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Standards of the Supreme Court

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United States Senator

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STANDARDS FOR THE SUPREME COURT *

*The Honorable John Cornyn ***

One important lesson learned during this past election year is that the American people want a return to basic American values, and an end to vicious, Michael Moore-style politics. Certainly the last thing Americans want is yet another year of incessant, baseless, and venomous attacks.

But if liberal special-interest groups in Washington have their way, more vicious politics is exactly what the American people will get, particularly in the likely event of a vacancy on the Supreme Court of the United States.

* * *

The American people want judges and justices on the bench who will dutifully interpret the law—distinguished legal minds and devoted public servants who will help implement, not make, political decisions, and who know the difference between personal opinion and professional duty.

But some special-interest groups do not want that. Having failed to advance their policies democratically at the ballot box in November, these groups now hope to achieve their ends in the courtroom and to impose their views on the country by judicial fiat.

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** United States Senator (R-TX) and Chairman, Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, United States Senate; Attorney General, State of Texas, 1999–2002; Justice, Supreme Court of Texas, 1991–1997. B.A., 1973, Trinity University; J.D., 1977, St. Mary's University School of Law; LL.M., 1995, University of Virginia School of Law.

Of course, they will not say so in public. Instead, they will try to distort the records of this President's well-qualified judicial nominees in an effort to defeat their confirmation.

One favorite tactic has been to attack the two distinguished jurists whom President Bush has frequently heralded as models of jurisprudence: Antonin Scalia and Clarence Thomas.¹ The judicial philosophy of these two fine Justices—a philosophy that respects and promotes democracy and returns decision-making to the people and to the states, rather than set national policy by judicial fiat—has even been condemned as downright hostile to civil rights.²

But consider the source of these attacks.

These are the same groups who claim that your civil rights are being violated whenever a public-school teacher recites the Pledge of Allegiance,³ a county clerk issues a wedding license only to the union of one man and one woman,⁴ or a soldier allows a Boy Scout troop onto a military base.⁵

These are the same groups that seek judges who will ignore the three-strikes-and-you're-out law when sentencing convicted criminals,⁶ invalidate consensus laws like the partial-birth-abortion

1. See Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, at A24 (noting that Bush has "singled out Justices Antonin Scalia and Clarence M. Thomas . . . as justices whom he held in high regard").

2. See, e.g., Saveourcourts.org, *The Scalia-Thomas Record on Civil Rights and Equal Opportunity*, at http://saveourcourts.org/the_facts/scalia_thomas.html (last visited Jan. 23, 2005) (describing Justice Scalia and Thomas as having "extreme views" on civil rights issues).

3. See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004); see also Press Release, American Civil Liberties Union, *ACLU Urges Supreme Court to Uphold Ruling Removing the Phrase "Under God" from Pledge of Allegiance Recited in Public Schools* (Mar. 24, 2004), at <http://www.aclu.org/court/court.cfm?ID=15298&c=261> (last visited Jan. 23, 2005).

4. See Christina Bellantoni, *ACLU Sues to Allow Gay "Marriage,"* WASH. TIMES, July 8, 2004, at B1.

5. See Associated Press, *Military Bases are Told Not to Sponsor Boy Scout Troops*, WASH. POST, Nov. 16, 2004, at A8.

6. See Press Release, American Civil Liberties Union, *After High Court Upholds Harsh "Three Strikes" Sentencing Law, ACLU of Southern CA Vows Reform Efforts* (Mar. 3, 2003), at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=12054&c=52> (last visited Feb. 7, 2005) (stating that the ACLU national office and its California affiliate served as co-counsel for the defendant in *Lockyer v. Andrade*, 538 U.S. 63 (2003), one of two Supreme Court cases attempting to invalidate the California "three strikes" law). The Supreme Court also upheld the "three strikes" law in the *Andrade* companion case, *Ewing v. California*, 538 U.S. 11 (2003).

ban,⁷ and block school-choice programs designed to expand educational opportunities to minority communities.⁸

