THE FEDERALIST SOCIETY

and its

Federalism and Separation of Powers Practice Group

PRESENT

THE ROLE OF THE SENATE IN JUDICIAL CONFIRMATIONS

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THE FEDERALIST SOCIETY

JUDICIAL CONFIRMATIONS

SPEAKERS:

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THE ROLE OF SENATE AND JUDICIAL CONFIRMATIONS

SPEAKER: My name is Doug Cox and on behalf of the Federalist Society and its Federalism and Separation of Powers Practice Group, welcome to today's special event, a debate on the role of the Senate in judicial nominations.

Our formal topic is: Of Senate Default and Judicial Nominations. Does the Constitution Require the Full Senate to Act? We call it a debate, but we are going to be proceeding informally. We hope that once we've heard from our guests today, we are going to get some interesting questions from the audience, so we will be looking to you.

These days, the role of the Senate in judicial confirmations has become increasingly contentious. What little certainty we thought we had seems to be disappearing under the pressure of partisan politics. Take the role of the President. Most of us here today would agree that the Constitution grants the power to nominate judges, at least, to the President, and that the President alone has the power to nominate. He

doesn't share that power with Congress or with the judiciary. After all, presidents and presidents alone have been nominating judges for 200 years.

But even today, that bedrock principle appears uncertain. Consider a recent insight offered by Senator Jeffords. Senator Jeffords is a lawyer and has spent the last 27 years in Congress. The functions and duties of his office are defined in the Constitution. As a member of Congress, he is constitutionally obligated to take an oath to support the Constitution. Thus, as a matter of professionalism, as well as patriotism, the Constitution must have been his daily study for 27 years. He has a very good basis to claim to be the real constitutional expert.

Senator Jeffords, with this background in mind, recently opined that he "slept better at night because he knew Senator Leahy was picking the judges." So, as he has observed from his expert perch, the functioning of the judicial nomination and confirmation process today, he perceives that the power of selecting judges belongs not to the President but to the Chairman of the Senate Judiciary Committee, an individual and

office not mentioned in the Constitution.

A good case can be made that Senator Jeffords is not exaggerating, and that Senator Leahy is indeed picking the judges. To be sure, he is subject to political constraints and may suffer a political loss now and then, but the same is true of all Constitutional actors. His power to pick is also limited by the list of names that the President is good enough to submit to him.

It is not implausible today for a senator to conclude that by deciding for which judges to hold hearings, by making negative votes a matter of party discipline, and by a host of other maneuvers, Senator Leahy is *de facto* picking the nation's judges. Senator Jeffords' insight thus is not based on constitutional abstractions but on practical realities, and perhaps he is on to something.

In many disputes involving the separation of powers, the actual conduct of the executive and legislative branches function as a gloss on the meaning of the constitutional text. Certainly, all of the dueling statistics we've seen in recent weeks as to

rates of confirmation under other presidents are designed to make prior practice a touchstone for the reasonable exercise of the Senate's constitutional advice and consent power. And perhaps the practice of permitting the Chairman of the Senate Judiciary Committee to exercise the *de facto* veto on judicial nominations is simply the most recent gloss on the presidential nomination power.

Well, no doubt our guests will be able to clear all this up. We are honored to have with us today -- and we are very grateful to have with us today -- two very distinguished gentlemen. Our first speaker will be Douglas Kmiec, Dean of the Catholic University Law School. Dean Kmiec is one of the nation's leading experts in constitutional law, just like Senator Jeffords. Prior to coming to Catholic, he taught constitutional law at Pepperdine and Notre Dame. He is the author or co-author of numerous books, and he headed the Justice Department Office of Legal Counsel under Presidents Reagan and Bush. He received his law degree from the University of Southern California.

Elliot Mincberg, our other guest, will respond

to Dean KMIEC and offer some additional thoughts. He is Vice President, General Counsel and Legal Education Policy Director of the People for the American Way Foundation, an organization that promotes public education and constitutional and civil rights, and an organization that is no stranger to fights over judicial confirmation. In addition, he serves as Vice President for People for the America Way. He also is an expert in constitutional law, with an emphasis on First Amendment law, and he has served as counsel in a number of important First Amendment cases.

Prior to joining the foundation, he was a partner at Hogan and Hartson. He received his law degree from Harvard. As I mentioned at the outset, our guests will share their thoughts with us, and then we will open things up for questions from the audience.

MR. KMIEC: Well, thank you, Doug. I am grateful to the Federalist Society and to all of you for allowing me to address this important topic and of course it is an honor to be put in the pantheon of constitutional scholars as Jim Jeffords.

This is a very important and vital topic, and

while I am indeed honored to address it and to participate with Elliot to explore it with you, it will also not only prove I hope elucidating but it will eliminate any possible chance I may have had of judicial nomination.

But that is okay. That will merely put me in the ranks of a large number of other people who are great distinguished rank in the profession, in the academy and elsewhere, and who deserve to be on the bench but, in fact, are finding it far too difficult and far too problematic to secure that position of public service.

There is little question, I think in the reasonable mind, that President Bush's judicial nominees have been singled out for particular disfavor. One can play with a great many statistics, and I'll just give you the one which I think is the most relevant. If you compare the relevant period of time, namely, the early period of the presidential administration, the President has put forward 103 nominations -- at least I think that was the number earlier this week. Of that number, 55 percent have been confirmed. In the same period of time

for Mr. Clinton, it was 90 percent. In the same period of time for his father, it was 93 percent. In the same period of time for President Reagan, it was 98 percent. There is something amiss.

Now, when you explore the public reasons given for what is amiss, normally what you get is a version of tit for tat. There are several problems with that argument. The first is that the percentages indicate it is at best only partially true. The second is that the argument takes us nowhere. Having been married for some 29 years, I am familiar with a certain line of argumentation.

(LAUGHTER)

MR. KMIEC: One can spend a great deal of time asking who is the last one to fail to take out the garbage, to fail to hang the key on the hook, or to turn off the lights in the basement. These conversations tend to be pointless, recriminating and lead to larger issues.

