 1960, he was called on, as the second Roman Catholic to seek the nation's highest office, to affirm his support for the separation of church and state. In a speech regarded as a turning point of his campaign, Kennedy memorably declared, "I do not speak for my church on public matters – and the church does not speak for me."

President Bush's candidacy deserves the same level of scrutiny – not because of what he might do in the future but because of what he has already done on behalf of an ultraconservative, mainly Christian constituency that has no qualms about trying to turn its faith into the law of the land.

There is no precedent in American history for the Bush administration's determination to infuse government with a highly specific set of religious values. Thomas Jefferson, a champion of strict separation of church and state even though his private religious beliefs remain a subject of debate, refused the request of evangelical religious supporters that he issue a presidential proclamation of thanksgiving to God for his blessings on America. James Madison vetoed a bill to grant public land in

Mississippi to a Baptist church. And in the 1870s, Ulysses S. Grant made what would be an unthinkable suggestion for a president today – that all church property be subject to taxation.

For nearly all American presidents before the current era of political piety, it would have been truly unimaginable to endorse a constitutional amendment dealing with any divisive religious issue. If gay marriage was not a hot issue in the past, the Constitution's omission of God was.

When Abraham Lincoln was approached during the Civil War by Protestant ministers demanding that he support an amendment to declare Jesus Christ the supreme government authority, the president cagily promised to take such action as "my responsibility to my Maker and our country demands." His action was to take no action at all.

The Bush administration, by contrast, has consistently taken aggressive measures to favor the most conservative religious elements in American society.

It is well known that the administration's anti-abortion policies are responsible for restricting embryonic stem cell experiments in ways that leading scientists believe are already causing the U.S. to fall behind the rest of the world in potentially lifesaving biomedical research. But that is only one segment of a wide-ranging assault on secular policies at every level of government.

Last September, for example, Bush announced changes in federal rules – all accomplished by executive orders circumventing Congress – that allow “faith-based” groups to compete with secular organizations for federal funds subsidizing everything from the renovation of churches to drug rehabilitation. Religious organizations may now receive tax money even if they discriminate against job applicants of other faiths. They may also promote religious conversions with public dollars.

Liberals usually shy away from challenging such practices because polls show that 75% of the public supports faith-based funding.

But they – and John F. Kerry – should take a close look at a 2001 poll by the Pew Forum on Religion and Public Life that found that 80% of Americans disapprove of any tax subsidies for groups refusing to hire workers of other faiths, which many of these evangelical organizations do. Taxpayers may like the idea of faith-based funding, but they have serious, practical reservations about what specific churches might do with the money.

Of even greater importance are the views of judicial appointees, who will shape policy long after Bush is gone. Alabama Atty. Gen. William Pryor, recently named by Bush to the 11th U.S. Circuit Court of Appeals in a “recess appointment” bypassing Senate confirmation, has displayed unabashed contempt for the 1st Amendment’s establishment-of-religion clause.

Pryor was an ardent defender of former Alabama Chief Justice Roy Moore, who defied court orders to remove a Ten Commandments monument from the state courthouse. At a pro-Moore rally, Pryor declared that “God has chosen, through his son Jesus Christ, this time, this place, for all Christians – Protestants, Catholics and Orthodox – to save our country and save our courts.” That statement alone ought to disqualify anyone for a federal judgeship.

There is a religious issue facing the country today: whether, in the 21st century, political leaders will continue to devalue the separation of church and state that has been the glory of our nation since the founders wrote a constitution assigning governmental power not to any deity but to “We the People.”

A Senator's Call to 'Win This Culture War'

The New York Times

September 1, 2004

David D. Kirkpatrick

At a closed, invitation-only Bush campaign rally for Christian conservatives yesterday, Senator Sam Brownback of Kansas called for a broad social conservative agenda notably different from the televised presentations at the Republican convention, including adopting requirements that pregnant women considering abortions be offered anesthetics for their fetuses and loosening requirements on the separation of church and state.

"We must win this culture war," Senator Brownback urged a crowd of several hundred in a packed ballroom of the Waldorf-Astoria hotel, reprising a theme of a speech by Patrick J. Buchanan from the podium of the 1992 Republican convention that many political experts say alienated moderate voters in that election.

Called "the Family, Faith and Freedom Rally" in e-mail invitations sent to Christian conservatives in New York for the convention, the event was organized by the Bush-Cheney campaign "to celebrate America and President George W. Bush," according to a copy of the invitation. The e-mail called Mr. Bush "a conservative leader who shares our values, who takes a strong stand for his faith."

Ralph Reed, a senior campaign adviser and liaison to conservative Christians, also addressed the crowd. Several campaign staff members, including the deputy political director, Christian Myers, attended, along with Timothy Goeglein, the White House liaison to Christian groups. One invited participant said the rally, which was closed

to the news media, was the main event sponsored by the campaign for social conservatives attending the convention.

The rally struck a very different tone from the speakers behind the lectern inside the Republican convention, where talk of national unity and cultural inclusiveness has been the rule. Last night, Mr. Brownback himself spoke on the subject of the president's compassionate conservatism and efforts to alleviate AIDS. "A fundamental principle of our democracy and our Republican Party is respect for the inherent dignity, equality and sanctity of every human life," he said from the podium.

The difference highlights a balancing act the Bush campaign faces in staging its convention. The spotlight on the party's national convention is a chance to project a welcoming, pluralistic face to moderate or undecided voters. But, anticipating a close election, the campaign has also made it a priority to motivate the socially conservative evangelical Christians among its base to go the polls.

At the afternoon rally, Mr. Brownback singled out several subjects of special interest to conservative evangelical Protestants that have been largely omitted from the presentations at the convention, including opposition to abortion and same-sex unions, the plight of Christians and other victims of violence in Sudan, human trafficking, and events in Israel.

"I fear for the Republic, I really do," warned Mr. Brownback, a favorite of party

conservatives. “We are accused of having a radical agenda for saying that marriage is between a man and a woman and it is the best way for children to be raised. It is not about being hateful. It is about being truthful.”

President Bush, for his part, also opposes legalized abortion and recognizing same-sex marriage. But he has said he supports the separation of church and state and the ability of states to create other forms of recognition for gay unions. He has pointedly avoided deprecating gay men and lesbians or engaging in talk of a “culture war.”

Representatives of the Bush campaign did not respond to several calls for comment on other aspects of the rally. But in an e-mail message to *The New York Times*, Nicolle Devenish, the campaign’s communications director, criticized the newspaper for covering an event that “was closed to the press” as “not professional or appropriate.” A *New York Times* reporter was invited to the event by participants who accompanied him.

Mr. Reed also addressed the crowd, recalling Mr. Bush’s response to a question about his favorite philosopher during the 2000 Republican primary. “The President said, ‘Jesus Christ,’” Mr. Reed recalled. And amid rousing applause, he repeated Mr. Bush’s distinctively evangelical follow-up: “The president said, as only he can say, ‘If I have to explain it to you, then you don’t understand it.’”

Mr. Bush’s most important accomplishment, Mr. Reed argued, was greater than any legislative achievement: “He has returned to us an office that was occupied by George Washington, Abe Lincoln, and Ronald Reagan. He has restored the honor and dignity of the highest office in the land.”

But it was Mr. Brownback who laid out more specific policy goals. On the subject of opposition to abortion, Mr. Brownback argued that many women who choose abortion were unaware of what he said was the pain the procedure caused a fetus. His call for women contemplating abortions to be offered anesthetics for the fetus referred to a bill, “The Unborn Child Pain Awareness Act,” that he has discussed introducing in Congress. “We are going to keep moving this agenda forward,” he vowed.

Mr. Brownback argued the importance to the culture of appointing more conservative judges, asserting that courts have conducted “a 40-year assault on the Constitution.” Courts, he argued, had wrongly overstretched “separation of church and state” to mean “removal of church from state.”

Urging action to alleviate violence in Sudan, he argued that the “strategic interest” of the United States was “that there are beautiful individuals there suffering, that many of you have prayed for for a long time.”

“You are the heart and soul of the party,” Mr. Brownback said. “And the press hits you all the time, like there is something wrong with ‘faith, family and freedom.’”

Recalling the motto “In God We Trust,” Mr. Brownback asked, “Is it still true? I say it is, and I say we fight.”

Before the television cameras inside the convention, the campaign has relied on a combination of moderate, pluralistic words and resonant religious atmospherics to appeal to both moderate voters and conservative Christian at once. On the first night of the convention, for example, Senator John McCain praised Islam as an

honorable religion – a statement many evangelical Christians consider heretical – and two Muslim speakers invoked Allah from the stage.

But at times the staging of the evening resembled an evangelical Protestant church service. Personal testimonials from the widows of Sept. 11 victims with heartfelt allusions to prayer were followed directly by a performance of the hymn “Amazing Grace,” and other performances have included a Christian rock group, a church choir from Queens and the Boys Choir of Harlem.

Calibrating its appeals to both conservative Christians and more secular or socially liberal voters is a longstanding challenge for the party. Although Mr. Buchanan’s 1992 speech may have alienated moderate voters by taking aim at the popular culture, political advisers to Mr. Bush believe his 2000 campaign failed to adequately mobilize conservative Christian voters. Mr. Bush’s political adviser, Karl Rove, has often said that conservative Christian turnout in 2000 was about four million votes below his projections in the last elections, and anticipating another close race they are counting on regular churchgoers, who tend

to vote Republican, to help Mr. Bush come out ahead.

Yesterday, Mr. Reed urged the crowd at the Waldorf to do everything possible to ensure Mr. Bush’s re-election, especially reaching out to acquaintances at their “churches, veterans halls and rotary clubs.” In the last election, he warned, “we got out-hustled the last weekend.”

Other Christian conservatives at the convention were already doing their part. At a hotel near the convention, the independent film production company, Grizzly Adams Productions, was screening a film dedicated to reaffirming Mr. Bush’s credentials as a sincere evangelical Christian and to criticizing the separation of church and state.

A recurring theme of the film is that Mr. Bush’s opponents dislike him mainly because of his forthright faith. “The notion that our leaders should have God in their life has suddenly become threatening,” a narrator says.

“Will the faith of George Bush be sufficient to keep us in God’s hands today?” the film concludes, “Perhaps if we all join our faith to his.”

Winning While Losing

The New York Times

July 15, 2004

Richard W. Stevenson

From the beginning, gay marriage has been an issue that President Bush has tried to finesse.

Under election-year pressure from his social conservative base, Mr. Bush endorsed the effort to adopt a constitutional amendment that would ban gay marriage. In the last few days he has turned up the volume on the issue, talking about it in his weekly radio address on Saturday and calling wavering senators over the last day or two in an effort to shore up support for the measure as it headed toward a crucial procedural vote on Wednesday.

But after endorsing the measure in February, he would often go weeks without mentioning it in public, suggesting either a personal or political reluctance, or both, about pushing it too hard. And when he did raise the topic, he was careful to modulate his message to avoid alienating moderate voters, warning in particular against allowing the issue to become an excuse for gay bashing.

“What they do in the privacy of their house, consenting adults should be able to do,” Mr. Bush said during a campaign stop in Pennsylvania on Friday, seeking to distinguish between private behavior and giving legal sanction to same-sex marriages. “This is America. It’s a free society. But it doesn’t mean we have to redefine traditional marriage.”

By hedging his position, if only a bit, Mr. Bush may have insulated himself somewhat from the sting of the defeat the proposed amendment suffered in the Senate on

Wednesday. But the way in which the proposal went down with a whimper – short of a simple majority, much less the two-thirds of the Senate needed for approval – raised questions about whether the White House had fundamentally misjudged the nation’s attitude on the issue. And the vote left even some of Mr. Bush’s own advisers wondering if his backing of the amendment did not hurt him politically more than it helped by further stoking opposition to him from the left.

“It’s a net loss for Republicans politically,” said one prominent Republican in Washington who works closely with the White House. “It does nothing for our base, because they’re grumpy about not having it, and it energized a significant portion of their base. I guarantee you that the gay community will give twice as much money and work harder for Kerry now, not so much because they care about marriage per se, but because this effort plays to their fears that we’re homophobic.”

While polling has generally found that most Americans are opposed to gay marriage, it has also shown that few people see the issue, or the proposal for a constitutional amendment that would define marriage as being only between a man and a woman, as being a priority for the country. Polls and focus groups have repeatedly found that the subject barely registers with voters, if it registers at all, at a time when most people are primarily concerned with Iraq, terrorism and jobs.

But wading into the issue was in keeping with the White House’s overriding political

priority, keeping Mr. Bush's base happy and energized, even at the risk of alienating moderate and swing voters who might see it as anti-gay.

It also provided an opportunity for the White House to maneuver Senator John Kerry into a position where it could again accuse him of taking both sides of an issue, the central theme in its effort to portray Mr. Kerry as so lacking in conviction that he would be an unreliable leader. Mr. Kerry has said he opposes gay marriage, but he also opposed the amendment, largely on the grounds that the issue was one for states to decide.

In the end, neither Mr. Kerry nor his running mate, Senator John Edwards, voted. But Mr. Bush appears to have been more successful in convincing social conservatives that he is steadfastly with them on the issue.

"This is where you see President Bush taking a political risk," said Deal W. Hudson, an informal adviser to the White House and the publisher of *Crisis*, a conservative Catholic magazine. "I think he knew there would be fallout among the swing voters who respond to the perception of political leaders being moralistic in their stands. Given that he knew that, for him to support the amendment to the degree he has is evidence of his conviction."

Mr. Bush won a big round of applause at a campaign rally in Wisconsin on Wednesday when he alluded to the "debate" in Washington over the subject. "I believe that a traditional marriage – marriage between a man and woman – is an important part of stable families," he said.

In a statement issued by the White House, Mr. Bush said he was "deeply disappointed" that the amendment had been "temporarily blocked" in the Senate, and he urged the House to take it up.

Some Republican strategists said the focus on the issue was part of a temporary diversion into a broader battle over values between Mr. Bush and Mr. Kerry before the campaign returns to the defining issues of the election – Iraq, terrorism and the economy.

But other Republican strategists said that in an election that is as likely to be decided by how successful each party is in getting its loyalists to go to the polls on Election Day as by their appeals to swing voters, gay marriage is proving to be a powerful issue that will not fade.

