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SHOULD IDEOLOGY MATTER IN SELECTING FEDERAL JUDGES?: GROUND RULES FOR THE DEBATE

*Dawn E. Johnsen**

The Constitution confers on the President the power to appoint federal judges “by and with the Advice and Consent of the Senate.”¹ While these words leave relatively little room for litigation challenging the constitutionality of judicial appointments,² debate continues to rage over the criteria Presidents and Senators should use in selecting judges. Particularly contentious is the relevance of what sometimes is described as a prospective judge’s ideology or judicial philosophy and views on substantive questions of law. During President George W. Bush’s administration, for example, Senate hearings examined the question “Should Ideology Matter?,”³ Senate Republicans staged a thirty-nine hour filibuster protesting the Democrats’ filibuster of four of President Bush’s nominees,⁴ and President Bush extolled the Supreme Court’s two most conservative Justices as his models for future appointments.

This is but the latest round in a debate of venerable heritage. In the famous Lincoln-Douglas debates of 1858, then-Senate candidate Abraham Lincoln pledged that if elected he would seek the overruling

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¹ U.S. CONST. art. II, § 2, cl. 2.

² Several lawsuits have challenged the constitutionality of President George W. Bush’s appointment of William Pryor, Jr. to the United States Court of Appeals for the Eleventh Circuit pursuant to the Recess Appointments Clause, U.S. CONST. art II, § 2, cl. 3. See, e.g., *Evans v. Stephens*, 2004 WL 2300457 (11th Cir. Oct. 14, 2004). In making appointments, Presidents are subject to constitutional constraints, such as the prohibition on religious tests, see U.S. CONST. art. VI, § 3, even if those constraints may not be justiciable.

³ *The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight & the Courts of the Sen. Comm. on the Judiciary*, 107th Cong. (2001) (includes two hearings, entitled *Judicial Nominations 2001: Should Ideology Matter?* and *The Senate’s Role in the Nomination and Confirmation Process: Whose Burden?*) [hereinafter *Hearings on Judicial Selection*].

⁴ 149 CONG. REC. S14,528 (2003). During the period in which the Senate filibustered four of Bush’s nominees, it confirmed 168, as the Democrats proclaimed repeatedly and prominently throughout the Republicans’ thirty-nine hour filibuster. *Id.* Television commercials also criticized the Democratic Senators for refusing to confirm the four nominees. See, e.g., The Committee for Justice, *CFJ Advertisements*, at <http://committeeforjustice.org/contents/commercial/> (last visited Nov. 23, 2004) (providing on-line access to some commercials).

of the infamous *Dred Scott* decision⁵ and as a Senator he would act in accordance with his belief that the Court erred in that decision. Lincoln quoted President Thomas Jefferson for support: "Our judges see as honest as other men, and not more so."⁶ He also cited Andrew Jackson's actions twenty-five years before: "General Jackson then said that the Supreme Court had no right to lay down a rule to govern a coordinate branch of the government, the members of which had sworn to support the Constitution."⁷ In response, Stephen Douglas ridiculed Lincoln for suggesting that Justices should be selected with an eye toward overruling *Dred Scott*:

Mr. Lincoln intimates that there is another mode by which he can reverse the *Dred Scott* decision. How is that? Why, he is going to appeal to the people to elect a President who will appoint judges who will reverse the *Dred Scott* decision. Well, let us see how that is going to be done. . . . [W]hy, the Republican President is to call up the candidates and catechize them, and ask them, "How will you decide this case if I appoint you judge?" . . . It is a proposition to make that court the corrupt, unscrupulous tool of a political party.⁸

The failure of Lincoln and Douglas, and many other great minds before and since, to move the country toward consensus regarding whether judicial nominees' legal philosophies and views should matter, suggests that the subject may be exhausted and the question irresolvable. Perhaps we should agree to disagree: some of us are with Lincoln, some with Douglas. On some constitutional issues of great public interest and import, substantial consensus may never exist.