(LAUGHTER)

MR. KMIEC: They also do absolutely nothing about the garbage, the light in the basement or the key

that's missing from the hook. And the argument that is given by the Democrats as to why only 55 percent of these talented people, including people like Estrada, John Roberts, Jeff Sutton, Mike McConnell, have not been heard from is equally unavailing and pointless.

You get a second line of argument and that is "Well it's not just that you did it to us," which of course as I said at best only partially true, "but it's also that we just don't like you." And the syllogism runs something like this. President Reagan and President Bush were particularly good at nominating people who would follow their judicial philosophy; President Clinton apparently was busy doing other things and did not have time to appoint members to the bench who would follow his judicial philosophy and, therefore, by indirect implicit unremunerated pre-numeral delegation, the Senate Judiciary Committee and its Chairman have taken up this responsibility. There are several problems with this argument as well. They are all relatively patent.

The first is, it's hardly true. Yes, Mr. Clinton did appoint a large number of people to the

bench and yes, they are discernibly different than Reagan and Bush nominees, but they are not different so much on ideology in a political sense, they are different on whether or not one observes the Constitution. If, in fact, one has a familiarity with federal state relations and their proper orientation, a familiarity with text and original understanding, and a desire to have principles of nondiscrimination based on race, then, yes, you can say there is a difference between Reagan and Bush nominees and at least some of those that now grace the bench because of the previous president.

And of course, the Senate Judiciary Committee has no presidential prerogative to step in for him. But worst of all about this ideological balancing argument is that, first of all, ideology is not defined and balancing is not defined and the authority to do it is nonexistence and perniciously it is a nontrivial attempt to destroy judicial independence. Insofar as it involves untenable questioning or promises in the context of the confirmation proceedings, it simply cannot be tolerated as a respectable academic view.

So, I think we have a problem. The problem can be stated in various ways. The Judicial Conference of the United States has a list that they keep of the number of judicial emergencies in the United States. It's a terminology that I don't think is quite saturated into the public mind yet. You know, we are going home on the Metro -- oh my goodness, there's a judicial emergency.

(Laughter.)

MR. KMIEC: I watched Dick Leon take his investiture yesterday with great grace and applause, deservedly so. But I also thought of the poor man getting the case docket he was about to get; and his district is better than some others.

So, here's the question. Is there a constitutional default? Yes. Is it an abuse of constitutional authority for what's taking place? The answer is yes. Now, the critical question -- can this abuse be remedied? At its most general level, the answer is remedied how? That's another question and not an answer. But most likely, through the people and their choice of senatorial representatives, which is a

long-term answer and a true one to our political process, but not necessarily an immediately hopeful one. This led me to focus, for purposes of our discussion here this afternoon, not just on the general default but on the specific means by which the Senate Judiciary Committee, under the leadership of Mr. Leahy, is proceeding. And that means is, of course, to defeat judicial nominees not only by stall and delay, but presumably in committee, as was done with Charles Pickering. Now the question is, is that constitutionally permissible and authorized? I will make the case here this afternoon that it is not.

Now, let's do some constitutional basics. There is no question but that the Senate has broad authority to set its own rules. I notice that Elliot has a Cato Constitution, which I think is generally the same Constitution as that adopted in 1787 --

(Laughter.)

MR. KMIEC: -- except that the Declaration of Independence is Article 1.

In Article 1, Section 5, it provides that each House may determine the rules of its own proceedings.

This is, of course, quite a broad authority but it is not an unlimited authority. No one would ever contemplate that Senate committees could be organized around impermissible racial or gender lines, nor would one assume some facetious notion that the Senate Judiciary Committee can undertake to decide cases or controversies -- a power obviously given, the last time I looked, in Article 3 to the courts. And I would submit that there is no reason to believe that the Senate Judiciary Committee has the authority to defeat a judicial nominee within its own ranks without sending that matter to the full Senate.

I believe the Senate believes this as well. If you look at Rule 31 of the Senate Rules, it provides that the final question of every nomination shall be, "will the Senate" -- notice it's not ten Democratic members of the Senate Judiciary Committee -- "will the Senate advise and consent to this nomination?"

Beyond the Senate rule, it is useful to look where it is always useful look if one wants to construe the Constitution: the text of the Constitution. The text of the Constitution provides in Article II, Section

2, that the President -- as Doug has already affirmed, notwithstanding Mr. Jeffords' somewhat interesting opinion -- the President shall nominate and by and with the advice of the Senate (again, not the Senate Judiciary Committee) appoint judges of the Supreme Court, etc. This is a proposition that was early confirmed by a Senate resolution found in the Executive Journal of 1789, which provides that all questions shall be put by the President of the Senate, and the Senators shall signify their assent or dissent, by answering -- I love to say it this way -- *vive voce*, aye or nay.

Now, that text is bolstered in a very important way, and in an unequivocal way, by the Federalist Papers. The Federalist Papers are not the Constitution, but they are helpful guides to the understanding of the Constitution.

Federalist 76 and 77 are replete with references from Alexander Hamilton in his defense of this particular organization of the appointment power, with the proposition that the Senate check will be one exercised "by the whole body, by an entire branch of the legislature." This is not just casual language. This

is not just throw-away language that Alexander Hamilton was including for purposes of rhetorical flourish. This was reflecting the Constitutional Convention's specific rejection of having a nomination process checked by a smaller body because the example was before them of the appointments by the governor of New York, which were subject to confirmation by a small council of advisors. Hamilton said that was a sure prescription for disaster or, in his words, every mere council of appointment, however constituted, will be a conclave in which cabal and intrigue will have their full scope. Hamilton makes clear in Federalist 76 and 77 that small groups given the check on the appointment power are more subject to targeted improper influence and are far less accountable than the full body, the entire legislative branch, that is contemplated by the Appointments Clause in the Constitution. In his words, "If a small committee or council is given the confirmatory authority, all idea of responsibility is lost."