"To what I would call the moralist portion of the president's base, this issue has become in some ways the new abortion," said Tony Fabrizio, a Republican pollster. "It generates passion."

James Thurber, director of the Center for Congressional and Presidential Studies at American University, said Mr. Bush had used the issue skillfully to reassure conservatives without alienating voters in the center.

"It was a classic way to appeal to the conservative values base, knowing full well that it wouldn't pass but that he would still get credit," Mr. Thurber said. "He can say it was the first step, and that he is on the side of his base, but he is not making it a major strategy, theme and message of his campaign nationally."

George W., Judicial Activist

Slate Magazine

February 25, 2004

Timothy Noah

Q: So if a state were voting on gay marriage, you would suggest to that state not to approve it?

A: The state can do what they want to do. Don't try to trap me in this state's [rights] issue like you're trying to get me into. In my state of Texas, if we tried to have gay marriage, I would campaign against it.

Candidate George W. Bush, in a presidential debate moderated by Larry King in Columbia, S.C., Feb. 15, 2000

Peter Singer cites this exchange in his new book, *The President of Good and Evil: The Ethics of George W. Bush*, in order to demonstrate the hypocrisy of Bush's subsequent support for a constitutional amendment banning gay marriage (which Bush formalized today). No genuine advocate of small government would seek to take from the states the right to decide whether people of the same sex can marry, Singer observes. Singer is an awkward ally for the gay rights movement, given his past support for interspecies sex (which prompted this dissent from Chatterbox and this somewhat more thoughtful reply from Slate's William Saletan). But this time out, the Princeton bioethicist's logic is unassailable. Bush is a fair-weather federalist.

In his remarks explaining his endorsement of the amendment, Bush also demonstrated that he's blundered into a second type of hypocrisy as well, denouncing judicial

activism while at the same time practicing it. On the one hand, Bush wants to curse the judiciary because it's mainly judges who have pressed for recognition of gay civil unions and/or marriages. (Even in Vermont, the first state to enact a civil-union law, legislators didn't act until a state Supreme Court ruling compelled them to.) Everything was fine until some activist judges and local officials made an aggressive attempt to redefine marriage. In Massachusetts, four judges on the highest court have indicated they will order the issuance of marriage licenses to applicants of the same gender in May of this year. After more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization.

Hoping to prevent this, Congress had in 1996 passed the Defense of Marriage Act, written by the thrice-married Rep. Bob Barr, R-Ga., and signed cravenly into law by the adulterous president whom Barr was bent on destroying, Bill Clinton. The law defined marriage as a legal union between one man and one woman as husband and wife and said no state could be forced to grant legal recognition to a same-sex marriage in another state. Thirty-eight states passed similar laws. Bully for them, Bush says: On a matter of such importance, the voice of the people must be heard. My administration will vigorously defend this act of Congress.

If the voice of the people must be heard, though, what else need Bush do? The state laws, and the question of whether or not state courts will uphold them, are none of Bush's business, because he opposes Washington meddling in local affairs. At the federal level, Congress in its wisdom has spoken and enjoys Bush's unqualified support.

But that isn't good enough for the religious right, which is disaffected with the Bush administration and may conceivably support a third-party challenge to Bush's presidency. So Bush must support the constitutional amendment, too.

He is doing this, Bush explains, because the Defense of Marriage Act, that righteous and democratic expression of the people's will, is, um, unconstitutional:

The Constitution says that full faith and credit shall be given in each state to the public acts and records and judicial proceedings of every other state. Those who want to change the meaning of marriage will claim that this provision requires all states and cities to recognize same-sex marriages performed anywhere in America.

Note the grudging and exaggeratedly passive will claim. Hey, he's saying, if it were up to me, I'd leave well enough alone. Unfortunately, those interfering judges just might agree that the Defense of Marriage Act really can't be squared with the Constitution. And that leaves me no choice but to capitulate:

[T]here is no assurance that the Defense of Marriage Act will not, itself, be struck down

by activist courts. In that event, every state would be forced to recognize any relationship that judges in Boston or officials in San Francisco choose to call a marriage. Furthermore, even if the Defense of Marriage Act is upheld, the law does not protect marriage within any state or city. For all these reasons, the Defense of Marriage requires a constitutional amendment.

Those damned activist judges! They're so powerful that they've got me doing what they want before they even tell me to!

If Bush really believed marriage was something to be decided legislatively, he'd wait until a judge struck down the statute before waving the white flag on its constitutionality. And he'd certainly avoid dictating what any state or city should do. That's what Barr, now retired from Congress, is doing. The Constitution is no place for forcing social policy on states, especially in this case, he's said.

Instead, Bush is doing the courts' work for them, declaring the Defense of Marriage Act unconstitutional while at the same time portraying himself as judicial activism's victim. He's like Cleavon Little in that scene from *Blazing Saddles* where he whips out his gun and takes himself hostage. In fact, it's his fundamentalist supporters who've taken Bush hostage, and they couldn't be less interested in helping Bush remain consistent about the proper role of the federal government. The only real belief animating this political discussion is the bigoted one that homosexuality is an abomination. President Bush may not subscribe to that belief, but he's more than happy to cater to it.

**The Politics of Piety;
Bush's Public Religiosity Connects with America –
and That Will Win Him Votes**

Los Angeles Times

July 11, 2004

Charlotte Allen

It's a meme typically favored by liberal, Democratic-leaning pundits: Religion – or rather, the public expression of religious belief in political life – is dangerous to America. The idea's propagators are usually talking specifically about President Bush, an unabashed Christian who lards his speeches with biblical allusions and once declared that Jesus Christ was his favorite political philosopher.

In a column titled "Bush's God" in this month's *American Prospect* magazine, Robert Reich, secretary of Labor during the Clinton administration, declares that religion is a graver threat to America than terrorism. Reich predicts that the great battle of the 21st century won't be between terrorists and the West but between "those who believe in the primacy of the individual and those who believe that human beings owe their allegiance and identity to a higher authority ... between those who believe in science, reason and logic and those who believe that truth is revealed through Scripture and religious dogma."

Reich isn't the only one anxious about religion invading politics. Last year, Barry Lynn, executive director of Americans United for Separation of Church and State, complained that Bush was sending a secret message of solidarity to fellow Christians when he used the phrase "wonder-working power" – taken from a Christian hymn – in a sentence praising Americans' faith and idealism in his State of the Union address.

And in a review of several books on the president's family for the current *New Yorker* magazine, David Greenberg contends that because the inspiration of God and the Bible "is purely personal or subjective, it's not open to debate – and decisions based on it become immune from scrutiny." In other words, it's downright undemocratic for the president to mention God in public.

There's an obvious response to Greenberg's argument: Given that we've got a presidential election in November, offering voters a chance to boot out the Bible-thumping president if they wish, where's the threat to democracy?

But that's beside the point, which is: Although the Constitution explicitly requires separation of church and state, most Americans don't mind – indeed many demand – that their president not only honor religious faith, an American hallmark, but function in some sense as a religious leader. Bush's predecessor, Bill Clinton, who did not strike most observers as devout, carried his Bible to a Washington church nearly every Sunday morning while president. And Sen. John F. Kerry favorably mentions his Catholic faith, despite his opposition to his church's moral teachings on abortion. It is safe to say that no one who possesses Reich's level of hostility to religion is likely to be elected president soon.

This is not just “ceremonial deism,” the purely formalistic civil religion that Justice Sandra Day O’Connor discussed in her concurring opinion in the Pledge of Allegiance case. It is a genuine civil religion, lending credence to G.K. Chesterton’s observation that America “is a nation with the soul of a church.” About 83% of Americans define themselves as Christians, and nearly all believe in a deity. True, only 38% attend weekly religious services, according to an ABC News poll in 2002 – but that’s startlingly high for a First World nation (and observers say it leaves out the millions who attend church, but less frequently).

Paradoxically, contends Baylor University sociologist Rodney Stark, America owes its high level of religious intensity to the separation of church and state. In contrast with Europe, with its fading government-supported churches, “We have a competitive religious economy here, where churches have to work to get members,” Stark says.

Not surprisingly, religion – Christianity and Judaism, in particular – fueled both the antislavery movement of the 19th century and the civil-rights movement of the 20th. The leaders of both movements didn’t hesitate to quote Scripture to remind their listeners that what they stood for was morally grounded in the Bible, as well as in secular philosophy. Religion was not only a “purely personal” matter but also one of grave public import.

That is as it should be. Religion, by nature, is a public thing, because it acknowledges a reality that is outside the private realm of the inner heart. Individuals’ faith and religious experiences are private matters, but religion itself, whether it be Wicca, Buddhism or Roman Catholicism, is shared and communal. Those who would banish religion to the realm of the strictly private in

effect contend that religion has no relevance to public life. This notion fatally trivializes religion by treating it as essentially meaningless.

More important, religion recognizes there is inherent meaning, order and purpose in the universe. It thus induces humility, a recognition that our puny ideas about how things are and ought to be may not be the final word. The horror of 20th century totalitarianism was the insistence of atheistic, militantly secularist intellectuals, from Germany to Russia to China to Cuba, that they had a right to impose their pet utopian schemes at the point of a gun or threat of the gulag. Professing “allegiance ... to a higher authority,” as Reich puts it, is a check on such murderous egotism.

Most Americans believe that God orders the universe, and so they resonate to declarations that this is true. Ronald Reagan’s popularity rested in part on his religious faith. Many people who would never vote Democratic admired Al Gore’s running mate in 2000, Sen. Joe Lieberman, for his observant Orthodox Judaism. In politics, it never hurts to represent your constituents. So why shouldn’t Bush – or Kerry, or any other politician or president – declare openly the extent to which religious beliefs inform his positions and policies?

The problem isn’t really religious beliefs or religion per se, but the deep American cultural divide over moral issues – abortion and gay marriage are the most contentious – informed by religious beliefs, and that a sizable voting bloc, evangelical Christians, shares many of Bush’s beliefs. Bush’s religiosity frightens the Reichs of this world, not because it promises theocratic tyranny, but because it speaks to a specific world view shared by millions of other Americans. If Bush happened to invoke Jesus in the name of, say, abortion rights or nuclear

disarmament, we would not be hearing lectures from intellectuals on the dangers of religion.

Religious people, certainly Christians, have over the centuries committed many a mortal wrong in the name of their faith. But those wrongs pale in comparison with the mountains of corpses generated by the two most ghastly 20th century experiments in turning governments over to irreligious intellectuals and social theorists – Nazi Germany and the Soviet Union – and their bloody epigones, some of which are still around today. There is some value to the humility inherent in deferring to something, or Someone, beyond yourself.

Look Left

The New Republic
March 15, 2004
Jonathan Chait

“With President Bush’s embrace yesterday of a marriage amendment, the compassionate conservative of 2000 has shown he is willing, if necessary, to rekindle the culture wars in 2004,” began a front-page story in *The Washington Post* last week. The sentence betrays an assumption that has characterized most of the coverage of the gay marriage debate: that the culture wars are being “rekindled” not by those who are revolutionizing the way society thinks about gay rights and marriage but by those who stand in their way. For many in the media, that is, efforts to expand gay rights simply constitute progress; efforts to arrest that expansion constitute culture war. (You see a similar dynamic in the way the press uses the phrase “class warfare”—i.e., not to describe those who want to redistribute wealth upward but, rather, to their critics.) In both cases, the coverage is a function of the kind of people—affluent, educated, and secular—who tend to work in the national media. Indeed, press coverage of the gay marriage debate offers a perfect case study of the degree to which journalists’ socioeconomic assumptions influence their reporting.

The operating premise of most of the recent news coverage has been that Bush’s support for a constitutional amendment banning gay marriage is an extreme move that may satisfy his conservative base but risks alienating voters in the middle. “It’s a cardinal rule of politics,” *The New York Times* declared in a front-page story last week. “Pay attention to the party’s base. In recent weeks, on a variety of fronts,

President Bush has done just that. [. . .] His impassioned endorsement on Tuesday of a constitutional amendment banning same-sex marriage, after weeks of intensive lobbying by social conservatives, was the culmination of this rapprochement. But will he pay a price with the centrist voters who so often decide presidential elections, as the Democrats hope?” *USA Today* chimed in, “Bush’s support of a proposed amendment had long been sought by conservative Christians, who are among the Republican Party’s most loyal supporters.” And the *Post* story quoted above asserted, “So when gay marriages advanced in Massachusetts and San Francisco, Bush felt a need to respond to the cries of social conservatives—even if it meant losing some swing voters he needs in November.”

But what if Bush’s support for the amendment banning gay marriage is not just a sop to his base but a way of appealing to swing voters? I should say here that, for my part, I believe gays should have the right to marry, and I find the amendment morally abhorrent. But I’m far less confident than others in the press that most Americans share my view.

When you look at the polling data, you discover that Americans are divided even on the legality of gay relationships—not marriages, mind you, just relationships. When asked by a CNN/USA Today/Gallup poll last July if “homosexual relations between consenting adults should or should not be legal,” “should” edged out “should not” by just 48 to 46. An identically worded

question, posed by a CBS/New York Times poll in December, resulted in just 41 percent replying yes and 49 percent no.

Unsurprisingly, the public rejects gay marriage by a far wider margin. Last month, the Annenberg Center conducted a poll asking, "Would you favor or oppose a law in your state that would allow gays and lesbians to marry a partner of the same sex?" Thirty percent said they favored it; 64 percent opposed it. This finding is pretty typical: In most polls, about one-third of respondents favor gay marriage, and two-thirds oppose it.

Support for amending the Constitution—which people are generally more reluctant to do to—is naturally lower. But, here too, the results are at best ambiguous. Only one poll has shown a plurality opposed to the amendment. That was the Annenberg poll, which found opposition by a 48-to-41 margin. But this was an anomalous result, probably deriving from the wording of the question, which described the amendment as "saying that NO [emphasis original] state can allow two men to marry each other or two women to marry each other." A few other polls have found public sentiment evenly split: A February Time/CNN poll resulted in 47 percent supporting the amendment versus 46 percent opposing. An ABC News/Washington Post poll found 46 percent in favor and 45 percent opposed.