Despite the longevity of the controversy and the temptation to conclude that little new remains to be said, it seems premature to declare the question intractable. The continued controversy does not simply reflect principled disagreement on the merits, and thus the possibilities for progress do not seem exhausted. To the contrary, the quality of discourse, as well as the selection process itself, have suffered from identifiable deficiencies in how elected officials and other interested parties debate issues regarding judicial selection. These deficiencies result in part from the political realities of judicial appointments, political realities that are resistant to change—in particular, the intense partisanship and tailoring of public positions on judicial selection criteria in order to achieve desired appointments. While academics and other commentators should not ignore very real

⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁶ PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 213 (4th ed. 2000) (quoting Lincoln-Douglas debates). See generally THE LINCOLN-DOUGLAS DEBATES (Harold Holzer ed., 1993).

⁷ BREST, *supra* note 6, at 212.

⁸ *Id.* at 213.

constraints on what is politically feasible, they also should not perpetuate politically charged and misleading modes of discourse or despair too easily of the possibility for even incremental change. In the hope of promoting principled and productive discussion, and cognizant of the forces to the contrary, I propose five ground rules to govern debate by all participants regarding the appropriate criteria for the selection of federal judges.⁹

Ground Rule # 1: Take account of constitutional history and the criteria that Presidents and Senators have used over the last two centuries in selecting judges.

American law students typically learn early in their study of constitutional law, when they encounter the facts surrounding *Marbury v. Madison*,¹⁰ that consideration of prospective judges' legal views dates back to the founding era. Shortly before Republican President Thomas Jefferson and a newly elected Republican Senate took office, lame-duck Federalist President John Adams and a lame-duck Federalist Congress expanded the federal courts and packed them with Federalist judges. Just a week before the change in administrations, the Federalists also rushed through legislation to create new "justices of the peace" for the District of Columbia, and the Senate hastily confirmed Adams' nominees, including William Marbury. Time was so short that the Adams administration neglected to deliver Marbury's signed commission (among others), which was soon discovered and withheld by the Jefferson administration—hence *Marbury v. Madison*. The Court's *Marbury* decision was authored by Jefferson's political foe Chief Justice John Marshall, himself just appointed by lame-duck President Adams. In the words of federal judge Michael McConnell (whose own legal views were closely scrutinized in the months leading up to his confirmation): "In the midst of this regime crisis, President Adams and the defeated Federalists sought to protect the nation from the radical measures of their successors by securing a powerful and independent judicial branch, staffed by life-tenured judges loyal to Federalist principles."¹¹ Then, as now, political party affiliation

⁹ This article is not heavily footnoted with examples of violations of my proposed rules, but I occasionally illustrate by reference to an article also published in this symposium by fellow panelist Lawrence Solum. See Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659 (2004). My proposed rules in part represent reactions to Solum's article, but primarily result from my own observations as a public interest advocate, a Department of Justice official, a law professor, and a citizen.

¹⁰ 5 U.S. (1 Cranch) 137 (1803).

¹¹ Michael W. McConnell, *The Story of Marbury v. Madison*, in CONSTITUTIONAL LAW STORIES 13, 14 (Michael C. Dorf ed., 2004).

weighed heavily and served as a rough, but valuable proxy for adherence to particular legal principles and views.

Almost two centuries later, President Ronald Reagan was among the Presidents most attentive to his judicial nominees' judicial philosophy and legal views. His nomination of Robert Bork to the Court in 1986 prompted extensive Senate (and public) consideration of Bork's views on numerous legal issues, which ultimately led to the Senate's decision not to confirm him. Bork's nomination was one of the most prominent elements of the Reagan administration's much larger and ultimately quite successful plan to substitute its legal views and vision for what it viewed as the very mistaken direction in which the courts were then heading. Reagan's Department of Justice, under Attorney General Edwin Meese III's direction, issued a series of little-known reports that detailed the desired changes on a wide range of the pressing issues of the day. One report included lists of the Supreme Court cases that the Reagan administration believed the Court had decided incorrectly.¹² Another report endorsed judicial appointments as a method of implementing Reagan's agenda for legal, and especially constitutional, change:

[I]t is hoped that this report will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible.