We are living that reality. All idea of constitutional responsibility has been lost. And worse than lost, it is now starting to invade, in ways that

even Hamilton couldn't contemplate, the executive function. Hamilton asked the question rhetorically in the Federalist Papers, could it be that giving the full Senate a confirmation role would somehow put the Senate in the position of extorting powers from the Executive that rightfully belong in the Executive? And he answered his own question by saying, in relation to what objects, what could the full Senate possibly be asking of the Executive to take away the Executive's power?

We know that since Senator Leahy has determined that his committee should in fact be the cabal that Alexander Hamilton feared, we know what is happening. The committee is now asking for the deliberative internal documents of the Solicitor General of the United States, not for serious, necessary review of a nominee but for sheer political harassment. And the litigation policy and strategy of cert-worthy cases and strategy through the lower courts is something, quite frankly, that is not subject to be bargained for in a matter of confirmation. And to suggest it in the context of Mr. Estrada's nomination is, I think, one of the lowest moments in the history of that committee.

Beyond text, beyond context, we have historical practice. And here is the historical practice. Not a single Supreme Court nominee has ever been meaningfully defeated in the committee. Yes, it's true that Homer Thornbury didn't get to the full Senate floor. It's also true that Abe Fortas got defeated, and therefore there was no room for Homer on the bench. Aside from that one little historical fillip, every Supreme Court nominee has gone to the full Senate. And therefore, it's not surprising that Mr. Daschel* and others entered into an agreement at the start of this Congress that that's how Supreme Court nominees would be treated. There is no justifiable basis not to treat lower court nominees in the same fashion.

Now, what's the historical practice on non-Supreme Court nominees? Here, I rely upon the Congressional Research Service and its own report. It's own report is that, by any way you want to count it, at most, there have been four nominees in the entire recorded history of our nation that have been defeated in the committee. And if you look closely at those four nominations, what you discover is that three of those

four are not really truly defeats in the committee but in fact very late nominations in a presidential administration that lapsed, or could not be taken after defeat or non-recommendation in the committee to the full Senate. Only one case in my judgment -- that of Jeff Sessions in 1986 -- is the historical anomaly.

Now, if text and context and historical practice is not enough to guide us, then maybe we should -- and I say this with some trepidation -- look at what the legal academy is thinking. Well, a member of the legal academy, not nearly in the same pantheon as Jeffords and KMIEC, but Larry Tribe has argued in his book that what matters most is that 100 Senators of diverse backgrounds and philosophies will vote on the confirmation of any judicial nominee.

When we look at the modern scholarship that emerged about the Senate Judiciary Committee, and it was enormous after the Bork experience, the typical recommendation made across the political spectrum was not to enhance or expand the role of the Senate Judiciary Committee but to lessen it. In fact, David O'Brien, in his report called "Judicial Roulette -- the

Report of the 20th Century Task Force" recommended that the Judiciary Committee be avoided altogether.

Other reports argued that the way in which to secure more "mainstream" candidates was to have a constitutional amendment that would require not majority within the Senate for approval but two-thirds approval. Notice that none of these scholarly inquiries assume that the question is disposed of with finality in the Senate Judicary Committee.

That's text; that's context; that's historical practice; that's modern commentary about the Committee and its role. Where does this leave us in terms of a constitutional violation? This is the separation of powers section of this wonderful society. We all know that a separation of powers violation occurs under our jurisprudence, either when one branch usurps the authority of another or when one branch undermines the independence of a coordinate, co-equal branch. I think we are there, ladies and gentlemen. Should there be a judicial remedy? It's hard for me to contemplate that.

Justice Kennedy wrote some time ago, "It remains one of the most vital functions of this Court to

police with care the separation of the governing powers. When structure fails, liberty is always in peril." Is there a basis for judicial review and intervention to correct this mischief? One would hope it would not come to this. But are we far away from what the Court invalidated as a legislative veto, a committee attempting to affect others outside of its own branch, contrary to the single finely wrought procedure outlined in the Constitution itself and its own history? Are we very far away from executive impoundment? Presidents who have assumed the ability, contrary to specific and undeniable statutory mandates, not to follow those mandates?

Yes. I know what you're thinking; I hear it. *Nixon v. United States* -- what's he going to do with *Nixon v. United States*? Not Richard; Walter. And, of course we know the issue there was the power of the Senate to arrange itself so that a committee basically conducted the trial and made a report -- and here's the critical difference, of course -- made a report to the full Senate for ultimate deliberation and disposition. In fact, Senate Rule 11, which was relevant in that

case, explicitly guaranteed that the full Senate would determine the competency and the relevancy of the evidence itself, and if it so needed to send for witnesses to further augment the record before reaching its own conclusion.

Nixon's rationale is that judicial involvement in impeachments would undermine the intended Constitutional check or unhinge considerations of finality. And in context, it is a quite sensible ruling on that score. But in this instance, the opinion not only does not undermine the argument I'm suggesting, it actually supports it because a lawsuit challenging the absence of full Senate action on judicial nominees promotes a constitutional check and promotes finality, and does not in the least undermine the judicial or Senate function. It advocates it.

Well, Doug is being generous, but he's also pointing to the watch. And so, let me conclude. Judicial intervention would not be my preferred course. But separation of powers violations are not invisible to jurisprudence, nor can they be. At some point, a line is overstepped.

Let this discussion today be a public invitation to the senator from New England and his colleagues to exercise not abuse of authority but stewardship -- stewardship of the responsible power that he's been given. And let him take steps to expand the agreement that already exists, that every Supreme Court nominee will go to the floor but also that every judicial nominee will go to the floor for ultimate disposition. If he is not prepared to do that, let at least the discussion begin that that should happen where there are undeniable judicial emergencies, as defined by the Judicial Conference, and where the nominees relate to those vacancies.

If that is not possible, then it seems to me that it is not only right but a duty to contemplate litigation and to contemplate other strategies in the advice of the President that may suggest, properly, under Senate Rules seeking to avoid the Committee altogether -- a prospect that is possible under the Senate Rules but I admit to you is quite fanciful. It can get matters to the floor, but it can get matters to the floor for no particular purpose because one can

imagine the body protecting its committee structure, as it should, when it is responsibly performing that structure.

