

# THE FEDERALIST SOCIETY

*Presents*

## JUDGES WARS

### PANELISTS:

**Professor Ronald Rotunda**, George Mason University School of  
Law

**Manuel Miranda**, Counsel to Senate Majority Leader Bill Frist

**Jeffrey Berman**, Subcommittee on Administrative Oversight in  
the Courts, and Chief Counsel to Senator Schumer

**Elliot Minberg**, Vice President of People for the American Way

**Leonard Leo**, Executive Vice President, Federalist Society,  
*Moderator*

Tuesday, September 9, 2003

**FEDERALIST SOCIETY****JUDGES WARS**

1  
2  
3 MR. LEO: Good afternoon. My name is  
4 Leonard Leo, and I am Executive Vice President of  
5 the Federalist Society. On behalf of the Society,  
6 it is my privilege to welcome you to today's  
7 important forum on the role of the Senate in  
8 scrutinizing the President's nominees to federal  
9 courts.

10 It's not very hard to set the stage for  
11 today's dialog. The fireworks we witnessed in  
12 connection with the Judiciary Committee's  
13 consideration of Alabama Attorney General William  
14 Pryor's nomination along with D.C. Circuit nominee  
15 Miguel Estrada's withdrawal last week have provided  
16 just about all we need in the way of a backdrop for  
17 today's exchange. The challenge will be to move  
18 beyond this political milieu and to have a  
19 discussion premised on some first principles and  
20 the application of those principles.

21 It is beyond doubt that, at least for  
22 some senators, judicial nominees' ideology has

1 | figured prominently in the confirmation process.  
2 | Consider the following statement by one member of  
3 | the Senate Judiciary Committee: "It is high time  
4 | we returned to a more open and rational  
5 | consideration of ideology when we review nominees."  
6 | The Senator continued, "If we do this, the knotty  
7 | question we face is how dominant a factor a  
8 | nominee's ideology should be in the Senate's  
9 | consideration." And this particular Senator  
10 | maintained that, "Several factors are relevant.  
11 | First, the extent to which the President himself  
12 | makes his initial selections on the basis of a  
13 | particular ideology; second, the composition of the  
14 | courts at the time of the nomination; and third,  
15 | the political climate of the day."

16 |           This particular Senator's statement,  
17 | though a good way to lay the foundation for a  
18 | debate, may present more questions than answers.  
19 | What is meant by ideology? Political views? Legal  
20 | reasoning? Judicial philosophy? Why should these  
21 | views matter? Should the composition of the courts  
22 | and the political climate of the day matter in

1 scrutinizing a particular nominee's beliefs?

2           Then there is the most recent chapter of  
3 this debate over Senate scrutiny of judicial  
4 nominees, whether a nominee's religious scruples  
5 are as a factual matter being considered by some  
6 members of the Senate in opposing nominees, and if  
7 so, under which circumstances, if any, that might  
8 be appropriate. In this regard, we've heard much  
9 talk lately about nominees' strongly held personal  
10 beliefs. Is this code for religious convictions,  
11 as some have suggested? How deeply do we want the  
12 political process to get into questions about the  
13 nature of a nominee's religious convictions and the  
14 strength of those convictions? In a world where  
15 some Senators do think it is proper to think about  
16 this, what quantum of evidence should be proffered  
17 to assure that those convictions will not interfere  
18 with the enterprise of judging, and who has the  
19 burden of proof?

20           To tackle some of these issues, we've  
21 asked each of today's distinguished panelists to  
22 consider a few questions in framing their remarks.

1 First, to what extent and under what circumstances  
2 is it appropriate for the Senate to consider a  
3 nominee's political ideology and judicial or legal  
4 philosophy? Second, is it ever appropriate for the  
5 Senate to consider the substantive nature of a  
6 nominee's religious views and the strength of those  
7 convictions? Third, in what ways might Senate  
8 consideration of political, legal, judicial, or  
9 religious beliefs either advance or hamper the rule  
10 of law and the independence of the federal  
11 judiciary? Fourth, to the extent that Senators  
12 have concerns about the strength of a nominee's  
13 personal convictions being distinct from the  
14 exercise of judicial power, how do we assess a  
15 nominee's record, both personal and professional,  
16 to predict future judicial performance with  
17 accuracy and fairness?

18           We have four speakers today. To my far  
19 left, Professor Ronald Rotunda at George Mason  
20 University School of Law. To my immediate left,  
21 Manuel Miranda, who is counsel to Senate Majority  
22 Leader Bill Frist. To my immediate right, Mr. Jeff

1 Berman, who is Chief Counsel to Senator Schumer,  
2 and serves also on the Subcommittee on  
3 Administrative Oversight in the Courts. Then  
4 finally, to my far right, Elliot Mincberg, Vice  
5 President of People for the American Way.

6           Each of our speakers will have ten  
7 minutes. After all four presentations, we'll have  
8 a very brief period for some rebuttal between Mr.  
9 Miranda and Mr. Berman, and then we will go to  
10 questions from the audience in the time remaining,  
11 which I hope will be enough to have a very good  
12 discussion with the audience and give all of you an  
13 opportunity to respond to other aspects of your  
14 initial remarks.

15           We will begin with you, Professor  
16 Rotunda.

17           PROFESSOR ROTUNDA: Thank you. Leonard  
18 said he'll tell me when my time is up. I've got a  
19 lot to say so what I will do is just talk too fast,  
20 which is what I normally do. I'm not really to his  
21 extreme left. I'm more of the extreme centrist  
22 position, myself.

1           First of all, obviously I agree with the  
2 American Bar Association and Lloyd Cutler, who I  
3 was privileged to work with at Wilmer Cutler &  
4 Pickering some years ago. The ABA says, for  
5 example, that it disapproves of any political party  
6 platform that deviates from the selection of judges  
7 on the basis of merit. They object to requiring a  
8 candidate's political or ideological philosophies.  
9 Lloyd Cutler said in an article he wrote about two  
10 years ago with Mickey Edwards that the president  
11 and the Senate must not ask for, and the candidate  
12 must not offer or consent to give, any pre-  
13 commitments about unresolved cases or issues that  
14 may come before them as judges. He said this isn't  
15 good for the court. It isn't good for the country.  
16 It's not good for the political parties.

17           We now have a situation where nominees,  
18 had there been a vote, would be confirmed; a  
19 situation where the majority of the Senate would  
20 vote in their favor. But they're not allowed to  
21 have a vote. Former White House counsel Lloyd  
22 Cutler said about a decade ago that the Senate rule

1 requiring the super-majority to change the rule on  
2 filibusters is plainly unconstitutional. This is  
3 again something I think is not good for the  
4 country, not good for the courts.

5           Should the Senate confirm people that  
6 have what -- I guess the phrase is "devoutly held"  
7 or "deeply held" religious views? I guess it's all  
8 right to believe in a religion kind of on a  
9 superficial level, but if you've got like a  
10 proselytizing Unitarian or something like that,  
11 that we should be more concerned about. What about  
12 a judge who's Catholic and attends daily Mass?  
13 Should he be a confirmed Republican appointee?  
14 That's Justice William Brennan.

15           What about John Noonan on the 9th  
16 Circuit, who not only has spoken against *Roe v.*  
17 *Wade*, he's written against it. He's been on the  
18 9th Circuit for about 10, 15, 20 years. What  
19 rights has he taken away from us? He's  
20 distinguished himself from some of the other 9th  
21 Circuit judges in that the Supreme Court usually  
22 affirms him. But I do think that if you look at



1 his opinions, the country and the judiciary would  
2 be losers, were he not on the 9th Circuit.

3           How about another Catholic, Justice  
4 Kennedy? Here's what Professor Tribe said of  
5 Justice Kennedy when he was being nominated. He  
6 said, "He's conservative on a great number of  
7 issues. I don't have any illusions he will be  
8 liberal. But he shouldn't be opposed just because  
9 of that." Nowadays, though, people would say that  
10 you should be. Justice Ruth Bader Ginsberg, when  
11 she was confirmed through confirmation hearings to  
12 the D.C. Circuit, said that it was proposed that  
13 the Committee ask her a series of questions,  
14 through a group called the United Families of  
15 America. Some of the questions they asked the  
16 Senate to ask: Can Congress limit the jurisdiction  
17 of the federal courts in, say, school bussing  
18 cases? Do parents have rights to abortion with  
19 respect to their minor children? Present law and  
20 the practices in the Armed Forces bar women from  
21 armed combat positions -- was that a sustained  
22 constitutional challenge? What principles do

1 federal judges follow in deciding social policy  
2 issues?

3           Senator Howard Metzenbaum, the Chair,  
4 refused to ask the questions. He said in no  
5 uncertain terms, "You don't mean that every nominee  
6 up for confirmation ought to have his or her views  
7 explored in all the controversial issues?"  
8 Ginsberg later wrote, in an article in the  
9 *University of Illinois Law Review*, that she found  
10 the questions a frightful prospect. She wasn't  
11 asked the questions. Another great justice who did  
12 not want to answer the questions, they were not  
13 asked. That was a different time and a different  
14 era.

