BROOKINGS JUDICIAL ISSUES FORUM

SCRUTINIZING JUDGE ALITO: DOES THE PROCESS WORK?

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C O N T E N T S

P R O C E E D I N G S

MR. TAYLOR: [In progress] —questions. We're obviously in the middle of the process and we've seen some very divergent characterizations of Judge Alito. The American Bar Association and people who know him, including Third Circuit colleagues—a Democrat, people of diverse race—all praise him to the skies both as a person and as a judge, say he's not a movement person he's a genuine judge. On the other hand, groups like Elliot Mincberg's People for the American Way believe that he is an extreme conservative ideologue, or words to that effect.

In the testimony last week, there were complaints that he was evasive in terms of not answering questions senators thought should be answered. There were also excuses along the lines of, well, he had to be because nobody who's not evasive could get confirmed today. I plead guilty to that view myself. And there were complaints from the pro-Alito side that Ted Kennedy and others resorted to innuendo on racist, sexist, unethical traits that don't exist.

At this stage, confirmation looks almost certain. It also looks as though there will be a party line vote, 10-8, in the Judiciary Committee and something closer to a party line vote on the full Senate than we're used to seeing when we have a nominee of unquestionably outstanding qualifications, basically on people thinking he's too conservative.

Each of our four panelists will speak for five minutes, opening statement, and then I'll ask some questions. Then there will be room for audience questions. I'm fishing around for my secret weapon. I've had difficulty enforcing time limits in the

past, and I noticed that in the presidential debates they a little gimmick. So this is going to be my little gimmick. When you see this, you know your time limit is past.

Our first speaker will be Sarah Binder, who's a senior fellow at the Brookings Institution, Ph.D. in political science, a professor at George Washington University, and the expert on the history and incidents of the confirmation process. Sarah?

MS. BINDER: Thanks. Could you hide that blinker?

MR. TAYLOR: I'll hide it for now.

MS. BINDER: I was going to focus on two aspects of the conference process as we've seen it so far, first, to try to put Judge Alito's confirmation process and prospects into some historical perspective, and second, to say a teeny bit about the hearings, to try to put them into historical and into institutional perspective.

First and foremost, the obvious, the Senate is considering Alito for a swing seat in a period of unified party control. Obviously simple facts, but in fact it can tell us quite a lot about what we've seen so far and what we can probably expect to happen over the next couple of weeks.

First, we should remember that most nominees to the Supreme Court tend to get confirmed. For the roughly 150 or so Supreme Court nominations over the course of U.S. history, 80 percent of them actually have been confirmed. Since 1900—so running from the 20th century through the Roberts nomination—over 90 percent of them have been confirmed. But in periods of unified party control such as we are in now, with the same party controlling the White House and the Senate, 96 percent of those

nominees have been confirmed since 1900. So the process clearly is presumed in favor of Judge Alito's confirmation.

The Alito nomination, of course, is for a swing seat. Political scientists like to call these critical nominations; that is, nominations that have a capacity to swing the Court in one ideological direction or the other.

Now, critical nominations in the 20th century, in fact, do have a tougher time being confirmed, but even these nominees get confirmed at high rates, at roughly 75 percent of them being confirmed. Just as a point of comparison, in the 19th century, these critical nominations, these essentially were the ones that did not get confirmed. The confirmation rate for those critical nominations was 45 percent of them being confirmed, in the 19th century.

So by and large, it's safe to say that Supreme Court nominees today have a very strong presumption in favor of confirmation even before the hearings take place, and even when nominations are for a critical or a swing seat for the Supreme Court.

Now, why do these nominees have such easy sledding, at least compared to the 19th century or the history of the Court confirmation process? One possibility is simply that the Senate has become more deferential to the president, perhaps because of extra political capital that the president and the presidency can bring to these battles. But another possibility is simply that presidents have become better at anticipating who is likely to be confirmable by the Senate, who is going to be acceptable to that pivotal senator who today we think of as the 60th senator who can decide whether there will be a successful filibuster or not.

Now, of course it's hard to tell which of these explanations is correct because they both lead to high confirmation outcomes, our high confirmation rates. But Senator Schumer said something interesting last week, suggesting—he said that because of the opposition that Democrats had raised against lower court nominees over the past four years, in fact Bush didn't nominate someone as conservative as he could in selecting Judge Alito—implying he could have selected somebody more conservative, from Schumer's point of view, who might have triggered a real filibuster.

Why no filibuster in this case, given that there's been a lot of effort by organized interests to convince senators to mount one? I would like to venture that perhaps the Gang of 14 agreement last spring actually has made a difference in how these decisions over the filibuster occur.

My sense is that the Gang of 14 agreement might have altered what goes on in terms of the decision-making. It has really institutionalized, in an informal way, who are the key decision-makers, who are the agenda-setters for whether or not there will be a filibuster. It set an amorphous standard—extraordinary circumstances—but it moved that decision-making, really, at least initially, into the Gang of 14. Where did Judge Alito go when he went to make his rounds before the hearings? He went right to the offices of the members of the Gang of 14.

I believe that agreement, the Gang of 14 agreement, has moved the discussion first into the Gang of 14, where previously it would have taken place almost solely within the Democratic, or the minority, party caucus. And remember, the members of that group are not all moderates. They are as much institutionalists and mavericks as they are ideological moderates—John McCain, John Warner, and so forth.

Now, with respect to the hearings themselves, we hear a lot of complaints that the hearings are charades, that nominees don't want to say anything that would jeopardize their confirmation. Republicans of late like to point to Ruth Bader Ginsburg and calling it the Ginsburg precedent set in 1993 whereby Supreme Court nominees will no longer say anything that could jeopardize confirmation. And it's suggested that this is a relative new phenomenon, where polarized politics has made it tough for anyone to say anything controversial that could jeopardize the confirmation.

In fact, the practice of reserving comment on issues coming before the Court, we should call it the Frankfurter precedent set back in 1939. Why 1939? In fact, this was the first Supreme Court nomination hearing where senators actually asked very direct questions of the nominee.

So my sense is that Judge Alito's reluctance to say all that much and, some say, to hide behind generalities—the president is not above the law, the president is very important—I don't think that side-stepping questions is terribly new. That is really the established terrain of the Supreme Court hearing process.

And just to wrap up, I think what's probably the most interesting about the hearings is not what Judge Alito said or not said, but what the senators said. If you listened carefully to those long days of questioning, there was quite a lot said, particularly by Specter and some of the Democratic senators, about the relationship between Congress and the courts. There were concerns about the Court substituting its own reasoning for Congress's reasoning. Specter noted that the Senate was thinking of passing a bill that would give Congress standing before the Supreme Court. He said, Why should the solicitor general be the only one to have an automatic, essentially,

recognized position arguing the administration's position before the Court? And so forth.

Presumably, the senators here are trying to convince us that the Court has been overstepping its bounds. I see it a little differently. I think, more likely, Congress in this period of very polarized politics has been writing very ambiguous law, that political disagreement within Congress and with the president has spilled over into the art of legislating. We shouldn't be at all surprised that the Court continually has come in to interpret these laws. The Americans with Disabilities Act, constantly cases coming back before the Court: What did Congress mean, how do we need to apply it? McCain-Feingold campaign finance reform, we're all waiting for the Supreme Court essentially to decide A) what Congress has said and whether or not it was constitutional.

So again, these hearings, I think, tell us quite a bit about the relationship of Congress and the courts. But it is as much caused by what the senators and members themselves are doing as much as the proclivities of the Court itself.

I'll stop there.

MR. TAYLOR: Thank you, Sarah.

Our next speaker is Elliot Mincberg, who's vice president and legal director of People for the American Way, one of the leaders of the oppositions to Judge Alito—Elliot substituting today for Ralph Neas, the head of People for the American Way, who was originally planning to be here. And a fine substitute he is. A law school classmate of mine, among other things, right? Elliot will speak for five minutes on Judge Alito and on the process.

