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A BROOKINGS JUDICIAL ISSUES FORUM

"CAN AN INDEPENDENT JUDICIARY BE ACCOUNTABLE?"

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P R O C E E D I N G S

MR. TAYLOR: Well, I guess we'll start. I'm Stuart Taylor, and our forum today is entitled "Can an Independent Judiciary Be Accountable?"—which is a catch-all, I hope, to cover a lot of ground that's on the front pages these days. Why is the judiciary so reviled in Congress? What's the role of the appointment process as a form of democratic accountability? The conflict over the filibustering of nominees, efforts, especially in the House of Representatives, to strip federal courts selectively of jurisdiction over certain issues, and even talk of impeaching judges for perceived usurpations of power.

We have six leading experts up here with me today who bring a very broad range of perspectives to bear on these issues, and I will introduce them in the order in which they will make their initial remarks. Our hope is to have initial remarks by each panelist of no more than five minutes, and then I will ask questions of them for another 40 minutes or so, and that should leave 45 minutes or so, or as much as it as we can use, for questions from the floor. We have a full two hours if we need it.

The first speaker—and rather than just introduce everybody in a bunch, I'll just introduce them as they speak. Our first speaker will be Sarah Binder, who is a Senior Fellow in Governance Studies at Brookings and a Professor Political Science at George Washington University, and she's going to give us some broad perspective on the fights that are going on today. Sarah?

MS. BINDER: Thanks, Stuart. Thanks for including me.

I thought I would open up our discussion today by offering a couple of observations about this tension or balance between accountability on the one hand and independence of the judiciary on the other.

I should start off by noting these aren't easy terms to define, and chances are we'll be using them differently over the course of the morning. At times we refer to the independence of particular judges or accountability of particular judges. Other times we're referring to the courts as an institution.

But I think it's important, regardless of how we're using the terms "independence" or "accountability," to recognize that it isn't an either/or proposition. We have neither had historically nor today an entirely independent court system, but neither have we have an entirely accountable court as well.

Many scholars like to think of the tension or the balance between these two values. I think sometimes it's more fruitful to think about a zone of independence within which judges do their work. It's a zone that's been constructed first by the Constitution in terms of lifetime tenure for judges as well as salary protections, but it's a zone that's also been constructed politically by Congress and the President over the course of U.S. history.

So let me just say a couple things about the parameters of that zone, the nature of the independence we give to judges, and then speculate a little bit about why we have this protected zone for judges and their actions.

First, in terms of the parameters of the zone of independence, it seems to me that Congress and the President, particularly the Senate and the President, have really used two rules to guide them in constructing the zone. First is simply a hands-off-the-

courts norm of independence, coupled with a system of up-front or prospective accountability through the appointments process that I'll come to in a moment.

First, in terms of the norm of this hands-off the courts, what do we mean? Well, first, and most importantly, it's been understood to mean that a judge's judicial acts should not be used as the basis or serve as the basis for impeachment. Chief Justice Rehnquist pointed to this actually in his end-of-the-year remarks on the state of the judiciary when he said, "Any other rule really would destroy judicial independence," that we have to give judges their space for making decisions.

Why is independence held to be so important? I don't think so much as an end in itself but, rather, as a means to securing the legitimacy of the judiciary. We have unelected judges in a democratic political system, and they have to be seen as being above politics in order to ensure that their rulings are, first of all, respected and then obviously implemented. This hands-off-the-courts norm is also extended to overt acts of court packing, FDR in the 1930s, jurisdiction stripping, changes in the structure of the courts and so on. Not that legislators haven't tried to rein in the courts periodically, but successful efforts have been relatively rare.

So we have this generally respected norm of hands off of the court. Where does accountability come in? As I said, we really have a system of prospective or up-front accountability exercised through the appointments process. The face of the judiciary is really shaped up front or primarily shaped at the moment of appointment. And here it's important to note—and I think we'll probably come back to this—that conflict over judges is not new. It certainly reached new heights or at least new public salience in the last couple of months, if not last year or two. But the appointment

process as a means for Presidents and their party to put an imprint onto the federal bench, that is not new. That has been with us historically, at least since Andrew Jackson in the 1830s and the advent of political parties.

Nominees have been contested in the past. It has not been quite as visible as it was the last month, but obstruction wasn't invented by Democrats in 2001, nor was it invented by Republicans in 1995.

Let me just wrap up with an observation about why the norm of hands off the courts has been respected for so long, if not, in fact, expanded. My sense is that the norm flows from a basic political idea of political uncertainty—uncertainty about who will wield public power or public authority in the future, as well as uncertainty about where the most important venues and which public policy will be made. Will it be Congress? Will it be the courts? Will it be the states over time?

And with that type of uncertainty, legislators have largely hewn close to this norm of hands off the courts, and very limited effort to impose accountability beyond the appointments process. Why? Because they never know when the tools of accountability will be used in the future against judges and courts with whose rulings you actually agree. And instead we've really settled for this up-front and, thus, necessarily imperfect means of accountability through the appointments process. And, again, it's imperfect—David Souter, Earl Warren are obvious examples.

Two implications to wrap up from these observations: first, I think legislators should be wary of trying to impose stronger means of accountability on the courts for the reasons I suggest. And, second, we as well as the public probably should expect, if not welcome, serious contest and contentious debate over the makeup of the

federal bench, particularly as the courts have become more important to the making of public policy over recent decades.

If we're unhappy about the ways in which the appointment process is playing out, whether or not you support or oppose these judicial filibusters, I think we need to think about mechanisms of changing the appointments process that take account of this political uncertainty about the future, and that harness or respect the future interests of both political parties over the shape of the bench.

I'll stop right there.

MR. TAYLOR: Thanks very much, Sarah.

There is a school of thought that the courts have taken some great liberties with the independence they've been accorded through our history, and one of the most eloquent of these is Michael Greve, who is second to my left, and he will speak next. He's the John G. Searle Scholar at the American Enterprise Institute. Mike?

MR. GREVE: Thanks, Stuart. I'll start where Sarah just ended, which is the increased public policy role of the federal courts.

It's fashionable now to bemoan how controversial and contentious this process, nominations process, has become, how many attempts there are to "curb the courts." But I think the source of those conflagrations and contentions is perfectly obvious.

As Justice Scalia has explained, if you have a court that doesn't even try to act as a constitutional interpreter, if you have a court that tries to be the moral conscience of the nation, people will in the end, at the end of the day, insist on accountability, not just ex ante for the nominations, but also ex post.

If you try to run the democracy from the federal bench, people will insist on democratic controls. As you just saw in Europe, even the French don't agree to being governed by an unaccountable elite. Americans will never do so. And my sense is that no institutional noodling, no call for restraint, no different partisan alignments, no changes in the appointments process will ever change that until the underlying court dynamics change.

To be even clearer about this, there is one decision in 1992, *Planned Parenthood v. Casey*, where the Supreme Court explained, look, we cannot retreat from *Roe*, we must stand firm, and you, the people, will be tested by following. And when the Supreme Court said that, Justice Scalia wrote in dissent, look, that's a Nazi jurisprudence, this is not America.

And people, I think, thought, whoa, that was completely over the top. But I think he really meant it, and I think he had, with all due respect to the court, he had a point. If you have a Nietzschean jurisprudence, you will eventually get a Nietzschean politics, which is now what we have.

Now, can you find any way out of that? And I think it's at the same time very easy and next to impossible. The easy way out is one single sentence in one single Supreme Court decision saying, "There is no constitutional right to abortion." What that would mean is that the advocates on both sides would have to go elsewhere because the questions will be decided elsewhere; because what the nominees think about those kinds of matters would no longer matter. It's true that even under that approach there are some very, very contentious constitutional issues that you can't get rid of in that way. The role of religion in public life is one of those. It's very hard for me to imagine that there's

some equilibrium rule on which sort of the contending forces, left and right, could come to rest. But with that one exception, probably most of the issues and most of the advocacy groups and most of the contention would go away once you overrule *Roe v. Wade*, once you overrule the gay rights decisions, which would naturally follow in that line of reasoning

The hard part, of course, and the next-to-impossible part is you can't get from here to there. Obviously, one judicial replacement, if it's Chief Justice Rehnquist, wouldn't change anything. Even two judicial replacements probably wouldn't change very much because it would mean a 5-4 decision or something in that vicinity, which won't end the contention. To settle these matters, you really need a sufficiently conclusive ruling to make everybody go away. And that is not going to happen because you'll have Justice Souter, you'll have Justice Breyer, Justice Ginsburg, Justice Kennedy on the other side. No matter what happens, they're going to be around for decades. And in the interim, there just simply is no constituency for judicial restraint across the board.

I ask you to imagine sort of a judge who across the board advocates, in a principled fashion, a much smaller role for the courts in American society—a judge who says, "I believe that *Roe* was wrongly decided; a judge who says, "I believe that *City of Boerne* was wrongly decided," and that's a case that greatly expanded the role of the court vis-à-vis the Congress under the 14th Amendment. And I believe *Bush v. Gore* was deeply, deeply problematic. You don't actually have to imagine such a judge because there is one, and he's constantly mentioned as a potential candidate. That's Michael McConnell. But I think it's even unlikely that he'll be nominated because of all his anti-conservative heresies. And I think if he were nominated, it would not be a

Hosanna cry, Alleluia, someone for restraint at long last. It would be an absolute bloodbath. So there will be continued agitation, I think, over the coming years. I can't think of a way to calm this down at all, and I look at it as just sort of the cost of having the Supreme Court that, in fact, we have.

MR. TAYLOR: Thank you, Mike.

Well, coming from—that's from the conservative perspective, sounds a little bit pessimistic about the future of this debate, but I sense some alarm from the liberal perspective every time I get a press release from People for the American Way. And we have one of their best scholars, Elliot Mincberg, here to explain their perspective on this. Elliot?

MR. MINCBERG: Thank you very much, Stuart.

You know, after the confirmations that we've seen over the last five years, and in particular over the last week, some might ask: Does People for the American Way still truly believe in judicial independence? The answer is that we do. It remains very important no matter who winds up being on our bench, but it emphasizes the importance of the proper forms of accountability and checks and balances with respect to our judicial branch.

Contrary to what Mike just said, attacks on the judiciary because of the content of individual decisions didn't start with Roe v. Wade, haven't been focused on that issue. We can go back to 1954 where there were signs of "Impeach Earl Warren" all across the South as a result of the Brown v. Board of Education decision.

