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THE PROCESS AND THE POLITICS

REFLECTIONS ON NOMINATION TO THE SUPREME COURT

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One of the great stimulating aspects of the Sphex Club is the somewhat awesome challenge to explore an area of interest in sufficient detail to withstand the collective scrutiny of the speaker's fellow members.

Frequently, the subject matter presented will take a speaker outside the realm of his familiar and ordinary routine. On other occasions, the opportunity is presented to more fully examine and reflect on matters related to one's business or professional life. I will take this opportunity to do just that. The 200th anniversary on February 2, 1990, of the first official meeting of the United States Supreme Court, coupled with the highly controversial Senate confirmation hearings on Robert H. Bork in 1987 and the recent nomination of David H. Souter, prompted these reflections on the nomination process for the Supreme Court and the politics associated with that process.

In preparing for this paper, I was quickly reminded of Dr. John Turner's address to the Sphex Club in March, 1989 that one should "give credit where credit is due", using as an example the demise of the presidential campaign of Senator Joseph Biden of New Jersey when he used a speech, almost word for word and without giving credit, of a candidate for the British House of Commons. For my part, the source of information

for this paper is best summed up by the great Will Rogers in the 1920's when he said ". . . All I know is just what I read in the papers. . . ".

The amount of commentary on the subject at hand appearing in newspapers, periodicals and recent books is overwhelming but provides rich and interesting sources of information. As Hugh Sidey said in Time magazine (August 6, 1990), Washington [D.C.] alone ". . . has 55,000 lawyers, 7,000 lobbyists, 20,000 congressional staff members and some 10,000 journalists. Most of them are self-appointed experts on the court". In summarizing some of this material, I can promise you that any of the speaker's original thought in this paper is purely accidental and I can also promise that the paper will not be "sesquipedalian", a simply marvelous word that I'm sure all of you know means ". . . characterized by the use of long words".

On July 20, 1990, Justice William J. Brennan, Jr., the 84 year old widely acknowledged leader of the liberal wing of the Supreme Court, announced his retirement. Less than 72 hours later President Bush announced his choice for Brennan's replacement, David Souter of New Hampshire. The media described the swiftness with which Souter was named as almost surprising as the nominee himself. On October 2nd of this year, less than two months after his selection, the 51 year old Souter completed what has been called the "toughest job interview in America" (Wall Street Journal, October 3, 1990), the nomination hearing before the Senate Judiciary Committee, chaired by our friend, Senator Joseph Biden,

and was confirmed by a 90 to 9 Senate vote as the 105th Justice of the Supreme Court. This was in marked contrast to the selection process in 1987 following the retirement of Justice Lewis Powell, a native Virginian and one of the eight founders of what is now the nationally known Richmond law firm of Hunton & Williams. In an effort to continue the conservative "revolution" characterized by the Reagan presidency, Reagan selected Robert H. Bork to replace Powell provoking an outcry from liberal forces and resulting in the most highly politicized campaign against a Supreme Court nominee in this century. Seemingly in an effort to avoid anger from both ends of the political spectrum, Bush selected a candidate described in the press as a "Stealth" candidate [Senator Howell Heflin D., Alabama], a "blank slate", one who has "left no footprints in the snow" and who has not written any law review articles, taught at a law school, been a speaker on the lecture circuit, served long enough on a federal court to establish a record that can be scrutinized, who did not graduate in the top quarter of his law school class, or has said or done anything unconventional. Now, conceding the media's right of fair comment and political rhetoric, this is hardly a fair description of a magna cum laude Harvard undergraduate, a Rhodes scholar, Harvard Law School graduate, former member of the New Hampshire Supreme Court and most recently a member of the U. S. Court of Appeals in Boston. Precisely because Souter was <u>not</u> a public figure with a public record, the "self-appointed experts" described by Hugh Sidey (<u>Time</u>, August 6, 1990) seemed forced,

as he says, ". . . to the ultimate absurdity: criticizing the Supreme Court nominee because there was not much about him to criticize".