MR. MINCBERG: Thanks, Stuart.

I think the San Francisco Chronicle this morning got it right: Supreme Court nominee Samuel A. Alito, Jr. was careful to avoid being too revealing at his Senate confirmation hearings, but he did answer the overriding question. He is the wrong choice to succeed Justice Sandra Day O'Connor on the nation's highest court.

And as Sarah pointed out, the fact that we are talking about succeeding Justice O'Connor is critical because she has been the swing vote on so many issues. At the hearings, I think Judge Alito continued to demonstrate a career-long pattern, starting even before that infamous 1985 job application, that puts him far to the right of O'Connor on issues like executive power, congressional authority, reproductive rights, the environment, civil rights, and many others.

What did we learn at the hearing? Well, we learned, as I think we knew already, Judge Alito's professional and technical qualifications, that he's well-liked and respected by employees and co-workers—clerks like Adam and his fellow judges. But we also saw that he evaded many questions. Indeed, he appeared in some instances to—whether intentionally or not, to mislead the Senate, not just on issues like Concerned Alumni of Princeton, which got a lot of attention, but on many which didn't, which were his descriptions of some of his own cases as the hearing went on. And I can get back to that more later as we do questions.

We saw confirmation at the hearings of what Professor Bob Post described as the effort by Alito to massage precedent and legal doctrine to make it come out the way he wants it to, leading to the result, as Professor Cass Sunstein pointed out, that more than 91 percent—or 91 percent exactly, excuse me, of Judge Alito's dissents are to the right of his colleagues', including conservative Republican colleagues—a

percentage far higher than even someone like Michael Luttig, widely reputed as one of the most conservative judges on the federal appeals courts.

Let me, if I can, give two fairly quick examples of that. A lot of discussion at the hearing about the Rybar case, a dissent by Judge Alito to a decision by the Third Circuit upholding the constitutionality under the Commerce Clause of a longstanding federal law limiting the possession and transfer of machine guns. Judge Alito said, I was simply trying to interpret the Supreme Court's decision in Lopez. But in fact, prior to his decision, give other federal courts of appeals had done exactly the same thing—interpreted that machine gun law in light of Lopez. Add his circuit, the sixth—six circuit courts of appeals had ruled that despite Lopez, the law was clearly constitutional. Judge Alito disagreed—dissented in a way that was clearly out of the mainstream.

And if you're worried about the consequences of this, as one environmental expert has already indicated, there's a case right now before the Supreme Court, this term, relating to interpretation of the Clean Water Act that raises similar Commerce Clause issues. And if Alito's interpretation of that law and Congress's powers is upheld, it's been estimated, something like 99 percent of the streams, lakes, and wetlands protected by the Clean Water Act would lose that protection.

Another example was Senator Schumer's questioning about the inconsistent way that Judge Alito has applied legal doctrines. He pointed out, for example, the strong dissent by Judge Alito in the Paroli [ph] case, involving terrible alleged sexual harassment of a disabled individual, which Judge Alito justified because, he said, there was a principle of judicial restraint here because the issue wasn't

sufficiently raised by the disabled person's briefs. But on the other hand, he dissented in a case that his majority went against the Caterpillar Corporation and in favor of an injured worker. The majority pointed out, there was one big problem with Judge Alito's dissent and that was that the argument he was making had never, ever been raised by Caterpillar either in the lower court or in the court above.

These are simply examples, and there are many, many more as we've been poring through the hearing transcript of what the hearing helped teach us.

Now, the process? Clearly far from perfect. Were there too many speeches? Probably so. I should point out, by the way, that according to the Daily Show, it's Senator Mike DeWine who won the prize for most consecutive minutes speaking without allowing the nominee to say anything at all. But I think there are a couple of important points about the process and about the speeches, too.

One, I think a lot of those were attributable to the, frankly, scandal that we've seen in recent months about the unauthorized National Security Agency wiretapping. This was the first chance senators had to publicly talk about this issue as it related to this Supreme Court nomination. That, I think, made things a little bit different.

Two, I think that a large part of this has to be laid at the feet of the media. The media is so concerned about the horse race—will there be a filibuster, won't there be a filibuster? The atmospherics. So many other issues that, frankly, very little time except from some more, I would argue, thorough print journalists—and I won't say whether I include Stuart in that view. We didn't see the kind of substantive coverage that we ought to see and therefore the kind of encouragement to get into substance. Indeed, much of the media even seemed to celebrate the fact that Judge Alito was able to

evade so many questions, rather than performing what we would consider to be the journalistic job of making clear that questions, when they're asked, ought to be answered, for very good reasons.

But finally, I think we have to talk a little bit about the politicization of the process. I think the best comparison is to compare this hearing to the hearings of justices Ginsburg and Breyer, where you similarly had a president—and a Senate, at least in the instance of Justice Ginsburg—controlled by the same party. The difference was President Clinton did not make this a highly partisan political issue. Indeed, Senator Hatch's biography points out that at a time when Republicans had as few senators as the Democrats do now, he consulted with Senator Hatch. And in fact it was Hatch that suggested Ruth Bader Ginsburg, and the result was a process that asked a lot of questions and answered a lot more than the Republicans claim. And it indeed did not create the kind of process we've seen.

So I think a large part of the fault in what's happened with the process has to go to the politicization that has occurred, which, frankly, I think I have to lay in large measure at the feet of Karl Rove and his very clever effort, that's been very successful with the Republican base, of using this issue to motivate the base in a highly effective way.

Now, as we look to the future, I have to—as I often do—disagree with my friend Stuart. I don't think we're going to see a strict party line vote on this issue. I'm actually hopeful that when a vote comes on the merits, we will see Republicans as well as Democrats opposing Alito. And I suspect we may see a Democrat or two on the other side. I also don't think the process is over. As Senator Schumer said just the other

day, all options remain on the table despite the media's penchant to want to express the conventional wisdom that this is all over. I think there's a lot of this process left to come.

Most important of all, we would argue, as not just People for the American Way says, but organizations representing millions of Americans from across the spectrum, many organizations who've never opposed a judicial nominee before, joined by professors like Post and Sunstein and many others who've looked at this nominee's record, that as the Chronicle put it today, as the Grand Forks Herald of North Dakota put it just the other day, Judge Alito is the wrong nominee to succeed Sandra Day O'Connor on the Supreme Court.

Thanks.

MR. TAYLOR: Thank you, Elliot.

Our next speaker is Adam Ciongoli. We're lucky to have him. He just made it down from New York, where he's now a lawyer at Time Warner. He was a law clerk to Judge Alito many years ago and has been a top aide to John Ashcroft both when he was in the Senate and when he was attorney general; has been present at the creation of many of the post-9/11 war on terror legal policies, I think. And he will perhaps have a slightly different view than Elliot did on Judge Alito and maybe even the process, too.

And he will get as much time as Elliot had. I couldn't bear to bring out my blinking red light, you were cooking so well.

MR. CIONGOLI: I'll actually try and keep it short.

The most striking moment of the hearings for me last week, and I watched most of them, was the end, which was when Senator Specter and Senator Leahy

turned to each other and congratulated each other on a dignified hearing. They both reaffirmed this word "dignified" over and over and over again. And it struck me most because, for most of the week, I had felt the same way. Until it was pointed out to me by my father, who I usually listen to sparingly—

[Laughter.]

MR. CIONGOLI: —that only someone who had spent as much time in Washington as I have—and I lived here for 11 years—would view that hearing as dignified, would view a process which questions the honesty, credibility, and racial tolerance of someone like Sam Alito as reasonable and dignified.