Moreover, polls that measure support for the amendment without mentioning the alternative of letting every state decide for itself produce consistent support. A February Gallup poll asked, "Would you favor or oppose a constitutional amendment that would define marriage as being between a man and a woman, thus barring marriages between gay and lesbian couples?" Among respondents, 53 percent supported it, and 44 percent opposed it. CBS's February poll had

a similar (51 to 42 percent) result. And, when CBS changed the wording to describe the amendment as "allow[ing] marriage ONLY [emphasis original] between a man and a woman"—without explicitly saying it would ban gay marriages—support grew to 59 to 35 percent. So there's no majority opposed to the amendment, and there may well be a majority who support it, perhaps even a substantial one, depending upon how the issue is framed.

Needless to say, this is not the picture one gets from media accounts of the controversy, which have tended to focus on the possibility that Bush's support for the amendment will cost him among swing voters. As this week's Time magazine contends, "Many swing voters are also the suburbanites who abandoned the GOP in the past when it got too wild-eyed about culture wars." This may be true as far as it goes. But the voters that Time is referring to—i.e., upperincome, socially moderate, economically conservative folks—don't make up the entire swing vote or even the largest portion of it. A larger bloc of swing voters has essentially the opposite sensibility—culturally traditional and economically populist. "The greatest bloc of contested voters watching politics from a distinct perspective is noncollege and blue-collar America," writes Democratic pollster Stanley Greenberg in his new book *The Two Americas*. "These are the voters for whom church and faith are important and who think values and family are under pressure too."

These downscale swing voters are substantially more likely to support an amendment banning gay marriage than the more libertarian suburbanites Time focuses on. And, while most of the recent polls on gay marriage are not broken down into useful demographics, such information as there is supports this assumption. The

Annenberg poll—which, again, was an outlier in showing overall opposition to the amendment—shows voters with advanced degrees overwhelmingly opposed to the amendment and all others essentially split.

It's not hard to understand why the national media fails to grasp the continued strength of cultural traditionalism: In Washington and New York, where many journalists

dwell, gay marriage is an increasingly mainstream proposition. Unfortunately, in most of the country, it's not. And, even if the media doesn't realize this, it's a good bet Karl Rove does.

THE SUPREME COURT AS AN ELECTION ISSUE

Fighting Over the Court It's Tough to Make the Supreme Court into an Election Issue

The Legal Times

October 9, 2000

William G. Ross

There are signs that the U.S. Supreme Court may be emerging as a significant election issue for the first time in more than 30 years. During the televised debate between George W. Bush and Al Gore last week, both candidates discussed the criteria they would use in making judicial nominations. With the retirement of more than one justice likely during the next several years, and with the Court closely divided on many controversial issues, Democrats and Republicans agree that the upcoming election could have a critical impact on the Court's direction.

If history is any guide, however, judicial issues will produce much campaign bluster but will affect few ballots.

Uncertain Impact

A long and largely forgotten line of presidential candidates and political activists have attempted to make the federal courts a decisive issue in many presidential elections during the past century. Their efforts have nearly always failed: The courts are not institutions that ignite the passion of voters. Bob Dole learned this lesson in our last presidential election, after voters responded with indifference when he attacked Clinton-appointed federal judges for allegedly coddling dangerous criminals.

Only three times—in 1924, 1964, and 1968—has the federal judiciary emerged as

an issue that actually may have swayed votes. Even in those elections, the issue's impact remains uncertain.

In 1924, campaigning as a third-party Progressive nominee, Sen. Robert LaFollette of Wisconsin attacked the Supreme Court for its decisions striking down social and economic regulatory legislation, and proposed allowing Congress to override the Court's decisions by a two-thirds vote. His campaign withered, however, when President Calvin Coolidge and his fellow Republicans vigorously accused LaFollette of seeking to sabotage constitutional government. (Republicans made a similar charge with much less effect against President Franklin Roosevelt during the 1940 campaign, in an attempt to exploit popular opposition to Roosevelt's unsuccessful 1937 Court-packing proposal.)

The decisions of the Warren Court—particularly those involving the rights of criminals, school prayer, and reapportionment—were prominent in both the 1964 and 1968 elections. In 1964, Republican nominee Barry Goldwater frequently attacked these decisions and promised to make more conservative appointments to the Court. During the 1968 campaign, after the Warren Court had continued to expand criminal rights in the wake of a major increase in crime, both Richard Nixon and George Wallace repeatedly promised to appoint justices who

would be more solicitous of what Wallace called "law and order." Discontent over the Court's decisions may have helped Nixon win his close race against Hubert Humphrey.

There are indications that the Court is more prominent in this year's election than it has been since 1968, with 36 percent of voters in a recent Newsweek poll indicating that they regard Supreme Court appointments as a significant election issue. Democrats are attempting to cultivate this issue by warning voters that the fate of abortion rights, affirmative action, gun control, and gay rights all hinge upon judicial appointments that the next president is likely to make. Meanwhile, Republicans may be more hesitant to discuss the Court, possibly because they fear their judicial preferences will risk alienating moderate voters.

Even so, judicial issues are unlikely to have much direct impact on the election. There are several reasons for this. First, many of the most significant and divisive issues that confront the Court are too abstruse for most voters to grasp. For example, few voters are likely to comprehend the subtleties of the Court's recent division over profound issues of federalism. Even those voters who know that the Court recently shielded states from lawsuits arising under the federal age discrimination statute are unlikely to fathom the Court's complex interpretation of the 11th and 14th amendments in its decision.

Moreover, the Court itself today is not a subject of unusual controversy, in contrast to past elections when the judiciary emerged as a major issue. Since the present Court is difficult to peg as "liberal" or "conservative," the general direction of the Court no longer provides a lightning rod for criticism. Controversies instead revolve around individual decisions of the Court,

which run the gamut from conservative to moderate to liberal. In this environment, Democrats must warn about the perils of a conservative take-over of the Court, a stance that is less likely to capture voter enthusiasm than a call to reverse the Court's direction.

As in previous elections, moreover, the impact of the Court issue also may be muted because the issue is often little more than a reflection of how voters already feel about candidates. For example, a voter whose support for Gore is based largely on his or her perception that Gore is more pro-choice than Bush is not likely to prefer Gore more merely because Gore may be more likely than Bush to appoint pro-choice judges to the federal courts.

In an era of low voter turnout, however, the judicial issue may motivate some voters to show up at the polls because they perceive that judicial appointments raise the stakes of the election. The prospect of upcoming Supreme Court nominations also stimulates political activists to greater commitment and provides an incentive for fund raising. The People for the American Way, for example, has issued a 78-page report entitled *Courting Disaster*, which warns about the dangers of "a Scalia-Thomas Supreme Court."

The issue of judicial appointments also may be attaining more prominence in presidential elections because the increased scrutiny of judicial candidates has reduced the traditional risk that judges will defy the expectations of the presidents who appoint them. Of course, there will always be a high degree of unpredictability in judicial performance. As the late Yale Law Professor Alexander Bickel once observed, "you fire an arrow into a very distant future when you appoint a Justice." The performance of judges today, however, is more predictable because candidates for the

Supreme Court as well as the lower courts receive far more intense scrutiny both during the presidential nominating process and Senate confirmation proceedings. Of course, even now the process is not flawless-when President Bush appointed David Souter to the Court, he surely did not expect the new justice to become so liberal.

The importance of judicial issues in this year's elections also reflects a growing sophistication about the Court. The highly publicized brawls over the 1987 Bork nomination and the 1990 Thomas nomination helped to stimulate greater awareness of the Court, as have improved news coverage of judicial issues and the growing ubiquity of legal issues in American life. Although polls consistently show that few voters pay careful attention to judicial decisions and that even the names of most of the justices are unknown to the overwhelming majority of Americans, few voters are unaware of the Court's vast power to affect significant public issues. Voters seem to understand generally that the Court can affect such highly charged issues as abortion, school vouchers, school prayer, and violence against women. Many voters also recognize that Supreme Court appointments are likely in the near future because of the average age of the justices.

Unanimity on Validity

The debate over the Court this year also helps to underscore the resilience of public respect for the Court and acceptance of the Court's power to review the constitutionality of state and federal legislation. In contrast to the virile populist attacks on judicial power in so many campaigns of yesteryear, no major candidate or political movement today questions the validity of judicial review or attacks the Court as an institution. (Of course, politicians on both sides of the

political divide demonize individual judges and justices.) Nearly everyone seems content to allow the Court to exercise vast powers, either because they support such powers or because they recognize the political impracticability of reining them in-which would include measures such as abolishing life tenure, abrogating judicial review, curbing jurisdiction, or implementing any of the other remedies widely advocated by two-fisted critics of judicial power until relatively recent times.

The issue today, therefore, is not the validity of judicial power itself, but rather who will exercise that power. In a variation on the old adage "if you can't beat them, join them," voters and politicians of all persuasions today seek to elect presidents and senators who will appoint judges who will serve their agendas. Although few votes may pivot on judicial appointments, voters are rightly giving more consideration to the types of judicial nominations that the next president will make.

Bush's Justice

The Weekly Standard
Monday, June 23, 2003
Terry Eastland

President Bush may or may not get the opportunity to name a Supreme Court Justice this summer. But if he does, who would be the right choice? Bush himself has told us. In 1999, Fred Barnes asked Bush what kind of judge he'd select. "I have great respect for Justice Scalia," he said, "for the strength of his mind, the consistency of his convictions, and the judicial philosophy he defends." There you have it. Someone like Scalia, assuming all other qualifications are met, would be the best choice for the Court.

In fact, we'd drop the word "like" in thinking about who should replace Chief Justice William Rehnquist, were he to step down. In that case, Scalia would be the logical choice, assuming he is willing to take the center seat. And then, of course, Bush could backfill with someone like Scalia. Likewise, if John Paul Stevens or Sandra Day O'Connor—next to Rehnquist, the oldest and longest-serving justices—were to leave the Court, Bush will surely want to select a replacement who shares Scalia's judicial philosophy.

We commend to Bush his own standard, not simply because he articulated it but because the Court needs more judges like Scalia. On race, religion, criminal justice, and national power, the Rehnquist Court is an improvement on the Burger Court, which was only slightly better than the Warren Court. Yet the Rehnquist Court has in important respects been a disappointment. Consider *Roe v. Wade*, the 1973 decision that invented the abortion right, thus destroying self-government on an issue

previously left to the people. The Rehnquist Court has not only declined to overrule *Roe* but also reaffirmed it in the 1992 case of *Planned Parenthood v. Casey*. Too many times the Rehnquist Court, notwithstanding its dominance by appointees of Republican presidents, has regarded Supreme Court precedents like *Roe* as sacrosanct, placing them above the Constitution itself. Against the anti-constitutional tendency of judicial supremacy, Justice Scalia, joined by Justice Clarence Thomas, has consistently dissented.

Fortunately, for a Court that needs judges who will abide by the Constitution, there is no shortage of qualified people who would be available for appointment. They include appellate judges Sam Alito of the Third Circuit, J. Michael Luttig and Harvie Wilkinson III of the Fourth Circuit, Edith Jones of the Fifth Circuit, Danny Boggs of the Sixth Circuit, and Michael McConnell of the Tenth Circuit. We'd add to this (non-exhaustive) list two individuals who aren't judges—Solicitor General Theodore B. Olson and Sen. Jon Kyl of Arizona.

Will Bush choose an Alito or a Luttig or an Olson? His generally excellent choices for the circuit courts suggest he might. But it's hardly a sure thing. He might be tempted simply to "trade up"—to get someone who is better at the margins than, say, Stevens, the lone Ford appointee who long ago joined the Court's liberal bloc. Or better than O'Connor, Reagan's first appointee who often votes with Scalia and Thomas (and Rehnquist and Justice Anthony Kennedy),

but whose opinions sometimes lack a rule of law clear enough to provide useful guidance. Simply to trade up, however—unless the trade is all the way up—is to waste an opportunity to influence the direction of the court. And Republican presidents since Nixon have wasted too many of these opportunities. What’s amazing is how many they’ve had—eight of the last ten vacancies occurring on their collective watch. Bush surely will not want to waste the first one he gets.

There is also the temptation to nominate White House counsel Alberto Gonzales, who since Austin days has been a member of Bush’s inner circle. Were Bush to appoint Gonzales, he would be the Court’s first Hispanic, and as such, Bush might be told, a signal to the growing Hispanic population that its home is in the Republican party. But Gonzales would be a problematic choice for the Court. His legal career so far doesn’t justify confidence that he would turn out to be a justice having the “strength of mind,” “consistency of convictions,” and “judicial philosophy” Bush admires. If Bush wants to engage in diversity politics, he can confine that enterprise to the executive branch and not extend it to the judiciary, where the appointments are for life. He could, for example, name Gonzales his next attorney general, in which case he would be the first Hispanic in that post.

A third temptation is to nominate someone without much of a paper trail who, the candidate’s advocates would claim, will prove Scalia-like on the bench. In other words, a “stealth” nominee. For a president who has endeavored not to repeat his father’s mistakes, we would hope the sufficient answer to that suggestion is the name David Souter. Appointed by George H.W. Bush in 1990, Souter is no longer a

blank slate but a jurist of whom the most partisan Democratic president could be proud.

Stealth is the strategy of those who imagine that a fight on principle with Senate Democrats can be avoided. It can’t be. Even from a nominee with the dullest, offensive-to-no-one resume, Senate Democrats will demand a confession of belief in the Supreme Court’s abortion jurisprudence.

Here it must be said that the entire point of the Democrats’ strategy on Bush’s circuit nominees—whether as the majority, delaying and not holding hearings, or as the minority, engaging in filibusters—has been to influence the kind of choices the president makes for the circuits and, especially, the Supreme Court. Already Democrats are offering Bush advice on his Supreme Court choices. Last week Charles Schumer suggested that Bush pick his Senate colleague, liberal maverick Arlen Specter!

The president can’t avoid conflict with Senate Democrats, not if he is going to name someone like Scalia. And indeed, were Rehnquist to step down, we would like to see the Democrats try to oppose Scalia as his replacement and to get the fight over principle well joined. Scalia is abundantly on the record on the issues that matter, including *Roe v. Wade* and *Planned Parenthood v. Casey*. (“If only for the sake of its own preservation,” Scalia wrote in a 2000 case, “the Court should return [abortion] to the people—where the Constitution, by its silence on the subject, left it—and let them decide, State by State, whether this practice should be allowed. *Casey* must be overruled.”) We can think of no one more able to stand his ground, and for right principle, than Scalia.