There are few factors that are more critical to determining the course of the Nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.¹³

Reagan and Adams fall at one end of the spectrum of attention to nominees' legal views. Variations have depended on factors such as the existing composition of the courts, the distribution of political power, what was at stake for the nation, the President or Senator's own priorities, and, for Senators, the selection criteria used by the President.¹⁴ Notwithstanding the variability, our constitutional history is replete with examples of Supreme Court Justices, and especially more

¹² OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988).

¹³ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988) [hereinafter OLP, CONSTITUTION IN 2000]. For an assessment of Reagan's ultimate "success" in changing constitutional doctrine on issues of federalism and congressional power, see Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003).

¹⁴ See Charles E. Schumer, *Judging by Ideology*, N.Y. TIMES, June 26, 2001, at A19 (discussing factors that might affect the relative importance of ideology in Senate confirmations).

recently lower federal court judges as well, who were nominated and confirmed (or rejected) in part because of their judicial philosophy and legal views. While space precludes much detail here, in addition to Reagan, Adams, and Lincoln, any list of prominent examples must include Franklin D. Roosevelt's nine appointments to the Supreme Court (second in number only to George Washington), after the Court invalidated a number of his New Deal policies.¹⁵

Just because the government has exercised power in a particular way for two hundred years does not necessarily mean, of course, that way is constitutional or optimal. But neither is it irrelevant. Even when the question is whether Congress or the President has violated the Constitution, past practice and tradition are highly significant.¹⁶ Regarding judicial selection criteria, because the issue is not one of constitutional authority, there exists even greater room and cause for taking account of past practice. No one seriously contends that Presidents and Senators violate the Constitution when they consider prospective judicial nominees' legal views. The issue is one of best practice and policy.

Professor H. Jefferson Powell, in a brilliant analysis of a series of constitutional controversies from 1790 to 1944, concludes that "our history legitimates efforts to persuade the courts to change their views on constitutional matters . . . by appointing, as opportunity arises, judges likely to take a different position."¹⁷ Even those who do not agree with this (to my mind, compelling) conclusion, nonetheless

¹⁵ Numerous books find judicial philosophy and legal views among the criteria actually used to select federal judges. Henry J. Abraham, for example, concluded that "[a]ll Presidents have tried to thus 'pack' the bench to a greater or lesser extent." HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 76 (7th ed. 1998); see also HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (2d ed. 1985); HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1972); SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* (1997); KERMIT L. HALL, *THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM 1829-61* (1979).

¹⁶ See, e.g., *Mistretta v. United States*, 488 U.S. 361 (1989); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *The Pocket Veto Case*, 279 U.S. 655 (1929).

¹⁷ H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 208 (2002). Professor Powell goes so far as to include the following on his list of twenty "shared constitutional first principles," *id.* at 205, legitimated by history:

The judiciary is not infallible; therefore, the people and the political branches of the federal government ought to take appropriate steps to change the constitutional views of the judiciary, when they believe the courts have erred, through constitutional amendment, litigation, and the appointments process. . . . The use of the appointments process for this purpose raises some hard questions in application, but despite the occasional protest by those substantively opposed to whatever change is sought, the principle is settled.

Id. at 207-08.

should heed Powell's general call for attention to history and tradition.¹⁸ Those who advocate disregard for nominees' views on legal matters should acknowledge and address our history and tradition to the contrary. They also should address a question closely related to and informed by history: What reasonably can be expected of Presidents and Senators, who may care deeply (and appropriately so) about how the composition of the courts affects the outcomes of contested issues of tremendous import. We should be wary of unprecedented or unrealistic ideals for how government actors should exercise constitutional powers.

Ground Rule # 2: Avoid politically charged, undefined terms, such as "political ideology," that obfuscate meaning and thwart productive debate.