Ten years ago, Tom DeLay—not an unfamiliar figure on these issues—was calling for impeachment of federal judges, attacking judges for, among others, a

temporary decision from one judge in California temporarily suspending an anti-affirmative action ordinance.

And today, what has been the biggest cause of the latest attacks, the claim that not only should we impeach judges, not only should we take away their chambers and their law clerks, but some suggestions that go, unfortunately, even further than that? It was the Terry Schiavo case, where Congress intervenes in what is clearly a state, local, family decision with a new federal law, 22 federal judges consider it, most of them appointed by Republican Presidents, all but one turned down Congress' invitation. And the answer from the right is: My God, those judges didn't do what we told them to do; we need to do something about that.

It's that kind of attack on the independence of the courts that we so vehemently oppose and that, frankly, I think is not going to be solved even if someone took the terrible invitation that Mike seems to be suggesting: Let's just overturn Roe v. Wade and one or two other decisions, and then we won't have any fight about this issue anymore. Believe me, there will be fights, no matter whenever we have an independent judiciary making these decisions.

Now, the Framers, in our view, really got it right. They talked about the two political branches, the executive and the legislative, having equal power when it comes to appointing the third branch, and that that branch would not be accountable in the political sense in terms of standing for election, but would indeed be folks that would be appointed by the other branches and have other kinds of constraints. Why not have them be subject to election? You can ask the question about what happens when there's a controversial call in a Yankees-White Sox game? Forgive me for saying White Sox,

but I am from Chicago. And asking: Why not have the players on the field vote whether the umpire should be thrown out if they don't like his call? That's essentially what's being argued by many of those who argue against judicial independence today.

But there are important measures that do, in fact, provide checks and balances and a different form of accountability for the courts. First, there's within the court system. Every lower court judge is subject to appeal. The judge that DeLay and others attacked in 1996, his decision was overturned by the courts of appeal. There is some internal accountability, which goes all the way to the Supreme Court, where, as the famous expression goes, it takes five not one judge to make a ruling.

Second, there is indeed post facto action that can be taken by Congress, by the legislative and democratically elected branches. For example, the 1991 Civil Rights Act overturned five to six U.S. Supreme Court decisions that narrowly interpreted federal employment discrimination law. Congress did it then. It can do it again, even with respect to constitutional decisions. If necessary, as a last resort there is always the possibility of a constitutional amendment, but Congress and others have very creative ways to get around court decisions to come up with other ways to achieve their legislative and other objectives without taking the drastic step of trying to impeach or attack, sometimes suggested almost physically, federal judges for the decisions they make that some don't like.

But in many ways, perhaps the most important kind of accountability, as Sarah talked about is the accountability that comes through the appointment process, through the fact that we have co-equal roles by the two branches in determining who should become lifetime federal judges. And the importance of doing that in a vigorous,

effective way has never been more convincingly demonstrated than what we've seen quite recently.

The fact of the matter is America does work best when no one party has absolute power, and that's why in our view methods like the filibuster and others that are important to ensure that there is consensus when it comes to judicial nominees is so important.

I'll talk about something that one of my colleagues from another organization said—not exactly an allied organization, but one that usually opposed us on judicial nominations. "The difference between having the filibuster and not," said Sean Rushton of the Committee for Justice, "could be the difference between President Bush picking an Antonin Scalia and an Anthony Kennedy for the U.S. Supreme Court." And I think that's exactly right. And I think it's why it's important to preserve mechanisms like the filibuster that will hopefully produce more consensus in our judicial nominations, less polarization, which, unfortunately, we've seen as some at the White House have figured out this is a great political issue to rev up their base, and a mechanism to be sure that we will get fair, open-minded judges in the future for whom judicial independence can and should remain an important reality.

Thanks, Stuart.

MR. TAYLOR: Thank you, Elliott. Some of the most forceful criticisms of the judiciary lately have come from the House of Representatives, and in particular from the Judiciary Committee.

We're fortunate to have Jay Apperson, who's Chief Counsel of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, to talk about that perspective. Jay.

MR. APPERSON: Thank you. I'm the least qualified, least brightest guy up here or person up here, so I'm very privileged to be here, as Stuart said, and I guess my role is to be a bomb thrower, so I'll try to do a little of that, but not so much that I lose my job.

Let me start out in that spirit, by noting that the news release announcing this forum, and it quoted five leading experts will discuss and debate why "the least dangerous branch" finds itself so reviled.

So I think it would be to counter that with a couple of Jeffersonian quotes, one of which a letter to Spencer Roan, March 9, 1821.

The great object of my fear is the federal judiciary. That body, like gravity, ever acting with noiseless foot and un-alarming advance is gaining ground step by step. Let the eye of vigilance never be closed.

So I hope that puts in perspective while we think the judiciary the least dangerous branch was considered certainly by some of the founders to be perhaps the most dangerous branch, and I think were Jefferson here today, he would believe himself quite prescient, with the advance of the power of the federal judiciary with respect to the other branches.

Obviously, I come from the House side. There's been discussion here about the effective checks on the appointment process. The House has no role in the

appointment process. In the Constitution, the role of the House is the impeachment process.

And much has been said, you know, the effective screen is by the Senate, the other body, in the appointment process, and so to say once they're in, they can do as they jolly well please. Now, you know I'm being a little provocative in characterizing. It's not intentional but just to further debate.

I think we make short shrift of the impeachment article and the role of the House with respect to ongoing congressional oversight of the judiciary. Without getting in case specifics, we, you know, have been rather aggressive in looking at particular sentencing practices, for example, of certain judges who are subject to legislation and also oversight.

We have been criticized by many in the media, many in the judiciary and elsewhere for seeking public records of a judge's sentencing practices, for example. We are called witch hunters for that.

And the power, the authority, the basis for congressional oversight of judges is found in the impeachment clause.

When we talk about accountability, federal judges are accountable to the public indirectly. They don't stand for election. But they're accountable to the public through the impeachment authority of the House of Representatives, and the ability of the House of Representatives to inquire in the first instance with respect to practices of judges.

Chief Justice Rehnquist's characterization noted at the opening in his year-end report, I think profoundly misstates the—overstates the impeachment activities

by the House historically. The notion that Congress—that the House cannot impeach for judicial acts, as the Chief said, I think is just wrong. And if you look at the records of the impeachment process, whether it's Alcee Hastings or most of the others, virtually every one of the articles of impeachment included judicial acts. I mean I haven't looked at the Alcee Hastings for a while. He's a sitting member of Congress, so I'm constrained to comment. But the record I think will reflect, you know, that he was charged with in the impeachment articles with taking judicial acts for money. Now, that particular matter probably constituted a crime. But it's not limited to criminal activity. Corrupt activities, actions on the part of the judges in their judicial acts, surely are the subject of inquiry by the House and potential impeachment in the appropriate case. And the historical record I think bears that out.

We can all agree, as Chairman Sensenbrenner has said, as the Judiciary Committee has historically said, that we should not be impeaching judges simply because we disagree with a particular ruling of a judge, for ideological or political reasons. But if some judge takes a judicial act for corrupt purpose, or unlawful judicial act, that clearly is the subject of impeachment and has historically been.

So I hope that—I don't want to eat up the time, but I hope that at least gives some perspective to where we've been in the House of Representatives under Chairman Sensenbrenner's tutelage at the Judiciary Committee.

MR. STUART: Thank you, Jay. Victoria Toensing, the Founding Partner of diGenova and Toensing and who's been I think attending these wars for a long time and has some recent experience on behalf of at least one client I think dealing with

the House's approach to these matters I think might have a different view than Jay just explained.

MS. TOENSING: Well, what I find is interesting Elliott is I grew up in Indiana. And I remember eight-, nine-years-old, we'd be driving to Indianapolis from Columbus, and there would be impeach Earl Warren signs. And I didn't know who this dude was, but I figured he was a pretty bad guy, if you know there are all these signs, though, on big, huge billboards, so it wasn't just in the South.

I think I was invited on this panel because I'm the only practicing lawyer. I really have to go the courts and work out things on behalf of my clients for this, so I may be bringing that kind of perspective to this conversation.

We're really talking about two arenas here. One, the independence of the judiciary in the—in what happens in the appointment process and how much happens to them as they're going through the appointments, and then the other arena is, well, once they get to be a judge, what kind of controls are still there and where should the controls be.

So let's just start with the first stage, which is the appointment process; and there I am, you know, I am the conservative on that. I have found what the Democrats have done in the past four years to some of these nominees despicable—a despicable act. These people have gone through an FBI check. Even though some people don't like it, they've gone through an ABA qualification process. They've had to go up to the Hill to have discussions with Senators about what they believe in, which they can answer one way or the other or say I'm not going to answer. They've had their

writings subjected—anybody in the Senate who's going to vote on them has that ability to read everything that they've written.

Public hearings. Everyone gets a public hearing where the Senators can cross examine them on any issue they want to.

I maintain as soon as that process is over, there needs to be a vote. All of a sudden I found it interesting that the vote on cloture re John Bolton was not a filibuster, which is what the Republicans had been saying for a long time about the Abe Fortas situation. It was merely a test, a water test, to see, well, how many votes were there really for Abe Fortas. It lasted for four days. Some of these nominees who've just been confirmed have been around for four years.

Now, here's why I'm concerned and because you're really going to limit the pool of people who are capable of being on the bench. I am a practicing lawyer, and let me just say real fast I don't ever want to be a judge. You couldn't pay me enough to be a judge. I love being a practicing lawyer.

But I want some people on that bench who are practicing lawyers. It isn't a coincidence that the people who stayed around for the four years are named Justice Rogers Brown, Justice Priscilla Owen, Judge Henry Sodd, and Attorney General William Pryor. Why is that? Because they had jobs that allowed them not to give a diddly-do whether they were in the process or not. But such good people Miguel Estrada and Caroline Kuhl had to drop out because who wants to come to you if, you know—if they know in a month or two or six months, you're going to lose them as a client and go into the judiciary. Nobody can hang around that long in private practice. I

mean we're going to lose a whole area of potential nominees, really qualified people if we say to them you could be subjected to this filibuster and it could go on and on.

You're also going to lose a lot of people who—it's just truly after a lifetime of working in the legal arena, really don't like their reputations besmirched. And what's bothered me is to see some of the debate that has gone on, and that debate.