It struck me as interesting that I had become that cynical, that callous, that this was just all part of the political game that's played in Washington, that it is perfectly—it's to be expected and, in some ways, even justified; that both sides do it—they level charges that are unreasonable, they call into questions things about judges that they know probably aren't entirely true, but it's part of the game.

And I think that it was really sort of capped off for me when Martha Alito reacted the way that most regular Americans would if they watched someone they loved and knew be accused of things that they knew not only were absolutely not true, but were absolutely reprehensible.

Now, I sit here with great interest listening to Mincberg talk about laying the blame at the feet of the media and at Karl Rove. It reminds me of the old, sort of, New York one-line joke that it's the criminal who kills his own parents and throws himself on the mercy of the court for being an orphan. People for the American Way and organizations like it have, unfortunately, I think, grossly politicized this process.

They may have good reasons from their perspective. They have, I think, a very different view of the Court than certainly I do. And as a result, I think they engage in tactics which necessarily politicize things. They grossly distort the facts in cases.

The two examples that Elliot gave are perfect examples, and Rybar is perhaps the best. First of all, it's not a long-settled federal law; it was a law that had been in place for nine years. It was the 1986 Firearm Owners Protection Act, FOPA. The fact that five circuit courts had sustained it doesn't get to whether or not the analysis was correct. But most importantly, Rybar has been bandied about as this radical opinion because Judge Alito actually believes that the federal government cannot regulate machine guns.

Well, I have the advantage of having been a clerk on the court in 1995 and '96, so I was there when Rybar was decided. So I'm very familiar with the case. And I can tell you that, if you read it, the most notable aspect of Judge Alito's opinion, I think, is that it says very clearly that Congress could pass this statute, under Lopez. All they have to do is one of two things. They either have to have a jurisdictional nexus in the statute, which virtually every federal firearms statute has, or they have to make findings about the impact on possession of machine guns on commerce.

Now, when the Supreme Court struck down the Gun Free Schools Act in Lopez, Congress reenacted it almost immediately, and it still stands today. It's no longer free to possess a firearm in a school—because the Supreme Court struck down Lopez—the federal law makes it a crime. What they did was they did both. They said the gun has to have passed in interstate commerce—that's easy, because every gun passes in interstate commerce; and they made findings. They passed the law, the law still stands.

If Judge Alito had been in the majority in Rybar, they would have struck down the statute—as the Ninth Circuit has, in fact; he omitted that part—

MR. MINCBERG: Which decision was vacated by the Supreme Court.

MR. CIONGOLI: Right. But Congress could very easily reenact the statute following Judge Alito's path, just plainly laid out in Rybar, as to how to pass the statute to pass constitutional muster. So it's not this sort of—it's not this incredibly radical opinion. It basically says, look, if the Supreme Court says something, we need to pay attention to it. We have a federal gun statute that they've struck down; this is a federal gun statute. It prohibits possession; this statute prohibits possession. There's no jurisdictional nexus in that statute; there's no jurisdictional nexus in this statute; that's highly unusual in federal gun statutes. They didn't make any findings in the Lopez statute; they didn't make any findings here.

He could have just left it at that. If he really had some agenda, he could have written some very broad opinion that created some theory, reading out of Lopez, that called into question all federal possessory statutes and called into question even statutes that had a jurisdictional nexus because that really doesn't get to the heart of what the Interstate Commerce Clause is about. He could have gone in the direction that Justice Thomas went; he could have cited Justice Thomas's concurrence in Lopez, which really is a much more aggressive conservative stance on Commerce Clause jurisprudence. He didn't do that.

I think that when you have organizations that mischaracterize opinions like this, and consistently mischaracterize opinions, it calls into question your ability to rely on them and everything they represent about a particular person.

Now, the response to that, of course, is I'm a law clerk so—and I thought it was in some ways outrageous that the two law clerks who came to testify to the Senate were dismissed as "oh, of course, they were his law clerks, they have nice things to say about him, isn't that nice, isn't that cute?" It dismisses the fact that a lot of us have spent a lot of time reading his opinions, but a lot of us—and I'll exclude myself from this—are fairly accomplished lawyers, and that, unlike political organizations that raise funds based on opposing these organizations, we have very little to gain here. In some cases, some of my colleagues, my former co-clerks, are very liberal people—you know, members of the executive board of Planned Parenthood, members of Lambda Legal Defense, members of the NAACP and the ACLU. All of these people unanimously support the confirmation.

Similarly, Judge Alito's colleagues don't really have anything to gain by supporting his nomination. These are people who worked on the 4,000-plus cases with him. They see how he decides cases.

And so to me, that is incredibly compelling. The people who have worked with him and see how he decides cases are the ones who don't have the political agenda here. They're not going to raise funds by opposing or endorsing the nomination. They're not going to advance their careers. I've already clerked, you know? I mean, for me this is a matter of dignity and respect, and that is a process that I really would like to get back to.

MR. TAYLOR: Thanks, Adam.

Last speaker is Ben Wittes, who's an editorial writer for the Washington Post on legal and judicial issues, among others, and he's now writing a book on the

confirmation process. He's going to talk about the process and maybe about Judge Alito for five minutes. Then I'll ask some questions.

MR. WITTES: A brief disclosure and a disclaimer. First of all, the Post did editorialize cautiously in favor of Judge Alito's confirmation on Sunday. There's the disclosure. The disclaimer is that I'm here in my personal capacity and my views expressed don't necessarily represent the views of the Post editorial page.

I'd like to start, if I could, some years before the nomination of Judge Alito, when Harlan Stone was elevated to be chief justice in 1941 from a seat as associate justice on the Supreme Court. A few notable, interesting things about the nomination. The first is that Justice Stone was a Republican and actually had been attorney general in a Republican administration, elevated by Franklin Roosevelt. That's the first sort of unthinkable thing that could happen, as if, you know, a Democratic president could nominate John Ashcroft.

The second thing is that his confirmation process took a matter of a few days; I believe two days or so. Exactly one senator spoke on the floor about it. And it's quite an endearing speech, actually. The senator, George Norris, had opposed Justice Stone when he had been nominated the Supreme Court 15 years earlier. And he took the floor and made a brief speech to express his joy at the nomination because it offered him an opportunity to correct the error that he had made 15 years earlier in opposing the nomination to the Supreme Court of the same man. And he expressed his gratitude to the president for the nomination—I believe this is an exact quote—"because I can in this small way, perhaps, rectify the wrong I did this man so many years ago."

And I think this is also just—seems almost quaint, or maybe more than almost quaint. It seems quaint in the context of the current political environment and the way we treat judicial nominees today. I think it's a particularly interesting question to ask why that has happened and why we've gone from—it's not that long ago; it's 65 years ago—a nomination can come up across party and be received as a matter so undeserving of debate and so obviously correct that you can have a process that brief to a norm in which a president makes a nomination and we have a convulsive national discussion about it with a great deal of mobilization of political money, interest groups, lengthy hearings—and all in order to get exactly what?

The title of this forum or discussion asks does the process work? I think the answer to that question, however it is meant and however you envision the purpose of the process, has to be no. If the goal of the process is to suss out who the person is going to be as a justice, it clearly doesn't work. I challenge any of you to predict confidently how the chief justice will vote on an issue of your choice. I challenge any of you to predict with great confidence how Judge Alito will vote on Roe v. Wade, which we've spent a great deal of time talking about over the last few months. I think that if you go back over the last several dozen nominations, the confidence with which nominees were viewed at the time of their confirmations is belied by the subsequent judicial careers of a great many of them—not 100 percent. Some of them prove pretty predictable. A lot of them don't. Moreover, if the goal of the process is something more elevated than that, which is a kind of a discussion of judicial philosophy, of the proper role of the Court, certainly we are not doing that.