15           Further we should realize that if we try  
16 to guess what judges will do, we're wrong. We're  
17 really wrong. Here's Professor Tribe on Justice  
18 Scalia a few years after he was on the Supreme  
19 Court, "So far I find myself more in agreement with  
20 him than any other justice this term. His opinions  
21 show a degree of care and attention to the actual  
22 issues before the court that is refreshing, and I

1 wish was shown by others on the court. The clarity  
2 of his analysis so far puts him in a class by  
3 himself." There's Tribe gushing on Scalia.

4           The rules of judicial ethics, our own  
5 tradition, our history, all counsel that neither  
6 the President nor the Senate should ask judicial  
7 nominees how they expect to vote on these legal  
8 questions. I think the Senators should ask the  
9 nominees if they've made any promises to the  
10 President or staff, and if they have, they should  
11 refuse to confirm him on those grounds. What we  
12 want are fair courts. Not liberal; not  
13 conservative; not moderate. But fair. That is,  
14 judges who will call them as they see them without  
15 regard to politics, even if their decisions -- like  
16 the desegregation decisions -- will not be popular.

17           Now, comes the old saw, "If it ain't  
18 broke, don't fix it". Our judiciary is the most  
19 respected in the world. I've traveled all over the  
20 world, and these emerging democracy I've got on the  
21 Rolodex, they want to emulate *our* judiciary. One  
22 of the judges on the Supreme Court in Moldova said,

1 we don't know much about your country; the  
2 Communists would not let us know. But we know that  
3 you are the judges we want to emulate. And that's  
4 why they brought me over there to consult with  
5 them. They wanted our judges, not the French.  
6 Although they came from a civil law tradition, they  
7 wanted America. Why would we change a system that  
8 has been working so well for 200 years?

9           One law professor, Vick Amar, wrote about  
10 two years ago that the Senators should examine why  
11 lawyers accept certain clients because, he said,  
12 the lawyers decision to take a case that he knows  
13 will involve the making of certain kinds of  
14 arguments are probative of his beliefs. I was  
15 appalled. You see, for years the ABA has been  
16 trying to teach laypeople that lawyers have every  
17 right and duty to defend clients -- members of the  
18 Communist Party, the Klan, the Nazi Party -- even  
19 if they don't agree with them. Now we have a law  
20 professor leading the charge saying all this should  
21 be unlearned, that we should judge lawyers by their  
22 clients.

1                   Judges were told to side on politics.  
2 Harry Edwards -- great judge; it's surprising he  
3 was never considered for the Supreme Court under  
4 President Clinton. Harry Edwards, a former law  
5 professor, did an empirical study of the D.C.  
6 Circuit. People said routinely that you could tell  
7 how the case is going to come out by looking at  
8 who's on the panel. He said that this is "a myth".  
9 He said it tends to "undermine public confidence in  
10 the judicial process." And then he showed that it  
11 wasn't true statistically.

12                   When Powell was nominated, Lewis Powell,  
13 the President of NOW testified under oath that  
14 Powell's confirmation would mean "justice for women  
15 will be ignored." When Stevens was nominated, a  
16 different President of NOW said that Stevens had  
17 "blatant insensitivity to the discrimination  
18 against women." If NOW were a baseball team, it  
19 would be batting zero. But it would not be in a  
20 league of its own because we've all done this.

21                   When Lewis Powell was nominated to the  
22 court, civil rights lawyer Henry March, III, a man

1 I respect, said at Powell's hearings that "Powell's  
2 record of continued hostility to the law has  
3 continued war on the Constitution." That's what he  
4 said about Powell. That's not the Powell any of us  
5 would recognize, but that's what he predicted.

6 Alexander Bickell said that when you  
7 nominate someone, the man himself cannot tell you  
8 what he will think about some of the problems he  
9 will face. This is illustrated by no less a  
10 judicial titan than Henry Friendly of the 2nd  
11 Circuit -- a great judge; a prolific author. In  
12 one case, one of the parties cited to him an  
13 article he'd written on that very same issue on how  
14 the court should rule. Friendly said, "I was  
15 wrong." He wrote in his dissent that as the  
16 majority agreed with his article, not with him, he  
17 said the genius of the common law system is that we  
18 decide these cases in a concrete context, not in  
19 the context of a law review article. So, he  
20 dissented. The majority cited his article. The  
21 Supreme Court reversed, agreeing with Friendly the  
22 judge and not Friendly the author. Friendly did

1 not know how he would rule on the issue, though  
2 he'd written an article on that very issue.

3           If we treat federal courts as an  
4 investment, not a speculation, I think the  
5 President, the Senate, and the media should worry  
6 less about how the nominee might vote on a  
7 particular issue, a prediction that's usually  
8 incorrect -- I mean, usually incorrect -- than what  
9 we think about the nominee's personal integrity,  
10 their good faith or intellectual ability.

11           The alternative, trying to think how the  
12 nominee is going to vote on a particular issue  
13 years from now, is difficult, if not impossible.  
14 Some people get it right. Even a stopped clock is  
15 right twice a day. But they're usually wrong. We  
16 do not know today what will be the big legal issues  
17 five or ten years from now. We do not know today  
18 what will be the liberal or conservative answer to  
19 them. But we do know today that it's going to get  
20 harder to get qualified people on the bench if they  
21 must wait one, two or three years before there's  
22 ever a vote after their hearing.

1 Thank you very much.

2 MR. LEO: Mr. Mincberg.

3 MR. MINCBERG: Thank you, Leonard. Good  
4 afternoon, and I have to say it's the first time I  
5 can remember that I've ever been introduced as  
6 being from the far right, but I'll take it for  
7 today.

8 I actually agree with much of what  
9 Professor Rotunda said, but I think there's a very  
10 important qualification to add. As he himself  
11 indicated, the notion of focusing, at least at the  
12 lower court level, on merit, on integrity, and not  
13 on judicial philosophy or "how they will vote" is  
14 something that has to be done by both sides here,  
15 by both the President and the Senate. And that is  
16 precisely where our situation takes us.

17 And let me start, also, with a quote from  
18 a Senator. "I believe the Senate can and should do  
19 what it can to ascertain the jurisprudential views  
20 a nominee will bring to the bench in order to  
21 prevent the confirmation of those who are likely to  
22 be judicial activists. This will require the



1 Senate to be more diligent and extensive in its  
2 questioning of nominees' jurisprudential views".  
3 Was this Chuck Schumer? No. It was Orrin Hatch,  
4 in 1997.

5           What we are dealing with today is a  
6 situation where, more than any other president in  
7 history that we know of, President Bush has made  
8 very clear that he does want to take  
9 jurisprudential views, ideology, points of view,  
10 etc., into account in making his selections for the  
11 federal bench. After all, he talked in the  
12 campaign about wanting to nominate people who are  
13 like Scalia and Thomas -- clearly, a point of view  
14 reflected there. Anybody who honestly believes  
15 that people like Miguel Estrada and John Roberts  
16 were selected solely because of merit without any  
17 view whatsoever about their points of view, their  
18 membership in the Federalist Society, other things,  
19 I have a bridge I would love to sell them. There's  
20 no question that that's occurring. And we see it,  
21 in fact, reflected in the actual processing of  
22 nominees by this administration.

1                   This is documented by a quote from  
2 another unlikely source, the *Philadelphia Daily*  
3 *News*, which reported earlier this year that  
4 Senators Specter and Santorum recommended three or  
5 four female prospective judges to replace the  
6 recently deceased Judge Carol Mannsman on the 3rd  
7 Circuit Court of Appeals. Each was interviewed at  
8 the White House, according to this article. Each  
9 was rejected because they were not sufficiently  
10 "conservative or pro-life." In a situation like  
11 that, where the President chooses to make  
12 philosophy, ideology -- call it what you will -- a  
13 key factor in selecting judges, it would be an  
14 abdication of duty for the Senate not to  
15 essentially say the same, to say we also want to  
16 look at the jurisprudential views, as Senator Hatch  
17 put it, of a nominee to determine, in part, what  
18 we're going to do with respect to confirming them.

19                   Now, in some instances, that's something  
20 that is easier to do than in other situations.  
21 Take situations where the President nominates  
22 people who already are judges. They have a track

1 record. We can say something about them. We can  
2 say, for example, with respect to Priscilla Owen,  
3 that she is the second most frequent dissenter on  
4 an extremely conservative Texas Supreme Court.  
5 There were almost a dozen times, when they were  
6 both colleagues on the court, when Alberto Gonzalez  
7 criticized her dissents, saying in one case that to  
8 adopt her view would require the court to  
9 judicially amend the statute. That tells you  
10 something.

11           We can look at Janice Rogers Brown, about  
12 whom, in 1996, the state bar evaluation committee  
13 looking at her appellate court record, said that  
14 among their concerns was her tendency to insert  
15 conservative political views into her opinions. We  
16 can look at the majority criticism of one of her  
17 dissents, for example, as an attempt to inject a  
18 personal theory of political economy into the law.  
19 We can look at her own analysis of the accepted  
20 principle of two-tiered constitutional review, the  
21 notion of strict scrutiny for fundamental rights  
22 and suspect classifications, rational basis for

1 everything else. Here's what Justice Brown had to  
2 say about that accepted constitutional principle:  
3 it is "highly suspect, incoherent and  
4 constitutionally invalid." That gives us something  
5 pretty concrete to go on in evaluating the  
6 jurisprudential views of nominees, and it would be  
7 irresponsible for the senate not to take that into  
8 account. Indeed, I think they've tried to do just  
9 that.