For example, Priscilla Owen and I have been out talking to. I'm pro-choice. I read all of her opinions on parental notification. She had a lousy state legislature who didn't know how to write a law. I'm sure it was the only time that's ever happened.

But there we are. A state legislature writes a law and says general things like someone should be fully aware. How are you going to interpret that? She tried her best. You know, and I think maybe that's kind of a female thing. It's more of a male thing to say screw it. They didn't know how to write it, so, you know, let 'em suffer. Women usually try to work it out.

So I look at those opinions and I just can't see the disparaging comments about her, and how she tried to thwart the law, when, in fact, she was trying to make something that was horribly written work out.

So that's my feeling. I come in, as you can tell, from a more practical viewpoint of I'm practicing and I want the courtroom to be a great courtroom. I'm not the theoretical person on this panel.

Now, let me go to what happens after the judges are appointed and they're on the bench, and in this respect I disagree with some of the people on this panel

wholeheartedly, and, yes, I did represent a judge who was sought after by the Judiciary Committee in the House.

But first let me tell you a story about. I was Barry Goldwater's Chief Counsel, and I adored him. He had such a good gut about things. He didn't have a law degree.

But I remember we were going out for dinner one night to discuss some stuff and he said, you know, there's a bill up tomorrow, and it's going to take away jurisdiction for the courts for bussing. Now, I'm for that. I'm really for that, but I'm going to vote against it, 'cause next time there might be something I want the courts to have.

And I think that really sums it up when we talk about taking jurisdiction away from the courts; that this—we're really getting into an horrible arena of saying okay the political process is this and these are the people in charge at this point, so we'll take away jurisdiction for that, and then 10 years later, the pendulum will swing and jurisdiction will be taken away for something else. I just don't want to see our judicial system be subjected to that.

But there's a process. There's a great process for judges who do bad opinions, and yes, there are judges who do bad opinions. We all know them. We've all been, you know, victims of that, who practice law. But that's the appellate process.

Now, if a judge commits a crime or an illegal act, of course, Congress has jurisdiction. They should. I mean the greatest irony is Alcee Hastings who they did impeach and convict and now he's back there as a member of the House of

Representatives I think is just kind of an interesting scenario here. But it was for an illegal act, and gratuity, as I believe or bribe or a gratuity.

But my client was being chastised and threatened because he downward departed on sentences. Now, that's not an illegal act. They were legal sentences. They were just below the sentencing guidelines. They weren't illegal as far as the law on what sentencing was. It wasn't that he gave somebody eight years, when there was a 10-year mandatory.

And for a judge to be asked to go back through his records and determine what's a drug crime, even that is, you know, a scary proposition, because we can't all agree on what's a drug case. Is a money laundering case a drug case? I don't know.

Is it, you know, something that was a diversion case, do we call that a drug case? I don't think any judge should have to go back and answer for what the judge did within the judicial arena, and I just will end on my hero, and I don't know if you've all ever heard this story about good old Judge Goodman from California, who was subpoenaed by the House in 1953 about something that the judges were doing. He was a chief judge, and they were subpoenaed about something the judges were doing—with the grand jury process. And they all appeared before the House, and they said, you know, what, if it's something about a judicial proceeding—I won't read you the whole—the statement—but if it's about a judicial proceeding, we're not going there. We're not going to talk to you. That's the arena for the appellate courts. But, you know, if you have—want to talk about something else, like our expenses, whatever it is that's procedural, we'll talk to you, and to me that sums up on how the judiciary after it's appointed should be responsible to Congress.

MR. TAYLOR: Thanks, Victoria. Joe Onek will close out our opening remarks. He's a senior policy analyst at the Open Society Institute and a Senior Counsel of the Constitution Project, and if memory serves, he might have done his share—a little judge picking of his own when he was Deputy Counsel to the late great Lloyd Cutler during the Carter Administration.

MR. ONEK: I'm actually going to begin by citing former President Carter. On the eve of the 2004 election, he wrote an op-ed, in which he suggested that American election system and procedures might not meet international standards. And he cited the fact that in most democracies today, you have non-partisan commissions that administer elections, while in the United States, you can have people like the Secretary of State of Florida or Ohio, very partisan officials, running elections.

I submit that we may be moving in the direction where we don't meet international standards for judicial independence either.

At the state court level, as you know, we now have more and more contested elections in which judges essentially have to raise thousands or even millions of dollars from trial lawyers or insurance companies, the very parties that are going to appear before them in court. That's not a recipe for judicial independence.

In the federal system, if you step back and look at it a moment, judges are selected by the political branches that they're supposed to be independent from. That's a bit of a problem.

Now, in Article III, we purport to solve it by giving them life tenure, and we've also had, and I think Sarah pointed this out, a whole set of cultural and other traditions which perhaps mitigate that problem.

But suppose, in fact, judicial nominees pledged to the political branches who were selecting them how they would vote? Suppose they promised that, well, I'll always vote for the federal government or against it. I'll always vote in favor of corporations or for unions or whatever.

And, of course, *Roe v. Wade* in the background. Well, we don't actually have that system. But de facto, we're moving toward it.

When Attorney General, now Judge Pryor, said please, God, no more suitors, that's what he meant. Don't pick people if you're not absolutely sure how they're going to vote on the cases you care about. No more suitors.

Now, I'm not suggesting this is a totally new problem, and Sarah pointed to that.

Certainly, in the New Deal, President Roosevelt sought to pack the courts and then he appointed a series of people who whatever else their differences and there were many, certainly were all committed against the jurisprudence of *Lochner v. New York* and were committed to giving the federal government broad powers and broad authority in the area of economic regulation.

But I think it has gotten worse today. You know, in a way, it's a little like gerrymander. We've had it forever, but increased partisanship, better census computers have made it worse.

Obviously, we've had some of these judicial problems forever, but other things I think have made it worse. One, of course, incredibly increased partisanship, fueled in large measure by Roe v. Wade, and I'll get to that.

We also have certain other developments. First of all, we have ideological interest groups right and left who look very, very closely at every nominee for their purity and impurity.

We also have a proliferation of forums, including these, this one, endless law reviews, and other occasions on which people can give their views and, in a sense, make their pledges, because that is what' now going on because there's Republican dominance of both branches. By the way, I'm sure it would be roughly the same if there was Democratic dominance. But we now have Republican dominance and so what we have is potential nominees making their pledges to the Federalist Society and others in symposia, law review articles, and so on saying you can trust me. I'm as right as you'll get.

And, of course, we are getting nominees who are about as right as you can get.

Even judges are competing with each other in their opinions and I—take a look at how Judge Luttig sort of plays with Judge Wilkerson in the Fourth Circuit and particularly take a look at his dissenting opinion in the Ambach opinion in the Hamdi case. I'd love to answer a question about it because it is an amusing example of how he basically says to the Federalist Society I'm better than Wilkerson. Look at this opinion.

And so the result, of course, is we're getting extreme judges. *Brown*, et cetera.

Is there a remedy in the current climate? I tend to agree with Michael that there probably isn't, although I would suggest that in the longer term maybe there are things that can be done. We're not going to amend Article III.

Carter again did use non-partisan commissions to help select circuit judges. He appointed them circuit wide, and they had, you know—worthy elder lawyers and retired judges, et cetera. I think that that's a system which may take little of the edge off the extremism. Now, obviously, the Republicans aren't going to do when they're in power. If the Democrats have all the chips, they're not doing it either. But if there came a time when there was mixed government, say, a Democratic President and a Republican Senate, that President might try it, and it might prove successful enough. It might dampen the partisan fires a little so that it would become a more broadly accepted idea.

Now, but we're not going to have that in the near future. And I would conclude by saying yes, we are going to have the candidates making their pledges, particularly on Roe v. Wade, and all I can say to Republicans as conservatives, watch out what you wish for.

For the past 20 years, Republicans and conservatives have, of course, gained enormously by the Supreme Court's decisions, and in particular its decision in Roe v. Wade. In my view, if Roe v. Wade were overturned, it would be an extraordinary boon to Democrats and some day, Republicans or conservatives will look back and say, gee, I wish we had appointed another David Souter.

[End of Tape 1, begin Tape 2.]

MR. TAYLOR: Thank you, Joe.

We'll now go to—I'll ask questions of each panelist and the panelists are invited to comment on the answers if they're so motivated. And after we've done that for a while, we'll open it to questions from the floor.

Let me ask you first, Sarah. I'll read something Alexander Hamilton said. He was concerned in Federal Number 78 that the judiciary has no influence over either the sword or the purse and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. And he said that the complete independence of the courts of justice is peculiarly essential in a limited Constitution—the concept of the courts being weak and needing help.

Blogger Mickey Kaus more recently, by contrast, wrote the following: In the post-Warren era, judges have almost uncheckable anti-democratic power. The Constitution has been durably politicized in a way that the Framers didn't anticipate.

And my question is whether you think Hamilton and the other Framers, if they could foresee the role the courts are playing today in issues ranging from abortion to the President's power to detain people in Guantanamo Bay—do you think Hamilton would still be concerned about the fragility of the courts?

MS. BINDER: We're always on shaky ground in anticipating Framers looking forward in part because of the enormous complexity of the legislation and the types of issues that are on the agenda today, let alone the diversity of state legislatures and the number of actors relevant here.

My hunch here—luckily, he's not around to challenge me—my hunch is he would maintain that the system has worked as anticipated; that the independence has been essential to the legitimacy of the court. And the legitimacy is essential because, as he said, it's the least dangerous branch. There is no other means of the court's implementing its decisions, unless those decisions are respected by the public and more generally as the public at large.

When we get into these debates about whether or not the courts are undemocratic, unaccountable, the question is unaccountable to whom, to elected officials, to the public more generally. And then we get into more difficult empirical matters for folks who study the courts and their legitimacy and why the courts are seen as legitimate.

There is a lot of evidence that the public actually doesn't pay attention to the actual decisions being made. But when they do focus on decisions, they tend to agree with the legitimacy of the courts even though they disagree with the actual decisions, which is very different than their views about legislatures.

My sense is that we've probably gone too far in thinking that courts are undemocratic. Again, it raises all these questions about what do we mean by democratic, and certainly democracy entails minority rights as well as majority rule.

So there are so many different issues raised here that it's difficult to come down a single way here. But my sense is that Hamilton was probably right that they're not overstepping their bounds, even remembering how ambiguous most legislation is. It requires interpretation, and sometimes that appears as judicial activism when it's necessary because Congress doesn't nail down specifically what is meant by every single term or every program.