Regardless of his ability, fitness and judicial philosophy, the Souter appointment, and the recent battle over the Bork nomination, appear to have both Republicans and Democrats contributing to the deterioration of judicial appointments into political tests of strength. The Democratic Congress, which has long been denied corresponding power in the Executive Branch, and the Republican White House, which has long been frustrated in legislative matters in the Congress, both seek a balance of power through the Supreme Court. As we will see, history has witnessed the evolution of the Supreme Court from the weakest branch of the federal system during its early years into what many experts now consider to be the most influential of the three branches of government. Two sitting Justices, Harry Blackmun and Thurgood Marshall, are both 82. Death or retirement could easily open two additional seats on the Court for future appointments by the Bush administration and the question becomes whether the nomination process will produce independent and able Justices or ". . . bland men and women who will seldom depart from the familiar ruts worn by the politicians who elevated them to the court." (Hugh Sidey, Time August 6, 1990).

We will return to that question after we examine briefly the history of the Court and some of its more famous struggles and controversies as

well as the crucial and controversial role of judicial philosophy, particularly in cases involving Constitutional issues.

EARLY HISTORY OF THE COURT.

In the words of James Madison, one of the benefits of an independent federal judiciary would allow this branch of government to be "a bulwark against every assumption of power" by the "legislative or executive" and would resist every "encroachment" on rights spelled out in the Constitution. Yet, delegates to the Philadelphia Convention in 1787 didn't spend as much time on the federal judiciary [which is defined in brief language in Article III of the Constitution] as they did in specifying the nature of the executive and legislative branches of government. The Constitution provided simply for "one supreme Court," but it did not say how many members that Court should have or what their qualifications should be. The Framers left all that to Congress and the President. The Judiciary Act of 1789 provided for a six-member Supreme Court, consisting of a Chief Justice and five Associate Justices. (Letter of Chief Justice Warren Burger [retired] appearing in Scholastic, Inc. 1990 - Skills Handbook on the U.S. Judiciary)

Article III of the Constitution states, also in simple terms, that the President ". . . by and with the advice and consent of the Senate, shall appoint. . . judges of the supreme court, . . ." This nomination by the President and appointment with consent of the Senate was viewed by the Framers as a method to insulate the Court from political pressures. This

also explains why Justices are appointed to the bench for life and serve until they resign, die or are impeached, an event that has happened only twice in the history of the Court.

The judicial independence of the Justices envisioned by lifetime appointment at compensation that is not to be diminished during tenure in office (Article III of the Constitution) is in contrast to most, if not all, state judges. For example, judges in our Commonwealth are elected by the General Assembly for fixed terms - - eight years for a circuit court judge and six years for a general district court judge - - and must be re-elected by that same body. Other states, particularly the western states, provide either for initial appointment or for popular election of judges who, once elected, must periodically submit their performance to voter approval to be retained in office - - a procedure known as a "retention" election.

In Virginia, we are unaccustomed to public campaigns for election to judicial office. Not the least of the problems associated with these campaigns is the great expense involved. The Chicago Tribune, in its October 25, 1990, issue reports on the expenditure by one candidate for that state's highest court of more than $365,000 of his own money and the race was not over! This brings to mind another observation by Will Rogers when he said: "Politics has got so expensive that it takes lots of money to even get beat with" (Bartletts, Familiar Quotations). I also recall a recent article in the Wall Street Journal describing the huge 11

billion dollar verdict in favor of Pennzoil against Texaco, which was reviewed by the Texas Supreme Court. The article reported that one of the members of the Texas Supreme Court had received a $100,000 campaign contribution from one of the law firms involved in the case. One could certainly argue that this might strain the concept of judicial independence of the judge hearing the case!

Back to the subject at hand, the Supreme Court, in its infancy, was the weakest of the three branches of government, openly scoffed at by members of Congress and largely unknown to the American public. Alexander Hamilton, writing in The Federalist Papers (No. 78) described the Court as "the least dangerous" of the three branches of the federal government. At its first meeting on February 1, 1790, only three justices showed up - - not enough for a quorum. The next day, four justices showed up and the first session was held. When the government moved to the new capital in Washington in 1801, the justices were not even provided with a building of their own.