It has been said by one senator that "every senator can vote against any nominee; every senator has that right. They can vote against them in the Judiciary Committee and on the floor. But it is the responsibility of the U.S. Senate to at least bring them to a vote." Those were the words of Patrick Leahy in 1997. But of course, that was then, and this is now.

The People for the American Way have properly pointed out in their materials that he was referencing not the failure to bring a nominee forward after a committee action, but the failure to call someone off the Executive Calendar. But I think the principle is the same, and the acknowledgement of the importance of full Senate deliberation is the same.

Madison, as you know, told us that the very definition of tyranny is the unification of the three powers into a single hand. Friends, ladies and gentlemen, the undoing of the effective exercise of the three powers is no less tyrannical.

Thank you very much.

(Applause.)

MR. MINCBERG: It's always a pleasure to follow Doug to the platform at these events. And I want to thank the Federalist Society for inviting me to be here. As I've said sometimes on other occasions like this, I feel very much like Daniel being invited to the Lion's den. I hope you'll treat me as well as the lions treated Daniel.

I'm glad that Doug used one particular word in his remarks. He used the word "fanciful." I think, frankly, that is the best description I can think of concerning the view that it violates the Constitution for the full Senate not to vote on nominees. I think it is a fanciful point of view. I will support that for you through looking at the words of the Constitution -- yes, the Cato Institute version. I wanted to be sure you guys would accept that I was looking at the right version. I'll also look to the historical precedents and what it would all mean, and then talk a little bit about the real way to solve the issues with respect to the judiciary and the appointment of the judiciary;

something we at People For care very much about.

Now, it's absolutely correct that the words of the Constitution say that the President shall appoint judges with the advice and consent of the Senate. In other words, for a judge to be confirmed, they clearly must be voted on by the full Senate. A committee would not do. And that, I submit, is what Professor Tribe and Alexander Hamilton and all the other people that were talked about by Doug are really referring to: that notion of a confirmation having to come from the full Senate.

But nowhere in that article of the Constitution does it breathe a word to suggest that the Senate must actually vote in full on a nominee, particularly when, as we've seen for hundreds of years, much of the business of the Senate is done through its committees. The Constitution also says, for example, that the President is to recommend legislation to the Congress. Does that mean that the Congress has committed a constitutional violation every time the full Congress doesn't vote? Of course not. But don't listen to me; don't listen to people like Akil Amar, who have

said the same thing. Listen instead to a founding member of the Federalist Society, Gary Lawson, who wrote the following several years ago.

"The Constitution," he says, "imposes no specific obligation on the Senate to act on the President's recommendations with respect to appointment or," he said, "even with respect to treaties. The Senate could simply refuse to consider or vote on all presidential appointments or treaties." Professor Lawson contrasts this, for example, with Article V of the Constitution, which is quite specific. Article V says that when the requisite number of states say so, Congress shall call a constitutional convention. So, as Professor Lawson points out, the Founders knew how to mandate action by the full Congress when they wanted to. They did not choose to do so with respect to Presidential appointments. And that, it seems to me, ends the argument from the perspective of the constitutional text.

But go further. Look further at some of what's been suggested. Look at the *U.S. v. Nixon* case, for example. Consider what the Constitution actually

says there. The Constitution says, "The Senate shall have the sole power to try all impeachments." It doesn't say the Senate Judiciary Committee. If there was ever an argument, in terms of literal reading, to say that it ought to be that the full Senate should act, it would be that.

But in fact, as Doug has conceded, the Supreme Court ruled that the full Senate did not have to sit over every minute of the trial, although of course they must do the final vote. Why is that? Because, again, the Constitution says so, quite explicitly. Two-thirds of the members must vote with respect to an impeachment. So, based on pure text of the Constitution, I think it is frankly a no-brainer that the Constitution does not require the full Senate to take action once the Senate Judiciary Committee has decided not to confirm a particular judicial nominee.

But apply this -- if you take Doug's theory seriously -- to what it would mean. Look at, for example, the literally tens and hundreds of nominations that have never been voted on at all. Look at what happened under the Clinton Administration, where,

between 1996 and 2000, just for the court of appeals alone, more than 40 percent of the people that the President nominated, never, ever got a vote. Was it a constitutional violation each time that didn't happen? Is the constitutional violation made worse because the committee acts and the full Senate doesn't act? Of course not. We argued strenuously, as did Senator Leahy, that the Senate should have acted on more of those nominees than they did. But the notion that it's a constitutional violation just doesn't cut it.

Look at some other examples. After all, the Constitution doesn't treat judges in one place alone. That advice and consent power applies to ambassadors and to all officers of the United States. So under Doug's theory, therefore, when the full Senate refused to vote on the nomination of William Weld as an ambassador, that was a violation of the Constitution. Somebody should have filed a lawsuit. James Hormel in fact was approved by the majority of the Committee that considered his nomination as an ambassador. There were only two votes against him in the Committee. Nonetheless, Senator Helms put a hold on his nomination and the full Senate

didn't vote on it. Was that a constitutional violation? I would have loved to have seen Doug file that suit for Ambassador Hormel.

My favorite example is Bill Lann Lee. Bill Lann Lee was nominated to the position of the head of the Civil Rights Division under President Clinton. And he didn't have enough votes to get out of committee. Democrats on the committee, and, by the way, Senator Spector, argued that the full Senate ought to consider that nomination. It seems to me, from a political perspective, there's a stronger argument for that than with respect to judges because, after all, officers are there to do the work of the President, and there's a pretty good argument that if the President doesn't have the people he wants to carry out his job, his job is being interfered with in a very direct way.

Here's what Senator Hatch, who now of course argues that the full Senate should vote on all of Bush's judicial nominees, said. He was asked, isn't this an issue of such importance that the full Senate should pass on it? Senator Hatch said, "No. That's what the Senate Judiciary Committees job is to do; to make these

determinations." We're the confirming committee, and if the person doesn't have the votes to come out of the committee -- and Bill Lann Lee did not -- that should end it." To quote my friend Doug, I guess that was then and this is now.