MR. TAYLOR: Thank you.

Mike, a two-part question on the judicial activism front. First, Joe rather provocatively said, I think, if your wish were fulfilled and *Roe v. Wade* were overruled, it would be good for the Democratic Party. I'd love to hear your reaction to that.

And, second, the Senate this week confirmed Justice Janice Rogers Brown of the California Supreme Court to sit on the D.C. Circuit federal court, which is often thought of as the second most powerful court in the country.

Among her noted quotes are that the Supreme Court's decisions in 1937 upholding the Social Security Act and other aspects of the New Deal—she said that those decisions were a disaster and that they represented the triumph of our own socialist revolution, and in the same paragraph compared that to the Bolshevik revolution and the French terror, and seems to indicate that she'd like to roll all that back.

Who are the judicial activists here, in addition to my question about *Roe v. Wade*?

MR. GREVE: Let me start with the first question. I think Joe is absolutely right. It's one of the dynamics that people underestimate. If the decision were really overruled, I think it would be—at least for the first two rounds of elections, it will be a debacle for the Republican Party. I'm nonetheless in favor of doing it, which goes to show what a non-partisan guy I am.

[Laughter.]

MR. GREVE: With respect to now-Judge Brown, look, it is one thing to say that these cases or any set of cases in 1937 or thereafter was wrongly decided. It is a completely different thing to say that, well, I'm now sitting on the Federal Court of Appeals for the District of Columbia; I should do my part to see that they are, in fact, overruled. A whole lot of things play into that.

With respect to these 1937 cases, there are a whole lot of people who say, yes, that was, in fact, a revolution. The Lochner court—that was the traditional

understanding. It was a revolution. Bruce Ackerman [ph] believes that. Cass Sunstein believes that. These are by no means conservatives.

Nino Scalia believes that, but he says that's all—let bygones be bygones, that transformation is over and done with, I have no intention of even questioning that. He just wrote a decision in the Gonzales case, the marijuana case, that says that again. I don't know how many times he has to say it again until people believe him.

I just want to say one quick thing, if I may, in response to Elliot, and the reason why I want to say it is it's so rare that I agree with Elliot, especially in public, that I really do want to take this opportunity to agree with two things he said.

One is the law, the Schiavo law, which I really think was a disgrace the way Congress handled that, and extremely unfortunate. What is weird about it, however, is it's not a court-stripping measure, okay. It conferred jurisdiction in a way that borders on unconstitutionality, to my mind. There's a very powerful argument that it was, in fact, unconstitutional.

And Congress has this weird passive aggressive attitude, and you see that in other contexts as well. So, for example, as Elliot said, and again quite correctly, there are many statutory things that Congress can, in fact, do when it disagrees with the court. It can do so respectfully.

But most of these decisions, or a lot of the decisions in any event, that agitate people are statutory decisions. They can be overruled by Congress in any day. The 1991 Civil Rights Act is not my favorite statute, but that is what happened there, and it was perfectly legitimate and perfectly sensible for Congress with those majorities to do that.

What Congress does instead now is refrain from those things it can reasonably do and then embark on these advocacy group-crafted gonzo measures like the federal marriage amendment which is very, very ill-advised, which is crammed in there at the request of the religious right, even though everybody understands it has absolutely no chance of enactment. All it does is inflame passions on all sides.

What that shows is that judicial activism in a very weird way has gone along with legislation abdication, and you see that in the refusal to entertain reasonable measures. You see that in the proliferation of accelerated review provisions which basically say to the court what we do here in Congress is just provisional. This campaign finance law—that's just provisional until you sages have told us what we really did here. And that is as irresponsible in a whole lot of ways as the activism of the court.

MR. TAYLOR: Thank you.

Hearing no objection, I'll assume that the panel is unanimous in agreement with what you just said and I'll ask Elliot a question.

Focusing on the current debate about the filibuster, Elliot, first, I thought Victoria raised a very interesting point that doesn't get the attention it deserves. When you have nominees who come out of private practice who don't already have judicial jobs, steady jobs, these people have been stalled for years.

Are you concerned that the filibusters that we've seen from the Democratic side might actually make it harder and harder to find good candidates who are willing to accept nominations for federal judgeships?

And, second, a question that has been posed to me and I wasn't sure what the answer was, so I'll ask you. When, before the current judicial filibusters, has the filibuster ever been used to further a noble cause? Presumably not the civil rights filibusters, but maybe you can think of one that I can't think of.

MR. MINCBERG: To take both those questions, Stuart—and I do agree with almost everything Michael said, by the way—another unusual circumstance, although I would obviously feel differently about *Roe v. Wade*, which may prove how non-partisan I am in suggesting I think that it ought not to be overturned.

But I don't think that Victoria's problem is a problem. Look right now at William Meyers, a lawyer in private practice who has been filibustered and hasn't exactly withdrawn his nomination. And there are many lawyers in private practice that continue to make their interest known in getting federal judgeships even if, unfortunately for us, Victoria isn't one of them.

I think that the importance of this check and balance was clearly emphasized in the votes that we've seen recently, and again in large measure, in my view, on the deterrent effect issue. You had all 14 of the signers of the deal talking about how important it was for the President to consult Republicans and Democrats in the future, and obviously to lean towards moderation, towards consensus, as Ronald Reagan did with Sandra Day O'Connor in his first pick, which the right at that time wasn't very happy with either. So I think that that's one of the important reasons to retain those checks and balances and to ensure we have the right kind of thing done.

With respect to the use of the filibuster, there have actually been a number of examples involving—I actually have a whole list which I'm happy to send

you back at my office of environmental legislation, balanced budget proposals that the filibuster was used to stop, attempts to eliminate worker protections and other civil rights protections that the filibuster has been used on.

It has clearly been a bipartisan tool, one that sometimes is used for good, sometimes used for ill, but clearly has been used, along with very similar mechanisms, to stop executive and legislative appointments.

People talk a lot about Abe Fortas. They forget pretty recently under President Clinton that Republicans used the filibuster to stop Henry Foster becoming Surgeon General and Sam Brown to be ambassador to, I think it was OECD in Europe. Nobody asked for the nuclear option then.

In fact, what was produced, although I frankly supported the nomination of Henry Foster, was some consensus that was achieved with Republicans in that instance. And consensus is a good thing, not a bad thing, in our politics which I think in many ways the filibuster can help achieve.

MR. TAYLOR: Thank you.

Jay, you spoke in general particularly about the impeachment power as a means of accountability. There has been talk by Chairman Sensenbrenner of your Judiciary Committee of having an inspector general perhaps for the judiciary. There are bills that have passed the House, I think, on the subject of stripping the courts of jurisdiction.

Could you give us sort of an explanation of what is happening in the House of Representatives that you think is important by way of seeking some measure of judicial accountability?

MR. APPERSON: Let me start by this, and with respect to Vicki, who had suggested our focus and inquiry with respect to a particular judge sentencing matter was because we disagreed with a particular downward departure.

The transcript in the case, okay, which was the focus of much of the investigation is where the judge stated on the record, "I just sentenced you to one month less than the guidelines. The guidelines were calculated by a computer, which apparently was not satisfied with the fact that 10 years is 120 months. And so we have a ridiculous extra month which I have taken off. Now, that represents an illegal departure, and if the United States wants to appeal, I suppose they will."

Now, this feeds in really to the suggestions that the appellate process is an effective check on misconduct by judges. It may or may not be. Look at this situation. We were excoriated by saying, well, you're making a big deal out of the fact a judge departed one month.

I imagine if the U.S. Attorney—look at what the U.S. Attorney is faced with. This is an admitted illegal departure, okay, on what I think anyone who understands the guidelines would recognize is not a lawful basis—a computer calculated the guidelines. What it means is the judge didn't like the guidelines, and I'm going to do what I jolly well please, okay, and he himself said this was an illegal departure.

One, it raises a whole bunch of—what is Congress supposed to do, faced with the transcript of sitting judge saying that on the record? What does that foster with respect for the law? So we inquired further with respect to that and been excoriated for it.

But look at the U.S. Attorney. Are you really going to take that case to the court of appeals and say we want this reversed and spend the six months and the briefing process and the argument process to get a new sentence of one month more? I don't think. And, in fact, Judge Rosenbaum said, my guess is they will decline, for the very reason we're talking about.

That, I would suggest, is all the more reason for concern—the arrogance of the judge who knows the U.S. Attorney ain't likely to appeal this, and therefore I'm not going to get called on it and I can do what I want, even though I know and admit on the record it is unlawful.

So that's one thing, I think, that feeds into this argument on the appellate process. Misconduct on the bench in a trial, for example, a long trial—you're not going to appeal just because the judge engaged in misconduct. Perhaps he berated counsel right and left. You're only going to appeal, either party, if that misconduct resulted in an adverse decision to you by and large.

And then you've got other factors. Particularly, the United States has other factors of resources and the very things in this case. So an appellate check in every case isn't going to happen. And, two, it's not an effective check on misconduct.

You asked about the independent inspector general for the judiciary. This was a concept that Chairman Sensenbrenner floated in a speech to Stanford University students not too long ago, and it's something we've been considering for some time at the Judiciary Committee.

We spent an awful lot of time and are still spending the time with respect to the records of Judge Rosenbaum. We've had other inquiries with respect to judges that we have to deal with. The impeachment process is an arduous one.

On the other side of that is, you know, the judicial discipline statutes are essentially delegated authority from Congress to the judiciary. This is an instance in which Congress has the authority to inquire as to respect to impeachments and misconduct, and yet has set up by statute essentially a self-policing function for the judiciary.

But if you look at the numbers—if you look at the numbers of misconduct complaints that are resolved, they're all dismissed. I mean, I think two made it, you know, in the last couple of years to any point of inquiry and it's dismissed.

Chairman Sensenbrenner addressed the Judicial Conference of the United States two years ago and used the example of our experience with the investigation of Judge Cudahy of the Seventh Circuit who was sitting on the special division overseeing independent counsels and, it was later learned, leaked the grand jury material that he had responsibility of overseeing.

And the independent counsel was wrongly accused in the press for a 24-hour period of leaking grand jury material for partisan political purposes to embarrass Vice President Gore on the eve of his nomination. And it was until later that Judge Cudahy admitted he was the source of the leak in talking to an AP reporter and asking for anonymity, and later suggested that his revelation of the grand jury material was inadvertent.