But, it didn't take long for our early history to reflect that a potential Justice's political views may be far more important than legal or scholarly qualifications (Scholastic Update, Vol. 122, No. 10 January 26, 1990). A. E. Dick Howard, a well-known constitutional scholar up the road at the University of Virginia Law School said: "Every President says he will appoint only the most qualified candidate and that the selection of Justices should be 'above politics'" but invariably it is a highly political

and very personal choice" (Scholastic Update). Our first Chief Executive, George Washington, clearly understood the relationship between choosing Justices and setting the nation's political course. For the first six Justices - - the Court was not expanded to nine members until 1869 - - Washington chose men who, like himself, were supporters of a strong centralized federal government, known as "Federalists", passing over perhaps more qualified candidates who advocated strong state powers, known as "Republicans". These appointments provoked howls of protest from the state's rights advocates in Congress but Washington prevailed. Right from the start, Washington's court did just what it was picked to do: it encouraged the development of federal power and authority, establishing the principles to govern the new nation.

When John Marshall took over as Chief Justice of the Court in 1801, the judiciary emerged as a respected, co-equal branch of the federal government. I'm sure you all recall the brilliant paper of member Wood on the life and work of Marshall. Marshall sat on the Court for 34 years and heard over 1,000 cases and wrote more than 500 opinions himself, many of them known as "building blocks" of our body of constitutional law. Marshall was a Federalist and a thorn in the side of his old friend and adversary, Thomas Jefferson, a Republican. In his 1987 book, The Supreme Court - How It Was, How It Is, now Chief Justice William H. Rehnquist recounts the reaction of Jefferson to the death of Justice William Cushing, described as "a sturdy Federalist and follower of Marshall" in

September, 1810. Cushing's death reduced the seven-member Court to six, evenly divided between Federalists appointees and Republican appointees. Shortly after Cushing's death, Jefferson, who was then two years out of office as President, wrote to his former Secretary of the Treasury, Albert Gallatin, in what Rehnquist describes as "unseemingly gleeful words":

> I observe old Cushing is dead. At length, then, we have a chance of getting a republican majority in the Supreme Judiciary. For ten years has that branch braved the spirit and will of the Nation. . . The event is a fortunate one, and so timed as to be a godsend to me.

Although Jefferson was out of power as President and could not "pack" the Court, he exerted his strong influence in seeking appointment of someone who had the "character of firmness enough to preserve his independence on the same bench with Marshall". In spite of Jefferson's efforts, President Madison appointed the young Joseph Story who, of course, fulfilled Jefferson's worst expectations about him. He became Marshall's principal ally on the great legal issues of the day, repeatedly voting in favor of national power and against the restrictive interpretation of the Constitution urged by Jefferson and his state's rights school. Furthermore, Story served on the Court for 34 years, one of the longest terms on record.

Up until 1835, when John Marshall left the bench, many of the Court's decisions related to the power-sharing roles and interactions of the

three branches of government (Scholastic, Inc. 1990 page 21). For example, in the case of Marbury v. Madison, probably Marshall's most famous decision, the Court asserted its authority to nullify Acts of Congress the Court found unconstitutional. Even during these early years, the American fondness for litigation did not escape the observation of Alexis de Tocqueville. I must add parenthetically how frequently quotations from this remarkable French statesman and political philosopher appear in any treatment of American history. Tocqueville visited the United States in 1831 and observed in his two part book, Democracy in America, almost prophetically I might add given today's climate, that: "Hardly any question arises in the United States that is not resolved sooner or later into a judicial question.". States' rights and slavery were major issues with the Court between 1835 and 1860 with slavery becoming a major judicial question with the Dred Scott decision (Dred Scott v. Sanderford) in 1857. This decision held that slaves were not citizens of the United States and could not sue for their freedom in a federal court, and is widely regarded as accelerating the outbreak of the Civil War, or, as some Southern historians would say, the "War of Northern Aggression", in 1861.