10 I think we get into an area of even  
11 greater controversy, if it's possible, when we look  
12 at people who have not yet served on the bench,  
13 people like William Pryor, in trying to determine  
14 their legal philosophy, their jurisprudential  
15 views. It is certainly true that no one can  
16 predict what anyone will or will not do on the  
17 bench. But there's no question that Attorney  
18 General Pryor's philosophy was strongly taken into  
19 account when the decision was made to nominate him,  
20 and the same must be true when the Senate makes a  
21 decision with respect to what to do.

22 Now, the charge has been made by some in

1 this room that, in fact, what happened with respect  
2 to Attorney General Pryor was anti-Catholic. I'd  
3 like to quote another person that you think I'm not  
4 likely to quote, President Bush, who said in  
5 February 2000, "Calling somebody an anti-Catholic  
6 bigot is beyond the reach. There is no place for  
7 that in American politics." I urge everyone in  
8 this room to adopt President Bush's philosophy in  
9 the future. But the fact of the matter is, the  
10 concern about Mr. Pryor had nothing to do with his  
11 views on religion. It had to do with his views on  
12 the Constitution.

13           Take even the controversial issue of *Roe*  
14 *v. Wade*. The one quote from Pryor that got the  
15 most attention was his repeated statement that *Roe*  
16 *v. Wade* was the worst abomination in constitutional  
17 history. Worse than *Dred Scott*, worse than *Plessey*  
18 *v. Ferguson*? Apparently so, according to Mr.  
19 Pryor. Is it not legitimate to take that view into  
20 account in evaluating somebody's judicial  
21 philosophy? Of course it is. There are many, many  
22 examples of Catholic and anti-abortion nominees who

1 have been confirmed by the Senate with frankly very  
2 little trouble. But when someone has the kinds of  
3 point of view that Mr. Pryor does, there is a good  
4 deal of concern. And it goes, of course, well  
5 beyond the issue of reproductive freedom.

6           Mr. Pryor disagrees vehemently with one  
7 of the most conservative judges on the 11th  
8 Circuit, Ed Carnes, in arguing that Judge Moore's  
9 Ten Commandments display should be permitted. He  
10 disagrees vehemently with one of the most  
11 conservative judges on the 4th Circuit, Judge  
12 Wilkinson, in arguing that the Endangered Species  
13 Act should be considered unconstitutional. Three  
14 times within the last few years, his extreme views  
15 on states' rights issues were so far out of the  
16 mainstream that this Supreme Court unanimously  
17 rejected them -- unanimously -- including, for  
18 example, his argument in an amicus brief that the  
19 Driver's Privacy Protection Act should be  
20 considered unconstitutional.

21           Of course it is not only legitimate, it  
22 is part of the Senate's responsibility to consider,

1 as Senator Hatch put it, the jurisprudential views  
2 of nominees in order to try to make their part of  
3 the constitutional process work the way it should.

4           Now, there has been a time, frankly, when  
5 these kinds of controversies didn't occur with  
6 respect, at least, to courts of appeals. President  
7 Carter had Merit Selection Panels that he used in  
8 states that were controlled by both Democrats and  
9 Republicans to try to do what Professor Rotunda  
10 talked about. That is not what is happening today.

11           Indeed, what we would urge, more strongly  
12 than anything else, is that both parts of the  
13 confirmation process, both the President and the  
14 Senate, take seriously the notion of trying to de-  
15 escalate the judicial nomination wars, to put a  
16 little bit of advice back into the advice and  
17 consent, to have some consultation with the Senate,  
18 to make efforts such as President Carter's, such as  
19 that has occurred in a few states, but not enough,  
20 to have some bipartisan selection panels to play a  
21 role, to find people, regardless of ideology or  
22 whatever term one wants to use, who can be

1 extremely well qualified people for the federal  
2 bench. That is the way to deal with this issue,  
3 instead of what we have seen. What we have seen is  
4 an effort to politicize this to a fare-thee-well,  
5 to, by no coincidence that I can see, accuse  
6 Democrats of being "anti" the two groups that Karl  
7 Rove most wants to penetrate in the 2004 elections:  
8 Catholics and Hispanics.

9           Is it a surprise that those are the two  
10 groups that Democrats are supposedly biased  
11 against? Not, unfortunately, to me. We need to  
12 make judicial nominations no longer a wholly owned  
13 subsidiary of the Karl Rove political machine, and  
14 instead try to produce genuine bipartisanship,  
15 genuine looking for quality, and not what we have  
16 seen from this Administration over the last several  
17 years.

18           Thank you.

19           MR. LEO: Mr. Miranda.

20           MR. MIRANDA: Actually, my understanding  
21 is that the White House is also looking to make in-  
22 roads with women, Jews, and just about every other



1 group --

2 SPEAKER: And he's doing a hell of a job.

3 MR. MIRANDA: -- and especially in the  
4 South.

5 I was interested in the reaction to the  
6 Estrada withdrawal a few days ago. Senator Schumer  
7 and Senator Kennedy especially were crowing about  
8 it and pointing out that this shows to the American  
9 people that they are stopping the Bush juggernaut  
10 of conservative judges. A hundred and forty-six of  
11 them have been confirmed, -- only one has been  
12 stopped. If that's stopping it, then to paraphrase  
13 Tara McAuliffe in the Pack of 9, they're a  
14 miserable failure doing a miserable job of stopping  
15 Bush judges. That's really not a matter of  
16 numbers. It's the proportions that are at stake.

17 And so, at risk of stupefying you, in the  
18 Leahy-Hatch statistics war, let me just point out a  
19 couple of things. In the first two years of  
20 President Bush, 76 percent of his judges have been  
21 confirmed. Clinton, 90 percent; Bush I, 90  
22 percent; Reagan, 99 percent; Carter, 93 percent.

1 The battle, of course, is over Circuit nominees.  
2 In the first two years, Bush, 53 percent; Clinton,  
3 86 percent; Bush I, 96 percent; Reagan, 95 percent;  
4 Carter, 100 percent. Of the first 17 judges that  
5 were appointed by President Bush, seven are still  
6 waiting. And if you had counted Miguel Estrada,  
7 the count would be eight. And then finally, more  
8 circuit court nominees have had to wait at least a  
9 year than in the last 50 years combined.

10 Now, that done, Jeff actually told me he  
11 was not going to do a statistical presentation, so  
12 hopefully we're going to get that over with. But  
13 the more important questions are the questions  
14 posed because it is not a matter of numbers and  
15 statistics. What is really at stake here is a  
16 battle over the Constitution. What is really at  
17 stake here is a battle over what the law means,  
18 what the law conveys to the American people.

19 Ever since Ezra gave some stability to  
20 the Scriptures of the Jewish people, ever since  
21 Napoleon took pride in the code, ever since the  
22 code movement, we have had a democratizing role of

1 law in history. And every great moment of law in  
2 history has given to the people greater clarity,  
3 greater understanding, greater control of their  
4 future.

5           And so, what is at stake in introducing  
6 ideology into the judicial confirmation process,  
7 and in effect making the once-independent federal  
8 judiciary a mere extension of Senate power, is to  
9 challenge the very notion of the rule of law, the  
10 very notion that people have some certainty in  
11 knowing what the law is, and what the law will be  
12 in the future. That stability is taken apart when  
13 what we do in the confirmation process is explore,  
14 investigate, whether a judge will rule our way.  
15 Not the right way; not the way that the law  
16 requires them to rule subject to appeal. But our  
17 way. That is what's at stake in the introduction  
18 of ideology, of course. And of course, in the game  
19 of semantics, of course the evaluation of  
20 jurisprudence and judicial philosophy is what's at  
21 stake in the hearing process.

22           But that is required -- we're required to

1 have a very limited definition of what that  
2 entails. We look, for example, at whether a judge  
3 understands and respects *stare decisis*.  
4 Conservatives, at least, especially look for that.  
5 We look, for example, at whether or not they view  
6 the Constitution as a living document or a  
7 mummified document in need of repair. We are  
8 especially interested whether they believe that  
9 Congress adopts laws and that the courts are  
10 supposed to enforce the laws that Congress adopts,  
11 unless they are constitutionally challenged, in  
12 which case you look to the Constitution and not to  
13 your political ideology. So, yes, jurisprudential  
14 views have a place in the confirmation process, but  
15 not personal ideology; not personal political  
16 opinion.

17           President Adams answered the questions  
18 that emanate from this debate. President Adams  
19 memorialized for us what the standard should be for  
20 our judges. He wrote that they should be "men" --  
21 of course, and women -- "men of experience on the  
22 laws, of exemplary morals, invincible patience,

1 unruffled calmness, indefatigable application, who  
2 will be appointed for life and subservient to  
3 none." Contrast this with the view that somehow,  
4 rather than being the stewards of the independent  
5 judiciary, the Senate is the master of the federal  
6 judiciary.