Now, the Judiciary Committee was faced with that record. You know, who asks for anonymity and then inadvertently gives information, okay? Without going into all the details of that, the Chairman of the House Judiciary Committee filed a formal complaint against Judge Cudahy and sent it to the Seventh Circuit. Judge Posner—I'm using the Chairman's—whitewashed that inquiry, conducted no investigation.

Now, look at the comity—not comedy, but comity—and reciprocity when—Alcee Hastings' impeachment is an example. That inquiry began in the judiciary, okay. Judge Godbold was vigorous in ferreting out that information and presenting it to the House Judiciary Committee for appropriate action, an impeachment inquiry, which the House took seriously and proceeded on it. A lot of the other impeachment matters came through that mechanism, and appropriately so.

But when the Chairman of the House Judiciary Committee sent a similar request back to the judiciary for them to police themselves, he was treated with disdain and dismissed summarily. Posner said Judge Cudahy had apologized. Now, he also said it wasn't 6(e) material. That was contrary to what Judge Sentelle, Chief Judge of the Special Division, characterized it in letters to the Judiciary Committee.

It is contrary to what the White House Counsel characterized it when they thought we were attacking the independent counsel for leaking it. They accused Judge Starr's office of engaging in criminal conduct. But suddenly, Judge Posner said it wasn't criminal conduct, it wasn't 6(e), and simply dismissed it.

So without respect to the merits, the perception from the House—and I think that goes into the Schiavo case. This was not—didn't go through our subcommittee. We had concerns with the original bill which did the Schiavo fix, as it

were, in a habeas corpus matter and we cleaned that up, but after that we were sort of out of it. So it's not—I'm not in the thick of that.

But I can share with you I think the sense of the Congress is that the judges just summarily dismissed Congress's attempt to write a statute and asked the federal judiciary, regardless of your position on the merits of the policy, take a look at this, do a de novo review.

And the perception is, I think, to reasonable people that the federal courts just simply said we're not going to do that; we're not even going to give it a review. If they had done that—I'm talking as a political matter—it seems to me, and I'm just speaking personally here, you know, if they had done that and gone through the process, reviewed the record and made the decision on the merits, whatever that would be, I think Congress would be a lot less critical of the federal courts in that instance.

So I hope that somewhat responds to what you wanted.

MR. TAYLOR: Thank you.

Victoria, a two-part question. Part one is respond in any way you see fit to what Jay just said. Part two, I'd like to pick up what Elliot just said, the nuclear option, which, as you know, is called the constitutional option by those who like it. I guess Trent Lott coined the phrase "nuclear option" and people like Elliot have been ramming it down his throat ever since.

MS. TOENSING: It shows he needs a PR person, right?

MR. TAYLOR: Yes. But as I understand it, it's a parliamentary maneuver that has been hovering that Bill Frist, the Majority Leader, would like to push through that was stalled by this "gang of 14" centrist compromise.

But the idea would be to change the rules by main force, by 50 votes, if necessary, with the Vice President breaking the tie, to ban filibusters of judicial nominees. And I'd like to know whether you think that's a good idea, a bad idea, and why.

MS. TOENSING: Oh, well, first let me respond to what Jay said, and I really didn't accept the appearance here to have to have my client go through the coals, because I don't appreciate that. But it just shows the perversion that occurs in the political process when politics gets involved in what is clearly a judicial decision.

The sentence was not illegal. It was a mandatory minimum of ten years. The judge downward-departed by one month and he used the term "illegal," which Jay has had explained to him a number of times, because it was a 19-, 20-year-old kid who didn't speak English and the words had to be used for the interpreter, the translator, to give them to the kid to say that the government could appeal, and the judge had to put that on the record.

And so by using the word "illegal"—Jim Rosenbaum is just a really blunt man, such a fine jurist, respected across this country and beloved by his U.S. Attorney, by the way—he spoke and said "illegal" so that the interpreter could explain to the kid why he could—the government might appeal the sentence he gave him.

So this just shows how perverted the process gets when Congress gets involved in what is truly a judicial matter.

Now, let's go to the nuclear option, which I supported, by the way, so I'm glad you asked me. I look at all of this process—you know that wonderful kid's game

about rocks, scissors, and paper. And so when one thing gets out of kilter, there is some kind of power there to stop it.

And I don't know whether this is paper or a rock or a scissor, Elliot, but truly the filibuster was being abused, in my view, being used against people for four years, not four days, not for a cloture vote, not in the way that the Democrats are now using it to hold up John Bolton's appointment, which they now say is not a filibuster, but in a way that was just forever keeping these candidates from being voted on.

I might have voted against one or two of them—I don't know—if I studied the record. But it seems to me at a certain point people are entitled to an up-or-down vote, and so I was for it. And it was a wonderful thing, too, because it worked. At least the threat of it got some process going, and if the Republicans had not done that, we'd still be there with all of these people in the waiting line and not confirmed.

MR. MINCBERG: Stuart, can I take a second—

MR. TAYLOR: Sure.

MR. MINCBERG: —to actually disagree with both of the last two speakers?

I wanted to say something about Jay, in addition to what Victoria said. Jay's discussion of the litany shows where the dangers come in with a Congressional method to attempt to discipline judges.

Maybe some people might agree if a judge is accused of actual criminal misconduct and the judicial system isn't doing a good job, there's a need to take action. And there probably is, although I hope it would be done to strengthen the judicial discipline.

But when in the same continuum we talk about the Schiavo situation and the implication—and Jay may not have intended this, but members of Congress surely would have—that because Congress didn't think the 22 federal judges thoroughly enough considered what Congress did that that might be a reason for Congress to take action against them, that cuts to the heart of judicial independence and I think shows where the potential danger is and the need to be careful about this.

The only brief comment I want to make about the nuclear option is that there's another rule that you learn as a kid, which is that you don't change the rules in the middle of the game and you don't break the rules to change the rules. And that's what the nuclear option would have done.

There are methods to change the rules in the Senate to eliminate or limit filibusters. Frist couldn't have gotten enough votes to do that and that's where the power play known as the nuclear option came from.

MR. TAYLOR: Thank you.

A question for Joe. I think you mentioned that you suggested that Judge Michael Luttig had been kind of auditioning in the Hamdi case for Federalist Society support, as opposed to Judge J. Harvey Wilkinson. Both have been mentioned as possible Bush nominees to the Supreme Court.

Could you explain what that's about?

MR. ONEK: Well, the Hamdi case—you recollect Hamdi was the Saudi national, but U.S. citizen, captured in Afghanistan, brought to Guantanamo. Once we learned he was a citizen, he was brought to military custody here in the United States.

All enemy combatants in the United States are conveniently placed in the Fourth Circuit, for reasons I need not go into. The case goes up to the Fourth Circuit, and the majority of the Fourth Circuit en banc—Judge Wilkinson's decision—says since he was captured on the battlefield, he does not get any process whatsoever, any hearing, any anything. We can keep him as an enemy combatant incommunicado forever.

Now, that decision was pretty conservative. It was, by the way, overturned by the Supreme Court 8 to 1. Only Justice Thomas affirmed. The other Justices had a series of different opinions, but eight Justices rejected Wilkinson's opinion as too conservative.

But the decision wasn't nearly conservative enough to Luttig, and here's what he did. Wilkinson had said, well, he was captured on the battlefield. A dissenting judge had said, well, how do we really know he was on the battlefield, since nobody has ever talked to him? His father gave an affidavit. No lawyer has ever seen him. How do we know he was captured on the battlefield?

Judge Luttig says I don't care if he was captured on the battlefield or not. If a President, my President, the appointing authority for judges, says—

[Laughter.]

MR. ONEK: What he did say is if the President says he's an enemy combatant, that's good enough for me; none of these limitations about him being captured on the battlefield. And so he trumped Wilkinson.

Now, as I say, Wilkinson is 8-to-1 defeated. Luttig went beyond it. I am sure that there are counsels in the White House today looking at that opinion and saying,

gee, there's our guy. And by the way, I'm told—I'm not an expert on Fourth Circuit jurisprudence—that this is only one of several incidents.

But it's part of a more general point that people are going out and promoting themselves by, in essence, being as extreme as possible. And apparently it does no harm. You can say that—you can compare, what, the 37 cases to the Bolshevik revolution and apparently it gets you on the D.C. Circuit. Not bad.

[Laughter.]

MR. TAYLOR: Thank you.

I have more questions, but some of you may have questions, too, and if you do, please raise your hand and I'll intersperse some of yours with some of mine.

Mr. Coleman [ph.]

MR. : It's a wonderful program. The only filibuster that I wasn't involved in, but I heard about which I thought great, was when during the height of the Korean War when President Truman tried to draft either the railroad workers or the steel workers because there was a strike, and Bob Taft stood up on the floor for four days and filibustered until they worked out a settlement. I thought that filibuster made sense.

I think that the problem today—and you hit it—whether the scholar, the law professor, and even more important, the press, you classify these judges as liberal or conservative. If I had time, I could tell you about six or seven opinions of Scalia. If being liberal means you let the guy out of jail, he has been more liberal in the last two or three years than anybody else.

But I don't think—and I would urge all of you to go back to reread a book by Morrison R. Cohen in 1945, which fortunately I read, going back to law school by

then, and it tells you what you really mean by the faith of a liberal. And it's a different process altogether.

And if you're going to continue to describe these decisions and judges as liberal, then you cannot jump on that gentlemen there because he comes in and fights on a ground. I can't jump on you.

But if you go back to the good old days, you know, when I became a law clerk to Justice Frankfurter, I knew that what he had said publicly and what he had done publicly were certain things that he wasn't going to say or do privately, and he had that discipline. But now that discipline has completely disappeared.

And then one other thing and I'll be finished. When I read about the duty to advise and consent, I'd like to put a hypothetical to you. The President of the United States takes the 14 people that were part of the deal, adds the Chairman of the Judiciary Committee and the ranking member of the Judiciary Committee, and says come over to Camp David this weekend; I want to discuss the appointment to the Supreme Court of the United States. I've been told—and this is all off the record now, confidence—I've been told by the Chief Justice he thinks he's getting better. He will know by the 1st of September whether he will be, and if he isn't, he says he's going to resign. If he feels he can do another term, he's not going to resign. Now, I have seen people on my list and this is what I've been told about each one. These are the ups and downs, and you have a discussion back and forth.