Yet Scalia should not have to stand alone. Nor should any other nominee. The great lesson of the Bork nomination is that a president must fight for his Supreme Court nominees. Bush should be ready to engage. So should his aides, though it is unclear who would do the job. Attorney General John Ashcroft has been oddly silent on judges. Perhaps Vice President Cheney, whose vote might be needed, could rise to the occasion. In addition, why not let the nominee make his own case? Surely it is time to move beyond the antiquated custom in which the nominee is required to keep silent while interest groups and senators slander him.

In any case, it will be important to make arguments that go beyond the shopworn phrases, "strict construction" and "judicial restraint." Specifically, the administration will have to explain why we need justices who construe the Constitution fairly, who recognize its powers but also enforce its limits, who decline to extend or create rights that aren't found in the Constitution, and who are willing to overrule holdings at odds with the Constitution. Let Senate Democrats argue for justices who embrace unlimited national power and create new "constitutional" rights whose enforcement necessarily leaves less room for self-government.

A presidency is always defining itself. So far the Bush presidency—though no one could have predicted this before September 11—has defined itself largely in terms of national security and foreign policy. If a vacancy on the Supreme Court occurs, another defining moment for this president will present itself, and the choice Bush makes will reveal his true commitment to constitutional self-government.

**Admit the Obvious: It's a Political Process
Ideology Governs Judicial Confirmations. Let's Say So**

The Washington Post

Sunday, July 18, 2004

David Greenberg

Foreign policy and the economy have emerged as the themes of this year's presidential campaign. But in the next four years we're less likely to see another terrorist attack or recession than a different potentially life-changing event: the retirement of a Supreme Court justice. The current crop of justices has been together for a record 10 years. It includes the 84-year-old John Paul Stevens, the oldest member of the court, and others who have had health problems. Given the Rehnquist Court's penchant for 5-4 decisions, a new justice could alter American society for decades.

Whoever wins the White House, it probably won't change the disingenuous pattern of partisan warfare that now takes place surrounding such nominations. Even while battling each other, the two parties collude in promoting a fiction: Both profess, against all evidence and common sense, that they choose and evaluate nominees not on the basis of ideology, but on professional merits. To base one's opposition or support solely on ideology is seen as politicizing the judiciary, the branch of government that's supposed to stand above the messy fray of partisan politics. So party leaders contrive to find extra-political reasons to oppose a nominee. They root their objections in a reputed character flaw, or performance of some unsavory act long ago, or lack of professional merit. Despite the illusions put forward, it's clear that ideology is at work in both appointment and confirmation.

No justice is apt to retire until the election is finished. But when one does, the pattern will reassert itself. Already, President Bush is spoiling for a fight. In his 2000 campaign, he pledged to appoint justices in the mold of Antonin Scalia and Clarence Thomas, the court's most conservative jurists. Last summer, he rebuffed Senate Minority Leader Tom Daschle's idea that he confer with Senate Democrats before selecting any nominee. Some of his choices for appellate court judges – notably Brett Kavanaugh, whose chief professional distinction has been to help write the Starr Report – are hard to interpret as anything but acts of partisan aggression. And earlier this month, Bush visited North Carolina and Michigan to blast the Democrats for holding up his lower court appointments.

Senate Democrats, numbering 48, constitute a large enough minority to block any appointment (if they stick together), since it takes 60 senators to end a filibuster and bring a nomination to a vote. During Bush's presidency, Democrats have united to oppose several of Bush's choices. They filibustered last year to block the appointment of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia Circuit. Estrada's conservative views regarding due process rights earned him the opposition of most black and Hispanic groups.

November's election won't change much; neither party is going to gain enough Senate seats to have a filibuster-proof margin. The Democrats, even if they were to regain control, won't be able to do more than obstruct the GOP agenda if Bush wins. And if John Kerry wins? Republicans proved during Bill Clinton's presidency that they, too, can thwart an appellate court nomination. Clinton dodged fights at the Supreme Court level by vetting his potential nominees beforehand with Senate GOP leaders. Still, when Byron White and Harry Blackmun retired, in 1993 and 1994, danger filled the air. Had Clinton followed his heart and nominated former New York governor Mario Cuomo, he would certainly have ignited a firestorm. Instead, he put Ruth Bader Ginsburg and later Stephen G. Breyer on the high court.

Although a few senators have recently begun arguing for letting friends or foes of a nominee frame their support or objections in honestly ideological terms, they have yet to alter the dynamic. That's because five deep historical developments – the decline of the imperial presidency, the prevalence of divided government, the rise of expertise, the advent of identity politics and the emergence of a culture of scandal – have conspired over the last generation to bring us to where we are today.

This unacknowledged partisanship was not the norm for court appointments in earlier eras. In the nation's first century, senators were deeply involved in the appointments, often objecting to a president's nominees for unabashedly political reasons. Between 1789 and 1894, 22 of 81 presidential Supreme Court nominees failed to reach the bench. They were either rejected, withdrawn or left unacted upon by the Senate. The reasons senators gave were sometimes baldly political. For example, George

Washington's nomination of John Rutledge to be chief justice in 1795 foundered because Rutledge opposed the newly negotiated Jay Treaty with Great Britain. Nathan Clifford, James Buchanan's choice for the bench in 1858, was rejected for being too pro-slavery. And radical Senate Republicans beat back Ulysses S. Grant's effort in 1870 to place on the court Ebenezer Hoar, who had opposed the impeachment of Andrew Johnson.

In the 20th century, a different pattern emerged. Senators mostly deferred to the president's wishes. From 1895 to 1968, only one high court nominee – John J. Parker, in 1930 – met defeat. Although a few others faced some rough weather, the strong presidency that emerged with William McKinley and Theodore Roosevelt allowed the chief executive generally to shape the Supreme Court.

The collapse of the unchallenged presidential prerogative did not start with Ronald Reagan's ill-fated 1987 nomination of Robert Bork. Rather, it began in 1968, when an alliance of Republicans and Southern Democrats, furious about the liberal rulings of the Warren Court, filibustered to keep Lyndon Johnson from elevating his friend Abe Fortas to the chief justiceship. (It's often recalled that Fortas was blocked because of shady financial dealings, but those arrangements didn't fully emerge until the next year, when they precipitated his resignation altogether.) Since the Fortas imbroglio, most presidents have faced difficulty in getting their appointments through the Senate. Richard Nixon lost two battles (Clement Haynsworth and G. Harrold Carswell) and so did Reagan (Bork and Douglas Ginsburg). And both those presidents had trouble confirming William Rehnquist, first to the court and then as chief justice. George H.W. Bush

won a fierce fight over Clarence Thomas. All along, ideological warfare – under the increasingly untenable guise of a debate on the merits – intensified.

Several profound shifts in American culture combined to create this new politics of appointments. First, the late 1960s and early '70s witnessed a broad assault on the presidency from the New Left and the New Right alike, and, with the Nixon administration's abuses of power, liberals also began to fear an "imperial presidency." Responding to such concerns, senators revived their advise-and-consent mandate as a way to check executive power.

Divided government also shaped the new dynamic. Nixon was the first president since 1848 to take office with the opposition party controlling both houses of Congress, and many Democrats, angry over Fortas's treatment, resolved not to let the new administration steer the high court into conservative terrain. Reagan, the first Bush and Clinton also lacked Senate majorities, complicating nominations.

* * *

Expertise and identity became innovations in public relations – ways of winning the battle by setting the terms of debate. Senators responded with innovations of their own. Notably, the enthusiasm for personal scandal that engulfed politics in the Watergate era provided a way to shoot down unpalatable nominees without invoking ideology. Since Fortas, nominations have turned – superficially – on questions of

alleged financial impropriety (Haynsworth), racist behavior (Carswell, Rehnquist), sexual harassment (Thomas), drug use (Ginsburg), blindness to conflicts of interests (Haynsworth, Carswell) or other scandals, real or inflated.

Even the apparent exception to this rule – the 1987 defeat of Bork – reinforced the unspoken ban on ideology. Bork's critics described him not as too conservative, but as "out of the mainstream." ... His foes seemed to be decrying the bearded nominee's character or even his sanity, rather than his opinions. (Bork asked the White House if he should sacrifice the beard for the team, but it was decided that shaving off a 20-year-old personal trademark would attract more criticism than the facial hair.)

Bush spoke in what has become familiar code during his July 7 campaign stop in North Carolina. "When the nominees come before people in my administration, we don't say, what is your specific position on that issue or another issue. What we say to the person is, what is your judicial temperament?" Bush said. "And I don't believe in litmus tests. [. . .] I do believe in making sure that we share a philosophy."

It's perfectly natural that Supreme Court appointments should be political issues, and it's time to stop pretending otherwise. Justices do not shed their politics when they join the bench. Senators shouldn't be embarrassed to say that they care whether the court is liberal or moderate or conservative. And candidates for president should be pressed to talk about it a lot more.

**Dismissed in Boston
Why won't the Democrats talk about judges?**

Slate

Wednesday, July 28, 2004

By Dahlia Lithwick

The American Constitution Society hosts a panel at the Boston Public Library titled "The Constitution at the Crossroads: 2004 and the Future of American Law." The first question after the formal presentation goes to the perennial election problem: "How do we get the issue of judges to matter to the American voter?" Why don't people care what kinds of judges the president puts on the bench?

I have read my share of overheated articles this month—the ones about the possibility of four Supreme Court vacancies over the next four years—and if I hear one more person characterize Justice Ruth Bader Ginsburg as teetering on death's door I will smack them. But the truth is that no one cares who appoints the next four justices, or three justices, or seven. We just don't. So, the lawyers are, quite reasonably, wondering why.

In a sense, it's an unfair question to ask at this convention, because the environmentalists, the stem cell folks, and the labor people are all in the same fix: This isn't the year to get any one issue before voters, who are having enough trouble deciding what to think about the war. But, if you can ignore the war for a moment, this should have been the year in which judicial appointments mattered a whole lot. For one thing, if you cared about gay marriage, or abortion, or the right to die, or civil liberties, as much as they say you do, almost nothing else matters *but* who's on the federal bench.

But more important, wasn't this election supposed to be a referendum on *Bush v. Gore*? Weren't the majority of American voters who felt that they'd been shafted by a partisan Supreme Court four years ago going to rise up this time and say "no" to ideological justices and their origami Constitution?

Apparently not, agrees the panel. People just don't track judicial appointments as an issue, and we just don't consider the power to appoint judges a truly important one. Professor Pam Karlan, of Stanford Law School, suggests that the remedy for this judicial apathy is that individuals whose lives have been affected by the courts need to speak out. She's right. We hear nothing about judges who refuse to grant abortion waivers. We hear nothing about judges who refuse to be bound by civil rights law. The fact that Bill Pryor, President Bush's recess appointee to the 11th Circuit Court of Appeals, just cast the deciding vote not to hear a case challenging the Florida law preventing gay couples from adopting went almost completely unnoticed in the national media.

Something magical happens when judges are confirmed to the bench. They become oracles, and we as a nation just stop caring about their activities. (Strangely, however, some liberal jurists need only burp at oral argument before the cries of "liberal activist" ring out.) Someone in the audience suggests that we need to do a better job of demystifying the Supreme Court. Someone

else adds that it would be “nice to know who these guys and gals go fishing with on weekends.” Big laugh.

Another audience member makes a really nice point: We tend to think of election cycles in manageable four-year units. If we don’t like the job he’s doing, we can boot him in a few short years. We forget that judicial terms are measured in decades. These bombs have extremely long fuses.

Professor Charles Ogletree of Harvard Law School points out that Republicans have simply done a better job than Democrats of articulating, committing to, and selling a coherent judicial philosophy. Democrats have used the presidency to create diversity on the bench but never to promote a unitary philosophy. Those chickens are now coming home to roost.

This is all a double-edged sword, of course. One of the very best things about the American electorate is its reverence for the judiciary. By refusing, for the most part, to be drawn into campaigns to smear, slander, and second-guess our judges, we have given them the space and independence to be fair.

But by failing to care who gets a lifetime appointment to the federal bench, or to scrutinize what they do there, we have dropped the ball on the very same social issues we claim to care about most.

I keep thinking that one speaker at this convention needs to stand up at that podium tonight and say: “Ladies and Gentlemen. Abu Ghraib. Thank you. Goodnight.” Because shouldn’t this election ultimately be a referendum on the rule of law? Shouldn’t the only issue before us be whether or not there will be legal constraints on executive power? Walter Dellinger, former acting solicitor general under Bill Clinton and star *Slate* contributor, puts this far more eloquently when he warns that if we don’t cast our votes about Guantanamo, and Abu Ghraib and those torture memos, we will someday look back on this election as emblematic of a national moral failure.

What is at stake, in this election, is whether we value the notion of being a nation that’s ruled by law as opposed to rulers. This isn’t just a voting issue. It’s what used to launch revolutions.

APPOINTMENTS

The Right-Wing Assault What's at stake, what's already happened and what could yet occur

The American Prospect

March, 2003

Cass R. Sunstein

Since the election of President Reagan, a disciplined, carefully orchestrated and quite self-conscious effort by high-level Republican officials in the White House and the Senate has radically transformed the federal judiciary. For more than two decades, Republican leaders have had a clear agenda for the nation's courts: to reduce the powers of the federal government; to scale back the rights of those accused of crime; to strike down affirmative-action programs and campaign-finance laws; to diminish privacy rights, including the right to abortion; and to protect commercial interests, including commercial advertisers, from government regulation. They have sought judicial candidates who would interpret the Constitution and other federal statutes in a way that would promote this agenda. And their nominees have been appointed to the bench.

To a degree that has been insufficiently appreciated, and is in some ways barely believable, the contemporary federal courts are fundamentally different from the federal courts of just two decades ago. What was then in the center is now on the left; what was then in the far right is now in the center; what was then on the left no longer exists. Conservative thought itself has changed no less radically. In the 1960s and 1970s, principled conservatives were committed to a restrained and cautious federal judiciary. Their main targets included *Roe v. Wade* and *Miranda v. Arizona*, which they saw as

unsupportable judicial interference with political decisions. They wanted courts to back off. But the goal has increasingly been to promote "movement judges" – judges with no interest in judicial restraint and with real eagerness to strike down the acts of Congress and state governments. On the central issues of the day, many conservative judges seem to think that the Constitution should be interpreted to overlap with the latest Republican Party platform. (Sometimes they call this "strict construction.")