So I think the first question to situate any discussion about Sam Alito is what exactly are we trying to accomplish in the process? And I think, at this point, the best explanation of what this process is about has almost nothing to do with the assessment of a nominee; that is, it's an opportunity for two sides in an ongoing political war to have a battle. You can tell me—I can describe, as can all of you, describe exactly what the trajectory of every nomination is going to look like before you even tell me the name of the nominee. That suggests that assessing the nominee is kind of a secondary consideration here.

In fact, we did more or less this a few months ago, before the president announced his nomination. I wrote a little editorial that said, okay, the president's going to announce his nomination pretty soon and here's what's going to happen. Now, this wasn't particularly prophetic, the fact that it was right to every detail; it was obvious what was going to happen. And it was obvious what was going to happen from the time the president was elected. The dynamics during a Democratic presidency are a little bit different, but it's still very, very predictable. And the reason is, is that this process really isn't about assessment of the nominee at all.

Now, if you really wanted to assess Sam Alito, there is a very large body of data, which is a 15-year record as a judge. One can debate the merits of it anyway one likes. His testimony adds extremely little to that. You know nothing substantial about Sam Alito today that you did not know prior to the hearings. And something very similar can be said of Ruth Bader Ginsburg. Exactly what did those hearings that we had—which were much less convulsive, granted—about Ruth Bader Ginsburg or about Stephen Breyer add to what we already knew about them? I submit, very, very little.

So I think a useful place to have this conversation is less about what did we learn about Sam Alito than what did we want to learn? What is the actual goal that we're pursuing? And the more I watch the process, the less convinced I am that the process has anything other—any reference points outside itself. It really is a battle like Social Security, like the war in Iraq that is a—it's a sort of an opportunity for the two sides to butt heads and attack each other and articulate their differences over sort of broad swaths of the way the world should be.

MR. TAYLOR: Are you done? Thank you.

I'm going to ask one round—two rounds of questions, if we have time before audience questions. First to Sarah.

Ben says the process doesn't work. Do you agree? And a slightly related question: Let's suppose that everything about the Alito nomination had unfolded as it has, except the Senate had 55 Democrats instead of 55 Republicans. Could he be confirmed?

MS. BINDER: Well, you first started on the question of does the process work. And Ben sort of alluded to this, that it's not quite clear what we mean today by whether the process works. And it's certainly, I think, a bit different than what the Framers might have had in mind originally, where the question was not should the president have his say over who should be put on the Court, right—originally in the Constitutional Convention there was some dispute about how Advice and Consent was going to be constructed.

I think the important part to take from that is that there was a dispute and there was no easy decision on how it was going to work. In fact, the end result was a

compromise. Originally it started with the Senate having the say. There was a little hesitation over the hot summer sticky months that maybe the president should come in; we didn't want a cabal of senators deciding. And then, in the end result, we've had a compromise with the standards being set as majority vote.

So it's not clear that there's ever been a precise view of what Advice and Consent was meant to be. I see advice-and-consent as an evolutionary process. It has evolved along the interests of senators. Whether or not there's been outside interests coming in or not, I don't believe those are totally new. We've seen them in the 1930s over the New Deal issues. We saw them in the 1960s over civil rights issues. So it's an evolving process. I think it's hard to pinpoint to say whether or not it works or not. But clearly, I guess I'm less on the view that it doesn't work. We've given an opportunity for both sides to marshal views here, even though some are frustrated, and many of them frustrated about what nominees can say or what they can't say.

Would things be a little different if we were in a period of divided-party control where we had 55 Democrats in control of the chamber? My hunch is that it probably would look a little different. I don't know that he necessarily would not be confirmed. Remember, there are a handful of Democratic senators—the Nelsons from Nebraska and Florida, perhaps Mary Landrieu, perhaps Kent Conrad from North Dakota. There are a number of marginally or reasonably moderate Democrats who in fact might vote for him anyway. And it's potentially that you'd still get up to—that Republicans could put together a coalition to get up to 51 votes, but my guess is it would be much tougher sledding, not least because Democrats would have the upper hand in trying to frame how the nominee would be portrayed.

MR. TAYLOR: Thanks.

Elliot, I imagine you might have some comments on what Ben and Adam have said. Have at it.

MR. MINCBERG: Maybe one or two.

Just briefly, without responding to what I consider some of Adam's ad hominems, I don't need to respond to what was wrong with Rybar because it was indeed Judge Alito's fellow judges, whose opinion when they were sitting with him, I think, is the one that counts the most, who said that Alito's opinion was counter to the deference the judiciary owes to the two coordinate branches, that nothing in Lopez requires either Congress or executive to play show-and-tell with the federal courts at the peril of invalidation of a congressional statute. And indeed, the Ninth Circuit decision that he mentioned was vacated by the Supreme Court. Every pending court decision on this issue goes the other way from Judge Alito. If that's not out of the mainstream, I don't know what is.

But I want to talk for a minute about what Ben said, because I can understand the frustration and the perception, but I would argue it's a bit of a misperception, that this is nothing more than an opportunity to have a battle without regard to who the nominee is. Believe me, I would really much rather be spending my time dealing with issues like election reform, election protection, other legal issues, than on issues that are engendered by the Supreme Court. And I can predict confidently that's true of most of the senators on the Judiciary Committee, particularly on the Democratic side.

But it's important to remember part of what Sarah talked about in terms of the structure of the process that the Founders created. The president nominates, the Senate provides advice and consent, and that's it. There's no other opportunity, short of malfeasance by a judge or justice, to check what they have to say, and short of a constitutional amendment when it comes to constitutional issues. These are lifetime positions that have critical importance to every issue we care about, from the environment to reproductive rights, to civil rights, to executive authority—all of the other issues.

So to suggest that somehow it's only to have a fight that people are involved in this I think is incorrect. I think what we do need—and, as Ben conceded, the trajectory was a bit different, at least in the last Democratic administration, though I can't predict for sure that it will be that way in the next one. It will depend on the politics. But I truly do think we need—and as I think Ben can testify, people have said this consistently over the last six years or so—we really do need, particularly at the Supreme Court level, to put more advice back into the advice-and-consent process.

I think we did learn a good deal more about Justice Ginsburg and, indeed even, I would argue, even about Judge Alito from the hearings that occurred. But there's no question that the Ginsburg-Breyer hearings, where you had genuine solicitation of advice from the executive branch, made a huge difference in the process working. I think Sarah is right, that it's an evolutionary issue. Maybe it's a de-evolutionary issue in some ways because evolution, we like to think, leads to a positive direction. I'm not sure all the changes are positive here.

But as long as there is a commitment on one side of the political aisle to put people in office, as Ben points out, as pledged in the election will be "models of Scalia and Thomas" who will move the Court to the right, it would be a dereliction of duty for senators that represent different interests not to do what they can to try to push back that process and to keep the Court in a position so that it can in fact protect our critical rights and liberties.

MR. TAYLOR: Thanks, Elliot.

Adam, where do you think, if you don't mind guessing a little bit, after two or three years have gone by and we've seen Judge Alito cast a bunch of votes, assuming he's confirmed— It's widely been predicted by some that he'll be, if not temperamentally, in terms of voting patterns with Justice Scalia and Justice Thomas almost all the time, giving President Bush what he supposedly wanted.

And a second part of the question is if the president had wanted a rock-solid, predictable Scalia-Thomas clone, would he have picked Judge Alito or is there someone else who comes to mind?

MR. CIONGOLI: Well, you're putting me on thin ice, I think. You know, it's always dangerous to speculate. My sense is that Judge Alito will probably end up voting with Justice Roberts an awful lot. I think that they tend to be very similar both in terms of their approach to the law and also in terms of their temperaments. And I think temperament plays a big role in how you decide cases. Judge Alito does not like to decide cases broadly. He does not like to reach out and decide issues that don't have to be addressed in a case. A perfect example—you know, there are judges on the Third

Circuit who tend to write very expansive scholarly opinions. Judge Alito tends to write separate in those opinions, on narrower grounds.