I'll ask all of you gentlemen, when they leave Camp David at eight o'clock on Monday, how long will that conversation remain private without it being in all of the newspapers?

MR. TAYLOR: You've covered a fair amount of ground. Why don't I—anyone who wants to jump in, jump in, but one thing you said, Mr. Coleman, was that Scalia would be liberal by recent standards if letting people out of jail makes you a liberal, which might have been true at the Warren Court.

Elliot, I'm not sure that you would characterize Justice Scalia as a liberal based on the press releases coming from People for the American Way. In fact, I think he's sort of the template of who you don't want put on the Supreme Court.

Could you comment on that a little bit?

MR. MINCBERG: Well, in many ways it's not so much that we don't want him as that the far right and George W. Bush do want him. We have outside our Courting Disaster 2005 book which looks at the dissents and concurrences of Justice Scalia and Justice Thomas, and tells us what would happen to so many of our critical rights and liberties if you had more of them on the United States Supreme Court.

And that "no more Souters" quote that Michael talked about is in this very context. What the right wants is no more Souters. They want people with what they consider are reliable records.

Now, it certainly is true that Scalia and Thomas are not clones of each other, as some people have sometimes argued. We saw just recently a disagreement between them in the marijuana case. But, overall, if you look at a whole range of areas, there are key, important commonalities that are exactly what the right wants—overturn *Roe v. Wade,* overturn *Lawrence v. Texas,* overturn 20 years of civil rights decisions on the Voting Rights Act, et cetera, et cetera, et cetera, which I think is the reason for that.

I wanted to make one brief comment on what Bill Coleman said about his hypothetical. It's not that different in some ways than what happened when Bill Clinton was President. Obviously, a lot less people, but according to Orrin Hatch's own book, Bill Clinton consulted him at a time when Hatch was the minority, when actually the Republicans had fewer Senators than the Democrats do now in the United States Senate.

And at least according to Hatch, he talked him out of Bruce Babbitt and maybe one or two others, and we had Ginsburg and Breyer who got confirmed by more than 90 to virtually nothing. I think there might have been one or two votes against Breyer because there was concern about a decision involving home schooling that he had issued. So there is good precedent for consultation.

I don't believe we'll see Bill's hypothetical, and whether it would stay confidential would depend obviously on those 14 people and the others that were in the room. But I do think it would be possible for this President, as others had, to do meaningful consultation and aim towards a consensus pick that would defuse all of this in the months to come and that would be better, I think, for our society and give me more time to focus on litigation issues.

But I fear that the huge interest of the right in this issue and Karl Rove's calculus about what a great political issue this is for his party is unfortunately going to lead us to more conflict in this area.

MR. TAYLOR: A footnote on the near-unanimous confirmation of Justice Ginsburg. I've seen Internet traffic from conservatives lately that are trying to re-litigate her confirmation and one of the major indictments in the bill of particulars is that she called for the abolition of Mother's Day. Now, I haven't run that down and can't

comment either way on her views about Mother's Day, but that's something that needs to be investigated.

MR. MINCBERG: Maybe that's an impeachment ground. Who knows?

MR. TAYLOR: Yes, sir, Mike.

MR. GREVE: Look, in response to Mr. Coleman's very sensible question—and this goes to a number of things we've been discussing here—first of all, I don't think there is this auditioning process, and even if there is, it's counteracted by the opposing consideration for most judges, which is anything controversial you say ever will be wrapped around your neck by the interest groups on the other side. You really have to be very, very nervous about that. So there's a very strong institutional incentive to tame your remarks and to not reveal what you really think.

The important point here is this: Look, in a lot of ways, these intensely contested issues—abortion, religion, gay rights, the death penalty, and so on—now crowd out a whole lot of things on the Supreme Court that are really worth having.

Just to give you an example, I've recently done a study on all of the preemption decisions in the Rehnquist Court. There are over 100 of them, and the interesting thing—it's too boring for most people what this is actually about, but it actually really matters; a lot of cases, a lot of federal statutes at stake.

And if you look at the decisions there, not only are there no voting blocks. You cannot even find voting pairs; that is to say the Justices in those cases—really, that's law. They call them as they see them. They have very, very nuanced views. There's none of this block voting at all, and there are other areas of business litigation that are like that.

The problem that you have in those cases in the large part of the civil docket to my mind is the problem Victoria mentioned earlier, and that is to say you now have a Supreme Court that has only one member who even remotely knows what litigation looks like. That's Steve Breyer. In a lot of cases, he simply finds himself alone simply because the rest of the Court has absolutely no idea of what business litigation in America now looks like.

It is of the utmost importance to get people up there who know what a discovery process is, right? And mind you, I mean just to give you one example of this, remember *Clinton v. Jones*, *Clinton v. Paula Jones*? Never mind the ruling, never mind the outcome. I don't know what the right outcome constitutionally is, but what it rests on is surely the President can be required to take a few depositions.

Well, excuse me. I mean, you can write that holding only if you know absolutely nothing about the law as it's currently practiced. And that is the Court we have and there are very strong institutional disincentives, as Victoria mentioned, to get people up there who have a clue, quite frankly. That is a really huge problem.

MR. TAYLOR: Thank you.

Yes, sir.

MR. : Mike McGough from the Pittsburgh Post Gazette. I'd like to ask Michael Greve why he picked *Roe v. Wade* overturning as the sort of magic bullet, as opposed to, say, *Griswold v. Connecticut*. And the reason I ask that is it seemed to me that one of the most successful strategies of the people who wanted to preserve *Roe*, going back to the Webster argument, was that if you pull the thread of the sleeve that is *Roe*, the whole sleeve that involves *Griswold*, marital privacy, and then all of those

1920s decisions protecting unenumerated rights of speaking a foreign language and putting your children in religious schools have to go, too.

And if that goes, you're offending a constituency that is much bigger than the pro-choice constituency, including everybody from home-schoolers, to the Amish, to people who are natural law believers, and that you can't stop with *Roe*. If you were going to be principled, you have to sort of go all the way back and get rid of *Griswold*, and I'd like your comment on that.

MR. GREVE: I just don't think constitutional law is that doctrinal. I mean, any lawyer worth his salt could have drawn a line then between those two types of cases. Any competent lawyer could draw the line now, and I think the symbols here, the issues themselves, are vastly more important than the doctrines and they are actually what drives this debate.

The reason why I picked this—of course, Elliot is totally right, Sarah is totally right. We've had these debates before. There was a whole lot of agitation about the Warren Court, about courts in earlier decades. Come to think of it, there was a lot of agitation about Justice Marshall—Chief Justice Marshall, I should say.

I was trying to explain what I think drives this debate now, as Joe mentioned earlier, under very, very different conditions, under conditions of much higher mobilization, much better technology, much less slack between Congress and the interest groups. And, there, I think the issues are starting with *Roe* and then gay rights and the death penalty, I think.

MR. MINCBERG: Just one quick word. I think it was a very good question because, frankly, the people on the Court and off the Court that are taking aim

at *Roe* are also aiming at *Griswold* about the right to use contraceptives, et cetera, et cetera. And I think you raise a very good point. Where would it stop? If you do eliminate a constitutional right to privacy, isn't it true that many of these other kinds of interests you talk about would be in jeopardy?

MR. TAYLOR: Yes?

MR. : My name is John ? with MSNBC. Can you comment on—the political reality is that there are fewer and fewer Democratic Senators. And certainly compared to the vote on Robert Bork, the difference in those days was that the Democrats had enough Senators to defeat Bork on a straight up-or-down vote, and there were liberal Republicans who would come over and join them.

So isn't the political reality that the Democrats politically have no choice but to filibuster because if they don't, it demoralizes their own base, their own groups that support them? And yet it creates this issue that you spoke of, of giving Republicans an issue to win, the obstructionism issue?

Senator George Allen, whenever he talks about the last Senatorial races, he says that's what won it for us in South Dakota, South Carolina, Louisiana, all over the country. So do you agree that there's kind of a dilemma that they're stuck in and they have to filibuster?

The other question I had on impeachment—Congressman Tom Feeney from Florida, who's on the House Judiciary Committee, raised the prospect of impeachment if judges cite foreign legal precedents.

Does it seem kind of—it's kind of a form of venting on his part, but does it do anything to even talk about a process that's so cumbersome that it's almost never used?

MR. TAYLOR: Did you want anyone, in particular, to take those questions?

MR. : No. Anyone who can comment.

MR. MINCBERG: Well, since Tom is pointing to me, I'll be happy to start. On the first question, frankly, it depends on who the nominees are and on a lot of other circumstances that we can't say right now.

I'll take a hypothetical situation. If it isn't Chief Justice Rehnquist who resigns but John Paul Stevens or Sandra Day O'Connor, and instead of doing what I've been pushing so hard for, consulting, looking for consensus, we see a Michael Luttig or a far-right nominee, the Democrats may decide that they absolutely have to filibuster.

On the other hand, they may try to go to Republicans first, including some Republicans who signed the deal and maybe a few who didn't, and say, look, this isn't just a court of appeals vacancy we're talking about here; this is the United States Supreme Court. A number of Senators have said they apply a higher standard when it comes to the Supreme Court.

So you may wind up being correct, but I think we can't know until we know the specific kind of situation that we're in front of. You're absolutely correct about the effort to try to use this as a political issue, which again I think is one of our problems.

On your impeachment point, which Jay may also want to talk about, you raise two questions. First, again, the problem with the blunt instrument. The notion that

if a judge cites a foreign decision, he should be subject to impeachment or similar discipline shows the problem we have with some of the rhetoric coming from some folks on this issue.

There is no question the impeachment process is cumbersome. It's supposed to be. That's the way the Framers set it up. It is in some ways a nuclear option, as well, that should be used only when there's a really good reason. And as again, thankfully, I think Congressman Sensenbrenner has acknowledged, it shouldn't be based on disagreement with the content of the decisions. I would argue it shouldn't be based on not liking what gets cited in the decision either.

MR. TAYLOR: Jay, what about that? Isn't impeachment a kind of a scarecrow? In fact, I can't think of a judge who has been impeached. It takes two-thirds of the Senate to convict.

MS. TOENSING: Hastings.

MR. APPERSON: Hastings.

MS. TOENSING: Hastings.

MR. TAYLOR: Hastings. Pardon me.

MS. TOENSING: You weren't listening to us.

[Laughter.]

MS. TOENSING: He's now in Congress.