7           If President Adams understood well enough  
8 the challenge of being judicious, to separate one's  
9 personal views from one's advocacy or one's role on  
10 the bench, he had reason to do that. Few people  
11 remember that it was John Adams who defended the  
12 British soldiers who, in March 1770, shot into a  
13 crowd on the streets of Boston. Our children study  
14 this episode today as the Boston Massacre. It is a  
15 history lesson Democrats, too, should learn in the  
16 judicial confirmation process. John Adams defended  
17 the British soldiers before a Boston court with  
18 angry mobs in the streets. I have to wonder if,  
19 today, John Adams would be delayed by the Senate  
20 Judiciary Committee, a blue slip would not be  
21 returned for him, or if he would be filibustered  
22 because of his unpopular political position.

1           The question, of course, of religious  
2 views comes naturally, and was easily understood by  
3 anyone who was watching in the Pickering  
4 nomination, because it was not with Bill Pryor that  
5 this first came up. The outside groups raised  
6 issues of whether Judge Pickering was right to  
7 suggest to a young defendant that, while in prison  
8 at age 21 or 22, they should perhaps look to their  
9 prison fellowship or seek some sort of guidance  
10 from spiritual leaders in prison, of whatever  
11 religion. They questioned whether or not this was  
12 appropriate. They challenged Judge Pickering  
13 repeatedly in their writings on the websites as to  
14 his religious views. Senators, I admit, did not do  
15 that inside the hearing room. They did not do that  
16 inside the hearing room. But what can you expect  
17 of a judge who once served as president of the  
18 Mississippi Southern Baptist Convention, when he  
19 clearly has trouble answering the question as to  
20 his personal views on abortion, clearly is  
21 convicted on the issue of his views on abortion?  
22 Must we not draw the conclusion that he is being

1 | questioned on the issue of abortion, but he is  
2 | truly being judged on whether or not he is a man of  
3 | great personal religious conviction?

4 |           We saw it again with Michael McConnell  
5 | and with John Ashcroft, by the way, when questions  
6 | of deeply held beliefs were raised. We saw it most  
7 | convincingly, convincingly to the extent that an  
8 | archbishop of the Catholic Church, Archbishop Shapu  
9 | wrote an incredible, an amazing, a shocking letter  
10 | published in the Diocesan newspaper of the  
11 | Archdiocese of Denver, basically lambasting  
12 | Catholics on the Judiciary Committee, and  
13 | especially, of course, the Democrats.

14 |           Let me just read you what he had to say.  
15 | This isn't something of mere fabrication. This is  
16 | something alarming, especially when you consider  
17 | that Archbishop Shapu is one of the most sober,  
18 | most restrained people in the Catholic hierarchy,  
19 | and perhaps the most respected bishop. He said,  
20 | "What Democrats have done simply proves what people  
21 | already believe, that a new kind of religious  
22 | discrimination is very welcome at the Capitol, even

1 among elected officials who claim to be Catholic."  
2 That's shocking. It is shocking if only, as  
3 lawyers, we understand it to mean that the  
4 appearance of impropriety has been raised, that  
5 appearance that causes the American people to  
6 mistrust our system of government. I suggested  
7 this morning, to a group of leaders of Association  
8 of Christian Schools, that they may well be advised  
9 to tell their charges that at this point, you can  
10 be anything in American, but if you are a Christian  
11 or if you are an orthodox Jew, a person of  
12 religious conviction, you might not grow up to be a  
13 federal judge.

14           Finally, there is the question that was  
15 raised as to what is the proper question that  
16 should be asked. You know, in many ways, many  
17 conservatives are sometimes very dismissive of  
18 liberals. I don't mean to be derogatory in this,  
19 but they are dismissive of liberals in suggesting  
20 that there hasn't been any new liberal idea in a  
21 long, long time. Well, that's unfortunately  
22 misleading. There have been many liberal ideas, if



1 only to advocate bad old ideas. So, when, for  
2 example, we see Gloria Steinam captured anew the  
3 notion that the personal is political, many people  
4 think that that was a new statement, a new idea,  
5 but we know that to be Marxist, Leninist and  
6 Stalinist.

7           So, when you sit behind the dais and you  
8 hear Richard Durbin suggest to a nominee, let's  
9 face it, the law is what any judge wants it to be.  
10 The law is what any judge decides it to be. What  
11 we are saying is what we know from the cultural  
12 revolution that has occurred in academia and has  
13 now crept into the Senate Judiciary Committee, that  
14 we have dismissed the notion of objectivity, we  
15 have dismissed the notion of objective truth, we  
16 have no longer a place for the notion that we judge  
17 by virtue of virtue. And so, when you take out  
18 virtue as a standard for determining whether one is  
19 to be a judge, as academia has told us to do, what  
20 is left? What is left is only bare partisanship,  
21 rank and base division and ideology. And that,  
22 unfortunately, is what we might have expected if we

1 were more careful to examine what academia tells us  
2 and advises us to do, as in fact academics did when  
3 they met with Democrats in a retreat two years and  
4 some months ago, and advised them that they should  
5 do exactly what they have done; introduced ideology  
6 into the judicial confirmation process to basically  
7 reject the notion that there is such a thing as  
8 objective truth, that judges can be objective. And  
9 they have done exactly what we have all seen  
10 throughout the culture. And really, we're to blame  
11 for that.

12 MR. LEO: Mr. Berman.

13 MR. BERMAN: Thank you very much for  
14 having me here today. I spent the bulk of Sunday  
15 with my parents. I'm pro-family, so I spent the  
16 day with my parents. And my mom said, "So what's  
17 going on this week? What do you have going?" I  
18 said, "Well, Tuesday, I've got this debate, this  
19 discussion I'm doing at the Federalist Society."  
20 She said, "The Federalist Society?" I said, "Yeah,  
21 the Federalist Society." She said, "You know,  
22 Daniel had the good sense to get thrown into the

1 lion's den, and you're walking in there just on  
2 invitation?" Yes. I'm walking in here and happy  
3 to be here and have the opportunity to address you  
4 on these issues.

5 I think that far too often we talk right  
6 across each other and we ascribe motives to each  
7 other that really don't exist. I don't think that  
8 my friend Manny Miranda is saying what he's saying  
9 today because he wants the Catholic vote. I think  
10 you believe what you're saying and I respect that  
11 belief. I profoundly disagree, and I think when  
12 you look at the facts and the evidence that are out  
13 there, I hope we can come to some understanding as  
14 we continue discussing this.

15 There's little doubt -- I think there's  
16 no doubt -- that, at the very least, everyone who's  
17 involved in the decision-making at the White House  
18 and the Senate believes that ideology matters.  
19 Whether it does or not -- I'm going to get the  
20 issue that Professor Rotunda raises for a moment --  
21 everyone believes it matters.

22 President Bush has picked judges who are

1 Republicans and right-wing. That's his choice.  
2 That's his prerogative. He's the President. He  
3 gets to make that decision. But he believes that  
4 ideology matters when he picks, for example, Brett  
5 Kavanaugh as a nominee to the D.C. Circuit instead  
6 of, for example, Elana Kagan, former White House  
7 counsel, current Dean at the Harvard Law School, as  
8 his nominee to the D.C. Circuit. You can look at  
9 their resumes and make a pretty strong argument  
10 that Dean Kagan, at this point at least, is more  
11 qualified for the D.C. Circuit than Brett, but  
12 Brett gets the nod. There's no question that Brett  
13 is a very bright guy, a very talented guy. But  
14 ideology is the factor that's making that decision,  
15 and I do believe that there's a reason for that.  
16 In the vast majority of cases that our courts  
17 handle, the answer is pretty straightforward.  
18 Almost every judge in the country would agree.

19           But on cases that are more hot-button,  
20 where you're dealing with states' rights issues,  
21 where you're dealing with the environment, where  
22 you're dealing with affirmative action, where

1 you're dealing with certain basic rights, there's a  
2 disparity. And again, I don't ascribe negative  
3 motives to most of the judges who are coming out on  
4 different sides of these issues. I think it comes  
5 from their world views, their ideologies, their  
6 judicial philosophies, their personal experiences,  
7 whatever it might be that's affecting this. And  
8 the data's there to support it.

9           Cass Sunstein, professor at Chicago, has  
10 a new study out that I would commend to everyone in  
11 the room that goes through the decisions of the  
12 D.C. Circuit, and I believe other circuits as well,  
13 showing what happens when you have a panel of three  
14 judges appointed by Republicans, three judges  
15 appointed by Democrats, or 2-1 and 2-1. It shows  
16 quite consistently in almost every one of these  
17 areas that when you have three Republicans, they  
18 come out -- not always, but frequently -- the way  
19 you would expect. Three Democrats, the way you  
20 would expect. And that one Democrat and one  
21 Republican on a panel of with two of the other have  
22 a moderating influence. That's the importance of

1 balance in the courts, and that's the biggest  
2 reason I think Chuck Schumer cares about balance on  
3 the courts when he talks about this stuff.