Moreover, their analysis of the law is as flawed as their views on policy. Consider these examples:

a) *Rights of the Accused*. The judicial philosophy of Justices Scalia and Thomas has led to numerous decisions favoring criminal defendants, notwithstanding the contrary views of some of their colleagues. In *Blakely*⁹ and *Apprendi*,¹⁰ they authored or joined 5-4 majorities recognizing a robust right to jury trial under the Sixth Amendment. In *Kyllo*,¹¹ Justice Thomas joined Justice Scalia's 5-4 majority opinion expanding Fourth Amendment protections against government searches based on new technologies.¹² Justice Scalia's dissent in *Maryland v. Craig*,¹³ decided before Justice Thomas joined the Court, championed a broader Sixth Amendment right of criminal defendants to confront their accusers than that ultimately adopted by the Court.¹⁴

b) *Employment Discrimination*. Fidelity to text and precedent has also led Justices Scalia and Thomas to favor employees in numerous employment discrimination cases. For example, they advocated a broader interpretation of the federal Age Discrimination in Employment Act favoring the employee, and dissented from the Court's decision in favor of the employer in *Cline*.¹⁵ Both Justices

7. See Press Release, American Civil Liberties Union, ACLU and National Abortion Federation Vow to Defend Federal Abortion Ban Victory as DOJ Pursues Appeal (Jan. 15, 2005), at <http://www.aclu.org/news/NewsPrint.cfm?ID=17333&c=148> (last visited Jan. 23, 2005) (discussing the ACLU's attempts to repeal the Partial Birth Abortion Ban Act of 2003).

8. See *Zelman v. Simmon-Harris*, 536 U.S. 639 (2002) (listing the ACLU and People for the American Way Foundation as co-counsel and ruling against these groups in holding that Ohio's scholarship program was not a violation of the Establishment Clause and that Ohio could continue providing tuition-assistance to qualifying students irrespective of whether the students attended religious or secular schools).

9. *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004).

10. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

11. *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that the use of a device that is not in "general public use" to explore the details of the home that would otherwise have been unknowable without physical intrusion qualifies as a "search" and is presumptively unreasonable without a warrant).

12. *Id.* at 40–41.

13. *Maryland v. Craig*, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting) (arguing that the Constitution provides "with unmistakable clarity" that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against them").

14. *Id.* at 859–60 (holding that permitting an alleged sexual abuse victim to testify by closed circuit television would not violate the alleged perpetrator's Sixth Amendment right to confrontation).

15. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 601–13 (2004) (Scalia, J., joined by Thomas, J., dissenting) (arguing against the Court's holding that the ADEA does not prohibit favoring the old over the young).

have authored a number of the Court's leading opinions faithfully construing race and sex employment discrimination laws in favor of employees, including *Oncale*,¹⁶ *Costa*,¹⁷ *Swierkiewicz*,¹⁸ and *Robinson v. Shell Oil*.¹⁹

c) *First Amendment*. Justice Thomas has been recognized by legal scholars across the political spectrum as a stalwart champion of free speech,²⁰ while Justice Scalia provided the critical fifth vote in *Texas v. Johnson*,²¹ the landmark flag-burning case issued prior to Justice Thomas's arrival on the Court. Justice Scalia joined Justice Thomas's 6-3 opinion in *Good News Club*²² ensuring equal access to public-school facilities by a religious group as a matter of free speech, as they had similarly held in *Rosenberger*.²³ And both Justices joined the Court's 5-4 decision upholding the ability of minority communities to enjoy educational choice, including equal access to parochial schools.²⁴

These and countless other decisions demonstrate how misleading it is to examine the work of judging through the narrow, partisan political lens advocated by these liberal special-interest groups. In fact, the job of a judge is to decide one case at a time, applying the existing law—whether a law written by Congress or a judicial precedent—to the facts, without regard to who wins or who loses. In other words, results-oriented decision-making is the oppo-

16. *Oncale v. Sundown Offshore Servs.*, 523 U.S. 75 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

17. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (concluding that a "mixed-motive" jury instruction is allowed so long as the employee can present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice).

18. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) (holding that in order to survive a motion to dismiss an employee only needs to state a claim upon which relief could be granted and not plead more facts than ultimately needed to succeed on the merits).

19. *Robinson v. Shell Oil, Co.*, 519 U.S. 337 (1997) (holding that the term "employee" in the Civil Rights Act of 1964 included former employees).

20. See, e.g., David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 487 (2002) (stating that "Justice Clarence Thomas has evolved into an ardent defender of commercial free-speech rights, becoming an even more forceful advocate for commercial speech than his luminous predecessor [Justice Thurgood Marshall]").

21. *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that burning the American flag is a protected form of political expression under the First Amendment).

22. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding that the exclusion of a religious group from a limited public forum was a violation of the group's free speech rights and that no Establishment Clause concern justified the exclusion).

23. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that the state university's exclusion of a student publication from participating in a student activities fund solely on the basis of the publications religious viewpoint was content discrimination and a violation of the First Amendment).

24. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

site of what a good judge does. No good judge twists the law or the facts to assure a particular outcome, and it is wrong for anyone to suggest that it is appropriate that they should.

Judges regularly find themselves on opposite sides of an issue; court decisions are often divided. Indeed, Justices Scalia and Thomas frequently disagree.²⁵

But it's offensive and wrong to say that one Justice is hostile to civil rights while another Justice is pro-civil rights, just because they happen to disagree from time to time. For example, it's wrong to say that the cases noted above prove that Justices Scalia and Thomas are pro-civil rights, while their brethren are anti-civil rights, just because they happen to disagree in those cases.

* * *

The American people also want a fair and reasonable process for deciding who shall serve on the Supreme Court. Under our Constitution, that means nomination by the President and confirmation by a majority of the Senate. Throughout our nation's history, every judicial nominee who has received the support of a majority of senators has been confirmed.²⁶

President Bush's nominees to the federal courts have enjoyed the support of a bipartisan majority of senators. Unfortunately, during this past Congress, a partisan minority of senators trampled upon two centuries of Senate tradition upholding the doctrine of majority rule. They have filibustered ten judicial nominees—for the first time in our nation's history—in order to prevent President Bush's nominees from receiving an up-or-down vote on the floor of the Senate.²⁷

25. See, e.g., Will Baude, *Brothers in Law?*, THE NEW REPUBLIC ONLINE (June 30, 2004), at <http://www.tnr.com/doc.mhtml?pt=Vyn1W0mi2qD22%2Fvce1byER%3D%3D> (last visited Jan. 23, 2005) (describing notable jurisprudential disagreements between Justices Scalia and Thomas, including the recent *Hamdi v. Rumsfeld* and *Ashcroft v. ACLU* decisions, and stating that "Thomas regularly breaks with Scalia, disagreeing on points of doctrine, finding a more measured and judicial tone, and calling for the elimination of bad law").

26. See, e.g., John Cornyn, *Our Broken Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 224–25 (2003) (listing the recent judicial nominees who garnered the support of fewer than sixty senators yet the Senate still acted to confirm the nominee by the necessary majority).

27. See, e.g., Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5; Carl Hulse, *Frist Warns on Filibuster over Bush Nominees*, N.Y. TIMES, Nov. 12, 2004, at A21.

Some Senators are now even claiming that they should have a role in selecting the next nominee to the Supreme Court.²⁸ The President, of course, is entitled to consult with whomever he wants, but cooperation is a two-way street, and one can certainly understand a president's reluctance to take advice from those who have obstructed his finest nominees.²⁹

Moreover, the Constitution is clear: The president, alone, nominates judges.³⁰ The Senate has an important advice-and-consent function, but that function applies only to the confirmation, and not the nomination, of judges.³¹ Much has been made of the word "advice," but as early Senate practice teaches, the Senate's constitutional function is simply to "advise" whether it considers a particular appointment to be a good idea and, separately, to "consent" to that appointment regardless of the Senate's own advice. (For example, when the Senate, for the first time, exercised its advice-and-consent function with respect to a treaty, it resolved "[t]hat the Senate do consent to the said convention, and advise the President of the United States to ratify the same.")³²

