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Debunking Double Standards

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DEBUNKING DOUBLE STANDARDS *

*The Honorable John Cornyn ***

At every new year, Americans traditionally reflect on the past, identify problems that need fixing, and adopt New Year's resolutions. In that same spirit, the Senate needs a New Year's resolution to fix its broken process for considering the President's judicial nominees. To do so, however, we must first recognize that liberal interest groups in Washington have prevented the Senate from confirming several of this President's judicial nominees for one simple reason: They don't want judges who will just apply the law as written.

These liberal interest groups want judges who will redefine marriage¹ and condemn the Boy Scouts,² expel the military from college campuses,³ and purge the public square of expressions of faith.⁴ They want courts to ignore the three-strikes-and-you're-out

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

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

3. See American Civil Liberties Union of New Jersey, *Defending Our Most Basic Freedoms, Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, U.S. Court of Appeals for the Third Circuit/Amicus, at http://www.aclu-nj.org/legal/legaldoCKET/free_speech/forumforacademicandinstitu.htm (last visited Feb. 21, 2005) (showing that the ACLU-NJ filed an amicus brief in *FAIR v. Rumsfeld* arguing that public law schools have a First Amendment right to bar military recruiters from their campuses and still enjoy the benefits of public funding).

4. See Brief of Amici Curiae of Americans United for Separation of Church and State, the American Civil Liberties Union, and People for the American Way Foundation et al. in Support of the Respondent, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (No.

law and give lenient sentences to convicted criminals,⁵ block school-choice programs designed to expand educational opportunities to minority communities,⁶ and require better treatment for terrorists than for ordinary Americans accused of a crime.⁷ They want judicial activists who believe that our civil rights are violated anytime a public-school teacher recites the Pledge of Allegiance,⁸ a county clerk issues a wedding license only to the union of one man and one woman,⁹ a terrorist is denied access to cookware or athletic equipment,¹⁰ or a Boy Scout troop is allowed onto a military base.¹¹

These groups want judges who will impose their agenda on the nation by judicial fiat—regardless of what the American people

99-2036); Brief of Amicus Curiae of People for the American Way in Support of Petitioners, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (No. 88-1597).

5. 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).

6. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In *Zelman*, various liberal interest groups coordinated an attempt to invalidate an Ohio scholarship program aimed at revitalizing the State’s struggling education system. *Id.* at 643–46. The interest groups argued that the scholarship program violated the Establishment Clause by providing a portion of the available tuition-assistance to qualifying students enrolled in private religious schools. *Id.* at 648–49. The Court held that the program was entirely neutral with respect to religion and that it provided benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. *Id.* at 662–63. In addition, the Court held that the scholarship program permitted individuals to exercise genuine choice among options public and private, secular and religious and therefore was not a violation of the Establishment Clause. *Id.*

7. See, e.g., Amnesty International, Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, Apr. 15, 2002, <http://web.amnesty.org/library/Index/ENGAMR510532002> (“Amnesty International believes that those captured and held by the USA during the conflict in Afghanistan must be presumed to be prisoners of war, whether they belong to the Taleban or *al-Qa’ida*. The Taleban were effectively the armed forces of Afghanistan when the US military operations began in October 2001, and *al-Qa’ida* fighters appear to have been an integral part of such forces, thus fulfilling the requirements of Article 4(1) of the Third Geneva Convention.”).

8. 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).

9. See Christina Bellantoni, *ACLU Sues to Allow Gay “Marriage,”* WASH. TIMES, July 8, 2004, at B1.

10. See *supra* note 7; see also Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 26 & 38, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.unhcr.ch/html/menu3/b/91.htm> (last visited Feb. 21, 2005).

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

have said at the ballot box. And they will do anything to oppose judges who will not blindly rule in their favor.

The commencement of a new Congress this week provides the perfect opportunity for senators to resolve to reform the judicial-confirmation process. An important first step in reform, however, is recognizing that these liberal interest groups have invented a series of double standards to defeat this President's judicial nominees. The Senate must resolve to reject these absurd double standards and restore fair and traditional standards in the coming year.

I. MAINSTREAM VIEWS

First, liberal interest groups claim that judicial nominees must hold "mainstream," and not extreme, views.¹² Yet they applied a very different standard to Democrat nominees.