4 I should say as an aside, I don't expect  
5 to say anything today that Senator Schumer would  
6 disagree with, but my remarks today are mine and if  
7 I do say something that he would disagree with,  
8 I've got that caveat there.

9 MINCBERG: And he'll let you know.

10 MR. BERMAN: And he absolutely will let  
11 me know.

12 Accepting, hopefully, the premise that  
13 the White House is considering ideology in this,  
14 and if anyone in the room doesn't think so, I'd  
15 love to have a discussion with you about. And  
16 maybe Mr. Boyden Gray can stand up and we can  
17 engage in that. But assuming it does matter, it  
18 has to be fair for the Senate to take it into  
19 account. I'm not going to go through the history  
20 of the Constitutional Convention and the Federalist  
21 Papers. There are people in this room far more  
22 learned than I on those.

1                   But it's fair to say that the founders  
2 really struggled with how to constitute the courts,  
3 how to build the courts, and they worked through a  
4 range of ideas, from the President having total  
5 power to the Senate having total power. They came  
6 up with an arrangement, as they did in most areas,  
7 where there would be a balance. There'd be a check  
8 and a balance -- the President has the power to  
9 nominate and the Senate has the power, actually, to  
10 appoint the judges, to confirm the judges. As  
11 Elliot said, it's advise and consent. We are  
12 seeing very little on the advise side. If we saw  
13 more on the advise side, I think we'd see a lot  
14 more consent.

15                   I guess I want to turn to this issue of  
16 religion because it's very troubling to hear the  
17 kinds of attacks that have been leveled. When we  
18 oppose Miguel Estrada, we're anti-Hispanic. When  
19 we oppose Priscilla Owen, we're anti-woman. When  
20 we oppose Charles Pickering, we're anti-southerner.  
21 When we oppose Bill Pryor, we're anti-Catholic.  
22 These kinds of *ad hominem* attacks -- I don't think

1 the evidence is there to support them. They're  
2 also destructive to the process.

3           But assuming that it's actually believed,  
4 I want to take the case study of Richard Wesley and  
5 Bill Pryor. Richard Wesley was confirmed  
6 unanimously by the United States Senate to a seat  
7 on the 2nd Circuit. I don't know this personally;  
8 I never asked him. He's a New Yorker. We never  
9 discussed this and it wasn't in his questionnaire.  
10 But people told me *sua sponte* that he's a Catholic.  
11 You look at his record when he was in the state  
12 assembly in New York, and it's pretty clear from  
13 the votes he made there that he's pro-life. I  
14 don't think there's really any disputing that. But  
15 Judge Wesley has a lengthy record as a judge in the  
16 State of New York, and he has proven himself on the  
17 bench not to be an activist. He's someone who does  
18 his best to look at an issue neutrally and  
19 objectively and does not bring an agenda to the  
20 decisions that he issues. He has joined opinions  
21 and written opinions that, if you were to accept  
22 him as an agenda-driving, right-wing conservative,



1 you would not expect him to join. That was a  
2 significant factor in my boss's decision, not just  
3 to vote for Judge Wesley but to actively champion  
4 his nomination and to shepherd his confirmation  
5 through the United States Senate.

6 He and Judge Wesley clearly do not see  
7 eye to eye on a number of core hot-button issues,  
8 but he was persuaded, Judge Wesley carried the  
9 burden, to show that he would be a fair and  
10 balanced judge -- not in the Fox News sense of  
11 "fair and balanced," but in the neutral sense of  
12 fair and balanced.

13 Bill Pryor hasn't done that. In fairness  
14 to Bill Pryor, he hasn't had much of an opportunity  
15 to do that because he has played the role of  
16 politician through most of his professional life.  
17 In that role as politician, he has been a very  
18 passionate advocate for a whole range of issues.  
19 Choice is certainly one of them, but states' rights  
20 is a huge one. He's been, along with Jeff Sutton,  
21 probably the strongest advocate in the states'  
22 rights movement.

1           That is of terrific concern to senators  
2 like my boss, who believe strongly that the laws  
3 the Senate passes, the laws that the Congress  
4 passes, have dramatic impact on the things that he  
5 cares about, the issues and the people he cares  
6 most about -- the environment, women, children,  
7 civil rights. Bill Pryor has been one of the  
8 people on the forefront of undermining those laws  
9 and trying to get the courts to move actively to  
10 take power away from Congress and give it to the  
11 courts. That's a scary thought for Chuck Schumer,  
12 to have someone who wants to undermine Congress'  
13 power on the courts.

14           So, I see how you can look at the  
15 opposition to Bill Pryor and say, "Look, he's anti-  
16 choice." That position comes from his Catholic  
17 theology. There's opposition to him based in part  
18 on him being anti-choice. Therefore, this is anti-  
19 Catholic activism by these senators. I think the  
20 counter-evidence is powerful, and I would ask you  
21 to look not only at Judge Wesley but at I don't  
22 know how many others. Someone, I'm sure, has

1 counted up Catholic judges, Catholic nominees,  
2 nominees who are pro-life, who these senators have  
3 supported. I just don't see how the argument holds  
4 weight, and I'm interested in hearing Manny's  
5 response to how you reconcile the votes for Judge  
6 Wesley, the championing of Judge Wesley with the  
7 opposition of Mr. Pryor, and in saying that is  
8 based on him being anti-Catholic.

9 MR. LEO: Manny, you're going to take two  
10 minutes to respond, and then Jeff, we're going to  
11 go back to you for two minutes. And then we're  
12 going to open it up for questions.

13 MR. MIRANDA: Wouldn't you know that the  
14 one website that I didn't probe this morning was  
15 the website of the Catholic League, Bill Donahue's  
16 group up in New York, which did a press release  
17 analyzing exactly this question, whether or not  
18 Senator Schumer and others have actually voted for  
19 Catholics who are clearly pro-life on the record.  
20 My understanding, from what I recall in reading  
21 that press release, they found only three, and of  
22 the three that were cited, I think one of them

1 wasn't Catholic and the other one had no evidence  
2 of a pro-life record. But I'll take Jeff's word  
3 for it that Wesley was that one that they found.

4 I recall the hearing for Wesley. I think  
5 few people attended and there was very little issue  
6 with him. I don't think that the question is  
7 whether Wesley got a pass, but whether there were  
8 senators in the prior hearing who asked him about  
9 his deeply held beliefs. The introduction of that  
10 particular construct is what is very, very honestly  
11 troubling to many people. No one, especially on  
12 the left, likes to be called a suggestion of  
13 bigotry. As Senator Frist has said, there is no  
14 one in the Senate that has rank bigotry in his  
15 heart. But the unintended consequences of  
16 introducing ideology and personal views into the  
17 confirmation process is exactly what we are talking  
18 about. It has this natural consequence that  
19 perhaps someone's personal views, derived of  
20 personal conviction of religious faith, will be at  
21 stake.

22 I think Senator Hatch has said it, and I

1 venture to repeat it, that folks on the left come  
2 to their views on the issue of abortion as a matter  
3 of politics and ideology. But folks who are pro-  
4 life do not reach their position, for the most  
5 part, in that way. We hold that life is sacred.  
6 We therefore derive that view from our religious  
7 beliefs, from the sense that we understand that  
8 view's relationship to God.

9           Very quickly, advise and consent.  
10 Absolutely, there is a role of advise and consent.  
11 The Constitution calls for it. It is manifested by  
12 an honest up or down vote on the Senate floor by a  
13 Senate majority. Senators are not entitled to  
14 prior restraint, censorship or consultation. What  
15 they are entitled to do is they are entitled to  
16 vote up or down on the Senate floor.

17           MR. LEO: Jeff.

18           MR. BERMAN: Folks can go to the record  
19 and look for themselves, but off the top of my  
20 head, I can name a half-dozen judges. I'd be happy  
21 to work with you, Manny, to give you the longer  
22 list, to the extent we can figure out who's what

1 religion, because we don't ask. And for good  
2 reason, we don't ask. In fact, the only senator,  
3 as far as we know, to ask a nominee what his  
4 religion is, is Orrin Hatch, who asked Bill Pryor  
5 what his religion is.

6 Ron Clark, from Texas, a very active pro-  
7 life legislator; Ralph Ericson, involved with pro-  
8 life groups in North Dakota; Kurt Engelhardt from  
9 Louisiana, a pro-life legislator; Joe Heaton, a  
10 pro-life legislator from Oklahoma; Karen Bodry, who  
11 I believe actually ran a pro-life organization in  
12 Alabama -- all judicial nominees. All were, I  
13 believe, voted for unanimously by Senate Democrats,  
14 the Judiciary Committee and the full Senate, and  
15 voted for by my boss. There's no litmus test; it's  
16 absurd to suggest that there is a litmus test. The  
17 evidence totally counters the idea that there's a  
18 litmus test, and I'd much prefer that we get the  
19 debate back on the merits and off these *ad hominem*  
20 attacks.