MR. TAYLOR: Let me revise that. I can't think of a judge who has been impeached who wasn't first indicted for a crime on the same matter for which he was impeached.

MS. TOENSING: Oh, spoken like a lawyer.

MR. APPERSON: And he was acquitted.

MR. TAYLOR: And acquitted.

MR. APPERSON: Thereafter impeached.

MR. TAYLOR: Without further harassment—

[Laughter.]

MR. TAYLOR: —is the impeachment remedy really—is it real? I mean, you're not really going to impeach a judge because he cited something the European Commission of Human Rights said, are you?

MR. APPERSON: Well, with respect—and I can't speak for Mr. Feeney—there has been, to my knowledge, no articles of impeachment filed by Mr. Feeney with respect to any judge for that issue or any others, nor have there been articles of impeachment filed, you know, by Mr. DeLay against anyone.

I think—again, I don't speak for Mr. Feeney, but I think it's not just to get people's attention, but it's to establish what the basis is for a member of Congress to raise a concern about. I mean, impeachment is in the Constitution. It is the House's only authority. We do not participate in the initial screening process on confirmation, okay. That's where we are in the constitutional scheme and that is the constitutional basis of any Congressional action or any Congressional authority.

Some member of the panel, and I forget who, started out at the end of the day, the Supreme Court or a judicial decision—its legitimacy must be found in the acceptance, okay, even if you disagree with it, that it is based on law, consistent with law, precedent, all the things we talk about everyday.

And that, it seems to me, embodies both public acceptance in the first instance, you know, and Congressional acceptance as the representatives of the people. So when a member of Congress says impeachment, I think he's—I'm assuming he's saying this is our legitimacy as a member of Congress.

And with respect to citing foreign sources, Chairman Sensenbrenner raised that issue, as well, two years ago to the Judicial Conference; I think again this year. So there has kind of been an ongoing debate on this issue both on the court and off the court. And I think it's important for members of the judiciary—because of the need to ground their decisions in proper basis and find acceptance, it's not a bad thing at all that members of Congress are raising the issue and signaling to the court there's concern about that. You ought not to walk down this road of—you know, we could pick any other issues.

So I hope that helps. I don't know.

MR. TAYLOR: Yes?

MR. GREVE: Very briefly, Jay, with all respect, I mean, to the Congress, this is what I mean by sort of passive aggressive. There is nothing in the Constitution that prevents—there's ample authority, in fact, that enables Congress to legislate on the force of foreign precedent, foreign law in United States courts. You don't have to scream impeachment for citing these precedents.

I'm not aware of—I mean, maybe it's out here. I don't follow Congress that closely, but there are sensible constitutional ways of addressing these issues, it seems to me, beyond making noise about impeachment.

MR. APPERSON: Well, when you say making—if I may, making noise about impeachment, I think you could make the case it would be folly because there have been certain references to foreign law in a case that Congress should pass a bill and prevent judges from citing foreign law.

It seems to me perhaps a more prudent and less controversial step is to say there is great concern about the court; that you ought to be thinking more clearly on this before you go down that road. So I think we would be attacked, you know, if we did what you were suggesting as, you know, an out-of-the-box, knee-jerk reaction that oversteps and bans any reference in any given case.

I mean, it's like—you know, I spent a time with the independent counsel—you know, the protective function privilege. You know, I mean, they lost that, I mean, and it seems to me that was the wrong case to bring a protective function privilege and has precluded it perhaps in a future case that it might be a legitimate basis perhaps in a civil litigation, and so forth.

So there are all kinds of consequences to actions. We all know this, and so I'm not sure that just, you know, passing a law is the way to do it. And I think perhaps Mr. Feeney and other members raising the issue in this context is the appropriate and prudent one.

MR. TAYLOR: On this matter of impeaching judges, we've had decisions. You mentioned that Chief Rehnquist has opposed that. I have in my hand a quotation from another member of the Court opposing impeachment for those reasons. The quotation is "You don't want to turn the judiciary over to the people. When you do that, the judiciary cannot stand as a bulwark between the people and the rights of the

individual, which is what they're supposed to do;" i.e., don't impeach judges. That was Justice Scalia, and I was thinking that maybe Elliot and some of the conservatives could agree that we should impeach him if he's going to get in the way of things like that.

But in the meantime, sir, back there.

MR. : I'm Al Milliken. I'm affiliating with Washington Independent Writers. Bill Pryor had been questioned, I know, in the Senate about his—or had been challenged about his deeply-held beliefs. And many, including myself, took that to be relating to his commitment to the Roman Catholic Church.

But in Alabama, he had ruled against Judge Roy Moore, who claims—you know, when your question for this forum is can an independent judiciary be accountable, it seems like Judge Moore's claim that ultimately he was accountable to God Almighty, and that was part of—in fact, the justification for the Ten Commandments in the courtroom there—when we talk about can an independent judiciary be accountable, who is this accountability to?

MR. TAYLOR: Sarah, do you want to talk about that?

MS. BINDER: Well, I probably have a pretty broad characterization of to whom we might be accountable. Yours sounds from that question a bit broader than mine.

Granted, this is a question that hasn't a single answer. We could say, sure, they should be accountable to elected officials. And we presume those elected officials represent a broad diversity of views across the country, so they should be accountable to the public. But, clearly, there are issues on which legislators don't exactly mirror the broad diversity of opinion in the country.

And clearly the issue of the social conservative issues of abortion, for one, gay rights and homosexuality the other—that's a classic example of the difficulty of deciding to whom we're talking about in terms of accountability.

Legislative parties, party elites, are polarized on these issues. There's no doubt about that, but the public is not polarized on these issues. And any good study of public opinion polling on pro-choice and limitations on the right to abortion, and so forth—they all come down to a moderate public opinion.

So, you know, to whom are we talking accountability is a tough question, and depending on how you answer it, you come up with very different views about how far to rein in courts and judges, and to whom they should be held accountable.

MR. MINCBERG: If I can jump in for a second, I think accountability in some ways may not be the right word for the judiciary. But if you want to use it, I'd say that they're accountable to the Constitution and to the checks and balances in our Constitution, because the whole idea of the judiciary is not to have people who face the voters every so often to make these decisions where, by definition, you're protecting the minority rights that are in the Constitution that you don't want to be subject to today's opinion poll which, if it had happened in 1954, probably would have meant that *Brown v. Board* would not have come out the way that it did. So that's why I tried to spell out before some of the checks and balances that I think do exist with respect to the judiciary that are the best way to handle that.

Judge Roy Moore was accountable, although he didn't want to be, to the fact that there were courts other than him that told him, you know what? You can't do

this. Some of the most conservative judges on the Eleventh Circuit told him this is wrong to put this monument—Roy's rock, as they called it—in the Alabama courthouse.

And it's that system of checks and balances within and without the judiciary that I think provides, if you want to use the term, accountability in our constitutional system.

MR. APPERSON: Stuart, if I may, it's interesting to talk about accountability. And Judge Tatel on the D.C. Circuit in the case of the Honorable John McBride in 2001, in a dissent and concurring opinion, you know, wrote, "As an initial matter, I believe the principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power, including interference by federal judges."

And he apparently was taking exception that not even judges in the delegated authority which we talked about earlier in the disciplinary—that they should not even be subjected to that, which I think is a fascinating issue.

Many think Congress—you know, we've heard it here—Congress ought not to be looking at these judges. Here, it says that the judges ought not to be looking at the judges. Well, if the judges can't look at them and Congress can't look at them, who is to look at them? The press, you know, hopefully, but sometimes, you know, they're not there in that courtroom when misconduct happens, when a judge seals a record and nobody sees the record. Just an interesting aside.

MR. TAYLOR: Thank you.

I had a question for Joe. A lot of the conversation about the courts proceeds on the assumption that their function is counter-majoritarian in the sense—as

Elliot just said, they protect minority rights. The critics on the other side might say they invent minority rights, but the supposition across the conversation is that the judiciary does things that cut against public opinion.

And I've gotten the impression from you that that might be a little too simple. Could you talk about that?

MR. ONEK: Well, let me say first of all that I clerked in the often-reviled Warren Court for Justice Brennan, also reviled, and obviously tried to think a lot about this whole issue of counter-majoritarianism, and so on.

First of all, there are obviously clauses in the Constitution which, if you believe in judicial review, order the court, in essence, to be counter-majoritarian. "Congress shall pass no law." If the majority of the people support a law and Congresses passes it, nevertheless there are certain laws that must be struck down if, in fact, you believe in judicial review, which I think most Americans still adhere to.

But I think there's another issue, which is that a lot of decisions—and I'm going to go back to the Warren Court—that people say are counter-majoritarian in the sense that they overruled what the political branches did are not really counter-majoritarian.

Let's take the most important Warren Court decisions. *Baker v. Carr*, the reapportionment cases: well, those obviously weren't counter-majoritarian. There, you had state statutes which, in fact, permitted minority numbers of voters in rural areas to basically—and under represent in the legislature voters in suburban and urban areas. The Supreme Court's decision in *Baker v. Carr* and subsequent decisions enabled the majority. So that can't be counter-majoritarian.

We just mentioned *Brown v. Board of Education*. Well, *Brown v. Board of Education*, I am sure, was counter-majoritarian in Mississippi. I'm not sure it was counter-majoritarian in the United States as a whole. I think probably American citizens as a whole did not support segregation.

MR. : [INAUDIBLE.]

MR. ONEK: Well, there are some problems. I understand that, but I don't think that the majority of the country supported it. Furthermore, it was clearly in the national interest in terms of economics, foreign policy, and national security. Leaving out the rights issue for a moment, it was in the national interest.

It turned out, by the way, dramatically to be in the interest of the South to overturn the segregation rulings. That national interest wasn't adequately reflected in the national legislature in large part because the Senate is not a majoritarian institution. In addition to the filibuster, it has—well, its basic structure is counter-majoritarian. It has filibuster and other rules. So that's one of the reasons why, although I think the national position there was clear.

Finally, *Griswold v. Connecticut*, 40th anniversary. Connecticut had a law which said even married couples; even married couples could not possess or use contraceptives. Now, does anybody in this room believe that that reflected the majority sentiment of the people in Connecticut? If it did, there would be many more people in Connecticut today than there are.

[Laughter.]