Controversy over judicial selection criteria frequently centers on the relevance of a potential judicial nominee's "ideology." Senate hearings and book titles ask whether ideology should matter.¹⁹ Ideology is a word used far more often by those who oppose its consideration, but proponents also sometimes argue in terms of ideology. At least in theory, ideology is an entirely appropriate word in this context. Definitions include "a manner or the content of thinking characteristic of an individual, group, or culture"²⁰ and "a set of doctrines or beliefs that form the basis of a political, economic, or other system,"²¹ all at least arguably relevant to the work of a federal judge.

Nonetheless, the debate over judicial selection would benefit if we were to stop using the word ideology entirely. Whether ideology should matter depends largely on what exactly is meant by the term, yet the meanings people intend vary dramatically. For example, some who argue that ideology is an illegitimate factor nonetheless defend the relevance of "judicial philosophy" and advocate preferences for judges who are originalists or strict constructionists or formalists. Others use ideology to encompass such inquiries and maintain that originalism is no less ideological than any other interpretive methodology. Notwithstanding the lack of a consistent definition, "ideology" is employed with remarkable frequency as shorthand without adequate definition, and sometimes even reflexively without any apparent thought to possible differences in meaning.

Recent writings by Professor Lawrence Solum and Senator Charles

¹⁸ See generally *id.*

¹⁹ See, e.g., *Hearings on Judicial Selection*, *supra* note 3; HENRY J. ABRAHAM ET AL., JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 34 (1990).

²⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1123 (1993).

²¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 871 (4th ed. 2000).

Schumer further exemplify the problem. Solum opposes reliance on ideology, while Schumer seeks to lift the taboo and promote open consideration of ideology.²² Solum uses the word quite differently than Schumer, even though his article directly responds to an op-ed by Schumer. Solum writes harshly of ideology, calling for “[d]ecision according to law as opposed to political ideology”²³ and claiming that “[a]n ideological judge will use election law to rig elections for her own faction.”²⁴ He focuses on political ideology, which he defines as “beliefs and attitudes about politics.”²⁵ “Judicial philosophy” to Solum means something other than ideology and, unlike ideology, appropriately may be a factor in judicial selection. Yet, Solum’s use of judicial philosophy—which he describes as “another dimension of judicial disposition,”²⁶ including realism and formalism (he favors formalism)—certainly falls comfortably within the dictionary definitions of ideology.

Schumer clearly does not share Solum’s definition of ideology. It would be absurd to read Schumer’s defense of ideology as encompassing a desire for judges who will “rig elections” or decide cases according to political ideology rather than law. Schumer does unnecessarily confuse matters by twice modifying “ideology” with “political,” but he generally uses ideology to refer to a nominee’s views on legal issues relevant to adjudication. He refers, for example, to the Senate’s refusal to confirm Robert Bork because of his views on abortion, civil rights, and civil liberties (all legal issues routinely before the courts) and also to George W. Bush’s designation of the Court’s two most conservative members, Justices Antonin Scalia and Clarence Thomas, as his models for future appointments.²⁷ Thus, even when commentators seek to engage in direct dialogue, as in Solum’s response to Schumer, by framing the discussion in terms of “ideology” they can hinder understanding and invite distortion.

An additional drawback to the word ideology is that it conjures thoughts of, and may be confused with, “ideologue,” a word that has very different connotations and definitions than ideology, including “theorist, dreamer, visionary”²⁸ and “a zealous exponent or advocate of a specified ideology.”²⁹ While the word ideology, used correctly, is a neutral term that refers to doctrines, beliefs, and ways of thinking, the

22 Schumer, *supra* note 14; Solum, *supra* note 9.

23 Solum, *supra* note 9.

24 *Id.* at 19.

25 *Id.* at 8.

26 *Id.*

27 Schumer, *supra* note 14.

28 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 20, at 1123.