With regard to the second part of the question, I think that there probably are more—sort of more conservative judges out there. I don't like to use the term "conservative" or "liberal" in dealing with a judge. I think it assumes that judges have political agendas, and I think that that does judges a disservice. I think that most judges try not to have political agendas. I think that there are small-c conservative and small-l liberal philosophies of judging. Judge Alito has a conservative philosophy of judging in that he tries, again, not to reach broad results.

There are judges out there who have written opinions calling into question the legitimacy of Supreme Court precedents in a variety of areas from, I think, both right and left, but in the context of this question, from the right. Those might have been candidates who would have been more sort of reliably conservative in a political sense.

MR. TAYLOR: Thanks.

Ben, Senator Biden, who said many, many, many things last week, I think one of the many things he said was that, you know, maybe we just shouldn't have nominees testify. I think his observation was sort of like yours—we don't learn anything, they don't really answer the interesting questions. Is that a good idea? And in general, how would you fix this process that's not working?

MR. WITTES: Well, I actually think there's a fair bit to be said for it. The tradition of having nominees testify in person has a sort of an odd and kind of less-than-distinguished pedigree. There had only been two incidents of a nominee—only two

to my knowledge—of a nominee testifying. One was Frankfurter in 1939, and before that was actually Harlan Stone in his original nomination in the '20s. And Justice Stone testified because, as attorney general, he had refused to drop an indictment against a senator and the senator was very angry and made allegations against him. He came up to address the allegations. There was no broad discussion of judicial philosophy.

The idea of grilling a nominee about his judicial philosophy really has a pretty firm date, and the date is 1955, when, in the immediate aftermath of Brown—Brown v. Board of Education, that is—the segregationists in the Senate wanted to make sure that this wasn't going to happen again. And there are—the hearings that immediately succeeded the Brown decision, specifically Potter Stewart's, John Marshall Harlan's—I think I have the order of those reversed, actually—have this, I think, really, for the first time, this very aggressive kind of inquest into the nominee's views of the law and "are you going to keep doing this?"

And the interesting thing about it is that liberals were appalled by this, because the preexisting wisdom was, as Abraham Lincoln famously put it, we cannot ask a man what he will do on the Court, and if we should ask, and he should answer, we should despise him for it—or disdain him; I forget the exact language of it. And this was a kind of conventional wisdom, that you can't—it's wrong to ask, and if you ask, then it's a horrifying thing if the nominee should answer you.

The segregationists actually managed to normalize the idea that we have this process. And the curious—and it got quite brutal, most brutal in—I mean, I refer any of you to Strom Thurmond's interrogation of Thurgood Marshall in 1967, which is a vicious and amazing interaction. And through 15 years of this, the position of liberal

senators was that this is illegitimate. And this changes when the nominating president changes, when the balance of power in the Senate changes.

The fascinating thing to me is that throughout the '70s nobody kind of goes back and says wait a minute, this was not right in 1955, when Potter Stewart—'55? I forget which year—Stewart actually has to say to the Senate, to the Judiciary Committee, I don't want you to confirm me in the belief that I'm going to sort of go back and revisit Brown. And there is no point subsequent to that where people kind of go back and say, wait a minute, this was not cool when it was Strom Thurmond doing it to Potter Stewart and it still kinda isn't cool.

It kind of got normalized and we all sort of accept it, without thinking about it, that we now, when the president nominates somebody, they go up there and they get asked a series of questions that we wouldn't confirm them if they deigned to answer. Or we would all sort of be horrified if, you know, John Roberts or Sam Alito said, Oh, yeah, I'm not going to vote to overturn Roe, or yes, I will vote to overturn Roe at my earliest convenience.

I think Senator Biden raises a very legitimate question, what role does this hearing process play.

And, you know, just if I could cite one more historical example. If you go back to the nomination of Charles Evans Hughes to be chief justice, in 1930, there is a very modern-seeming debate among the senators, the progressives of both parties against the conservatives of both parties about the nomination and whether it should succeed. And the debate—you know, if you substitute the name LaFollette for the name Schumer, the argument is exactly the same. He's extremely well-qualified, he's a

brilliant advocate, and he's going to entrench a lot of things that I disbelieve and it's going to produce more results that I don't like and I'm with Brandeis and Holmes and I don't want to have any truck with this.

And all of this argument, this argument goes on fiercely on the Senate floor for several days. He's eventually confirmed, actually fairly narrowly. And all of it goes on without the appearance of the nominee. And I think, you know, if Senator Biden were here, he could probably make, you know—he could probably make the argument that senators voting in that had as much confidence in what they were doing as he would have in voting for or against Sam Alito.

MR. TAYLOR: Thanks. I'm going to have one more quick round of questions, then audience questions.

First, Sarah. The Frankfurter precedent, and the whole question of should you answer the questions, we've kicked around a little bit. I've heard it argued that Judge Alito took the I-won't-answer approach or the bob-and-weave approach a little farther than others, in this sense. In 1985, in his job application, he wrote quite emphatically the Constitution does not protect a right to an abortion. That's more or less verbatim. And obviously, Senator Schumer and others were asking him, is that still your view?

Now, when Judge Bork was similarly situated and he'd said lots and lots of things, he answered. Judge Alito would not answer that question. Is that new? Is it a bad— Should he have answered that question?

MS. BINDER: I don't know that that precise formulation is new or not, but the general pattern of not wanting to be drawn into specifics about one's past and applying it to the future, I don't think that's terribly new. I think it's also a point to

remember here that Judge Alito and, to some extent, Judge Roberts had similar approaches to that question, because Roberts himself had a track record from his service in the Reagan administration. And he, too, to some degree, said those are views—his primary line for his legal clients, well, right, I'm just the attorney for those pushing those cases. So it's a different formulation than Alito, but neither of them really wanted to address head-on—again, to the contrast of Bork.

I would just step back from some of the comments that have been made today on this question of how the process works or not works, just to throw in again the idea that the institutional rules of the game here and the practices in the Senate evolve with the interests of the senators. What do I mean here? How does it account for what seems to be a more politicized process? We've heard, well, maybe it was Karl Rove, maybe it was the action of organized interests. I would step back and point to things we haven't talked about today.

First, the shape and the structure of the party system matters a lot for how these confirmation hearings and the process unfold. We have very ideologically polarized, regionally divided parties. And it makes a difference for the types of questions they bring to bear and the types of answers that they want from nominees. So getting rid of the hearings, keeping the hearings, I don't think it matters all that much. We would still have these forces on senators and on the nominees.

That's the first general factor. The second I think we sometimes lose sight of is the role of the courts and the types of questions courts are being called on to answer. We started in the 1960s with more criminal justice questions, 1970s, social issues, Roe v. Wade and others. We shouldn't be surprised that senators put more energy

and effort into trying to figure out how these nominees are going to act on the Court. And it looks politicized. We might attribute it to other motives—the Roe motive, the organized interests' motives. The bottom line is the parties are different today and the issues that the courts are called on to talk about and to weigh in on, those are different today. And I think it has changed, from our perspective, the character of the confirmation process and thus raises concerns about whether or not it's really working.

MR. TAYLOR: Thank you.

Elliot, hypothetical question. The role of—go forward a few years—a Democratic president, still a Republican Senate. The Democratic president nominates Cass Sunstein or Judge David Tatel—or you, maybe—

MR. MINCBERG: Hah.

MR. TAYLOR: And then the questions come. What's your view, Mr. Nominee, on late-term abortion? Should "under God" be stricken from the pledge of allegiance when it's recited in schools? Does the Second Amendment protect any personal rights? Should gay marriage be legislated by the courts? What about pornography and the First Amendment? How about flag-burning, the Patriot Act, the death penalty, racially preferential affirmative action? Let's suppose that the nominee is candid and he answers by—he gives—let's just suppose, by coincidence, every answer matches the position People for the American Way has on that issue. How many votes do you think that person would get?