For example, prior to her service on the federal bench, Justice Ruth Bader Ginsburg—a distinguished jurist and liberal favorite—served as general counsel of the American Civil Liberties Union,¹³ a liberal organization that has championed the abolition of traditional marriage laws and attacked the Pledge of Allegiance.¹⁴ Before becoming a judge, Ginsburg expressed her belief that traditional marriage laws are unconstitutional, but that prostitution is a constitutional right.¹⁵ She also wrote that the Boy Scouts and Girl Scouts are discriminatory institutions,¹⁶ that courts must require the use of taxpayer funds to pay for abortions,¹⁷ and that the

12. See Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5 (discussing how Democrats desire judicial nominees to be within the "political mainstream").

13. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 319 (rev. ed. 1999).

14. See *supra* notes 8–9 and accompanying text.

15. See RUTH BADER GINSBURG & BRENDA FEIGEN FASTEAU, REPORT OF COLUMBIA LAW SCHOOL EQUAL RIGHTS ADVOCACY PROJECT: THE LEGAL STATUS OF WOMEN UNDER FEDERAL LAW 72, 190–91 (1974) (stating that bigamy law is "of questionable constitutionality since it appears to encroach impermissibly upon private relationships" and that "[p]rostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions"); see also John Cornyn, *Restoring our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, 17 n.50 (2003).

16. See SEX BIAS IN THE U.S. CODE: A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 145–46 (1977) ("The Boy Scouts and Girl Scouts . . . perpetuate stereotyped sex roles"). This report was authored by Ruth Bader Ginsburg and Brenda Fagen Fasteau. For a more detailed analysis of this report and Justice Ginsburg's views on related issues, see Phyllis Schlafly, *How the Feminists Want to Change our Laws*, 5 STAN. L. & POL'Y REV. 65 (1994).

17. See Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1976 Term*, in

age of consent for sexual activity should be lowered to age twelve.¹⁸

Needless to say, many Americans do not consider these views to be mainstream—yet Senate Republicans and Democrats alike set aside such concerns and approved her nomination to the Supreme Court of the United States by a 96-3 vote.¹⁹ By contrast, this President's judicial nominees—who hold views shared by millions of Americans and enjoy the support of a bipartisan majority of senators—suffer vicious attacks and unprecedented obstruction at the behest of liberal interest groups.

All senators should reject this double standard. We should consider nominees on the basis of their qualifications and judicial temperament—and not on the basis of some distorted conception of the political mainstream. We should examine their commitment to applying the law *regardless* of their personal beliefs—and not the actual content of those beliefs. And we should consider nominees based on the mainstream support of a bipartisan majority of the Senate—rather than the virulent opposition of a partisan minority of senators.

II. ABORTION POLITICS

Second, liberal interest groups claim that this President's judicial nominees must swear allegiance to certain views with regard to abortion.²⁰ Yet once again, they apply a very different standard to Democrat officeholders.

With the blessing of these groups, Senate Democrats have unanimously elected Senator Harry Reid as their new leader—even though he says he personally opposes abortion and has re-

CONSTITUTIONAL GOVERNMENT IN AMERICA 217–24 (1980) (criticizing the Supreme Court rulings denying the right to public funds for abortions and asserting that the restrictions on public funding for poor women is a “stunning curtailment” of women’s rights); *see also* Schlafly, *supra* note 16, at 70–71 (concluding that based on Justice Ginsburg’s publications and speeches, Justice Ginsburg believes that the government “has an affirmative duty to fund abortions”).

18. *See* SEX BIAS IN THE U.S. CODE, *supra* note 16, at 102 (“[We must] eliminate the phrase ‘carnal knowledge of any female, not his wife who has not attained the age of sixteen years’ and substitute a federal, sex-neutral definition of the offense. . . . A person is guilty of an offense if he engages in a sexual act with another person . . . [and] the other person is, in fact, less than 12 years old.”); *see also* Schlafly, *supra* note 16, at 68–69.

19. *See* ABRAHAM, *supra* note 13, at 319.

20. *See* Charles Babington & Mike Allen, *Two Issues May Deeply Divide Next Congress; Parties Are at Odds over High Courts, Social Security*, WASH. POST, Jan. 3, 2005, at A1 (discussing how “many liberal groups” will press Democrats to filibuster any of President Bush’s nominees that are opposed to abortion).

peatedly refused to support *Roe v. Wade*.²¹ Such personal views are shared by millions of Americans and certainly should not be a basis for denying high public office to otherwise qualified individuals. Yet these groups have done precisely that to several of this President's judicial nominees.