In transforming the federal judiciary, Presidents Ronald Reagan and George Bush Senior were critical figures, seeking to populate the bench with young judges committed to the preferred view of the Constitution. Many of their appointees remain active – and will so remain for many years. But the effort to reshape the federal judiciary has not been limited to Republican presidents. Republican senators have been equally single-minded. Showing extraordinarily little respect for presidential prerogatives, right-wing senators did whatever they could to block President Clinton's judicial nominees. Sometimes the obstructionists justified their actions by labeling Clinton nominees, whatever the facts, as "liberal activists." Sometimes they offered no reasons at all and simply refused to schedule confirmation hearings. One result was that many moderate Clinton nominees received no serious consideration

from the Republican-led Senate Committee on the Judiciary.

In contrast with their single-minded Republican counterparts, Democrats in the White House and the Senate have been astonishingly passive. To high-level Democrats, the composition of the federal judiciary has rarely been a major priority. Clinton chose two centrist justices, Ruth Bader Ginsburg and Stephen Breyer, whose views are far more cautious and moderate than those of such liberals as William Brennan and Thurgood Marshall. Ginsburg and Breyer are exceptionally distinguished choices (and, in my own view, their caution and moderation are entirely appropriate). But they cannot be counted as the Democratic counterparts to Justices Antonin Scalia and Clarence Thomas. And with a few prominent exceptions, including the nominations of Robert Bork and Thomas, Democratic senators have usually deferred to Republican presidents. Under Reagan and Bush Senior, immoderate “movement” judges have been confirmed to the lower courts without the slightest protest.

Judicial Robes, Political Swords

The result of this one-sided political battle is that America now has an ideologically reconstructed federal judiciary that has taken a strong stand, in many cases, against both Congress and the states. The Rehnquist Court has struck down at least 26 federal enactments since 1995 – a record of activism against the national legislative branch. In terms of sheer numbers of invalidations of acts of Congress, the Rehnquist Court might well qualify as the all-time champion.

* * *

What about the lower courts? Many people, including some Democrats, have urged that judges on those courts simply vote in accordance with “the law.” In their view, it doesn’t really matter whether appointees come from Democratic or Republican presidents. This claim might have been true in previous periods in American history. But because of the efforts of recent Republican presidents, the argument is ludicrous. My own studies show stunningly sharp differences between the votes of judges appointed by recent Republican presidents and the votes of judges appointed by recent Democratic presidents. Consider a few examples: Republican-appointed judges almost always vote to strike down campaign-finance laws, whereas Democratic-appointed judges usually vote to uphold those laws; Republican-appointed judges generally vote to strike down affirmative-action programs while Democratic-appointed judges overwhelmingly vote to uphold those programs; Democratic judges are much more likely to vote to strike down restrictions on the right to choose than Republican judges, who are far more likely to strike down an environmental regulation that has been challenged by industry in court.

Many defenders of right-wing judicial activism contend that they are really behaving neutrally. Often they say that they are simply following “originalism” – an approach that interprets the Constitution in a way that fits with the original understandings of those who ratified it. Originalism is a principled and honorable position. Unfortunately, the current right-wing activists aren’t practicing it. The original understanding of the 14th Amendment, passed during Reconstruction, strongly suggests that affirmative-action programs are acceptable. But because the

right-wing activists on the bench and in the Department of Justice are on the warpath against affirmative action, they don't consult the original understanding when it doesn't suit them. In ruling that Congress lacks the power to allow citizens to sue to enforce the law, the Rehnquist Court said not a word about the original understanding, which indicates that Congress has exactly that power. Too often, the views of contemporary federal judges are closer to the Republican Party platform than to those of the framers.

* * *

I do not suggest that the constitutional law of 2010 will look at all like the constitutional law of 1935. Courts move slowly; usually they respect their own precedents. But significant changes are continuing to occur. Amid those changes, what is most alarming is the large-scale shift in conservative commitments. I believe – indeed, I argued in the first issue of this magazine 13 years ago [see “The Future of Constitutional Politics,” *TAP*, Spring 1990] – that in the 1960s and 1970s, conservative critics were right to object, on democratic

grounds, to some of the Court's liberal decisions, including *Roe v. Wade* itself. They were right to say that the Court should be reluctant to wield ambiguous constitutional provisions as a kind of weapon against reasonable judgments from Congress and the states. But in the current period, President Bush and others are asking the Court to do exactly that. Right-wing activists even appear to have convinced themselves that, by remarkable coincidence, there is a close fit between their own political commitments and the Constitution itself. In a way, they're right: By appointing judges who see things their way, the fit is becoming closer every day.

Is there any possible response? It would be good to begin with a sustained objection by those who understand the problem. The nation is in the midst of a period of right-wing judicial activism, more extreme than any such period since the New Deal itself. A great deal has already happened, but much worse may be on the way unless far more people – moderate and even conservative Republicans, as well as Democrats – come to see what the nation stands to lose.

**Remarks by the President During Federal Judicial Appointees Announcement
The East Room**

May 9, 2001

Thank you all very much. Attorney General, it's good to see you, sir, and happy birthday. Today is his birthday. Also, Judge Al Gonzales. Judge Gonzales is a great friend of mine who, fortunately, is my lawyer and is a part of the process, judicial selection process. Thank you for being here, Judge.

I'm also honored to welcome members of the United States Senate who are here to welcome the nominees to Washington: of course, Senator Orrin Hatch, Chairman of the Judiciary; as well as Senator Patrick Leahy, ranking member on the Judiciary. It's good to see you men, thank you both for coming.

John Warner, George Allen, George Voinovich and last, but not least, Senator Strom Thurmond. Welcome. (Applause.) Thank you all for coming.

I'm pleased to welcome my judicial nominees to the White House. And I'm pleased to welcome their family and friends, as well.

This is a proud moment for all of you, and it's a proud moment for me, as well. A President has fewer greater responsibilities than that of nominating men and women to the courts of the United States. A federal judge holds a position of great influence and respect, and can hold it for a lifetime.

When a President chooses a judge, he is placing in human hands the authority and majesty of the law. He owes it to the Constitution and to the country to choose with care. I have done so.

With me this afternoon are my first 11 judicial nominees, individuals of experience and character. Four of them serve as United States district judges, all four confirmed by unanimous votes. Two others are sitting judges on state supreme courts. Four have served as law clerks in the Supreme Court of the United States. One has served here as an associate counsel to the President. One already holds the position for which I nominate him, by recess appointment of President Clinton.

These men and women have followed different paths to this nomination. They come from diverse backgrounds, and will bring a wide range of experience to the bench. All have sterling credentials and have met high standards of legal training, temperament and judgment.

As a group, they command broad, bipartisan support among those who know them and who have served with them. I submit their names to the Senate with full confidence that they will satisfy any test of judicial merit.

These first nominations are also an opportunity to outline the standards by which I will choose all federal judges. The American people expect judges of the highest caliber, and my nominees will meet that test. A judge, by the most basic measure, has an obligation shared by the President and members of Congress. All of us are constitutional officers, sworn to serve within the limits of our Constitution and laws. When we observe those limits, we

exercise our rightful power. When we exceed those limits, we abuse our powers. Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. To paraphrase the third occupant of this house, James Madison, the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference. Understanding this will make them more effective in the defense of rights guaranteed under the Constitution, the enforcement of our laws, and more effective in assuming that justice is done to the guilty and for the innocent.

My standard is informed by the oath that each judge will take: to administer justice without respect to persons, and to do equal right to poor and to the rich. A good judge exercises these powers with discernment, courage and humility. These are commitments, not just to philosophy, but of character.

My nominees today and in the years to come will be notable for their distinction and accomplishments. And all will be exceptional for their humanity and their integrity. With today's 11 nominees, we continue a constitutional process that involves all three branches of government.

For many weeks now, we have sought and received advice from senators of both parties. I now submit these nominations in good faith, trusting that good faith will also be extended by the United States Senate. Over the years, we have seen how the confirmation process can be turned to other ends. We have seen political battles played out in committee hearings – battles that have little to do with the merits of the person sitting before the committee.

This is not good for the Senate, for our courts or for the country.

There are, today, over a hundred vacancies on the federal courts, causing backlogs, frustration and delay of justice. I urge senators of both parties to rise above the bitterness of the past, to provide a fair hearing and a prompt vote to every nominee. That should be the case for no matter who lives in this house, and no matter who controls the senate.

I ask for the return of civility and dignity to the confirmation process. And with this distinguished group of nominees awaiting confirmation, there is no better opportunity than right now. I congratulate all of you on your service past, and for your service to come.

God bless. (Applause.)

Stop the Madness

In the judicial nominations war, do unto others as you would have them do unto you.

Legal Times

May 27, 2003

Stuart Taylor Jr.

Republicans and Democrats are nearing the brink of nuclear warfare over President George W. Bush's judicial nominations. Unless both sides compromise, the damage to the government and the nation could be profound.

Hostilities have raged on and off since the 1987 Battle of Bork, resulting in a downward spiral of partisan bitterness and recriminations. The latest and biggest escalation has been Senate Democrats' all-but-unprecedented filibusters of professionally well-qualified Bush nominees who are simply too conservative for the Democrats' taste. And now, as both sides prepare for a climactic battle in the event of any Supreme Court retirements, Republicans are threatening the so-called nuclear option.

Here's how it would work: Republican leaders would ask Vice President Dick Cheney, as the Senate's presiding officer, to rule that the Constitution requires the Senate to hold up-or-down majority votes on all presidential nominees. Such a ruling would trump any contrary advice from the Senate's parliamentarian. And unless vetoed by a Senate majority, such a Cheney ruling would override both the Senate rule requiring 60 votes to break a filibuster and the one requiring 67 votes to amend the rules themselves. It would also weaken the counter-majoritarian role that the Senate has proudly played since the founding of the nation.

The Republicans could then ram all of Bush's nominations through with 51 votes.

But such a ruling, Senate Democrats have made clear, would mean Armageddon. They would and could use parliamentary devices to bring the chamber to a grinding halt for weeks or months, bottling up Bush's entire legislative program and slowing down all other business. The fallout would bring partisan bitterness to a nadir unseen in recent history.

Time to be Statesmen

It's time for a statesmanlike compromise to take us back from the brink, like the one that President John Kennedy and Soviet leader Nikita Khrushchev crafted to step back from the brink of nuclear war during the Cuban missile crisis of 1962.

The key would be for Republicans and Democrats alike to recognize that only a blinkered partisan or an artificial-intelligence supercomputer could calculate with real confidence which party deserves more blame for bringing the judicial appointment process to an ever-sorrier state over the past 16 years.

President Ronald Reagan arguably overreached when he nominated archconservative Robert Bork in 1987 to fill the seat of moderate centrist Justice Lewis Powell Jr. This effectively asked a Democratic-controlled Senate to help move the Supreme Court – as closely divided then as now – sharply to the right; just for starters, Bork's confirmation would probably have doomed *Roe v. Wade*. Democrats understandably balked. But

rather than confining themselves to challenging Bork's conservative views, they demonized the distinguished former solicitor general as a monster bent on destroying our constitutional rights.

Then, during the first Bush administration, came the equally bitter battle of 1991 over another archconservative, Clarence Thomas, which would have been a partisan extravaganza even if Anita Hill had never shown up. Senate Democrats could not stop Thomas. But below the radar, they used stalling tactics to bottle up some well-qualified lower-court nominees.

Senate Republicans greatly escalated such stalling tactics during President Bill Clinton's second term. Despite Clinton's conciliatory efforts to consult with them, and his avoidance of provocative nominations – most of his picks were closer to being moderates than crusading liberal activists – Republicans used “secret holds” and other gimmicks to deny votes to many Clinton nominees and demagogic attacks to defeat one [Ronnie White] on the floor.

One result was to save for the current President Bush lots of lower-court vacancies that would, but for Republican obstructionism, have previously been filled by Clinton nominees. Although Bush made a brief conciliatory gesture by renominating one of those Clinton choices, he has otherwise treated his narrow election victory as a mandate to mount the most determined push of any president in recent history to change the ideological balance of the lower federal courts.

Senate Democrats understandably felt justified in resorting to stalling tactics of their own to bottle up some of Bush's more conservative choices. And after a bare 51-seat Republican majority took control in

January, the Democrats had to choose between seeing Bush's nominees confirmed en masse and resorting to the filibuster. Never before has this parliamentary weapon been used to kill nominations solely because of ideological disagreements. But now, Democrats are filibustering two professionally well-qualified Bush nominees to federal appeals courts, Miguel Estrada and Priscilla Owen. They plan to filibuster others, and are threatening to filibuster any Supreme Court nominee they consider too conservative.

Unhealthy Precedent

If this tactic succeeds, it will set an unhealthy precedent. While the Senate has confirmed 124 of Bush's judicial nominees, any 41 senators could henceforth kill any judicial [or executive branch] nomination, no matter how admirable the nominee's character and qualifications. The result would be to unduly sap the power of Bush and future presidents to shape the judiciary – and to doom almost any nominee who has ever dared express a controversial thought.

So it's not hard to understand the Republicans' temptation to go nuclear. Their argument that the Constitution requires the Senate to confirm any presidential nominee who has majority support is plausible, although far from compelling. And Bush might profit politically by the GOP's going nuclear, especially if the Democrats seek to filibuster a Supreme Court nominee who comes across at his or her confirmation hearing as likable, unthreatening, and telegenic.

But resorting to the nuclear option would drive the last nail in the coffin of Bush's pledge to be a uniter, not a divider. It would also be bad for the country, which needs less partisan warfare, not more.

The president should invite Senate Democrats to pull back from the brink. The best way to do that might be an informal compromise along these lines: Bush would promise to consult seriously with Democratic senators before making any judicial nomination, as the Constitution's "advice and consent" clause contemplates. In addition, in light of the Senate's slim Republican majority, he would pledge not to try to swing the Court's ideological balance by naming a strong conservative to replace any of the four liberal or two centrist justices who may retire during this Congress.

These Bush pledges would be conditioned on a commitment by Democratic leaders to end their current filibusters and not to filibuster any other judicial nominees on ideological grounds as long as Bush keeps his part of the bargain. Bush could make the deal more palatable by giving a bit of ground to the Democrats who seek access to Miguel Estrada's internal memos from when he worked in the solicitor general's office.