MR. MINCBERG: I suspect probably not very many in the way that you've phrased it. But I do think that you put your finger on something. There is a difference between answering this is what should happen in the future, this is what the

courts ought to do or the legislatures ought to do, and then, on the other hand, explaining a nominee's own views on a subject—making clear, of course, that, as any good judge should, although they come into a case with preexisting views, they're going to listen carefully to the briefs and the arguments, et cetera, before making a decision.

The difference between Roberts and Alito in that regard was that Roberts could credibly say that he was simply representing the administration in everything he did. In that job application to which you refer, Sam Alito was representing Sam Alito and nobody else, giving his own view. And I think it's a lot less excusable to say I won't tell you whether I still have that view. He could have said whether he didn't and then gone on to point out, as every good judge should, that even though I started out with that, I have to deal with precedent, I have to deal with the briefs, I have to deal with X, I have to deal with Y. That would have been a more honest answer—which he might yet have been able to be confirmed with or not, depending on how that answer went.

I think the hearings do tell you something. David Souter, for example, is someone who we did not oppose, although we raised a lot of questions about him, because, although he was as much of a stealth nominee as anybody, his answers to questions at the hearing, while refusing to answer some of the $64,000 questions, did give a pretty good idea of his philosophy, his approach to things, which was very different than, I think, what some on the right had hoped. And I think it is possible for a judge or for a nominee to do that in a way that doesn't cross any lines of impropriety and, hopefully, preserves the ability to be confirmed without playing some of the games that we've seen in the last nomination or so.

MR. TAYLOR: Thanks.

Adam, quickly. Could any nominee who fully and candidly answered every question in terms of, well, here's what I think now; I might change my mind—briefs, arguments, whatnot. But could a liberal, could a conservative, could a moderate who gave an answer on every issue, well, here's what I think now, be confirmed?

MR. CIONGOLI: Unfortunate, I think not in this environment. I think we should try to get the process to an environment where that can happen. I think that will require a peace brokered by people yet to be identified. This is a bipartisan problem. I worked on the Senate Judiciary Committee at a time when President Clinton was nominating judges, and the actions of Republicans have sown some of the fruit that is being borne now. I think that, in my lifetime, anyway, probably started most notably with the Bork confirmation hearings and it has just gotten progressively worse, with a couple of bright spots in between.

We should be in a position where judges can talk about their general approach to legal issues. I think when you ask about a specific legal conclusion that would be the underpinning of a particular prior holding, you start to run risks. I don't think you want Supreme Court nominees, or any nominees, giving an indication that they have a predisposed inclination in a particular case or line of cases because I think that parties have the right to believe that judges are going to have an open mind. And I think that to hear someone say, well, I believe that the Constitution does not protect a right to X but I have an open mind, is a difficult thing to hear; as opposed to a judge saying, look, I'm not going to comment on that because I do have an open mind, and to comment on it would actually be to dissuade people that I have an open mind.

MR. TAYLOR: And lastly, my last question, Ben, let me press you a little bit on why nominees shouldn't answer questions. We know what seven of the current members of the Supreme Court think on all of the issues we're talking about. We know it in great detail because they've written it in their opinions and their dissents and their concurrences. And as you know, Justice Scalia wrote an opinion for a 5-4 majority of the Court, a conservative majority a few years ago, in the Republican Party of Minnesota case in which the issue was whether elective judges should be able to say, well, here's what I think about the issues, and whether there was any ethical reason not to. And the answer was, no, there is not—they should be able to say that, in fact, they have a First Amendment right to say that.

So, what's the big problem with judges answering these questions?

MR. WITTES: Well, I mean, first of all, I do not think that the proper posture for a judicial nominee is the one that Justice Scalia took in his nomination, which was, asked what he thought of Marbury v. Madison, he said, it could conceivably come before me, I'm not going to address it.

[Laughter.]

MR. TAYLOR: You laugh. It was true.

MR. WITTES: Right.

I mean, there is an extremity to the argument that is sort of nonpragmatic and that I'm not necessarily advocating. On the other hand, you know, I would not want to be—the secondary component of the answer is, you know, when justices have expressed views on something in the context of cases that they've decided, that's

inevitable. That's their job. There's nothing we can do about that. And there is a question of whether they should do it when it's not inevitable.

And again, just to pick on Justice Scalia, you know, Justice Scalia gave a speech in which he articulated in very strong terms—what was it?—that there was no right to die. Is that right? And I believe, you know, that led him to have to recuse in a case.

MR. TAYLOR: That was "under God."

MR. WITTES: I'm sorry, that's right. It was "under God."

MR. TAYLOR: The pledge.

MR. WITTES: And, you know, he gave a speech down in Virginia and he said, look, isn't this ridiculous? And the next day, he had a motion to recuse on his desk. And he granted it.

So, you know, the proper—you know, these things are not without consequence, and you don't want—I would not want to be a litigant, say, challenging an abortion statute in the context of a court in which everybody had proclaimed their positions in the context of, you know, nominations, where those commitments that they were made were actually—you could count the votes on the Senate in association with each statement you made. I think there is a strong prudential consideration as well as an ethical consideration that cautions against that.

I also think, at a subconscious—or maybe not so subconscious—level, once you've spoken publicly on an issue, you're much less apt to change your mind, because you have to contradict yourself. And that does—I don't know how much that weighs on people, but, you know, once I've written an editorial that says X, I'm much

less apt to write an editorial that says not-X. It's human nature. And I think that's not less true—you like to think, well, I'm open-minded, I'll always revisit my premises, and, you know— And so you will. And yet, are you less likely to— [flip tape] —articulated X? I think you are.

And so I think there's a—you know, I don't think the right answer is, you know, no, Marbury v. Madison could still come before me. On the other hand, I do think we have to be respectful of the anxieties that people have about testimony. And I think Justice Ginsburg articulated that very strongly in Chief Justice Roberts's defense. She was speaking at Wake Forest University and was asked about his reticence, and I think the language she used was that it was unquestionably right.

MR. TAYLOR: I think on your not-X and X, you underscored one of the differences between columnists and editorial writers. Speaking as a columnist, if I write X and then I write not-X, that means I can get two columns out of every subject.

[Laughter.]

MR. TAYLOR: But when you've got the entire editorial page hanging around your neck, I suppose it's harder to be nimble that way.

MR. WITTES: We revisit positions all the time. I would be interested to see how many judicial opinions, you know, you can identify at the Supreme Court level—I can think of a few—in which a justice with a track record of saying X produces an opinion that says—I mean, famously, Harry Blackmun—I will no longer tinker with the machinery of death. Right? But there's—it's not an everyday thing that a justice who has a clear and known position on an issue says, you know what, I've been wrong. And that's just because justices are people.

MR. TAYLOR: The closest I can think of immediately is I think Justice Kennedy wrote the opinion in Roper v. Simmons this past year saying you can't execute a 16- or 17-year-old, and he'd voted the other way 15 years ago. But as Justice Scalia pointed out, Justice Kennedy's position wasn't that he's changed his mind; his position was that the Constitution had changed over the past 15 years. Which is nimble thinking?

MR. WITTES: A subject for another forum.

MR. TAYLOR: Now, any questions from the audience? Yes, sir.

QUESTION: Hi. I just want to say that I actually really disagree with this idea that the hearings don't serve much of a purpose. Not that any one of you has endorsed that fully in what you've said. But I think that we've—sort of absent from this discussion has been the role of the hearings in informing the public. As someone who watched both the Roberts and the Alito hearings, a lot of them, I think that I learned a whole lot about the nominees compared to what I would have learned if I had just read about them, and sort of what to think of, say, Democratic senators who maybe support one and not the other. And I think that the public has a lot to learn when elections come around. And also just watching, particularly in this last one, what the senators from both sides care about in a nominee. And I think that the hearings—maybe I'm someone who pays, you know, above-average attention to this kind of thing and maybe the average American doesn't watch the hearings, but they read about it in the newspaper or whatever.