21 MR. LEO: Why don't we open it up to some  
22 questions.

1           AP: Assuming there's no litmus test and  
2 we do default to the merits, if I remember  
3 correctly, Chairman Leahy and Senator Schumer both  
4 a couple of years ago were standing firmly on the  
5 notion that the ABA's evaluation was a threshold  
6 question, if not the definitive question to be  
7 answered in determining the merits of a judicial  
8 nominee. That being the case, if I'm not terribly  
9 mistaken, Mr. Estrada was deemed well qualified  
10 unanimously by the ABA panel. So, when you speak  
11 of the merits and you say there's no litmus test,  
12 I'm curious what you deem to be the merits and how  
13 your bosses have shifted, in my view -- I'm not  
14 saying that's obvious -- from the ABA as the gold  
15 standard to something else that I find a little bit  
16 more amorphous at this point.

17           MR. BERMAN: Yeah, it's rank hypocrisy,  
18 basically -- no, I'm kidding. It's a joke a little  
19 levity in the room.

20           What Senator Schumer has said is that  
21 he's got three criteria he uses when he's selecting  
22 or he's considering judges: excellence,

1 moderation, and diversity. On excellence, that's  
2 where the ABA comes in. The ABA is evaluating  
3 whether this person has the intelligence and  
4 experience required of a person nominated for this  
5 particular judgeship. The ABA is, to an extent  
6 useful in that regard, and my boss has said as  
7 much. On moderation and diversity, the ABA doesn't  
8 consider diversity at all, and they don't consider  
9 moderation, philosophy, ideology -- whatever word  
10 you might want to choose there -- at all, including  
11 composition of the court and the need for balance  
12 on that court. So, President Bush, by any  
13 standard, had done an outstanding job nominating  
14 judges who are legally excellent, who are bright,  
15 talented, and generally experienced. It's on the  
16 moderation. And on diversity, as well, he's done,  
17 I think, a very good job. It's on the moderation  
18 part that my boss has the objection.

19 MR. LEO: Next question. Over here.

20 AP: I just wanted to seek a  
21 clarification. My understanding of your remarks,  
22 vis. the pro-life -- particularly Judge Wesley, if



1 he is pro-life, and I don't know that for a fact --  
2 that basically, if they're not activists, then they  
3 would be acceptable in that light. The second part  
4 of that is that also a criteria for your senator  
5 that they should not be activists in any other  
6 thing?

7 MR. BERMAN: Activism is one part of the  
8 calculus. But what my boss is looking for is the  
9 full picture. There was the discussion of burdens  
10 earlier. He does put the burden on the nominee.  
11 If a red flag is raised, it's up to the nominee to  
12 demonstrate that the nominee has what it takes to  
13 set aside his or her views and apply the law in as  
14 neutral a way as the law can be applied. In many  
15 cases, that's been done. In some cases, he's not  
16 been persuaded. The degree to which someone has  
17 been an activist on an issue, the degree to which  
18 that is offset by other experience that  
19 demonstrates an ability to set that aside, as is  
20 the significance of the court, the balance on that  
21 court, so on and so forth.

22 Just briefly, for example, he doesn't

1 think he should have a Supreme Court of nine  
2 Scalias, but you want to have a couple of Scalias  
3 offset by a couple of Brennans. That makes sense  
4 to him.

5 AUDIENCE PARTICIPANT: There's actually,  
6 unbeknownst to a lot of people perhaps, a long  
7 history in this country of recess appointments for  
8 federal judges dating back from George Washington  
9 to President Clinton, of course, with his recent  
10 appointment of Roger Gregory. I guess I'll just  
11 say I had a column in *Legal Times* this week on the  
12 topic.

13 I suggested that if President Bush would  
14 make recess appointments (and understand that  
15 someone has to accept the appointment -- and that  
16 obviously might come at great personal sacrifice,  
17 but let's just assume he would do that) that would  
18 actually immediately create a firestorm because Mr.  
19 Berman's boss would go bananas, along with some of  
20 his colleagues. But that would be a healthy thing  
21 for the country to engage in a broader  
22 constitutional conversation in the same way that

1 Mr. Miranda talked about the democratization of the  
2 law, I think, and it's a useful thing for the  
3 broader public to engage in this type of  
4 conversation that we're having right now in this  
5 room, which often is confined to the law  
6 professors, with deference to Professor Rotunda and  
7 people inside the beltway.

8           So, I want to ask, and Mr. Berman and Mr.  
9 Miranda can respond, what would you think about  
10 recess appointments, and would, in fact, that be a  
11 useful thing if someone were to accept a recess  
12 appointment, like Miguel Estrada, for example?

13           MR. MIRANDA: I think I'm not going to be  
14 able to give you a full answer because it's really  
15 in the prerogative of the President, and I wouldn't  
16 be in a position to comment too much on that.  
17 Certainly, recess appointments are a vehicle or an  
18 instrument, and one that President Clinton used  
19 with Roger Gregory, who President Bush later  
20 renominated in his May 9, 2001 group. So, it's  
21 certainly an instrument to be used. It's between,  
22 I suppose, Miguel Estrada and the President whether

1 he was offered a recess appointment. Certainly,  
2 it's a difficult thing to accept, especially if  
3 you're 42 years old and have a thriving legal  
4 practice. Whether that's what would obtain a  
5 national debate -- I'm not certain of that.

6 MR. BERMAN: I think both sides would  
7 welcome a national debate on this, and so I'm  
8 tempted to say that anything that would generate  
9 that, I'd welcome. I don't know what reaction  
10 would be from the Democratic senators and my boss.  
11 You know, it's a legitimate use of the President's  
12 powers; I don't think anyone would challenge his  
13 ability to do that. Whether it would create a  
14 political firestorm or not, I don't know. And you  
15 know, my boss is a very calm guy. He doesn't go  
16 bananas. And so, I can't see that happening,  
17 either. I just don't know.

18 AUDIENCE PARTICIPANT: I'm Joe Sella,  
19 with the Ave Maria list. Just this past week,  
20 there was an attorney handling a particular case in  
21 Ohio that has asked a number of Catholic judges to  
22 be excused from a particular case because of their

1 | deeply held beliefs. Some people who have served  
2 | as ABA character witnesses or some nominees had  
3 | questions put to them about the fact that they had  
4 | been recommended by a particular pro-life  
5 | organization, and being able to separate their  
6 | deeply held beliefs from their ability to make  
7 | even-handed decisions.

8 |           Do you consider this ideological test  
9 | leading into bigotry when these nominees or judges,  
10 | are too devout or visibly enthusiastic about their  
11 | faith, and their ability to make even-handed  
12 | decisions is called into question. How does your  
13 | boss reconcile his outlook on it?

14 |           MR. LEO: I'm not sure I understand the  
15 | question.

16 |           AUDIENCE PARTICIPANT: How does he  
17 | separate a devout Catholic's belief from his  
18 | ability to make an even-handed decision on a case?

19 |           MR. BERMAN: Well, again, it's the  
20 | totality of the circumstances. You have to look at  
21 | the full record and make a determination based on  
22 | all the experience the judges had, the nominees

1 had. It is, as Elliot mentioned, helpful when the  
2 nominee has been a lower court or a state court  
3 judge because you have a real record on which to  
4 go. In many instances, as in the case of Judge  
5 Wesley, the record is quite persuasive, that while  
6 this individual may have deeply and devoutly held  
7 beliefs, this individual is not using the bench as  
8 a means to advance those beliefs.

9 MR. LEO: In that regard, I don't want to  
10 put you or Manny on the spot, since this is  
11 obviously going to be on the floor, so if you have  
12 to back away from this question, I understand. But  
13 to put this in somewhat concrete terms, since I  
14 Elliot, you mentioned the Pryor situation with  
15 regard to the Ten Commandments case, how would you  
16 go about evaluating the fact that General Pryor  
17 ostensibly enforced the court's decision, despite  
18 having clear views to the contrary? Is that a  
19 relevant consideration or is it too  
20 contemporaneous? I assume this is the kind of  
21 thing you're referring to when you say "context"  
22 and "totality of the circumstances?"

1           MR. BERMAN: Sure. I think it is  
2 certainly relevant for discussion. I don't think  
3 that abiding by a totally unambiguous, obviously  
4 binding court order says a whole lot under those  
5 circumstances.

6           But the other thing I would say about  
7 this is, the church-state issues are less the  
8 concern with Attorney General Pryor with my boss  
9 than the states' rights issues and environment,  
10 disability rights, and all the other stuff on the  
11 table.

12           MR. ROTUNDA: You have no idea how  
13 General Pryor would rule if he were on the bench.  
14 He made an argument on behalf of his client, the  
15 State of Alabama. That's his job. That's what  
16 he's supposed to do.

17           MR. BERMAN: But who's actually his  
18 client in that case?

19           MR. ROTUNDA: I thought the State of  
20 Alabama.

21           MR. BERMAN: I think it was Justice  
22 Moore.

1 MR. ROTUNDA: Okay, that's fine, too.

2 It comes out the same way.

3 MR. BERMAN: He didn't have to undertake  
4 to represent Justice Moore.

5 MR. ROTUNDA: He makes the argument, and  
6 he's always said, you have to obey federal court  
7 orders. That's what you're supposed to do.