The logic of such a compromise would be a mutual recognition that filibustering a Supreme Court nominee would be a far more defensible tactic than filibustering a lower-court nominee. The reason is that – especially when the justices are as closely divided as now – one or two Supreme Court appointments could engineer dramatic changes in the law on big national issues including abortion, affirmative action, religion, campaign finance, and civil liberties. Arguably, the president should not be able to engineer such a change with a mere 51 votes in the Senate. The 800-odd

judges on the lower federal courts, on the other hand, have far less latitude and are far more constrained by Supreme Court precedents.

No more Provocations

Any such compromise would quickly unravel unless Bush and Senate Democrats avoided unnecessary provocations. If conservative Chief Justice William Rehnquist retires, for example, it would not do for Bush to try to promote Justice Antonin Scalia, a slightly more conservative, ferociously brilliant polemicist who is a red flag to liberals. Such a nomination would not tip the Court's balance [Scalia would still have only one vote]. But it would send liberal groups into a frenzy that would make it hard for Senate Democrats to resist liberal demands for a filibuster.

Perhaps the most formidable obstacle to any compromise is that Republicans and Democrats alike seem to believe passionately that their adversaries' tactics have been uniquely outrageous. There may be less trust between them than there was between Kennedy and Khrushchev in 1962. Before it's too late, they should all ask themselves this question:

If the shoe were on the other foot – if a President Al Gore were trying to ram a slate of liberal judicial nominees past a 48-seat Republican minority – wouldn't we be doing about the same things that our adversaries are doing now?

**Checkmate in the Judges Game?;
For democracy's sake, President Bush should threaten a recess appointment, or two.**

Legal Times
September 8, 2003
Randolph J. May

Quick! Name President Dwight Eisenhower's three recess appointments to the Supreme Court.

C'mon, fess up. You didn't know that Chief Justice Earl Warren [1953] and Justices William Brennan Jr. [1956] and Potter Stewart [1958] took their seats by virtue of appointments made during Senate recesses. Each was subsequently confirmed by the Senate, but not before participating in deciding cases during their recess service.

More recently, three weeks before leaving office, President Bill Clinton appointed Roger Gregory to the U.S. Court of Appeals for the 4th Circuit, after Gregory's nomination had stalled in the Senate for six months.

So, here's my not-so-modest – and admittedly politically risky – suggestion for President George W. Bush: Now that Congress is back from its August recess, he should promptly announce that if the Senate fails to vote on the nominations of Priscilla Owen and William Pryor Jr. before it next leaves town, he will give them recess appointments. And he should try to convince Miguel Estrada, who has informed the president that he wishes to withdraw his nomination, to accept a recess appointment too.

Estrada and Owen were both nominated, along with Roger Gregory, in May 2001 in Bush's first batch of judicial nominations. Gregory was confirmed within three months, becoming the first African-American to sit

on the 4th Circuit. More than two years later, both Estrada and Owen still have been denied confirmation votes, and, along with Pryor, have faced filibusters mounted by Senate Democrats.

A Good Firestorm

I understand that in today's supercharged judicial nominations environment, recess appointments – which would allow Estrada, Owen, and Pryor to sit on the bench until the Senate either confirmed them or the next congressional session ended – will ignite a political firestorm stoked by Sens. Patrick Leahy of Vermont, Edward Kennedy of Massachusetts, and Charles Schumer of New York and their fellow Senate Judiciary Committee Democrats. I don't purport to know how the politics would play out. But I do contend that if Bush believes his nominees are qualified for the bench and have been treated unfairly in the Senate, a few recess appointments will provoke a constitutional dialogue in the country that can actually contribute to our nation's political health.

There is always the risk, and not a small one, that this tactic would further politicize the already overly partisan judicial nominations process. But we may already have reached the limits of nasty partisanship. There can be no doubt that many well-qualified men and women who would distinguish themselves as federal judges are discouraged from accepting nominations for fear of having to run the

Senate gantlet. Witness Estrada's bitter experience with the broken process.

If, in response to the political firestorm ignited by the recess appointments, Bush were committed to vigorously defending his action, the nation could benefit from the ensuing debate. The president would have to explain why, in his view, his nominees are well-qualified to be judges by virtue of their professional and personal attributes, why he believes they are not the "judicial extremists" their Democratic opponents proclaim them to be, and why circuit court judges are not free to disregard Supreme Court precedent in a system governed by the rule of law.

And the president would have to articulate his views concerning the Senate's proper advice and consent role, and the degree of deference that he believes should be accorded a president's nominations. He would have to explain the circumstances, if any, under which he thinks it appropriate for Senate filibusters to be mounted to deny judicial nominees up-or-down votes on their nomination.

Finally, he would be forced to explain why he believes recess appointments to Article III courts are proper in the face of the likely charge that such appointments compromise not only the Senate's advice-and-consent role, but also the independence of the appointees who have not been granted life tenure by virtue of Senate confirmation. After all, it might be argued that a recess appointee may tailor his or her decisions to enhance prospects for ultimate confirmation.

My point here is not to argue in favor of specific nominees, or against the use of Senate filibusters to block an up-or-down vote on their nominations – although, based on what I know, I think that the nominees

I've mentioned should be confirmed, and that the filibusters preventing votes on their nominations are inappropriate. Rather, my point is that because Bush surely believes they should be confirmed and are being treated inappropriately, he should escalate the fight for them in a way that will engage the American people in a constitutional dialogue.

Talk to the People

Some may argue that a spirited debate between the president and the Senate Democrats, and the defenders of each, concerning the issues of constitutional principle and philosophy involved in the nomination fights is too esoteric for the public to follow. I give the American people more credit, and see no reason to leave this debate to inside-the-Beltway pundits and the nation's law professors.

Our democracy's ongoing vitality depends on widespread understanding of our constitutional system by a broad swath of the American citizenry, especially in an era when we are absorbing so many immigrants from lands with far different political systems and constitutional cultures. Such understanding can be enriched when our elected leaders engage in serious debate about fundamental constitutional issues.

Of course, Bush should follow my suggestion only if he believes that the recess appointments are constitutional. It would not serve his interests, or the nation's, to instigate a constitutional debate by acting in an unconstitutional manner. This is where some more constitutional history and precedent are useful.

Recess appointments of Article III judges are not a recent phenomenon. To the contrary, the practice dates from the

republic's earliest days. George Washington, who had served as president of the Constitutional Convention, made three recess appointments of federal judges in his first year in office. There is no evidence that his recess appointments to the Supreme Court of Justice Thomas Johnson [1791] and Chief Justice John Rutledge [1795] were challenged by any of the Founders then serving in his Cabinet or in Congress. Perhaps, most tellingly, by the end of 1823, during a period when most Founders were still alive, there had been five recess Supreme Court appointments, without engendering constitutional controversy.

All in all, there have been more than 300 recess appointments to Article III courts. [For more on the historical record, see the September 2001 paper, *Recess Appointments of Federal Judges*, by Louis Fisher of the Congressional Research Service, and the unsigned 1957 Stanford Law Review note "Recess Appointments – Constitutional but Unwise?"]

There has never been a challenge to recess appointments for federal judges to reach the Supreme Court. Both the 2nd and 9th circuits, the only two appeals courts that have considered the issue, have dismissed arguments that the Article II recess appointment power does not encompass Article III judges. [See *United States v. Allocco* [2nd Cir. 1962] and *United States v. Woodley* [9th Cir. 1985].]

Responding to the principal claim that a temporary appointee lacks the independence of a life-tenured Article III judge, Allocco stated: "This hypothetical risk must be weighed against the danger of setting up a roadblock in the orderly functioning of government which would result if the

President's recess power were limited." To the same effect, the 9th Circuit, while acknowledging that a recess appointee theoretically may be subject to greater outside pressure than a confirmed judge, nevertheless concluded that it must "view the recess appointee not as a danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of Article III."

Make no mistake. I am not advocating that Bush embark on a campaign of wholesale recess appointments. And I am not intimating that I know whether Owen, Pryor, and, especially now, Estrada even would accept such appointments. Certainly, the personal sacrifice involved, without any assurance of ultimate confirmation, could be substantial.

High-Stakes and High-Minded

What I am suggesting is that, if the nominees would agree, and if Bush is willing to take his case to the people, the heat generated by recess appointments would create the opportunity – indeed, necessity – for the president to lead an edifying dialogue. This high-stakes and high-minded discussion would concern the appropriate role of federal judges in our judicial system, including those who sit below the Supreme Court; preferred modes of constitutional interpretation; and the boundary that separates the "extreme" from the "mainstream" in our constitutional jurisprudence.

In a government that ultimately must stand or fall based on a shared understanding of constitutional values and the rule of law, more rather than less constitutional conversation is always a good thing.

Bush Bypasses Senate On Judge Pickering Named To Appeals Court During Recess

The Washington Post
Saturday, Jan. 17, 2004
Mike Allen and Helen Dewar

President Bush bypassed senators yesterday and installed Charles W. Pickering Sr. as an appeals court judge, ending a three-year battle over a Mississippian viewed by Democrats as hostile to civil rights. Republican officials called the decision a calculated escalation by Bush in his standoff with Democrats over their use of delaying tactics to stall several of his most conservative nominees for lifetime seats on the federal bench. The move threatened to poison White House relations with Democrats further at the start of an election year.

Bush used his recess-appointment powers to seat Pickering, 66, a federal district judge in Hattiesburg, Miss., on the U.S. Court of Appeals for the 5th Circuit, based in New Orleans. Pickering was sworn in last night at the U.S. District Courthouse in Jackson, Miss., the state capital, less than three hours after Bush's announcement.

Such appointments, which the president can make when lawmakers are out of session, last until the next Congress takes office – in this case, next January.

Senate records show the power, usually exercised with lower-profile nominees, has been used to elevate judges only a handful of times in the past 30 years. Less than a month before leaving office, President Bill Clinton used the mechanism to install Roger L. Gregory as the first black judge on the U.S. Court of Appeals for the 4th Circuit, which includes Maryland and Virginia. Bush

renominated Gregory, who was confirmed for life.

Pickering was challenged by Democrats over his 1994 actions from the bench to reduce the sentence of a man convicted of burning a cross near the home of an interracial couple. Republicans contend Pickering was motivated by concern over the fairness of sentences meted out in the case.

Democrats also raised questions about Pickering's contacts as a state senator in the 1970s with the Mississippi Sovereignty Commission, which worked to preserve segregation. Bush has called Pickering "an advocate of civil rights" and pointed to a large number of African American leaders in Mississippi who came forward to declare their support for him.

Bush, in a written statement issued after he had departed for Camp David yesterday afternoon, asserted that a bipartisan majority of senators supports Pickering and that "if he were given a vote, he would be confirmed."

"But a minority of Democratic Senators has been using unprecedented obstructionist tactics to prevent him and other qualified individuals from receiving up-or-down votes," he said. "Their tactics are inconsistent with the Senate's constitutional responsibility and are hurting our judicial system."

Sen. Charles E. Schumer (D-N.Y.), a Judiciary Committee member, said he took the appointment as “a finger in the eye.”

A Senate Republican leadership aide said the appointment was intended as a “shot across the bow” to Democrats after the White House decided they were paying too small a price for filibustering the nominations of Pickering and five other appeals court nominees, several of whom Bush sees as potential Supreme Court picks. But the aide said Bush was “taking a chance,” because Democrats might retaliate on other nominees they might otherwise have allowed to be confirmed.

Both parties are likely to make Pickering an issue in November’s election as an engine for motivating core supporters. Within hours of Bush’s decision, Democrats were charging that the appointment shows his reelection could threaten reproductive and civil rights. Republicans were arguing that Pickering’s dilemma shows why Bush needs more Republicans in the Senate, where the split is 51 Republicans, 48 Democrats and one independent.

Nominated by Bush soon after he took office in 2001, Pickering was rejected by the Senate Judiciary Committee when Democrats controlled the chamber in 2002. Bush renominated him last year as soon as Republicans regained control of the chamber. The nomination stalled after a furor over racially inflammatory remarks by then-Majority Leader Trent Lott (R-Miss.), his main patron, who subsequently resigned from his leadership post.

Pickering and his allies continued to try to build support for the nomination. He was later approved by the Judiciary Committee on a party-line vote, setting the stage for a showdown fight on the Senate floor last fall.

As they had done with several other Bush nominees, Democrats filibustered Pickering’s nomination. On a vote of 54 to 43 in Pickering’s favor, the judge’s backers fell six votes short of the 60 needed to end the stalling tactics and bring the nomination to a final vote. Bush called the action “a disgrace.”

Democrats condemned Bush’s decision, announced at the start of a holiday weekend.

Senate Minority Leader Thomas A. Daschle (D-S.D.) said it shows Bush “has no interest in working in a bipartisan manner to appoint moderate judges who will uphold the law.” And Sen. Patrick J. Leahy (D-Vt.), ranking minority member of the Judiciary Committee, called Bush’s move a “cynical, divisive appointment that will further politicize the federal judiciary.”

Several leading Democratic senators juxtaposed the appointment of Pickering with Bush’s wreath-laying in Atlanta on Thursday at the grave of Martin Luther King Jr., on what would have been the slain civil rights leader’s 75th birthday. Sen. Edward M. Kennedy (D-Mass.) called the appointment “an insult to Dr. King, an insult to every African American” and said it “serves only to emphasize again this administration’s shameful opposition to civil rights.”

Campaigning in Iowa, several of the Democratic presidential candidates decried the decision. Former Vermont governor Howard Dean called the appointment, after the King visit, “an ultimate hypocrisy.” Sen. John F. Kerry (Mass.) said Bush is “threatening civil rights on behalf of right-wing ideologues.”

On the Republican side, Lott said Pickering’s nomination had been “stifled by

special interests who have unfairly smeared the reputation of a good man.”

Republicans said Pickering is likely to retire

when his recess appointment expires – unless he is confirmed, which the GOP concedes is unlikely.

Statement on Appointment of William H. Pryor Jr.