29 WEBSTER’S NEW WORLD DICTIONARY 669 (3rd coll. ed. 1988).

“zealous advocacy” of an ideologue connotes extremism and the risk of ends-driven adjudication, which are antithetical to the rule of law. No judicial nominee wants to be viewed as an ideologue, and no Senator wants to be seen as supportive of the appointment of ideologues. Modifying “ideology” with “political” additionally creates the specter of inconsistency with law, especially given the general unpopularity of anything political and the familiar, though typically exaggerated, law/politics dichotomy.

The judicial selection debate generally suffers from a dominance of terms and phrases rendered meaningless through misuse and, worse, designed to mislead: judicial activism, strict constructionists, extremists, litmus tests, judges should “interpret not make law.” Whether such terms have meaning and merit depends on how we define them, but these terms, like “ideology,” often are used without definition.³⁰ For example, ideologically conservative Senators typically ask judicial nominees if they will “interpret not make law,” and nominees of widely varying ideologies all can respond truthfully in the affirmative, while ignoring the loaded nature of the question.

“Litmus test” is another common shorthand term that, without elaboration, often obfuscates more than clarifies. For example, shortly after President George W. Bush’s re-election, a radio journalist asked David Frum, special assistant to President Bush, whether Bush would select Justices according to an anti-abortion litmus test. Frum predictably answered no to “litmus test”—a term of negative connotations that virtually no one will endorse—but nonetheless went on to acknowledge that he expects close scrutiny of “judicial philosophy” and legal views, including views regarding *Roe v. Wade*:

I think he [Bush] will find there are a lot of Justices who personally favor abortion who happen to think that *Roe v. Wade* was a bad case. And I think what he will be looking at is judicial philosophy. That is, I think, a somewhat different thing from a litmus test. You want to know how a judge thinks, you want to know how he approaches the law. . . . They will look through the vast corpus of cases that if the person is on a lower court they’ve presided over, they’ll look at their writings, they’ll look at the way they’ve litigated things, and say, is this a person whose philosophy is broadly congruent with ours.³¹

Frum failed to explain how the detailed scrutiny he anticipates differs from a litmus test in any meaningful way, and the interviewer failed to ask a follow-up question—indeed, the interviewer invited the evasion by framing the question in the easily refutable terms of a litmus

³⁰ Cf. William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (discussing problems with the terms “judicial activism” and “conservative”).

³¹ *Fresh Air with Terry Gross* (National Public Radio broadcast, Nov. 3, 2004).

test.

The debate over judicial selection criteria would benefit immeasurably if we would avoid undefined, misleading, and politically charged language, and challenge its use by others with demands for clarification. We should say what we mean, rather than seek to persuade through slogans tested by focus groups. We, of course, cannot avoid shorthand entirely. Terms that may be superior to ideology include judicial philosophy, legal philosophy, legal views, and interpretive methodologies. When we refer to prospective nominees' views and approaches on questions of law, we should use the word legal rather than the word political as a modifier. We also should avoid terms that mask the extent to which judges' legal views and preferred methodologies matter.

Ground Rule # 3: Do not pose false dichotomies, such as a choice between character on the one hand and judicial philosophy, legal views or, even less helpfully, ideology on the other.

The debate over judicial selection criteria sometimes is framed as a choice between competing characteristics. Professor Solum, for example, presents such a choice, as is clear from the title of his article: *Judicial Selection: Ideology Versus Character*. In exploring (then rejecting) the relevance of ideology, Solum asks: "How might we come to think the traditional judicial virtues (judicial temperament, civic courage, judicial intelligence, practical wisdom, and so forth) should not be the focus of the judicial selection process?"³² Not surprisingly, with the question so framed, Solum comes down on the side of character and against ideology, as would many—as would I—if actually forced to make this choice.