8 I've met the guy. I remember several  
9 years ago when I was visiting Alabama, I went to  
10 the office and asked for a little tour, and I see  
11 in the office pictures of Abraham Lincoln and  
12 quotes from Martin Luther King, Jr. While that was  
13 going on, there happened to be a Democratic  
14 governor of Alabama who said he did not support the  
15 efforts of the attorney general to eliminate the  
16 anti-misogynation clause of the state constitution.  
17 It wasn't part of his platform, he said. And I  
18 thought to myself, this is the New South; finally  
19 the Party of Lincoln is doing what it's supposed to  
20 do.

21 This is a guy who's has been arguing for  
22 his client. In these states' rights decisions that



1 | you present, he often wins before the court. We  
2 | usually think that's a good idea, you know, for the  
3 | lawyer to win. That's a plus for the lawyer, not a  
4 | negative. Sometimes he loses on behalf of the  
5 | State of Alabama, as well he should. But he's just  
6 | a lawyer arguing for the client, so we don't know  
7 | what he would personally do. He's made the  
8 | argument that there's a Ten Commandments on the  
9 | frieze of the Supreme Court. Now, I think that's a  
10 | different context; he made the argument, the court  
11 | ruled against him, and he enforced the court order.  
12 | He did exactly what he's supposed to do.

13 |           MR. LEO: Elliot.

14 |           MR. MINCBERG: I just want to comment on  
15 | that a little bit. What Professor Rotunda said may  
16 | actually be partly responsible for some of the  
17 | problems that have arisen about people frankly  
18 | misinterpreting phrases like "your deeply held  
19 | beliefs". What Pryor was doing was way beyond  
20 | representing any client in addition, as Jeff said,  
21 | to volunteering to represent Moore without really  
22 | having a client in the case.

1           Pryor very personally made clear on his  
2 own behalf that he agreed with what Moore was  
3 doing, that he would have ruled the opposite way of  
4 Judge Carnes, one of the most conservative judges  
5 on the 11th Circuit Court of Appeals. He attended  
6 press conferences with Moore, he was at rallies for  
7 Moore, making clear, among other things, his  
8 jurisprudential views on that issue. So, in part  
9 an order to refute this sort of argument that  
10 Professor Rotunda is making, "Oh, he's only  
11 representing his client," I think some senators  
12 have said what we're talking about here is not just  
13 what you've done on behalf of your client, but your  
14 own beliefs, your deeply held beliefs. Whether  
15 they're motivated by religion or, as in the case of  
16 state's rights, presumably something else -- I  
17 don't know for sure.

18           The concern is that Pryor has not shown  
19 the ability to truly apply the law in a way that is  
20 within the mainstream, even measured in many  
21 instances by conservative judges. That, I think,  
22 is where the concern comes in. It may well be that

1 | there is confusion because of, I think, senators  
2 | trying to distinguish the sort of situation where  
3 | lawyers have been nominated and said, "Well, I just  
4 | did this on behalf of the client." Pryor is going  
5 | far beyond representing the interests of any client  
6 | in staking out his jurisprudential views in a whole  
7 | range of areas that are far outside the mainstream.

8 |           MR. ROTUNDA: I just thought he was  
9 | staking out his First Amendment views.

10 |           MR. LEO: One more very quick volley on  
11 | this, and then I want to go to the next question.

12 |           MR. ROTUNDA: I just thought he was  
13 | staking out his free speech rights. He's allowed  
14 | to argue against a decision. He's not allowed to  
15 | disobey it, and he didn't.

16 |           MR. MINCBERG: He's certainly allowed to  
17 | -- of course, he has every right to say what he  
18 | said. But the Senate has every right to take into  
19 | account what he said in determining what his  
20 | jurisprudential views are.

21 |           MR. ROTUNDA: You mean, there should be  
22 | a vote. I mean, I think the Senate should vote on

1 this.

2 MR. LEO: Jeff, this is something to  
3 write to Mom about, right?

4 AUDIENCE PARTICIPANT: This is for  
5 Elliot, and I think this question has a yes or no  
6 answer. The *Philadelphia Daily News* article that  
7 you used as evidence that the Administration  
8 rejected those three nominees because they weren't  
9 conservative and weren't pro-life enough, did it  
10 cite or quote an Administration source for that, or  
11 was that the article's characterization of it?

12 MR. MINCBERG: I'll read you precisely  
13 what it says. "Each was interviewed by White House  
14 aides. Each was found wanting. In Melvin's case,  
15 it is probably because they didn't want to lose her  
16 as a candidate to the state Supreme Court. But the  
17 others were not sufficiently conservative or pro-  
18 life, our sources say."

19 You can't truly imagine that the  
20 Philadelphia newspaper would quote whoever that  
21 source was, since whoever it was undoubtedly would  
22 lose their job. I mean, as someone, Tom, who's

1 just recently come to work for the Senate, you  
2 understand the importance of keeping  
3 confidentiality.

4 MR. LEO: There was a question in the  
5 back.

6 AUDIENCE PARTICIPANT: The senators who  
7 profess to be Catholic, yet who are most in  
8 conflict with Catholic church teaching, seem to me  
9 to be the most uncomfortable with the anti-  
10 religious charges. How far are Republicans willing  
11 to make this political? Are they as unwilling to  
12 really fight politically, as they've been shown to  
13 be unwilling to go through a few days and nights of  
14 a real filibuster?

15 MR. LEO: I think that's for you, Manny.

16 MR. MIRANDA: I was fairly lonely, and  
17 that certainly brings me back in.

18 I think, without giving away anything to  
19 our friends on the other side, Senator Frist has  
20 made it very clear -- in fact, in a letter this  
21 morning, to his colleagues, he said that all  
22 options are open.

1           Now, that said, it should be made clear  
2 to you that this notion of 24/7 and going all night  
3 is highly dramatized. It is a Hollywood  
4 production, but it doesn't really exist in the  
5 rules. You cannot force Democrats to come to the  
6 floor and speak all night in a very dramatic  
7 manner. That will not be the way that this will be  
8 resolved. And I know that because historically, it  
9 has never resolved a filibuster.

10           Filibusters have been resolved in two  
11 ways: compromise or surrender. We're not quite  
12 willing to admit surrender yet, and we have not  
13 compromised. We have not given away, bargained,  
14 bartered, we have not done the usual things that  
15 former Senate leaderships are known to do. We have  
16 not compromised; we have not yet surrendered.  
17 We're going to continue to fight. And we have held  
18 an unprecedented one-month, or six-week, rather,  
19 debate on the floor on Miguel Estrada, brought him  
20 to cloture vote seven times. It was historic at  
21 the vote, but we gave him seven cloture votes. So,  
22 we're going to continue to look into the right

1 solution, but it should be very clear.

2 I mentioned a founding father earlier,  
3 and ultimately, the founding fathers intended for  
4 the American people to protect their own  
5 Constitution. And if that means that the final  
6 vote, the cloture vote that matters, is on November  
7 2, 2004, it's up to you to cause that to happen.

8 MR. LEO: Question over here. The  
9 gentleman right here.

10 AUDIENCE PARTICIPANT: Scott Conwell.  
11 I'm a candidate for elected judgeship in Maryland.  
12 My question goes to Mr. Mincberg. He advocates a  
13 merit selection procedure, which is always  
14 dominated by bar associations, which are 80- to 90-  
15 percent, depending on how you calculate it,  
16 dominated by Democrats and the trial lawyers. So,  
17 my question is how -- isn't that just politics by  
18 another name?

19 MR. MINCBERG: Well, a couple things.  
20 First of all, I didn't advocate merit selection per  
21 se. I used what Carter did as an example of  
22 depoliticizing. I think there are a number of

1 potential ways to try to remove some of the rancor.  
2 Merit selection might be one. Bipartisan  
3 commissions, which have been set up and are  
4 deliberately bipartisan, are another. So, there  
5 are a number of different ways to do that.

6 I confess that's the first I've heard  
7 that as a characterization of bars across the  
8 country. But again, from my perspective, it's not  
9 as important for the moment precisely what method  
10 is chosen. It might be a different method in  
11 different places because of the different  
12 composition of the Senate delegations from  
13 different states. To me, what's important and the  
14 true way to get beyond the rancor is to put a  
15 little more of the advise in advise and consent and  
16 to try to have a way that diffuses the strong  
17 injection of jurisprudential views, or what have  
18 you, at both ends of Pennsylvania Avenue.

19 AUDIENCE PARTICIPANT: I'm Reba  
20 Holycross of the Independent Women's Forum, and  
21 this question is for Mr. Mincberg.

22 You several times used the phrase "Senate



1 responsibility" gravely, and -- to stop the  
2 juggernaut of Bush's use of ideology. My question  
3 is why, given the role of the Senate responsibility  
4 to weigh in on this, do you endorse the few  
5 senators who are impeding the Senate in doing its  
6 responsibility and preventing a floor vote on these  
7 nominees?