28. See Letter from Senator Edward M. Kennedy to President George W. Bush (June 25, 2003), reprinted in *From the Bag: Irrecusable & Unconfirmable*, 7 GREEN BAG 2d 277, 281-83 (2004), available at http://www.kennedy.senate.gov/index_high.html (last visited Feb. 2, 2005) ("I'm writing to express my hope that in considering potential nominees . . . you will consider the example of earlier Presidents who . . . fully respected the role the Framers gave the Senate to share with the President."); Letter from Senator Patrick Leahy to President George W. Bush (June 11, 2003), at <http://www.leahy.senate.gov/press/200306/061603.html> (last visited Feb. 2, 2005) ("I write to urge you to engage[] in meaningful consultation with Members of the Senate, including those in the other party, before deciding on nominees."); Letter from Senator Harry Reid to President George W. Bush (Dec. 3, 2004), at <http://reid.senate.gov/record.cfm?id=229302> (last visited Feb. 2, 2005) ("[T]he power to make lifetime appointments to the Supreme Court and the lower federal courts is a shared power."); Letter from Senator Charles E. Schumer to President George W. Bush (June 10, 2003), at http://www.schumer.senate.gov/SchumerWeb/site/pressroom/press_releases/PR01772.html (last visited Feb. 2, 2005) ("The Constitution dictates that federal judges be nominated by the President with the advice and consent of the Senate.")

29. Letter from Senator John Cornyn to President George W. Bush (June 17, 2003), reprinted in *From the Bag: Irrecusable & Unconfirmable*, 7 GREEN BAG 2d 277, 283-84 (2004), available at <http://cornyn.senate.gov/record.cfm?id=213077> (last visited Feb. 8, 2005).

30. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate . . . Judges of the supreme Court, and all other Officers of the United States.")

31. *Id.* ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . ."); see also John Cornyn, Editorial, *Advice and Consent -- After the Fact*, WASH. POST, July 1, 2003, at A12.

32. See 1 ANNALS OF CONGRESS 55 (Joseph Gales ed., 1834); see also David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 180 (1995) (describing the approval of the nation's first treaty, a consular agreement that Thomas Jefferson had concluded with France in November 1788).

When our last President, Bill Clinton, was presented with two vacancies on the Supreme Court, both of his nominees were given up-and-down votes and confirmed.³³ Neither was filibustered by a partisan minority—despite their clear liberal leanings. Both are distinguished jurists—one, a former general counsel of the American Civil Liberties Union who had written that traditional marriage laws are unconstitutional,³⁴ and the other, a former Democratic chief counsel of the Senate Judiciary Committee.³⁵

Should President Bush be presented with a vacancy on the Supreme Court during his second term in office, his nominee should be granted at least that same courtesy.

* * *

A vacancy on the Supreme Court could occur at any time. A retirement could be announced at the end of the Court's session in June or July. Or one could be announced in March or April, as was done in 1993 and 1994, thereby giving the President and the Senate additional time to consider a nominee. Finally, a vacancy could arise tragically due to a medical problem.

But whatever the time frame for a Supreme Court vacancy, the process for selecting a successor must reflect the best of our American judiciary, and not the worst of American politics.

33. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 316–26 (rev. ed. 1999) (describing the confirmations of Justices Ruth Bader Ginsburg and Stephen Breyer).

34. See *id.* at 319; RUTH BADER GINSBURG & BRENDA FEIGEN FASTEAU, REPORT OF COLUMBIA LAW SCHOOL EQUAL RIGHTS ADVOCACY PROJECT: THE LEGAL STATUS OF WOMEN UNDER FEDERAL LAW 72 (1974) (stating that bigamy law is “of questionable constitutionality since it appears to encroach impermissibly upon private relationships”); see also John Cornyn, *Restoring our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 17 n.50 (2003).

35. See ABRAHAM, *supra* note 33, at 323–24.