Character, and especially commitment to the rule of law, unquestionably should be an essential inquiry in deciding to whom to give lifetime appointments to the federal judiciary. Consideration of any other factor certainly should not be at the expense of character. If, in filling a Supreme Court vacancy, the President and the Senate were forced to choose between a scoundrel who happens to share certain legal views and a judicial paragon who does not, the decision would not be difficult. Scoundrels do not belong on the federal bench.

This framing of the issue, though, quite obviously poses a false choice. The importance of character tells us nothing about the relevance of ideology or, to use a preferred term, views on legal matters. Presidents and Senators need never choose between the two, and those

³² Solum, *supra* note 9, at 4-5 (citation omitted).

who advocate going beyond character do not typically denigrate the relevance of character. Who could seriously dispute the desirability of federal judges who possess judicial temperament, civic courage, judicial intelligence, and practical wisdom?³³

This false choice permeates debate precisely because its use can quite effectively promote desired appointments. It succeeds, though, only by stifling open and productive discussion and unfairly stigmatizing those who would consider nominees' legal views as unconcerned with character. Presidents and Senators respond by considering factors other than character only surreptitiously, while offering other public reasons for their judicial selections. Legitimate inquiries into character then become distorted, as Senators, interested groups and other observers, who are alarmed by what they view as the extreme legal views of a nominee, search instead for character-based reasons for opposition. As Senate Judiciary Committee member Charles Schumer explained in a *New York Times* op-ed:

The not-so-dirty little secret of the Senate is that we do consider ideology, but privately.

Unfortunately, the taboo has led senators who oppose a nominee for ideological reasons to justify their opposition by finding nonideological factors, like small financial improprieties from long ago. This 'gotcha' politics has warped the confirmation process and harmed the Senate's reputation.³⁴

This is not a partisan issue. Recall, for example, President Reagan's search for judges who shared his legal philosophy and views on particular legal issues. Then-Reagan administration official Stephen Markman testified before Congress that character is just the beginning inquiry: "[F]or a president charged with preserving, protecting, and defending the Constitution, the search for judicial candidates with legal proficiency and judicial temperament, while critical and essential, is not the end of the process."³⁵ The relevant question thus is not character or

³³ In the end, Solum acknowledges that "there is a sense in which the dichotomy between *character* and *ideology* in judicial selection is a false one," *id.* at 23, but he nonetheless promotes that dichotomy and does not address the harm it causes.

³⁴ Schumer, *supra* note 14.

³⁵ *The Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench: Hearing Before the Sen. Comm. on the Judiciary*, 100th Cong. 19 (1988) (statement of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice); Stephen J. Markman, *Judicial Selection: The Reagan Years*, in JUDICIAL SELECTION, *supra* note 19, at 34. Stephen Markman, currently a Justice on the Michigan Supreme Court, served under Reagan as Assistant Attorney General for the Office of Legal Policy, the office entrusted with advising the President on judicial appointments and also the office that authored the series of Department of Justice reports that detailed the administration's desired changes in constitutional and other legal doctrine. See, e.g., *supra* notes 12-13 and accompanying text.

ideology, but what (if anything) in addition to character should form the basis for the selection of federal judges. For any judicial vacancy, a number of individuals of exemplary character can be identified for potential appointment. In choosing among them, is it legitimate for Presidents and Senators to consider potential appointees' judicial philosophies and legal views to the extent they are relevant to the task of judging?

President Ronald Reagan answered that question strongly in the affirmative. As mentioned in Ground Rule #1, his Department of Justice issued a series of reports that detailed his administration's agenda for legal change, with an emphasis on originalism.³⁶ One report, specifically written to highlight what is at stake in judicial selection, devoted almost two hundred pages to analyzing fifteen "constitutional controversies that may come before the Court between [1988] and the year 2000, the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court."³⁷ Among the controversies: criminal procedure, abortion, affirmative action, public funding of religious schools, the public accommodation of the exercise of religion, sexual orientation, the Takings Clause, the Contracts Clause, rights of aliens, and judicial enforcement of the separation of powers.³⁸