February 20, 2004
Statement by the President

Today, I exercised my constitutional authority to appoint William H. Pryor Jr. to serve on the United States Court of Appeals for the Eleventh Circuit. Bill Pryor has served as the Attorney General of Alabama since 1997 and has had a distinguished career as a public servant and practicing attorney. His impressive record demonstrates his devotion to the rule of law and to treating all people equally under the law. He has received widespread bipartisan support from those who know him and know his record. I am proud to name this leading American lawyer to the appellate bench.

Attorney General Pryor was nominated more than 10 months ago, but still has not received an up-or-down vote in the Senate. A bipartisan majority of Senators supports his confirmation. If Attorney General Pryor were given a vote on the floor of the Senate,

he would be confirmed. But a minority of Democratic Senators has been using unprecedented obstructionist tactics to prevent him and other qualified nominees from receiving up-or-down votes. Their tactics are inconsistent with the Senate's constitutional responsibility and are hurting our judicial system.

As a result of today's recess appointment, Attorney General Pryor will fill a seat on the Eleventh Circuit that has been designated a judicial emergency. He will perform a valuable service on a court that needs more judges to do its work with the efficiency the American people deserve and expect. Again I call on those in the Senate who are playing politics with the American judicial system to stop so that my nominees receive the up-or-down votes they deserve.

Understudies

The New Republic

May 26, 2003

Clay Risen

This January, the Bush administration nominated James Leon Holmes, a Little Rock lawyer, to sit on Arkansas's Eastern District Court. On April 10, however, Holmes's nomination was delayed indefinitely in the Judiciary Committee after a group of Democrats, along with moderate Republican Arlen Specter, balked at his religious-right provenance. (As the former president of Arkansas Right to Life and a longtime anti-abortion activist, Holmes had authored articles arguing that "the woman is to place herself under the authority of the man" and comparing the pro-choice movement to Nazi Germany.) In an almost unprecedented move, on May 1, Republicans sent Holmes to the Senate floor without the Judiciary Committee's imprimatur.

Ultimately, though, what makes Holmes an anomaly among President Bush's district court nominees is neither his far-right provenance nor the fact that he has made it to the Senate floor. What's anomalous about Holmes is that Democrats slowed his nomination down at all, even temporarily. While Democratic senators have waged a few high-profile battles over Bush's nominees to higher courts—for instance, Miguel Estrada, Priscilla Owen, and Charles Pickering—they have put up little resistance to the administration's steady politicization of the lower federal courts. "What has been noticed at the appellate level is also happening at the district court level," says one aide to a member of the Senate Judiciary Committee. "It's just no one pays attention."

District courts are the lowest and most

numerous in the federal judicial system, and as such they are often deemed politically irrelevant—concerned with, as one staffer to a member of the Judiciary Committee puts it, "making widgets." But those widgets are the building blocks of much of U.S. law. Because, in most instances, district courts are the first courts to hear a case, they set the tone for later appeals. "District courts make, in most cases, the most important decisions and the decisions that appellate courts defer to," says Peter Rubin, a lawyer and president of the American Constitution Society. "Should we verify a class action, should we grant summary judgment—and that's the end of the case for a lot of people." District courts can also provide political cover for more conservative judges at the appellate and Supreme Court level by reducing the chances that those courts will be forced to reverse decisions. "One of the problems," says Michael Gerhardt, a professor at the William and Mary School of Law, "is, if you don't take ideology into account in the lower-court nominations, then your higher judges are forced to reverse more often."

In Louisiana, for example, a recent Bush appointee to the Eastern District Court, Jay Zainey—who was unanimously confirmed by the Senate last year despite a record as an anti-abortion activist—ruled against a woman who claims she was denied access to abortion services while in prison. The woman, known to the court as Victoria W., had been sent to prison for a parole violation and soon after learned from the prison doctor that she was pregnant. She requested an abortion but was denied; by the time of her release, it was too late to obtain one.

Victoria W. contacted a lawyer and filed suit in federal court, and the case came before Zaine in April 2002. Zaine dismissed the case in a three-page order, refusing even to hear it. The decision was unprecedented. "No federal court in the country," said Victoria W.'s lawyer, Linda Rosenthal, "has ever held constitutional a prison policy that intentionally obstructed a prisoner's right to terminate her pregnancy." Victoria W. is appealing the verdict, but that appeal will be heard by the U.S. Court of Appeals for the Fifth Circuit, which is already overwhelmingly conservative and will only grow more so if Bush succeeds in placing Owen and Pickering on it. By making a controversial ruling at the district level, Zaine gives the higher-profile appellate court room to uphold his ruling while avoiding the taint of right-wing judicial activism.

The flip side works as well. A recent ruling by Sam Haddon, a Bush appointee in Montana, in favor of an oil- and natural-gas-exploration company accused of violating the Clean Water Act (CWA) was overturned in April by the U.S. Court of Appeals for the Ninth Circuit. In doing so, the appeals court expanded the CWA's list of pollutants and opened up the possibility of further suits—which reinforces its image as an excessively liberal bench. And, paradoxically, Haddon's ruling, which experts say represents an almost unprecedentedly narrow interpretation of the CWA, will likely receive much less public scrutiny because it took place at the district level.

Another reason district court benches matter is that they serve as "farm teams" for higher courts. Because appellate nominees who come from the district courts have federal judiciary experience, district courts make excellent places to cultivate future appellate court nominees and to park potentially

controversial nominees. Take William Steele. An Alabama magistrate judge, he was nominated in 2001 to the U.S. Court of Appeals for the Eleventh Circuit. But he soon came under withering fire from a bevy of civil rights groups, who charged him with "racial insensitivity" in a number of anti-discrimination suits. His nomination was withdrawn, but, in January, Bush nominated him to Alabama's Southern District Court; he was confirmed by voice vote in March. After a few years building a federal judicial record at the district level, he could be an almost unstoppable appellate court nominee.

So far, the administration has filled 100 district court seats, and, while most of the nominations have not been controversial, as a whole they have been at least as ideologically oriented as the more high-profile names at the appellate level. On the list is Paul Cassell, confirmed to the Utah District Court in May 2002, who previously led a campaign to overturn the Supreme Court's landmark Miranda ruling; Michael Mills, a Mississippi nominee known for his anti-abortion views while on the state supreme court; and Nebraska's Laurie Smith Camp, who has been an outspoken abortion-rights opponent. Another frequently cited appointment is that of Ron Clark, who recently began his judgeship on Texas's Eastern District Court. As a member of the Texas House of Representatives, Clark put forward a series of bills to limit access to reproductive-health services, including placing zoning restrictions on clinics and instituting mandatory 24-hour waiting periods. Despite his record on abortion and his lack of judicial experience, he was approved by a voice vote in October 2002. However, Clark was also running for reelection to the narrowly divided Texas House, and, if he had immediately accepted the administration's appointment, he would have likely ceded the closely contested race

to a Democrat. So, with Bush's blessing, Clark refused the appointment until after the election-winning and then promptly resigning, an unheard of step that blurs the line between the White House's political interests and its duty to promote an independent judiciary.

There is no formal requirement for how the president nominates district court nominees; nevertheless, there are traditional checks and balances that have evolved over the last 50 years, practices that are being either rewritten or discarded by the administration. These include ignoring state judicial nominating committees, rejecting American Bar Association ratings, placing Justice Department political appointees in positions related to judicial selection, and refusing to cooperate with home-state senators. Says one former Justice staffer, "They have systematically ignored bipartisan commissions [and] ignored traditions of consultation that were in place when we got there and have been in place for years in order to make these ideological appointments and political rewards for jobs well done."

Bush has come under especially heavy fire for ignoring home-state senators when making his judicial picks, reversing a tradition that had held since the Eisenhower administration. In the past, administrations have either allowed senators from a district's state to make nominations or have given them broad sway in the selection, even when the senators are both from the opposing party. Several states have even organized bipartisan nominating committees in an attempt to institutionalize this coordination. But, in a number of instances—in Washington, Hawaii, Wisconsin, and Florida among others—the administration has ignored both the senators and, in many cases, the commissions. In the case of

Florida's Southern District Court, the White House not only overlooked nominees put forward by the state's Judicial Nominating Commission, it also rebuffed concerns about the process from Democratic Senators Bob Graham and Bill Nelson. Both senators criticized the administration publicly for going ahead with its own nominee, Cecilia Altonaga (though, neither voted against her when she was confirmed on May 6). "It's a stunning lack of consultation with the home-state senators," says one former Justice staffer. "For years, there was fabulous cooperation between the senators in Florida no matter what the party. [. . .] We had no trouble filling Florida judgeships with very qualified, nonpolitical people, and [Bush] just ripped it up."

Democrats, for their part, say they are so busy fighting at the appellate level that a number of controversial nominees have slipped through virtually unopposed. [. . .] As an example, several Democratic staffers cite John Bates, whom Bush appointed to the D.C. District Court. A former independent counsel's office lawyer under Kenneth Starr, Bates was nominated to the court in June 2001 and received unanimous Senate approval in December of that year. Soon after coming to the bench, he was assigned to hear *Walker v. Cheney*, in which the General Accounting Office (GAO) sued the vice president for access to documents detailing meetings with energy-industry officials. In December, Bates ruled against the GAO. That ruling, in addition to effectively closing off public inquiry into the energy task force, could have a disastrous long-term impact on congressional oversight of the executive branch. And it proves definitively that a district court judge can have a powerful impact on the nation's political and legal battles—something the Bush administration understands all too well.

Here's What Less Experience Gets You

The Washington Post
Sunday, March 2, 2003
Michael J. Gerhardt

I do not know Miguel Estrada. Nor do Democratic senators. Many were confounded when President George W. Bush first nominated Estrada in May 2001 to the nation's second-most powerful court, the U.S. Court of Appeals for the District of Columbia Circuit. Estrada, nominated at the tender age of 39, had practiced law for less than a decade. At his confirmations hearings, he said little about his judicial philosophy. After his appointment languished in the Democratic-controlled Senate and Bush renominated him this year, Estrada appeared again before the Judiciary Committee and failed to dispel the mystery surrounding his views.

Estrada has been singled out by Senate Democrats, who are filibustering to block a vote on his nomination. Yet in other respects, Estrada is not unique. Like many of Bush's other appellate court nominees, he is relatively young. Like many of these younger nominees, he has left virtually no paper trail, making it difficult to attack his record in confirmation hearings.

Statistics show the growing importance of younger nominees in the selection of judges for the nation's federal courts of appeal. In the modern era, the average age of a circuit court nominee at the time of confirmation has gone from a high of 55.9 years under President Dwight D. Eisenhower to a low of 48.7 years under the first President Bush. The average age of President George W. Bush's confirmed circuit court nominees was 50.5 during the 107th Congress, but his more recent choices show that he wants to follow his father's example. His circuit court

nominees include not only Estrada, but Jeffrey S. Sutton (40 when first nominated to the U.S. Court of Appeals for the Sixth Circuit), Steve Colloton (39 when nominated to the Eighth Circuit) and Priscilla Owen (46 when first nominated to the Fifth Circuit). The average age of the nominees awaiting confirmation to appellate seats is 50.1.

Relative youth is not the only virtue the Bush administration is seeking in its nominees. The people counseling Bush on judicial appointments are convinced that his father erred in appointing some judges, notably David Souter, who has become a reliable vote for the Supreme Court's moderate wing and cast a pivotal vote for reaffirming *Roe v. Wade*. Consequently, Bush's counselors conduct extensive interviews with prospective nominees about their judicial philosophies. Many of the nominees have been active members of the Federalist Society, established in the early 1980s to organize, cultivate and sharpen conservative thinking about the Constitution. Activity within the Federalist Society constitutes important – and sometimes the only – evidence of a young conservative's ideological commitment.

Armed with that commitment, a young judge might help Bush establish a conservative legacy that could outlast his presidency by decades. Yet with Republicans now in control of the Senate, judicial nominees have no incentive to testify openly about their views before the Judiciary Committee.

Democrats have seen other nominees display reticence in talking about judicial ideology, such as during the Supreme Court confirmation hearings for staunch conservatives Antonin Scalia and Clarence Thomas. Since Bush mentioned during the 2000 presidential campaign that Scalia and Thomas would be his models if he were to appoint a Supreme Court justice, Democrats worry that Estrada, and many of his fellow nominees, would share the hostility those justices have shown toward abortion rights, affirmative action, strict separation of church and state, and broad federal power to regulate the economy.

Democrats have cried foul, accusing the administration and Republican lawmakers of pursuing an ideological agenda that they never openly defend. Republicans have pointed to Estrada's sterling resume and accused Democrats of making the Honduran immigrant – who graduated at the top of his classes at Columbia University and Harvard Law School, clerked for Justice Anthony Kennedy and served as an assistant in the solicitor general's office – the latest victim of a vicious cycle of payback.

Some trace that cycle back to Republican senators who believed that President Jimmy Carter packed the lower federal courts with women who would use their judicial power to advance liberal social policies. Others believe President Ronald Reagan poisoned the process by pledging to appoint judges and justices who would overturn liberal decisions on abortion rights and federalism – the balance between federal and state authority. Some view the then-Democratic Senate's rejection of Robert Bork's nomination to the Supreme Court as a watershed event for which the Republicans have sought revenge.

In fact, the cycle of payback and ideological agendas can be traced to the earliest days of the nation. Every national leader has cared about the likely ideologies of nominees to the federal bench. The only way to ensure that nominees will perform satisfactorily is to adopt reliable selection criteria, because, once confirmed, federal judges serve for life, wield enormous power and are immune to political retaliation for their decisions. President George Washington selected Supreme Court nominees based on their fidelity to the new Constitution and broad interpretations of federal power. President Andrew Jackson based his choices on nominees' political fealty and strong support for state sovereignty. President Franklin D. Roosevelt sought commitment to upholding the New Deal's constitutional foundations, and President Lyndon B. Johnson wanted support for the vigorous protection of civil rights. Presidents Reagan and George H.W. Bush based their judicial selections in large part on nominees' variance with liberal opinions and devotion to the use of original intent as a primary source of constitutional meaning.