So, I mean, what do any of you think about—I think that when people talk about the hearings don't have much purpose, maybe they're talking about, you know,

affecting how the senators vote. And that may be true, but I think that the public has a lot to learn from watching the hearings.

MR. MINCBERG: I think it's an excellent point. I also don't agree with those who say the hearings don't have much purpose. Again, there are problems in them, but I think they can be fixed rather than tossing the whole ball of wax out.

I do think that you are to be commended, frankly, for watching the hearings, because what does concern me isn't so much people who don't watch the hearings and who read the newspapers—which, again, with two print people up here, I can say that more generously at least tend to be a little more thorough in their coverage—I worry a lot, frankly, about the CNN flashing headlines and showing this scene or that scene from the hearings rather than getting into the substance, which I think is what you got from actually watching the hearings.

I do believe, from having been through every one, I guess since Bork—I wasn't working for People For at the time, but was involved in it—but I do think you do learn a lot about a nominee from watching how they answer questions for two days, three days, or whatever the case may be. Even if they're being reticent, even if some say they're being overly reticent, there are answers they give that do reveal a lot about the nominee and, as you say, about the senators. So I'm not among those who would argue for eliminating them altogether, although, again, I think some of the factors that I talked about could improve the situation significantly.

MR. CIONGOLI: I want to say for the record that I agree with everything that Elliot just said.

MR. TAYLOR: All right.

MR. MINCBERG: Terrific.

MR. TAYLOR: Maybe we should stop. Let's have another question.

QUESTION: With my own background in theatre, none of the confirmation hearings seems to have the drama that the Clarence Thomas hearings did. Everything, I think, in comparison seems boring. And then also, just from an intellectual point of view, I just found fascinating the Bork hearings, you know, that got me thinking in ways that I hadn't previously. And I guess since he was denied the confirmation, you know, everyone's been much more careful than he was since then. Although from one particular response, I found Justice Ginsburg's answer about Roe v. Wade as illuminating and as convincing as any that I have heard. That was showing a lot of intellectual integrity, I thought, that I also saw from Judge Bork.

MR. TAYLOR: More questions?

QUESTION: I want to ask Elliot a question. Gary Mitchell from The Mitchell Report. And the question is, could you give us the names of three potential nominees for the court that President George Bush is likely to nominate that you would either support or not oppose?

MR. MINCBERG: Well, if I did that, you could be sure that they wouldn't be nominated.

MR. MITCHELL: You're beginning to sound like Sam Alito.

MR. MINCBERG: But I can say we did, in fact, talk about a number of potential nominees, including several that had been nominated by the president himself for lower court positions, who we and other groups made clear we would not oppose because their record, while conservative, was a lot more like Sandra Day O'Connor than

Antonin Scalia or Sam Alito. Indeed, if you look at the lower court nominations of President Bush, it's only, I think, something like a dozen—I may be wrong by one or two—that we and other groups have actually opposed.

It is possible to get nominees that come up from a president, Republican or Democratic, who don't get opposed, who do fall within the mainstream in a lot of very significant ways, and I think the president could have done that. I think we— One obvious example of this, and I'll give you an example of somebody who the president nominated who we in fact did not oppose was Harriet Miers. We were still undecided, were still evaluating that nomination. But it was the far right wing who said she's not passing the litmus test that we want who took her nomination down in a way that even Senator Specter has been really quite critical of.

So I think that the concern is that the right wing made, unfortunately, all too clear to the president that they have no room for tolerance, they want somebody who falls within their range or they're going to make sure that that nomination gets taken down. And that has more influence in this White House than People For or millions of Americans ever could.

MR. TAYLOR: By the way, again, imagining a Democrat wins the presidency in 2008, any names of potential nominees you'd like to put on the table now?

MR. MINCBERG: Well, again, if I did that, you could be sure that—

MR. TAYLOR: We're talking about a Democratic president.

MR. MINCBERG: Well, okay, that's a fair point. I mean, I certainly have enormous respect for Judge Tatel, who both of us know well, who I think would be a terrific nominee. There have been a lot of others that have been mentioned—Sonia

Sotomayor, who was nominated both by a Republican and a Democratic president for seats on the Court, is now on the Second Circuit Court of Appeals. And there are many others. And again, there were a number of Republican nominees who I think would have made the list and would have—I can't say they would have produced a controversy-free nomination because of what we saw with Harriet Miers. I fear very much that if the president had picked somebody a bit more moderate than he did, that the right may well have reacted in very much the same way.

MR. TAYLOR: More questions?

QUESTION: Carl Osgood with Executive Intelligence Review.

One thing that has only been subtly referred to, really, so far is that this nomination has been made by an administration that has a very expansive interpretation of the meaning of executive power. And Judge Alito seems to be very much in accord with that interpretation. Can anybody speak to the implications that having five votes of this sort on the Supreme Court might have for the separation of powers?

MR. CIONGOLI: I actually take a little bit of exception with the underlying premise, which is that he has—this nominee has an expansive view of executive power. I think that Judge Alito went to great pains to explain the difference between his view of the unitary theory of the executive—which was the subject of a speech that he gave in 2000—and, say, for example, Professor John Yoo's view of the unitary executive, without naming Professor Yoo by name. You know, I think Sam's view of the unitary executive is one that many people on the sort of small-c conservative side of the legal spectrum share, which is that if you're going to have an executive power, the Constitution delegates the executive power to the president and not to

independent agencies. The sort of legal shorthand is Morrison v. Olson was wrongly decided. That's about as far as it goes. It gets to scope, not to the breadth, or depth, of executive power.

I don't think—I'm not aware of anything that Judge Alito has done outside of when he worked at OLC, where I think you have to assume that he was representing the institutional interests of his client, that takes a very particularly expansive view of executive power. But I suspect that I'm about to be proven wrong.

MR. MINCBERG: I don't know about proof, but I do think that even the more limited view of the unitary executive that Judge Alito tried to articulate at his hearing still raises serious questions. As you pointed out, he thought Morrison v. Olson was wrong. That means Congress doesn't have the power to appoint an independent prosecutor who the president can't fire. That's an important check and balance right there. In his description of the unitary executive in that famous Federalist Society speech, one of the things Judge Alito said, or one of the reasons for it is because we need a "vigorous executive," which begins to get a bit close to the views of Professor Yoo and others.

If he is confirmed, we obviously we won't know until he gets on the Court how he will interpret. But to answer your question in particular, let's assume for the moment that what we and others have raised concerns about Judge Alito is correct, I think it's extremely dangerous, because we do have an administration right now—and may have in the future, Democrat or Republican—that seeks an incredible unilateral assertion of power to wiretap citizens without a search warrant, without congressional authorization, to detain U.S. citizens as enemy combatants, to write its own exceptions to

laws passed by Congress, such as the torture statute, or to reinterpret them, suggesting that a law that very specifically said we're not meaning to upset the cases that are already pending before the Court, the Justice Department, as Ben knows, just argued yes, it does. Clearly contrary to the language and history of the statute. That's very dangerous and I think it's critical that we have a Supreme Court that will truly serve as an independent check on presidential power.

MR. TAYLOR: I had a little legalistic question on that. I remember Professor Tribe last week testified that the distinction that Judge Alito drew between unitary executive power—meaning he's all-powerful within the scope—that doesn't mean the scope is too big. And Professor Tribe said that that distinction is incoherent; it's impossible to believe both of those things at the same time.

I'm not sure he fully explained that. Do you agree with him, and why is that?