8 MR. MINCBERG: Well, I don't think they  
9 are impeding their responsibility. I'd say just to  
10 the contrary, if you look historically, at the  
11 statements of Senator Hatch, who's made clear, when  
12 the shoe was on the other foot, that the use of the  
13 filibuster is a perfectly appropriate thing to do,  
14 and indeed a way that effectively was used under  
15 the Clinton Administration to ensure that just  
16 about every nominee who went through did have more  
17 than sixty votes. It's often not remarked upon  
18 that Richard Paez, for example, was filibustered.  
19 A number of prominent Republicans -- I won't name  
20 names -- voted to continue the filibuster. But  
21 indeed, there were more than sixty votes for him  
22 and just about every other Clinton nominee. And it

1 | was effectively a way that was used to protect what  
2 | Senator Hatch contended were minority rights, in a  
3 | time of divided government, more consensus in this  
4 | area.

5 |           Now, in my view, it should not take that.  
6 | And I think that if the President was more serious  
7 | about diffusing this, it should not have to take  
8 | that. But when the President escalates, as he's  
9 | continued to do, when each time there's opposition,  
10 | his response is not to look for more moderate  
11 | candidates but to give us more Brett Kavanaugh's and  
12 | Janice Rogers-Browns, I think that the only way  
13 | that the Senate can truly try to produce some  
14 | consensus is to say, "Look, the filibuster is an  
15 | appropriate tool; it's been used by Republicans as  
16 | well as by Democrats; it's going to force consensus  
17 | one way or the other." Mr. Miranda suggests the  
18 | ballot box -- I hope there are better ways to do  
19 | that. But I think it is indeed a quite responsible  
20 | thing, as past Senates and Presidents demonstrate.

21 |           MR. LEO: Manny, you wanted to say  
22 | something?

1                   MR. MIRANDA: Yes. This notion that  
2 Senator Hatch has given weight to the argument that  
3 you should filibuster is beyond the pale, really,  
4 of taking words out of context. Senator Hatch was  
5 making arguments that the filibuster is indeed a  
6 device. But that was said in the context where he  
7 was arguing that the filibuster should *not* be used  
8 in the case of Richard Paez, in the case of so many  
9 others. He has repeatedly argued to his caucus and  
10 on the floor of the Senate that the filibuster is  
11 an improper device with judicial nominees. And  
12 that statement, repeated so often, is here taken  
13 out of context.

14                   Let me just say that, with respect to  
15 Richard Paez, who admittedly waited a very long  
16 time, but for Senate Republicans, he would never  
17 have gotten the vote that the Constitution  
18 requires, a fair up or down vote. And I wonder,  
19 all things considered, if Miguel Estrada, if  
20 promised that within four years he would get an up  
21 or down vote, he might take that deal.

22                   MR. MINCBERG: It's a vote that some

1 dozens of Clinton nominees never got.

2 MR. MIRANDA: It's a vote that dozens or  
3 however many Clinton nominees never got, and a  
4 larger number of Bush I nominees never got.  
5 Nominees who were nominated very late in the game,  
6 in the term, in some cases nominees who, as Senator  
7 Hatch has said, the reasons for their not going  
8 forward could not even be made public, which he has  
9 made clear.

10 MINCBERG: Nominees "late in the term"  
11 who wound up waiting four years or more under  
12 Clinton.

13 MR. MIRANDA: Two or three -- actually,  
14 really, Paez is the main one that waited a very,  
15 very long time --

16 MINCBERG: Helene White never got a  
17 hearing; waited more than four years.

18 MR. MIRANDA: Again, in the case of  
19 Richard Paez, he ultimately got a vote. And 377  
20 Clinton nominees got a vote and were confirmed.

21 MR. LEO: Question over here.

22 AUDIENCE PARTICIPANT: Mr. Berman, I

1 find it hard to believe that you or Mr. Schumer  
2 really require of nominees 20 instances of ruling  
3 even-handedly against what you understand to be  
4 their beliefs about something. But I want to come  
5 back to this question of moderation. I have to put  
6 aside the state's rights issue because I haven't  
7 seen a lot in the press on your boss's feeling  
8 about General Pryor in regard to state's rights.  
9 What I have seen is quite a lot about his  
10 immoderate views on abortion. Now, if you consider  
11 that and if you believe the recent polls, as many  
12 Americans today label themselves pro-life as pro-  
13 choice, and for many, many, many years, all number  
14 of polls will show that upwards of 70 percent of  
15 the American people disagree with most of the  
16 abortions that *Roe v. Wade* allows. So, just  
17 looking at these various types of polls, how can  
18 your boss continue to say that Pryor's views on  
19 abortion are so immoderate that it disqualifies him  
20 from a judgeship.

21 MR. BERMAN: Well, again, I'll say that -  
22 - and I'm happy to email you; you can go to our

1 office's website and look at his statement, because  
2 he was the ranking member at the Pryor hearing, and  
3 read the whole opening statement, about 1/20th of  
4 which is on choice and the rest is on other issues.  
5 But it's the rhetoric on the abortion issue that I  
6 think is most troubling. It is comparing abortion  
7 to the Holocaust, our history of abortion to the  
8 Holocaust. It is saying that *Roe* is the worst  
9 abomination in the history of constitutional law,  
10 worse than *Dredd Scott*, worse than *Plessie*, worse  
11 than *Koromatsu*. It is a whole litany -- word used  
12 advisedly -- of statements that my boss believes  
13 constitutes extremist rhetoric, or at least extreme  
14 rhetoric, and that's troubling to him. Again, it  
15 is one factor among many that he's considering, but  
16 it's troubling to him. And 20 instances may have  
17 been a bit of hyperbole. There's no set number.

18 MR. LEO: Manny.

19 MR. MIRANDA: But it seems to me that  
20 what is not being taken into consideration is that  
21 when Senator Hatch asked Bill Pryor the question,  
22 "Will you enforce the law regardless of your

1 personal views," Attorney General Pryor answered  
2 unequivocally, "Senator, you can take it to the  
3 bank."

4 MR. BERMAN: And if he's confirmed, and  
5 if he's not true to that, the Bank will still cash  
6 that check. Who's going to say, "actually, no, I'm  
7 not. I'm going to be true to my own self and not  
8 true to the law"? No one's going to say that. Of  
9 course, he's going to say that, and he may even  
10 believe it. I'm not even saying Bill Pryor doesn't  
11 believe what he's saying there. But he comes from  
12 a place, and again, not just on the choice issue,  
13 it is so far over that it is troubling. It is a  
14 serious concern. The burden of showing that he  
15 will be a fair and balanced jurist has not been  
16 carried.

17 MR. MIRANDA: Well, admittedly, what we  
18 have is a new situation, but the deference to the  
19 President, is what has been lost. Let me put it  
20 another way. The question of ideology is asked.  
21 It is asked of the American people when they elect  
22 a president every four years. At that point, a

1 president has the prerogative of nomination. And  
2 the Senate's role is to determine whether that  
3 person is a virtuous man or woman, a person who  
4 will follow the law, as it is, and rather than  
5 follow the law that Senator Schumer or anyone else  
6 wants it to be.

7 MR. BERMAN: I agree. And that's part of  
8 the problem. The question is whether he's going to  
9 follow the law. The question is whether he's going  
10 to be an activist who's going to use his judicial  
11 powers to advance his own agenda or he's going to  
12 follow the law. I don't have a problem with that  
13 statement.

14 MR. LEO: I want to close with one quick  
15 experiment. I'm going to pose three questions.  
16 All I want is a simple answer from each of the  
17 panelists, which is whether this question is proper  
18 or improper to ask a nominee.

19 Was *Roe v. Wade* rightly decided -- proper  
20 or improper question?

21 MR. ROTUNDA: I don't know. I think that  
22 leads into a seminar.



1           MR. LEO: Okay, so you can't answer the  
2 question. Manny, is that a proper or improper  
3 question?

4           MR. MIRANDA: I think it's an improper  
5 question for the nominee because for the nominee to  
6 answer that question effectively and honestly, he  
7 would have to have the arguments in front of him,  
8 the briefs in front of him, and evaluate it all.

9           MR. LEO: Jeff.

10          MR. BERMAN: It's not the way I would ask  
11 it, but it's a proper question.

12          MR. LEO: Elliot?

13          MR. MINCBERG: Yeah. I would agree with  
14 that. The question really becomes, how does the  
15 nominee answer it, and how does the senator respond  
16 to that answer.

17          MR. LEO: Okay, so we get to the second  
18 question, which is, should there be a right of  
19 privacy under the 14th Amendment of the  
20 Constitution, Elliot, proper or improper question?

21          MR. MINCBERG: Absolutely proper.

22          MR. LEO: Jeff?

1 MR. BERMAN: Sure.

2 MR. LEO: Manny?

3 MR. MIRANDA: I think that's a proper  
4 question.

5 MR. LEO: You think that's proper?

6 MR. MIRANDA: There is a right to  
7 privacy. It's a fact of life. There's gravity --

8 MR. LEO: Why do we have academics n  
9 these panels? I'm just going to stop this exercise  
10 right now and let you get back to your desks.

11 Thank you very much.

12 (Panel concluded.)