Now, with respect to the analogy to the Supreme Court, it is certainly true that the Senate, by tradition, has agreed to consider all Supreme Court nominations. That's a tradition that the Senate has had and that, frankly, I think the Democrats deserve credit for continuing, rather than the approbation that they've gotten. But with respect to previous nominees, if you look at the period -- and I look at the same Congressional Research-Service report that Doug does -- if you look at the period since 1980, there in fact have been six nominees to various courts -- Senator Sections was one of them; so was Kenneth Reiskamp and a number of others -- who were not able to get enough votes to get out of committee. Of those six, only one got a vote on the full Senate floor. As to the timing issue, Reiskamp was defeated in April. Bernard Siegan was defeated in July. I see no reason why you can argue that the

congressional calendar would have made it impossible to have voted on those folks. The fact is, there is no respectable constitutional argument for the position that the full Senate ought to be voting on each nomination that comes through. If it did, Senator Hatch, Senator Lott, and all the rest, committed more constitutional violations than I can count during the years 1996 to 2000.

That, I think, brings us pretty directly to the question that I think we all agree is an issue that ought to be looked at what do we do about the judicial confirmation issue? There is no question that what has happened since the mid-1990s has caused the situation to deteriorate quite significantly. To his credit -- whether or not it was because he was distracted by other things, I certainly can't say -- President Clinton did not, in his nomination process, make an attempt to push the judiciary as far to the left, one might say, as has been pushed by some of his predecessors to the right -- something that a number of my progressive friends were quite critical of President Clinton for doing.

For example, look at his Supreme Court

nominees of Ginsburg and Breyer. On both of those, he consulted with Senator Hatch, even when Senator Hatch was not chair of the Judiciary Committee, before he made those nominations. He continued that process of consultation with respect to lower court nominees. His reward was an unprecedented blockade that occurred, beginning in 1996. I gave some of the statistics for that before.

What's been the response of Senator Leahy? So far, since last July when Senator Leahy took over the Senate Judiciary Committee and when the full Senate became Democratic, 57 Bush nominees had been confirmed. That is three times the number that were confirmed in the first year of the first Bush Administration; more than twice the number than was confirmed in the Clinton Administration's first year. And if you compare it to years like 1996 when the Senate was under Republican control, it outclasses it incredibly. Do you know how many court of appeals nominees were confirmed in 1996 by the Republican controlled Senate? Zero. Not one. If there was anything that was a constitutional violation, I would like to see Doug take that case up to the

Supreme Court or some place else.

In fact, we can quibble about whether it's appropriate to look at numbers and percentages all day long. But the fact is, in reality, it is certainly true that the second President Bush has done a very good job, and I give those of you who have populated his counsel's office credit for nominating judges more quickly than his predecessors did on either the Republican or the Democratic side. But there's only so much time one has to process nominations. Even if they submitted 300 nominees, there would only be so much time to process those that have been through.

But if you don't like my numbers and you prefer Doug's percentages, let's look at one other statistic. That is the number of vacancies on the courts. In 1995, just before the Senate was taken over by Senator Lott and other Republicans here were about 65 vacancies on the federal courts. As of last July, just before Senator Jeffords' historic switch, the number of vacancies that resulted from all the delays that we've talked about almost doubled to 111. The number today, for the first time in more than six years, has been

reduced to 86.

So, I think that if you're looking at the actual performance of what has happened, the assertions that Doug has made with respect to Senator Leahy are some that he ought to take back. He won't, but he ought to, because Senator Leahy's done an excellent job at trying to deal with this issue.

What's the real solution? After all, it is certainly true that there are nominees that have been made by President Bush, that we have opposed, other groups have opposed, and I suspect members of the Senate Judiciary Committee will vote down. Some may even be voted down in the full Senate, depending on what happens in the future. But is there a way out of some of this? I think there actually is, if in fact your members in the White House, and the President, were truly as interested in solving judicial vacancies as in achieving other objectives.

The President announced when he campaigned that he was looking for judges and justices in the mold of Scalia and Thomas. Is it any wonder that Democrats and progressives are going to be skeptical, are going to

be concerned, with respect to nominees in that mold? But, if in fact -- and Senate members have pleaded with the Administration for this I don't know how many times -- the Administration were more interested in putting people through, conservative nonetheless, but not quite in that Scalia and Thomas mold, and tried to do some genuine bipartisan consultation, as President Clinton did with respsect to a number of district court and court of appeals nominees, I think you could increase the number of people confirmed still further. But as long as members of this Society and members of the Administration are more interested in pushing the Supreme Court and the federal courts as far to the right as Scalia and Thomas are, as long as they're more interested in that than in actually filling judicial vacancies, I predict this problem will not go away because we and others who care about this issue are equally determined to say that the federal courts should truly be an independent check, and should not in fact be captured.

Yes, it is true. The President has every right to take judicial philosophy into account when

making these nominations. But by that same token, so does the Senate have every right to take that into account in its processing. True peace will come if there is genuine bipartisan cooperation on this issue -- something we and others have called forever a long time. That doesn't just involve the Democrats and the Republicans in the Senate. It involves the Republicans in the White House, as well.

Let me end with one final note, the attack on Senator Leahy with respect to records of the Justice Department relating to nominees. I have to remind Doug that in the days of the William Rehnquist nominations, which occurred during Republican control, with respect to the Bork nomination, with respect to several other nominations, as was recently mentioned in the *Legal Times*, memos from the Justice Department have, in fact, been looked at in reviewing the nominees' qualifications, and I don't think that comes as any surprise. The notion that Senator Leahy is attempting a partisan witch hunt with respect to any particular nominee frankly does not have support in fact.

I think it would make much more sense to spend

less time debating the constitutional theory, which again, to borrow -- and use a little out of context -- Doug's word, is fanciful. It would make a lot more sense to spend less time debating that constitutional argument and instead talking about whether or not it is possible that maybe some genuine bipartisan cooperation could be found in a way that would, in fact, allow more of the vacancies to be filled without jeopardizing, in our view, the precious rights and liberties that the independent judiciary protects.