MR. MINCBERG: Well, I'm not sure you'd go quite so far as to say it's incoherent, but I think there are problems around the edges. Because part of the theory of the unitary executive is that the president possesses all of the executive power. And part of the issue is, what is the inherent executive power? President Bush argues that that inherent executive power includes the power to order wiretaps, to in some instances give his own interpretation of laws, et cetera.

So I think that the attempt that Judge Alito made to draw the distinction, while in some ways there—I don't disagree with Adam—there is some logic to that distinction, it breaks down around the edges. Whether it gets quite to the level of "incoherence," I'm not as smart as Professor Tribe and I can't quite tell.

MR. TAYLOR: Sarah, any thoughts on executive power?

MS. BINDER: Well, I would just, I guess, add to the discussion that this is yet another area of separation of powers where the evolution of national political parties has affected how these powers get exercised and how they get interpreted. And one of the key questions for senators, in part, as we look to members of Congress is, are your priorities here aligned with your partisan or ideological commitments to certain policy positions, or do you have loyalties to your institution? I think many congressional scholars would say that part of the problems we see in the way Congress conducts itself is that institutional loyalties have weakened. Why aren't they up there defending the power of Congress to define executive power and how much authority should be given to the president? Why are they, instead—why do we see a partisan divide on the use of balanced executive power?

Again, I think this is an issue yet to be played out, to see what cases come before the Court and how the Court decides.

MR. TAYLOR: Ben, are you worried about what Judge Alito would do on, say, let's suppose that somehow this eavesdropping program, National Security Agency, comes before the Court. Can you read tea leaves in what he said that suggest he'd be on the pro-executive side? And by the way, would that be a good side to be on or not?

MR. WITTES: I actually find the total base of knowledge available to the public about this NSA eavesdropping program insufficient to make any firm judgments about it one way or the other. I do think that there is a tendency in Judge Alito's writing that troubles me, that represents a kind of a deference to executive power,

executive authority both at the state and federal level that is in many ways laudable, but does go too far at times, in my opinion.

There's a case that particularly bugged me as I read it of a Chinese defector who came to this country, defects because he is the head of a trade delegation and becomes suspicious that some of his subordinates are going to defect. And under Chinese law, he's required to report them and doesn't want to—not because he has a problem with the law, but because he doesn't really know if they're guilty or not.

So what does he do? He defects himself. And the INS determines that this is actually not a ground for a valid asylum claim because he doesn't have any political problem with the law in question, he merely has a question about whether the people are guilty or not. And the majority of the Third Circuit kind of gave that the back of their hand and Judge Alito was willing to defer to it, which struck me as a bit excessive in the deference department.

I do have concerns about what he will—you know, how that sort of tone and attitude translates into sort of war on terrorism deference questions. But I'm less certain I know the answer to that question than a lot of the senators who seem to be certain that he's, you know, going to tolerate all kinds of things that will constitute the end of the republic.

MR. TAYLOR: The majority pointed out, by the way, in the very case that Ben is talking about that Alito's dissent "not only guts the statutory standard, but ignores our precedent."

Adam, you had a quick thought?

MR. CIONGOLI: Yeah, just for those who want to compare Judge Alito to Justice Scalia, Justice Scalia has not been either the executive's or law enforcement's best friend in a lot of these areas. I mean, he's had some pretty historic rulings on Fourth Amendment grounds. His opinion in the Hamdi decision certainly did not make the administration happy.

I actually think that Judge Alito is—you asked me earlier, before this started, what the biggest surprise might be. I think the area of executive power might be the area that might be the biggest surprise—not because it's inconsistent with where he stands right now, but because what I believe to be an inaccurate picture of where he's likely to go has been painted and he'll be measured against that.

MR. TAYLOR: Let me just put one thing that's been on my mind, particularly when one thinks about, well, theories—he's a "unitary executive" guy. I think one thing that's troubled people in the immigration area is that the Board of Immigration Appeals seems to be becoming more and more a rubber stamp—reduce the number of judges, reduce the number of appeals. And another concern I've heard expressed on the executive power front is, well, when we have unified government and we don't really have much policing coming from Congress to the executive branch, the judiciary ought to be more aggressive than it might otherwise be. But these are kind of pragmatic judgments. I'm wondering whether, if you've got a certain theory of executive power, all that's irrelevant, or whether pragmatic judgments are fair game for—

MR. WITTES: I mean, I would say it's not the role of the judiciary to substitute for the minority party in the context of unified government. That really is an electoral consideration that the people make in electing the president, in electing the

Congress. And, you know, the fact that people have elected Republicans does not mean that the judiciary should give heightened scrutiny to executive judgments.

I do think, however, that there is—you know, I think you have to think of executive power and the theory of how much deference the executive gets as a neutral principle; that either you're going to have a judiciary that is going to reserve the right to kind of, for lack of a better word, give a hard look, kind of an oversight function with respect to executive functioning, and congressional functioning, or you believe the judiciary could kind of keep a hands-off and get in only when there's very clear statutory jurisdiction or constitutional jurisdiction and a very clear violation.

Now, to Judge Alito's credit, I think that I have not seen any indication in his opinions that he does not regard deference as a neutral principle. I think he seems as apt to defer in situations—I have not seen situations, in other words, where he's not apt to defer because he disagrees with the policy in question because, say, it's too liberal. And in fact, in one of his abortion decisions, which I think hasn't gotten enough attention, he, in the presence of a very strong dissent that would not have deferred to Secretary Shalala's interpretation of Medicaid reimbursement rules, he was prepared to do so. And so I think there's a—you know, while I am disquieted by the degree of deference he shows, I do think it is important to say that he does seem to show it in a very nonpartisan and even-handed fashion.

MR. TAYLOR: I almost agreed with everything Ben said until the last minute or so. I commend the immigration section of our report that does in fact show, I think, some clear inconsistency in when he does defer and when he doesn't defer to

immigration authorities. But I do agree with a large part of what Ben said. It's a critical question as to the extent to which you will show that kind of deference.

And indeed, Robert Gordon, an adjunct at Yale, made a very good point, Adam, in terms of your point, that, frankly, Scalia may be more willing to come at the government and disagree with it when Fourth Amendment rights are at stake, when people's privacy and other rights are at stake than Alito may be, because of, as Ben suggests, the deference that he's shown to the executive branch.

MR. WITTES: One quick point, if I may, on the question of—

MR. TAYLOR: We're about out of time, Ben.

If there's one more question, we'll hear the question. If there's not—yes. Bill Coleman.

QUESTION: Can we get back to this question of what the nominee is saying? Suppose in that infamous memo of Alito in 1995 he'd said, I think that Brown was wrongly decided and that there should not be any law which says that blacks have to go to school with whites?

Now, do you mean to say that when he is up as a nominee to the Supreme Court that he ought not to be pressed on that question? And if that's so, if you get to the abortion question and now you realize, whether you agree with the original decision or not, as I understand it, at least 60 percent of the women in the nation believe there should be some right of free choice, doesn't that almost fall in the same class as if he wrote something which said I think Brown was wrongly decided and therefore I won't follow it?

MR. TAYLOR: Excellent question. Why don't we give Adam Ciongoli 30 seconds to tackle it and then we'll call it a wrap.

MR. CIONGOLI: I think that if he had written that, he would have—well, he wouldn't have been nominated and he would have to answer that question. I think the difference is one that he tried to make in his testimony, which is that Brown is a case the holding of which, that separate but equal is not consistent with equal protection, that issue is highly unlikely if not impossible to come before the Court at this point. Whereas the issue of Roe v. Wade is an issue that continues to be active litigation in the courts and could well come before the Court in the next few years.

MR. TAYLOR: Indeed.

Thank you to your four panelists and to patient audience. I've learned a lot; I hope someone else has.

[Applause.]

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