MR. ONEK: And I should say my wife and I were in Connecticut at the time and we wanted to finish school, so we violated that law. And the law existed not

because it had majority sentiment, but because in political reality, there was a very powerful interest group which was powerful enough to keep the law from being repealed, although not powerful enough to keep it from being not enforced at all in many communities, certainly in downtown New Haven.

So my point is that simply because the court strikes down a law passed by the political branches doesn't in and of itself mean that it is acting in a counter-majoritarian way. In some cases, that may be true. But, of course, in many of those cases the Constitution itself, I think, requires the court to be counter-majoritarian.

MR. TAYLOR: Victoria had a comment.

MS. TOENSING: In going along with that theme, Ruth Bader Ginsburg has argued—and I'm paraphrasing her, but that *Roe v. Wade* really went out beyond where the electorate was ready to go. And she, of course, is a supporter of the conclusion of *Roe v. Wade*, maybe not the process or how it got there, and I understand that opinion.

But she has said state legislatures were working with it. They were trying to figure it out, and if we had just waited maybe another decade, it would have been a political decision by the various states, as opposed to a Supreme Court decision which has perpetuated the discussion and the problem with the abortion issue to this day.

MR. TAYLOR: Thank you.

MR. GREVE: Can I just—

MR. TAYLOR: Yes.

MR. GREVE: Look, just one other way of looking at that issue of majoritarian or minority rights. One way of looking at it is to say at the end of the day

the Supreme Court will follow and sometimes meet a little the dominant elites of the country.

The 1937 post-New Deal Court was basically acting out the program of the New Deal—a much bigger welfare state, some more respect for First Amendment rights, and so on and so forth. What the Court did in 1954 was to anticipate a social consensus on that issue of discrimination. And what it tried in 1973 was to anticipate a social consensus on abortion, which never, ever happened, and so the Court was out there caught flat-footed.

And the big problem for the Court right now is to figure out—it has absolutely no idea which way the intellectual elites of the country are going or will go in the future because they're all very, very deeply split. There is no consensus, and the Court is just sort of flailing, trying to figure out where the country is going. That is one way of looking at it.

MR. TAYLOR: Yes?

MR. : Hi. I'm Seth Stern [ph] with Congressional Quarterly. I'm wondering if there are ways that Congress and the courts could kind of interact or talk more. I'm thinking of a recent bill in the House to make sanctions mandatory, Rule 11 punishing for frivolous or meritless lawsuits.

It struck me that during consideration in committee, there weren't any judges testifying or asked for their input beyond a letter, even though usually it's done through a process involving judges when the federal rules are amended.

I mean, are there ways that each other kind of needlessly provoke each other and add to the animosity?

MR. TAYLOR: And I might ask Victoria to comment on that, but, in fact, I've read, I think, in Newsweek that Justice O'Connor has been informally cooking lunch for some members of Congress to try and smooth things over a little bit; that there have been a few little informal contacts between judges and members of Congress, but not much going on.

Victoria, other than—and I assume judges don't want to get hauled up on subpoenas to testify about their practices.

MS. TOENSING: Yes.

MR. TAYLOR: But is there a friendlier way of going about this, of trying to foster understanding between the branches?

MS. TOENSING: Well, it seems to me a more informal proceeding would be appropriate because there is, as we've talked about earlier about my client, a problem if you come up and testify and somebody doesn't like what you've testified about. But maybe some kind of informal discussion about what this really means—let's talk about Rule 11. That will be the day that you can really get some judge to impose a Rule 11 penalty, because I've fought like mad for them at various situations where cases were frivolous and it's really hard to get a judge to impose a Rule 11 penalty.

MR. MINCBERG: I mean, there clearly is a process that is used, as you pointed out, Seth, with respect to changes to the Federal Rules of Civil Procedure. You've got an established process. It isn't quite as established with legislation.

You had recently, as many know, an instance where two members of the Supreme Court, Breyer and Thomas, came to testify before the House. And there was some dialogue—let's put it that way—including on this issue of citing foreign law, and I

think Breyer and Thomas held up pretty well in that exchange and it was probably a healthy thing to have happened.

So Victoria is right that there are instances where having a judge come up and talk about their own decisions is a real problem. But when you're talking about broader issues of the type that you raise, I think it's possible, consistent with judicial independence, separation of powers, to come up with ways that there can be dialogue, whether it's in committee hearing or other kinds of contexts, and I think it has been done and can be done again.

MR. TAYLOR: Sir?

MR. : I'm John Vecchione [ph.], I'm a practitioner in town. John Vecchione. I'm a practitioner, and I really appreciated those comments because sometimes you do wonder what's going on up there.

We've heard a lot of talk of Lochnerization today, and it seems that judges out of the mainstream are those who—Justice Holmes' dissent want to constitutionalize the social statistics of—

MR. : Spencer.

MR. : Spencer, right, and the liberal side seems to want to constitutionalize the social statistics of Alfred Kinsey. So my question is this: the big letters on the back of the book you talked about—the biggest letters in the Constitution are "We, the People," and what I've heard here today is that the people should sit down and shut up. Any attempt to attack the judiciary or rein in their power is seen as illegitimate.

And here's the question I have: A lot of us feel that the umpires aren't making bad calls; they're giving the White Sox four strikes. And when that happens, could we perhaps, in striking down laws, pass a law that in order to strike down a law of the states or that Congress passes, there has to be a 7-2 majority or a 6-3 majority, something along that line? And that would aid your consensus efforts.

MR. MINCBERG: Before I get—I'm sorry. Why don't you start with somebody else first?

MR. TAYLOR: Yes. I sensed Joe might have thoughts on that. If you don't, I'll respond.

MR. ONEK: Well, I don't see the necessity. First of all, we, the people, have various recourses, as Elliot pointed out earlier. In many cases, there are legislative remedies to get around any decision that the Court made. Many of its important cases are, after all, statutory interpretation.

In extreme cases, of course, we, the people, can amend the Constitution, and there have been several amendments to the Constitution directly overruling Supreme Court decisions, starting with the first amendment, after the first ten, the 11th Amendment; obviously, the 13th and 14th dealing with slavery and those issues; I think the 19th Amendment dealing with the income tax, and so on, so that we, the people, are not powerless.

I also think as a realistic matter, Michael is correct that in the broadest sense, and over time, the Supreme Court seeks and, in essence, you know, follows the election results. Obviously, you can have a period where it doesn't, and there may be issues in which, as he suggests, where the public stands is not fully clear.

But I don't think that it would be fair to say that we, the people, in this country are powerless to influence the judicial process, even aside from obviously the role they're now having in the appointment process.

MR. TAYLOR: Jay, did you have something?

MR. APPERSON: Yes, if I may. There's been a lot of reference and suggestion that Congress abdicate its responsibilities in not directly passing statutes and overturning a case, for example.

In the PROTECT Act only very recently, we did exactly that, and in overwhelming numbers in both the House and the Senate changed the standard of review for departures from the federal sentencing guidelines from the Coon v. United States case, the Rodney King beating case, in which the Supreme Court changed the standard of review and said it would be a deference to the district court judge.

In the PROTECT Act, we returned it to a de novo standard of review. And only, you know, within a year, in *Booker* and *Fanfan*, striking down the mandatory nature of the federal sentencing guidelines after being in place for 20 years, and only recently having passed a de novo standard of review by statute, Justice Breyer simply excised the provision of the PROTECT Act that changed the standard of review. No suggestion on his part or anyone else that it was unconstitutional. He simply excised it—those were his terms—and another provision of the PROTECT Act.

Congress is left to wonder. When we do take action, they are simply struck down or excised, whatever that means. And Justice Breyer had the audacity to say this is what Congress would have preferred. After 20 years of having a clear statute by saying that the federal sentencing guidelines shall be mandatory, they were suddenly

made advisory. And Breyer crafted a new thing; I guess reminiscent of his time as a staffer in the Senate, started writing the laws up there.

So the Congress is—you know, that's an eye-opener for the Congress. It ought to be an eye-opener for all of us and it goes back to legitimacy of underpinnings of Supreme Court decisions, because at the end of the day suppose Justice Breyer had simply said this is required by the Constitution, just said it? When he says that or when Justices are willing to say it, they can always trump anything we do in Congress.

And then you talk about a nuclear option. Boy, that's it. You know, if nobody can—it doesn't pass the smell test, you know, and yet they're willing to do it on raw power, and *Booker* and *Fanfan* came pretty close, I think.

MR. TAYLOR: Thank you, Jay. I'd observe on *Booker*, *Fanfan*, which were the decisions striking down the federal sentencing system as it existed, I've tried to write a brief, 1,500-word piece of journalism summarizing what the Court did there and I'm convinced it can't be done. It's incomprehensible and I hope nobody is going to bring that up again.

[Laughter.]

MR. TAYLOR: Not that I'm criticizing you for bringing it up.

MR. APPERSON: It's all right.

MR. TAYLOR: All right. Any more questions out there?

I might ask Sarah one, and we only have about five minutes. You heard various proposals, suggestions, and discussions of means of holding the judiciary accountable. Do any of them strike you as alarming? Is there anything going on in the

current debate that you as a political scientist see out of sync with our tradition and seems to have a potential for doing real harm to our institutions?

MS. BINDER: Well, I would come back to where I started off, which is the underlying motivation why legislators typically historically have not tried to rein in the courts in the types of ways some of us have been talking about today, which is political uncertainty about the future.

And, granted, political scientists don't always talk in terms of constitutional norms and values. We talk in terms of self-interest, and politicians understand that tables turn. And implementing these types of pretty strong accountability based on what judges decide, when the Framers set up a system of an independent judiciary, will inevitably come around to haunt members who implement them. And they will find themselves potentially having judges whose views they agree with being attacked by the opposite party.

And my sense is this isn't just political science theorizing, but it has been a strong restraint on legislators throughout history encouraging them to rein in, given the realities of electoral politics in the United States. And that's probably where I would end on this.

I would just throw in one minor note. Your point about perhaps changing the rules on courts to require a super-majority—granted, that brings home the politics of the super-majority procedures that have been vilified in the Senate. There's a politics to these procedural changes and there's a politics to the choice of the rules of the game, and there's no constitutional principles at stake here because the Constitution allowed Congress to set the rules of debate.

Again, they sound—these types of super-majority rules are attractive in many different settings, but there are costs and benefits to them and I think we need to step back and realize that they are politically-constructed rules of the game.

MR. TAYLOR: Any more questions?

I guess it's allowed to finish three minutes early, so I thank our panelists for a very interesting discussion.

[Applause.]

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