Thank you.

MODERATOR: Well, we've heard strong opinions, strongly held, and our format doesn't permit rebuttal, so no one's going to be leaping for anyone else's throat up here. But I think both of our speakers have given you, the audience, a target-rich environment.

(Laughter.)

MR. MINCBERG: Do you have a bull's eye that I could stand behind?

MODERATOR: Not just you by any means. I think that many people could have been surprised at the notion of where the Dean ended up with his litigation

suggestion.

So, questions. Gene.

GENE MEYER: I'm interested in whether Doug has a response on the constitutional question. It was a very interesting argument, but I wasn't sure how he'd respond to it. And I wanted to ask Elliot, I don't know the numbers, but of the number with Clinton, how many of that 40 percent that were nominated in that last three months before the end of term.

MR. KMIEC: My response to the textual argument that Elliot made would be this. I don't think there's any either textual or contextual support for drawing a distinction between the power to confirm and the power to consider. I believe Alexander Hamilton makes it plan in the Federalist Paper, and I'll just quote him, that " the President is bound to submit the propriety of his choice", not just for purposes of confirmation, but in Hamilton's words, to the discussion and determination of a different and independent body, namely -- again, quoting Hamilton in the specific -- "the entire branch of the legislature."

So, it's very clear to me from the reading of

the Federalist Papers and the arguments that Hamilton was seeking to reject -- namely, the argument in favor of a smaller group and a committee or a council -- that he was finding security in the size of the group and the nature of its deliberation, not just in terms of somebody that the smaller group likes as a result of cabal or intrigue, who managed to make it to the full Senate, and therefore you can now allow for the rubber stamp of the Senate floor action. That's not what was contemplated by our Founders, and I don't think that's what's envisioned by the text. So, that would be my answer to that, Gene.

I do think there is a difference, by the way, between *Nixon* and this case. The text of the *Nixon* case talks about the sole power to try impeachments. If ever there was language in the constitutional text that invites courts to stay out, sole powers language does that. And then you factor in the notion that the judiciary itself would have its function compromised by engaging in review -- you have to remember that the judiciary not only has an impeachment function, but it has the function of trying the criminal cases that often

parallel, as it did in Mr. Nixon's case. So, I think there are responses on both the textual as well as the precedential issue.

Elliot.

MR. MINCBERG: I'll answer Gene's question. With respect, Doug, I don't think your responses really cut it, particularly since it's clear that what Hamilton was talking about was a council that would have the power to approve nominees, which is a critical difference.

But with respect to Gene's question, I don't have the numbers in front of me, and we do have them on our report that we publish on our website. But I can recall a number of examples of people who literally waited years and years, sometimes without a hearing, sometimes without a vote. I think, for example, about the 5th Circuit. There were two nominees -- Jorge Rangel and Enrique Moreno, who collectively, between them, waited, I think it was something like three and a half years, without as much as a hearing. Both were nominated to the 5th Circuit Court of Appeals, in plenty of advance time prior to a Presidential election. And I

will say, at the time, beginning in very early 1996, and more recently in '99, even before 2000, some interest groups on the conservative side made quite clear their objectives. They wanted to stop any more nominees, as many as they could, because they wanted to preserve as many as possible for a potential future Republican president to fill. It didn't quite work out in '96. It did work out in 2000. And there's no question that stall had occurred for all that time, as I think Doug and I both agree, is part of what has hurt the atmosphere on that issue now.

MR. KMIEC: Although, let me suggest, we are now fully into the tit-for-tat marital dispute form of argumentation, which I think gets us nowhere.

MR. MINCBERG: No -- I was only responding to Gene's question on that. That is certainly not my reasoning. I am more than willing to say, just based on the text of the Constitution, this argument doesn't cut it.

MR. KMIEC: But Elliot, it seems to me that you made essentially two arguments. You made an argument that they did it to us -- argument number one -

- and the argument that the only way out of this impasse is if you give us people that we politically like. And the point, I think, of the President and the point of people advising the President is that this isn't a question of partisanship. This isn't a question of Republican or Democrat. This is a question of fidelity to the text and structure and history of the Constitution.

To the extent that there were delays on nominees in the Clinton Administration, most of those who were delayed were delayed because they had a record of judicial performance or a record that illustrated that they had a fascination with implied causes of action, for reading federal statutes in ways that could not possibly be governed by the text and that was largely governed by their own desire for a particular outcome.

It seems to me that those are two qualitatively different objections. One is an objection that says we want an outcome. We don't like the fact that states have certain immunity from certain federal causes of action; we don't like the outcome that the

Commerce power may have a limit to it; we don't like the outcome that people with religious beliefs do not have to be discriminated against in the context of federal programs. Those are objections that are basically political objections that have great resonance in the political convention but should have no resonance before a Senate Judiciary Committee.

MODERATOR: Elliot, why don't you respond. We are still on the first question.

(Laughter.)

MR. MINCBERG: I know that.

MR. KMIEC: It's a good question.

MR. MINCBERG: I find it fascinating that Doug decries the tit-for-tat and then proceeds to go right to it. The notion that the Clinton nominees were delayed because they were wacko judicial activists is frankly wacko. The two that I mentioned, Moreno and Rangel, no one raised an objection to that. Our current Attorney General, John Ashcroft, delayed a white-shoe litigator from Arnold & Porter, Margaret Morrow, for over three years without any evidence of judicial activism. But even if you believe those things to be true, if

anything, that would reinforce the notion that Democrats now have, that we need to be awfully careful about who comes in.

It is certainly true that President Clinton, for better or for worse -- and again, some of my liberal friends weren't too crazy about it -- did, in fact, take seriously the advice part of advice and consent, did take advice in advance of nomination. It is certainly not unconstitutional for President Bush to do the same. That kind of work, I think, would in fact bring us out of this problem.

AUDIENCE PARTICIPANT: Will the full Senate vote on nominees that have gotten out of committee?