Debate about judicial selection criteria might ask whether President Reagan legitimately exercised his appointment power in selecting judges based on their views on these legal issues. Should he instead have been unaffected by legal views in choosing, for example, between Robert Bork, whose work the Reagan/Meese Department of Justice reports often cite favorably, and Laurence Tribe, whose enormously influential constitutional law treatise and other work those same reports often cite as counter to Reagan's views?³⁹

One possible response that should quickly be dismissed is the fiction that nominees' legal views should be irrelevant because judges' legal views do not matter and character is all that truly is relevant to judging. As law students quickly learn, the Constitution often cannot be interpreted simply by reference to constitutional text. Federal judges must interpret ambiguous constitutional and statutory text—such as the meaning of liberty and equal protection in the Fourteenth Amendment. They must resolve difficult legal questions for which a single clear answer does not exist. As President Reagan well understood, judges'

³⁶ See *supra* notes 12-13 and accompanying text.

³⁷ OLP, CONSTITUTION IN 2000, *supra* note 13, at iii.

³⁸ *Id.*

³⁹ See Solum, *supra* note 9, at 3 ("The real question is whether there is a tenable argument for the proposition that we should select judges whose ideologies we dislike but whose characters we admire. This article argues for an affirmative answer to that question . . .").

legal philosophies, methodologies, and views on particular legal issues greatly affect the lives, liberties, rights, and welfare of Americans and others under their jurisdiction.

Ground Rule # 4: The importance of judicial independence, essential to the rule of law, should not prevent relevant inquiries into legal views during judicial selection.

Our constitutional democracy relies upon an independent judiciary, with life tenure protection, committed to the rule of law. Just as history is replete with examples of judges whose appointments depended in part on their legal views, those same judges sometimes have resolved legal issues contrary to the policy preferences of those who appointed them—and in some instances, contrary even to how they would have resolved the issue as an initial matter, absent stare decisis.⁴⁰ Relatively rarely have Justices been widely suspected of consciously choosing to sacrifice the rule of law in order to promote partisan interests.⁴¹

More often, though still relatively rarely, Congress and Presidents have directly challenged judicial independence in adjudication. Some challenges met remarkable success in the nineteenth century: the suspension of the 1802 Supreme Court's Term, alterations in the size of the Supreme Court to manipulate outcomes, and laws that stripped the Court of jurisdiction in order to prevent judicial review. In more recent times, while similar measures have been proposed, serious challenges to judicial independence have failed, including attempts to change the size of the Court, to strip courts of jurisdiction over specific issues, and to impeach judges for unpopular decisions.⁴²

Presidential and Senate consideration of potential nominees' views on legal matters prior to appointment is not akin to such direct challenges to judicial independence, and commentators should not draw false or imprecise analogies. Nonetheless, questions can be hypothesized that could cross the line and threaten judicial independence after appointment, such as the extraction of a promise that a prospective judge would decide a case in a certain way as a condition

⁴⁰ See, e.g., *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992) (joint opinion of O'Connor, J., Kennedy, J., and Souter, J.). For examples less well known than Justice Kennedy's vote in *Casey*, see POWELL, *supra* note 17, at 110-28.

⁴¹ But see *Bush v. Gore*, 531 U.S. 98 (2000), and commentary on the case far too extensive to cite here.

⁴² For an analysis of various incursions on judicial independence throughout United States history, see Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003); *id.* at 159 ("[A] politicized appointments process now stands alone as a viable device for promoting prospective judicial decisionmaking accountability . . ."); see also *Ex Parte McCordle*, 74 U.S. (1 Wall.) 506 (1868) (considering jurisdiction-stripping legislation).

of nomination or confirmation. While reasonable people can differ about where to draw the line, the thrust of Senate questioning in past confirmation hearings has not come close to threatening judicial independence, in part because the nominees themselves frequently cite judicial independence concerns as a basis for declining to answer questions, and in part because the hearings are open and subject to public review.