These groups have it exactly backwards. If anything, one's personal opinion on abortion (or any other issue) is even less relevant for judicial nominees than for United States senators. Judges are duty-bound to follow the law regardless of their personal views. By contrast, legislators are elected precisely because of their personal political views.

It is also worth noting that, while *Roe* has been on the books for over thirty years, the American people continue to support parental notification and consent laws and other consensus laws like the partial-birth-abortion law, and oppose mandatory public funding of abortion. Yet liberal interest groups file lawsuit after lawsuit demanding that judges reverse these popular and democratically enacted policies by judicial fiat,²² and they oppose the appointment of judges who will not blindly rule in their favor.

Senators should consider judicial nominees on the basis of their qualifications and commitment to applying the law as it is written—regardless of their personal views on abortion or *Roe*—just as Senate Democrats recently set aside such views in electing their leader.

21. See 145 CONG. REC. 26,389 (1999), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=1&vote=00337 (last visited Feb. 2, 2005) (showing that on October 21, 1999, Senator Harry Reid voted against the Harkin Amendment which endorsed the Supreme Court's decision in *Roe v. Wade*); 149 CONG. REC. S3600 (daily ed. Mar. 12, 2003), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00048 (last visited Feb. 13, 2005) (showing that on March 12, 2003, Senator Harry Reid voted against the Harkin Amendment for a second time); see also Charles Babington, *Reid Vows to Stand Up to the GOP Issues*, WASH. POST, Dec. 19, 2004, at A1 (noting that Senator Reid "differs from his party's orthodoxy" with regard to abortion and he has voted to ban partial-birth abortions and is one of two Democrats to "oppose an amendment expressing support for the Supreme Court's 1973 *Roe v. Wade* decision").

22. See Brief of Amici Curiae in Support of Respondent for People for the American Way Foundation et al., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (No. 99-830), available at http://www.naral.org/facts/stenberg_amicus.cfm (last visited Feb. 7, 2005) (challenging partial-birth abortion laws); Brief of Amicus Curiae of 178 Organizations in Support of Planned Parenthood of Southeastern Pennsylvania, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 & 91-102) (challenging parental consent laws); Brief of Amici Curiae of the American Civil Liberties Union et al., *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (challenging denial of government funding laws).

III. SENATE TRADITIONS

Third, liberal interest groups insist that it should take a supermajority of sixty senators to confirm a judicial nominee, and they viciously attack any effort to restore the traditional rules for confirming judges as a “nuclear” tactic. Yet it is their radical re-writing of Senate rules—rather than the attempt to restore constitutional traditions—that is so destructive.

The rules governing the judicial-confirmation process should be the same regardless of which party controls the White House or the Senate. They should not be subject to the whims of liberal interest groups. Yet every judicial nominee who has enjoyed the support of a majority of senators has been confirmed—until now.²³

The Senate should reject this double standard and restore our constitutional and traditional standards for confirming judges. No one would say that, although fifty-one percent of voters can elect a Democrat to office, a sixty-percent vote is required to elect a Republican to office. Likewise, our Constitution and Senate tradition provide that a majority of senators may confirm a judicial nominee, whether the president is a Democrat or Republican. Indeed, throughout history the Senate has consistently confirmed judges who enjoyed majority but not sixty-vote support—including Clinton appointees Richard Paez,²⁴ William Fletcher,²⁵ and Susan Oki Mollway,²⁶ and Carter appointees Abner Mikva²⁷ and L.T. Senter.²⁸

Yet liberal interest groups now demand that this President’s judicial nominees must be supported by a supermajority of senators, or else be denied even the courtesy of an up-or-down vote, through the unprecedented use of an obstructionist tactic known as the filibuster.²⁹ Such tactics are dangerous to the rule of law because they politicize our judiciary and give too much power to special interest groups. As law professor Michael Gerhardt, a top Democrat adviser on the confirmation process, once wrote, a supermajority rule for confirming judges “is problematic because it

23. See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 224–26 (2003).

24. See *id.* at 225.

25. See *id.*

26. See *id.*

27. See 125 CONG. REC. 26,049 (1979) (confirming Judge Mikva by a vote of 58-31).

28. See 125 CONG. REC. 37,474 (1979) (confirming Judge Senter by a vote of 43-25 with thirty-two senators absent for the vote).

