

A Litmus Test for Judges?



By Jan LaRue

No other U.S. president in recent history has experienced the obstruction, opposition and falsehoods concerning judicial appointments than has George W. Bush. Clearly, the opposition has made *Roe v. Wade* its litmus test for approving the President's nominations to the federal courts.

Ironically, though, the President has not once mentioned overturning this case, which brought abortion on demand to the United States, as a criterion for his judicial picks. Instead, he has acknowledged his support for candidates who share the

judicial philosophy of Justices Antonin Scalia and Clarence Thomas. These justices are pro-Constitution—the only “litmus test” that matters.

Alexander Hamilton wrote that the judiciary's purpose is “to secure a steady, upright and impartial administration of the laws.” The judiciary “may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements” (*Federalist Papers* 78).

Indeed, President Bush recognizes that a judge swears an oath to uphold the

Constitution despite personal, political and public-policy beliefs.

A pro-Constitution nominee:

- ★believes that a judge should be limited by the text, structure and logic of the Constitution. Those adhering to this judicial philosophy are known as “originalists.” They respect the words of the Constitution and the intent of those who wrote it.
- ★believes that a judge must be fair and impartial. That is, the nominee is not a partisan or “extremist.” We hear that word used frequently by those who oppose President Bush’s nominees, while they like to call their kind of judge a “moderate.” This is a code word for those who agree with their political position, while their opponents are always “extremists.”
- ★possesses the required competence, temperament, character, knowledge of the law and experience. The nominee is known to be virtuous, courteous, humble, evenhanded, open-minded, firm and dedicated to the law. Further, the legal community respects his or her knowledge of the law.

President Bush has always said that he would make judicial nominations that fulfill these criteria, and the American people have twice elected him. Therefore, the right thing, according to the Constitution, is for the Senate to defer to the President’s choices.

As Hamilton wrote in the *Federalist Papers* 76, “The person ultimately appointed must be the object of [the President’s] preference,” and the Senate should refuse to confirm a nominee only for “special and strong reasons,” such as “unfit characters from State prejudice, from family con-

nection, from personal attachment, or from a view to popularity,” or “possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.” Hamilton states that the Senate is meant to “have a powerful, though, in general, a *silent* operation.” [Emphasis added.]

Yes, the Senate Judiciary Committee should question the nominee regarding his philosophy of interpretation, written opinions and other writings; but not about political philosophy. Nor should the nominee be asked for advance commitments to rule certain ways in unresolved or potentially future cases. In the words of President Abraham Lincoln: “We cannot ask a man what he will do (on the court), and if we should, and he should answer us, we should despise him for it.”

The battle over President Bush’s judicial nominees is far from over. With at least one Supreme Court resignation expected—and others likely—the debate over originalist versus activist judges, who consider the courts a policy-making body, will continue.

Take action: At press time, a Supreme Court resignation had not yet occurred. However, you can still act. Using information in this article, write a letter to the editor of your newspaper. In addition, encourage President Bush to hold firm on this critically important issue. E-mail: president@whitehouse.gov; comment line: 202-456-1111.

When a Supreme Court nomination is announced, watch CWA’s Web site for what you can do. ■

For more information on judicial nominations, visit www.cwfa.org/courts.asp.

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