Ground Rule # 5: Be consistent, candid, and nonpartisan in articulating the appropriate criteria for selecting judges. More bluntly stated: political expediency does not excuse hypocrisy or dishonesty.

This proposed ground rule is quite straightforward and noncontroversial on its face, yet often violated. The value in a representative democracy of principled and candid public officials, particularly on matters of such public importance as the selection of federal judges, is self-evident. The electorate should know on what basis Presidents and Senators choose those to whom they give lifetime judicial appointments.⁴³ And while changed circumstances might warrant changed criteria,⁴⁴ those criteria should not change dramatically with which party holds political power. For example, absent a principled justification, a Senator should not attack an opposing Senator for using criteria that the attacking Senator herself used when the seats were reversed.

A process marked by lack of candor causes an additional harm: It tends to inject imbalance in favor of Presidents, and against the Senate, in the appointment of the third branch. Presidents make judicial selections with relative secrecy regarding their individual thought processes, as compared to the more public nature of the Senate confirmation process in which one hundred Senators reach a joint decision on a specific individual. Presidents far more easily can avoid admitting the extent to which their selections reflect ideological considerations, while Senators participate in a detailed public inquiry with regard to each of the Presidents' nominees.

And yet, with the stakes so high, strong incentives exist against consistency, clarity, and nonpartisanship, including incentives for Presidents, Senators, and others (such as advocacy groups) involved in

⁴³ Solum states that he and Schumer agree on this point. "If *ideology* is to play a role in judicial selection, that role should be *transparent* and not *covert*." Solum, *supra* note 9, at 5. Solum, though, does not address the fact that his criticisms strengthen the taboo on ideology that Schumer seeks to lift.

⁴⁴ See *supra* note 14 and accompanying text.

the appointments process to sacrifice principled and open debate in favor of arguments likely to maximize the number of desired appointments. It may be efficacious, at least in the short run, for those seeking to advance their judicial choices to be misleading and even hypocritical concerning the criteria they advocate and apply. Witness, for example, the substantial shift in the public positions of Republicans, both prominent individuals and the thrust of the party, from the time of Reagan's largely successful championing of judicial appointments as a vehicle for dramatic constitutional change to George W. Bush's presidency and Republican opposition to Democratic Senators' consideration of nominees' legal views. Democrats and progressives face the same temptations, as power shifts. In short, elected officials resort to inflammatory buzz phrases and false dichotomies because they work.

The prospects for substantial change appear dim, at least in the short term. The possibilities for eventual improvement, though, would be enhanced to the extent that participants in this debate seek ways to encourage and reward candor and principle on the part of those entrusted with the power to nominate and appoint judges. Too often commentators instead are themselves imprecise or misleading in their choice of language, and they sometimes even adopt inflammatory political rhetoric. Those who criticize Presidents or Senators who take account of nominees' legal views should be clear about the basis for their criticism, especially whether the objection is to the consideration of legal views or to the substance of particular nominees' views. For example, those critical of the Reagan/Meese agenda for legal change should not suggest that Reagan's aggressive reliance on legal views in judicial appointments constituted a misuse of his appointment power, if the true objection is to the substance of the ideologically conservative legal views Reagan sought to promote. Republicans and conservatives similarly should be principled in their criticism. We all should applaud efforts of any elected official who seeks to move beyond particular nominations and short-term partisan gain and instead address systematic deficiencies in the judicial selection process.⁴⁵

Debate about judicial selection that violates these five proposed ground rules—that is, debate that ignores history and reality, uses misleading language, poses false choices, misconstrues judicial independence, or is otherwise unprincipled and partisan—might result in some short-term wins. With so much at stake, the temptation to act contrary to the proposed rules undoubtedly will prove great at times. We should be cognizant, though, of the resulting harm to our

⁴⁵ See, e.g., *Hearings on Judicial Selection*, *supra* note 3; Schumer, *supra* note 14.

constitutional democracy: a distorted judicial selection process that hides from the electorate the true considerations that drive the selection of those given lifetime appointments to the federal bench.