29. See, e.g., Cornyn, *supra* note 23, at 192–97.

creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of the special interests."³⁰

There is nothing sacrosanct about the obstructionist tactic known as the filibuster. In fact, there are at least twenty-six laws on the books today which abolish the filibuster in a number of policy areas and thereby ensure that a majority of senators is sufficient to take action.³¹

Nor is there anything extraordinary about a majority of senators acting to craft Senate rules and procedures. The constitutional authority of a majority of senators to strengthen, improve, and reform Senate rules and procedures was expressly stated in the Constitution,³² unanimously endorsed by the Supreme Court of the United States over a century ago,³³ and dutifully supported and exercised by the Senate on countless occasions ever since, as carefully documented in the next issue of *The Harvard Journal of Law & Public Policy*.³⁴ Such authority has also been recognized—indeed, praised—by leading Senate Democrats, including Robert Byrd³⁵ and Ted Kennedy.³⁶ And Senator Charles Schumer ac-

30. Michael Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 398 (1994).

31. See Cornyn, *supra* note 23, at 212–14.

32. See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings.”).

33. See *United States v. Ballin*, 144 U.S. 1 (1892).

34. See Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205 (2004).

35. *Id.* at 207–08. Senator Byrd is quoted as saying:

The first Senate, which met in 1789, approved 19 rules by a majority vote. Those rules have been changed from time to time So the Members of the Senate who met in 1789 and approved that first body of rules did not for one moment think, or believe, or pretend, that all succeeding Senates would be bound by that Senate. . . . It would be just as reasonable to say that one Congress can pass a law providing that all future laws have to be passed by two-thirds vote. Any Member of this body knows that the next Congress would not heed that law and would proceed to change it and would vote repeal of it by majority vote.

Id. (citing 125 CONG. REC. 144 (1979) (statement of Sen. Byrd)).

36. See, e.g., 121 CONG. REC. 3850 (1975) (statement of Sen. Kennedy). Senator Kennedy stated that,

The notion that a filibuster can be used to defeat an attempt to change the filibuster rule cannot withstand analysis. It would impose an unconstitutional prior restraint on the parliamentary procedure on the Senate. It would turn rule XXII into a Catch XXII. It would give the two-thirds filibuster rule itself an undesirable and undeserved new lease on life.

Mr. President, the immediate issue is whether a simple majority of the Senate is entitled to change the Senate rules. Although the procedural issues are complex, it is clear that this question should be settled by a majority vote.

Id.

knowledge of the legitimacy of such authority at a Judiciary subcommittee hearing I chaired just two years ago.³⁷

Liberal interest groups have disparaged the authority to restore Senate traditions by majority vote as a “nuclear” tactic. But what is truly nuclear is the radical alteration of the Senate confirmation process—not the attempt to restore Senate tradition by traditional means.

* * *

Two years ago, all ten Senate freshmen, Republican and Democrat alike, joined to declare that the Senate’s confirmation process is badly broken and that we need a fresh start.³⁸ Restoring the Senate’s judicial confirmation process by using honest and fair standards and procedures for judging nominees, and repudiating the extreme double standards perpetrated by liberal interest groups in Washington, would be an excellent start.

37. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 60 (May 6, 2003), available at <http://www.gpoaccess.gov/databases.html> (last visited Feb. 4, 2005).

Mr. KMIEC. . . . The real constitutional injury here . . . is the entrenchment of rules being imposed from one body onto the next.

Senator SCHUMER. Which could be changed by majority vote.

Mr. KMIEC. And should be changed by majority vote . . .

Senator SCHUMER. Right. That is why—I do not know why you say “imposed,” because . . . the 51 Senators of the majority could propose changes in the rules.

Id. (emphasis added).

38. A copy of this letter is available on my website at http://www.cornyn.senate.gov/doc_archive/JCP/Letter%20to%20Senators%20Frist%20and%20Daschle.pdf (last visited Jan. 26, 2005). See also Cornyn, *supra* note 23, at 229–30.

RESPONSE FROM SENATOR DURBIN