MR. MINCBERG: I don't know. You'd have to talk to Senator Daschle about that. But again, I would be very surprised if the people who have been approved by the Committee are not voted on by the full Senate, at least by the time that they adjourn. Whether it's going to happen between now and July, I don't know. The President just yesterday asked the full Senate and House to, before they recess, agree on a major restructuring of the government and presumably to confirm whoever he

nominates to that particular position. They might be busy, but I would be very surprised if the people approved by the Judiciary Committee don't get full votes before Congress adjourns -- again, a marked departure from what happened prior to that when the Republicans were in control.

AUDIENCE PARTICIPANT: Would you agree that the legal issue of confirmation is the same for judicial nominations as Executive Branch nominees?

MR. KMIEC: I think textually, it is the same. I can't draw any distinctions based on just the plain reading of the text and, therefore, I would concede that point to Elliot. But I do think, to the extent that we are informed in our understanding of the text by Federalist Paper argument or by tradition that has followed from the beginning, that judicial nominees have been set out in a particular way both by the Founders and by the practice that perhaps does not extend to executive nominees.

It does seem to me, as Elliot's argument makes plain, that a good number of executive nominees have been treated differently; certainly far differently than

Supreme Court nominees, both by agreement and long-standing practice. Even though we may disagree as to the specific numbers, it's a very, very small number of lower court nominees who have been disposed of with finality by the Committee, in the sense of the Committee acting and then not reporting out to the full Senate.

There's a different number about the Committee not acting, and one can have a different debate about whether it's a more grievous constitutional violation to do nothing, or a more grievous violation to reach a conclusion in a deliberation and then not allow it to go forward.

MODERATOR: Roger.

AUDIENCE PARTICIPANT: Concerning the argument from Hamilton, and the cabal in New York -- is it not the case that that was raised in reference to the fear that the small group would act to confirm people, and therefore deprive the full Senate of its vote, and it cuts the other way when you're talking about denying? I see nothing in the Hamilton text that suggests that he was referring to a small acting committee denying; it's quite the other way around.

MR. KMIEC: Well, it's an interesting read, Roger, but I think you're reading something into Hamilton that's not there. Hamilton is talking about deliberation and determination and discernment. It seems to me that all those things, in discussion, can go in either direction. You can have a committee, as you have had, report a nomination favorably and the vast number of judicial nominees do get reported favorably over time in terms of historical practice. But you can also have nominees reported without recommendation and with negative recommendation. And there's nothing that I see in 76 or 77 of Hamilton that says he was talking about one case rather than another.

MODERATOR: Yes, in the back.

AUDIENCE PARTICIPANT: I'd like to direct a question to Dean Kmiec. What about the political questions doctrine? Bruce Ackerman and some Senators said that because of *Bush v. Gore*, President Bush shouldn't get involved in nominating Supreme Court justices. Even if you're correct that the Constitution is violated, is our recourse truly to be found in the courts? What about standing?

MR. KMIEC: You know, everything you have just said was encapsulated in the great hesitation that I kept articulating about turning to the courts. I think there is a violation. I think there is a good chance that if one filed the complaint, it would be treated as non-frivolous and not subject to sanction.

(Laughter.)

MR. MINCBERG: Does anyone want to take a bet on that one?

MR. KMIEC: On the other hand, I think the arguments you raise for nonjusticiability are powerful arguments that would have to be contended with. I don't think they are as powerful as they were in *Nixon*, as I have tried to distinguish *Nixon*, because of the different nature of the judicial role here, which is affirming a constitutional check and affirming the separation of powers without undermining other constitutional functions. In *Nixon*, you very much had, if you invited the judiciary in, to undermine its own function in terms of criminal cases, and also undermine its functions in terms of the check on the judiciary itself.

As the Chief Justice articulated in *Nixon*, if you involved the judiciary in the review of Senate convictions under the impeachment power, you're inviting their review not just of judicial officers but of all officers. And certainly, if you invite them of judicial officers, the single check on the judiciary has disappeared, so that's a different case.

Your question about standing is undeniable and would be one that would keep the lamp on the Dean's desk burning long and hard.

(Laughter.)

MR. KMIEC: But that does not deny the constitutional violation, even though it may be non-justiciable.

MR. MINCBERG: I just want to mention one specific thing about Doug's interpretation of the *Nixon* case, which again I think is just plain wrong. What the Court was called upon there to do was not to get involved substantively in whether Judge Nixon should be impeached, but just to enforce the Constitution's requirement, which according to Judge Nixon, required that the full Senate act at every stage on his

impeachment. And again, the text seems to be more with Judge Nixon on that issue than with Dean Kmiec on that issue. The Court nonetheless rejected it.

AUDIENCE PARTICIPANT: Consultations, conciliation and even compromise may be a better way to resolve some of these disputes.

MR. KMIEC: Well, as a constitutional matter, I think it is well settled, as Doug said in his opening remarks. But it is the President's prerogative to nominate. So, he does not have an obligation, as a constitutional matter, to consult.

MR. MINCBERG: Agreed.

MR. KMIEC: As a practical political matter, I think one would readily urge consultation in many cases. If that consultation is to be more fulsome -- to pick the word that Chuck Cooper used to use in the Office of Legal Counsel -- if it is to be more fulsome, I would think there ought to be some consideration given in response. Namely, we will consult in advance but the guarantee will be that every one of these people we consult about will go to the floor for the full, constitutionally-intended deliberation.

MODERATOR: We can't have reasonableness breaking out too much here. I mean, I thought the real response was the recess-appointment talk.

AUDIENCE PARTICIPANT: You made mention that procedurally, you should treat judges like ambassadors, that there is a textual basis for that. What are your views on blue slips?

MR. KMIEC: Well, my response to blue slips is I don't like them. I have as much dislike for the blue slip process as I do for committee final determination. I do think there was a helpful agreement reached to make at least the blue slips public. But that really tells you that you're about to suffer an injury and you are suffering an injury and it's not done anonymously; so, it's the difference between being mugged by someone you know and being mugged in the dark.

The fact of the matter is that I think they're both aconstitutional and not consistent with the argument that I've set forth.

MR. MINCBERG: Which again, if it true, would have meant that there were multiple constitutional violations by now Attorney General Ashcroft, Mr.