In every era, senators have checked presidents' efforts to shape the composition and direction of the federal courts. After Republicans had forced Abe Fortas off the Supreme Court because of ethical improprieties, Democrats scuttled his would-be replacement, President Richard M. Nixon's nominee Clement Haynsworth, for his own ethical lapses. Republicans blocked dozens of President Bill Clinton's judicial nominees, including Elena Kagan, a Harvard law professor nominated to the same court to which Bush has nominated Estrada. One Clinton nominee, Michigan state judge Helene White, waited four years without ever getting a hearing before the Judiciary Committee. Clinton's nominees were

opposed because of concerns about their propensity to read their personal policy preferences into the law. Republican senators blocked Clinton's nominees with procedural tactics. Democrats at that time complained that every judicial nominee was entitled to a final vote on the Senate floor. Republicans responded that the Senate's failures to take final action on nominations were expressions of its constitutional obligation to give its "advice and consent" on them. They also claimed that the rules of the game had been constant for decades. For instance, President Reagan had nominated Jeff Sessions – now a senator from Alabama – to a federal district judgeship, but the Judiciary Committee rejected his nomination and never forwarded it to the full Senate.

Over the past two decades, the judicial selection process and confirmation battles have become more public. Interest groups now mount campaigns on judicial nominations, as some groups are doing by running television ads for and against Estrada's appointment. Bush courts Hispanic voters by chastising Democrats for opposing Estrada, while few Democrats believe that Bush genuinely cares about diversifying the federal judiciary.

Estrada's reticence raises anew the questions of what senators are entitled to know about the views of a judicial nominee and how they can find out. Estrada and others argue that judicial canons of ethics preclude them from giving answers that would indicate how they would rule in cases likely to come before them as judges. The ethical rules protect judicial independence and guard against judges' pre-judging matters likely to come before them. Senators have largely (but not always) shown their respect for judicial independence by framing their questions to elicit information about

nominees' ideologies and approaches, but not how they would rule in particular cases.

It is hard to see how the questions Estrada has declined to answer would jeopardize his independence. He would not identify a single Supreme Court case with which he disagreed, and initially wouldn't even name judges he admires (though he cited three in writing later). Other Bush judicial nominees have answered such questions. Reagan and Bush White House officials asked them of people under consideration for nomination. Republican senators have quizzed numerous Democratic nominees about the Supreme Court precedents with which they disagree. Democratic senators are now asking judicial nominees the same questions.

There are non-controversial answers to the question of which precedents nominees support or question. The high court's unanimous 1954 decision in *Brown v. Board of Education*, striking down state-mandated segregation in public education, is an obvious choice as a case to admire, while one obviously wrong decision was *Korematsu v. United States*, in which the court upheld the forced internment of Japanese Americans on the West Coast after the attack on Pearl Harbor.

Judicial philosophy – or ideology – matters, and nominees should be asked their preferred approaches to constitutional interpretation and the criteria they would employ for construing Supreme Court precedent and determining errors in earlier decisions that might call for new rulings. The Bush administration is correct (and amply supported by many former Democratic officials) in refusing to supply internal memoranda from the Justice Department. But no one is entitled to be a federal judge simply because he or she overcame adversity, attended a fine law

school and collected some solid work experience. Senators have the legitimate authority to weigh the judgment of a nominee who, if confirmed, will for years be entrusted with the final word on many of the important regulatory and constitutional questions that routinely come before the nation's second-most powerful court.

Estrada brings a golden resume. Rather than make its nominee's philosophy a matter of

public record, the administration has sought to make it a matter of guesswork. In the Estrada case, the administration has chosen not to engage in the ideological fray, but to simply avoid it. In the elusive youthful Estrada, Bush has found the model judicial candidate for an era in which ideology matters deeply, so deeply that it can't be revealed.

Activist, Schmactivist

The New York Times

August 15, 2004

Dahlia Lithwick

There is probably nothing I can do or say to convince you that the words “activist judge” have no more meaning than the words “hectic smurlbats.” You’ve heard “activist judges” so many times – from the president, from Congress, from the angry guys on the radio – that you can define it right along with me. Together then: Liberal activist judges make law, as opposed to interpreting it. They ignore the plain meaning of texts to invent new rights. Superimposing their moral views onto their legal reasoning, they brazenly advance the cause of the fringe liberal elites in the culture wars.

That certainly sounds right. Justice Antonin Scalia would say it better, of course. He’d make reference to the framers and toss in words like *kulturkampf*. But it hardly matters. We all evidently believe that you’re either for the liberal activist judges or against them. Folks on the left say they protect minorities from majority tyranny, as the Massachusetts Supreme Judicial Court did last year in the gay marriage decision. Folks on the right say they act as unelected superlegislators. Folks on the left say they are interpreting a living Constitution. Folks on the right say they are unmoored from any fixed point, save, perhaps, the Harvard Law School.

We can disagree about outcomes, but we have, at least as a matter of political language, internalized the fiction that liberal judges “make” law, while conservative judges “interpret” it.

A modest proposal, then: Let’s invent a new term right here, today, for judges or judicial nominees on the right, who claim to be merely “interpreting” the Constitution, even when they are refusing to impose settled law; law they deem unsettled because it was invented by “liberal activist judges.” And while I am open to better suggestions, here’s a tentative offering: “Re-activist judges.”

Re-activist judges are the ones trying to roll back time to the 19th century. Re-activists are the judges who have reactivated federalism by rediscovering the “dignity” of states. Re-activists view *Lawrence v. Texas* – last year’s gay sodomy case – as having all the jurisprudential force of a Post-it note. When the United States Court of Appeals for the 11th Circuit upheld an Alabama ban on the sale of sex toys last month, it did so by sidestepping the logic animating Justice Anthony Kennedy’s opinion in *Lawrence*. Ignoring Kennedy’s lofty promises of sexual privacy – his assurance that “there is a realm of personal liberty which the government may not enter” – the 11th Circuit framed the case as a dust-up over the constitutional right to a vibrator.

Re-activists like Priscilla Owen, President Bush’s nominee to the United States Court of Appeals for the Fifth Circuit, rewrite the Texas parental notification statute in abortion cases, to make it vastly harder for young women to bypass parental consent. Re-activists like another Bush nominee, Janice Rogers Brown, have called the

Supreme Court's shift toward defending New Deal legislation in 1937 the start of "the triumph of our socialist revolution."

Re-activist judges have increasingly adopted the view that their personal religious convictions somehow obviate the constitutional divide between church and state. President Bush's recess appointment to the 11th Circuit, Bill Pryor, expended energy as attorney general of Alabama to support Judge Roy Moore in his quest to chisel the Ten Commandments directly into the wall between church and state. Pryor is entitled to be offended by case law barring government from establishing sectarian religion. But what re-activist judges may not do is use their government office to chip away at that doctrine.

Re-activist judges are able to present themselves as "strict constructionists" or "originalists" by arguing, as does Justice Clarence Thomas, that any case decided wrongly (i.e., not in accordance with the framers of the Constitution) should simply be erased, as though erasure is somehow a passive act. And while there is an urgent normative debate underlying this issue – over whether the Constitution should evolve or stay static – no one ought to be allowed to claim that the act of clubbing a live Constitution to death isn't activism.

So, judicial re-activism. It doesn't exactly trip off the tongue, I know. But let's put it out there anyhow, and attempt to level the rhetorical playing field before November.

The Case of the Gradually Disappearing Supreme Court

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July 1, 2008 – With the retirement of 88-year-old Justice John Paul Stevens today, the Supreme Court’s membership dwindled to four. The remaining two liberals (Stephen Breyer and David Souter) and two conservatives (Antonin Scalia and Clarence Thomas) are almost certain to deadlock on big issues including abortion, affirmative action, gay rights, religion, and presidential war powers. So any tie-breaking replacement for Stevens would be in a position to rewrite vast areas of constitutional law. This, in turn, almost guarantees that no nominee in the foreseeable future will have much chance of getting past the Senate filibusters that have blocked all eight of the men and women named by the president since the retirements in 2005 of Chief Justice William Rehnquist and Justice Sandra Day O’Connor, at the ages of 80 and 75, and the retirements in 2007 of Justices Ruth Bader Ginsburg and Anthony Kennedy, at the ages of 74 and 71.

No matter who wins the 2008 presidential election, the Senate is once again likely to be so closely divided that senators in the opposing party will easily muster the 41 votes to sustain a filibuster against any nominee who does not pass their litmus tests. And any nominee who can pass the Democratic test would fail the Republican test, and vice versa.

Indeed, experts say it’s conceivable that the Court’s membership could eventually shrink to zero, unless and until one party or the other can muster a decisive Senate majority. (The Court would already be out of business had it not reduced the quorum required by

its rules from six to five last year and then to four this year.) Whoever wins the 2008 presidential election will once again be under enormous pressure to pick nominees acceptable to his political base – and doomed to be blocked by filibusters – rather than seek a deal with opposition senators to break the logjam.

Some even speak of a slow-motion Supreme Court suicide over the past five or six decades. By steadily aggrandizing their own powers, both liberal and conservative justices have made the Court into a wide-ranging superlegislature, imposing on the nation the personal political preferences of whichever group can get five votes in the guise of construing the Constitution. This in turn has transformed Senate confirmation battles into plebiscites on the nation’s most-divisive issues, almost as consequential and bitterly contested as presidential elections. It has made increasingly anachronistic the traditional refusal of nominees – now seen as mere candidates for political office – to discuss their views. It has galvanized conservative and liberal activists alike to attack any nominee who fails their tests of ideological purity. And when combined with the Senate’s deep partisan split and the legitimization of the filibuster as a device to block any nominee who falls shy of 60 votes, these trends have produced a stalemate that may threaten the Court’s very existence.

The downward spiral of partisan bickering over judicial nominees is rooted in the conservative backlash against the Warren Court’s well-intentioned assumption of vast

and unprecedented powers to expand criminal defendants' rights, take over school districts in pursuit of desegregation, redraw election districts, ban school prayer, and more. Richard Nixon, Ronald Reagan, and George W. Bush all campaigned on vows to put more conservative judges on the bench.

They were only partly successful. Nixon put the conservative Rehnquist and Chief Justice Warren Burger on the Court. But he also chose Justice Harry Blackmun, who wrote *Roe v. Wade* in 1973 and had become the most liberal justice by the time he retired in 1994, and the more moderate Lewis Powell, who voted with the liberals on abortion, affirmative action, and religion. Stevens, a Gerald Ford appointee, also ended up in the liberal bloc. And President Carter stocked lower courts with liberals.

Reagan's first Supreme Court appointee, the ideologically amorphous Sandra Day O'Connor in 1981, ended up voting much like Powell. Reagan did make the Court more conservative by elevating Rehnquist to chief justice and appointing the conservative Scalia in 1986. But Reagan's 1987 bid to push the Court decisively to the right, by choosing conservative crusader Robert Bork to succeed Powell, provoked a titanic confirmation battle that ended in a 58-42 defeat by the newly Democratic Senate. In the process, Senate Democrats made "to Bork" a verb and set a precedent for opposing even eminently qualified nominees solely (or at least primarily) because of political disagreements with their philosophies. Reagan ended up appointing a more moderate judge, Kennedy, who ended up joining O'Connor – and the liberals – on big social issues including abortion rights, religion, and gay rights.

Similarly, while the first President Bush pushed the Court to the right by choosing

the fervently conservative Thomas in 1991, he had inadvertently pushed it to the left the previous year with his first appointee, Souter. Picked because he had no publicly expressed views to galvanize opposition, this "stealth nominee" proved to be solidly liberal. And when Souter joined Kennedy and O'Connor in a 1992 opinion that largely reaffirmed *Roe v. Wade*, bitterly disappointed conservatives vowed that there would be "no more Souters."

President Clinton, uninterested in spending political capital to mold the courts, chose moderately liberal judges Ginsburg and Breyer. But this did not stop Republicans from escalating the judicial wars during Clinton's second term by using their control of the Senate and various stalling tactics to block many qualified lower-court nominees who would have been confirmed in up-or-down votes.

Meanwhile, during the 1990s, the more conservative justices (often joined by O'Connor and Kennedy) became increasingly aggressive in striking down civil-rights provisions and other acts of Congress based on constitutionally questionable notions of states' rights. This in turn fueled a liberal backlash against "right-wing judicial activism."

The second President Bush touched off a bitter, protracted battle with Senate Democrats – who were spoiling for revenge – by choosing strongly conservative nominees for federal appellate vacancies, many of which would previously have been filled by Clinton nominees but for Republican obstructionism. The Democrats' loss of Senate control in 2002 left them with only one blocking tactic: the filibuster, which had never before been systematically used to block, on ideological grounds,

nominees who would otherwise have been confirmed. And filibuster they did.

In the 2004 campaign, with the Supreme Court closely balanced on issues including racial preferences, gay rights, abortion rights, and religion, Bush and John Kerry were implored by their conservative and liberal bases to pledge to put on the Court only people who had publicly espoused views rejecting (in Bush's case) or embracing (in Kerry's case) *Roe v. Wade*. By the campaign's closing weeks, each candidate had come very close to doing just that. Even moderate centrists, and Souter-like "stealth" candidates, were off-limits and, in any event, unconfirmable, because conservative and liberal groups were determined to avoid the kind of surprises that Blackmun, Stevens, O'Connor, Kennedy, and Souter had given Republicans.

The winner of the 2004 election was thus committed to choosing nominees who were sure to be blocked by filibusters. And the widespread assumption that a Hispanic nominee could skate through because of the opposition party's fear of offending a key voting bloc proved incorrect. By the time ideological opponents had finished trashing every controversial aspect of every nominee's record, in multimillion-dollar ad campaigns featuring distortions and denunciations by various Hispanic "leaders," Hispanic voters were so split and

confused that opponents felt safe to filibuster.

This made almost inevitable the filibusters in 2005 of the first two nominees to replace Rehnquist and O'Connor, and then of the second two. Nor was it a great surprise when the president – vowing never to “knuckle under” on a “core presidential prerogative” – spurned proposed trades in which the Senate would confirm one nominee of his choosing and another picked by the other party.

This uncompromising stance kept the president's political base happy. It also had the not-unwelcome side effect of insulating from any further Supreme Court second-guessing the president's claims of vastly expanded power to override the Bill of Rights and congressional constraints in the name of the war against terrorism. Since the Court began shrinking – to seven members in 2005, five in 2007, and now a stalemated four – both its prestige and its will to take on a wartime president have diminished. “I can't say I miss them much,” the president has reportedly said of the departed justices.

So at a time when we desperately need a judicial check on executive power, the justices – with a push from the president and the Senate – may have taken themselves out of the game.