Sessions and many others during the Clinton Administration.

But what I was trying to talk about was the constitutional matter. Ambassadors, executive officers and judges are all in the same part of the Constitution. I don't think that translates necessarily into the Senate deciding to give the same deference to executive as to judicial nominees, or vice versa. As I pointed out, I think there's a stronger political argument that a president ought to get more deference with respect to people who are in his own administration. After all, they're only there as long as the president is. They're there specifically to fulfill his policy functions, as opposed to the judiciary, which is lifetime, an independent branch. And I think that is the tradition that has arisen in the Senate, and I think, frankly, that's a very good tradition, although I agree with you that the Constitution doesn't differentiate.

MODERATOR: Yes, sir.

AUDIENCE PARTICIPANT: I was trying to keep quiet.

(Laughter.)

AUDIENCE PARTICIPANT: On the issue of whether there is a constitutional requirement for the full Senate to act on judicial nominations, I heard no distinction until a moment ago between the Supreme Court and the other judges. The Constitution clearly allows, permits the Senate or the Congress to, by law, avoid the confirmation by the Senate, then Section 2 of Article II, except for ambassadors, other public officials, judges of the Supreme Court and other offices of the United States not herein provided, which shall be established by law, which includes all judges except those of the Supreme Court, as they think proper, and the President alone and the courts alone are in the heads of departments.

So, in other words, the Senate does not have to do it. They have an out, by law, if the Congress wishes to, to avoid having to confirm these people at all. There is clearly a distinction, though, here, and a question, too, between the justices of the Supreme Court and the judges of inferior courts.

MR. KMIEC: There is the distinction. Obviously, one Court is constitutionally created and

others are created pursuant to legislation. I don't believe the Constitution's ever been interpreted as -- I assume you're not arguing that Congress has the power to limit the terms of the federal judges that they appoint to Article III benches around the country.

MR. MINCBERG: No. I think the argument is that Congress could, by statute, say that for lower court judges, they shall be appointed consistently with the Appointments Clause, but in other vehicles than advice and consent.

MR. KMIEC: Well, I think it's a good argument and it's one that would need to be contended with. I don't think it defeats the argument insofar as one understands -- we still have an argument about what it means, in terms, to give advice and consent, and what the obligation of that is under the constitutional text.

AUDIENCE PARTICIPANT: The Constitution clearly provides an out. They can even let the President do it and other courts do it.

MODERATOR: Yes, sir.

AUDIENCE PARTICIPANT: Elliot speaks of the importance of cooperation and consultation, but I wonder

how serious the Democratic leadership would be. Didn't Senator Leahy say something, congratulating the President, that his first eleven nominees is a group we can work with?

MR. MINCBERG: The fact is, a number of those have in fact gone through, including, I should point out, some that Senator Leahy clearly would not have chosen. Edith Brown Clement, a member of this Society, conservative by any way, shape and form, was confirmed to the 5th Circuit Court of Appeals. But a number of them have not, and that's because a number of that first group are frankly among the most controversial nominees. Several of them will get hearings; there's no question about that, this year. The Senator has promised hearings, and I believe he'll deliver, at least with respect to Priscilla Owen, Miguel Estrada, and I think Mike McConnell, I think were the three specifically mentioned.

But, as Senator Mike DeWine once pointed out, the Senate can't operate first-come, first-served, because it would slow the process down even more. When subsequent to that first group, the President nominated

some folks -- actually a few of them, actally there was a little bit of bipartisan consultation. There were a number of people nominated after that first group who had consent or at least advice by individual Democratic senators.

Those people got through more quickly because, in fact, they were less controversial, it was easier to get them through, and given what Doug has talked about, about the needs of the courts, it made sense to prioritize that way. But that is unfortunately not the case with respect to a number of those first 11. A number of them are very controversial, very troubling, and I think the Senate is doing the right thing in processing them carefully. You'll find more about that on our website. I'm sure you'll disagree with it, but you'll find some of the reasons why a number of them, we think, are quite controversial.

AUDIENCE PARTICIPANT: I was just wondering if the distinguished speaker from People for the American Way believes that every single American citizen should be represented by a reasonable Senator who will move forward?

MR. MINCBERG: I think the American people certainly have the right, if they really care about this issue -- as someone has suggested -- to vote in a Senate that would do what you assert you want them to do. But in fact, President Reagan actually tried to do that -- some of you probably don't remember this -- in the '80s, tried to argue that because the Senate wasn't approving some of his judges fast enough, this is why the Democrats ought to be turned out, and it didn't work. There's no question, it's going to be tried again this year and we'll see what happens with that.

But I think that is no more true than it would be true to say that people have a right to demand, as a constitutional matter, to vote on James Hormel or Bill Lann Lee or many others. The notion that the full Senate must act on everything that the President sends up would paralyze the legislative process.

MODERATOR: We're going to take one more question and then we're going to end because we like to finish very promptly at this Society.

AUDIENCE PARTICIPANT: I just have a quick question for Mr. KMIEC. Do you argue that there's an

affirmative constitutional obligation for the Senate to consider all nominees? And Mr. Mincberg, would you place any limits on the Senate's ability to delegate the stop power?

MR. KMIEC: I think the first question is very difficult. There's a non-judicially enforceable constitutional duty for the Senate to take up nominees, but by virtue of the fact that it's not judicially enforceable, you're dependent upon the body of people that you've elected to perform the function.

MR. MINCBERG: I think it would be almost impossible to conceive the Senate giving away any of its power --

(Laughter.)

MR. MINCBERG: -- to an outside agency. So, I don't think we have to worry too much about that. There are some other aspects of the Constitution that we haven't delved into that might argue with respect to that, about giving the power to a body that wasn't elected by anybody. Certainly, the 19 senators on the Senate Judiciary Committee were elected by the people of their respective states.

MODERATOR: I want to thank both our speakers.

(Applause.)

MODERATOR: Maybe we can arrange a rematch after the fall elections. I want to thank all of you for coming.

(Whereupon, the panel was concluded.)