The period between 1889 and the first two decades of this century were marked by enormous growth and sweeping social and technological changes. In general, decisions of the Court were conservative during this period in the sense that deference was given to legislative majority rule on

most issues including social changes and civil rights. For example, in Plessy v. Ferguson, the Court found in 1896 that segregated railroad cars were constitutional if the accommodations were equal. This "separate but equal" doctrine was overturned in 58 years later by the Warren Court's famous 1954 decision in Brown v. Board of Education. Thurgood Marshall, the 82 year old Justice now sitting on the Court, argued the case for the winning side.

Philosophical Issues in the Last 70 Years

The early history and development of the Court is interesting and confirms from the earliest days of the Court the political efforts of the elected Executive Branch to influence the composition and decisions of the Court. This history of the Court further shows, as Chief Justice Rehnquist observes, that constitutional doctrine is related to, and reflects, economic and social change in the nation (Rehnquist, the Supreme Court).

We are at a point in our country's history where what has happened in recent years regarding appointments to the Supreme Court, and what is likely to happen in the near future because of the ages of Justices Harry Blackmun and Thurgood Marshall, will have a profound impact on the direction of our social and economic policy. Historians say the ultimate legacy of Ronald Reagan's eight years as President may be the Supreme Court he left behind. Reagan appointed three conservative Justices to the bench, Sandra Day O'Conner, Antonin Scalia and Anthony Kennedy. He also named a fourth conservative, William Rehnquist, to the post of Chief

Justice in 1986 to succeed Warren Burger. These four Justices are generally perceived to believe in "judicial restraint" or a more narrow interpretation of the Constitution. Three other Justices, Byron "Whizzer" White, Harry Blackmun and John Paul Stevens, are perceived to be moderate Justices, who make decisions on a pragmatic case by case basis and are generally regarded as the most unpredictable voters. Thurgood Marshall is regarded as the most liberal member of the Court and represents the philosophy of "judicial activism" or the use of the Court to promote a vision of the social good. Our friend from New Hampshire, David Souter, is the rookie on the Court and we would have to assume that his philosophy would be one of judicial restraint. Obviously, President Bush, continuing in some degree the Reagan movement, should have the opportunity to appoint one or more additional Justices, particularly if he is reelected for a second term.

Let me hasten to add at this point that any attempt to label any Justice, or any other member of the judiciary for that matter, is risky at best. All sitting judges have unique personalities, biases and backgrounds and, particularly in Supreme Court appointments as we shall see, Justices have exercised their judicial independence and have made decisions contrary to the wishes of the Executive Branch who appointed them.

Let me also hasten to add that labels such as "liberal" and "conservative" are terms that are enigmatic - - oh no, that sounds

"sesquipedalian" - - let's try "vague" - - at best. The common wisdom is that the new majority on the Court is "conservative" but what does that mean? In the political context, the terms liberal and conservative have multiple shadings and meanings that have shifted over time (Robert Glennon, Will The Real Conservative Please Stand Up?, ABA Journal/August 1990). A 19th-century liberal might be today's conservative. I suspect that most of us have a rough idea of what a conservative political ideology looks like. To paraphrase the immortal words of Justice Potter Stewart in trying to define the concept of pornography: ". . . I can't define it, but I know it when I see it. . . ." Generally, we might say that a conservative political ideology would allow the social and economic agenda to be established by the majority of elected representatives. On the other hand, a liberal political ideology might imply that certain civil rights and civil liberties of the individual and the minority should be afforded some protection from the tyranny and whims of the majority.

However, to better understand the character of the present Court and to help us understand the selection process of a justice, it is important to distinguish between political conservatism and judicial conservatism.

So, let us take a few moments to visit a few basic concepts of judicial philosophy to help us when we read a controversial decision of the Court or watch the next Senate confirmation hearings.

Let's start first with a well-known judicial activist, the recently retired Justice Brennan. Brennan took his seat on the Warren Court at age 50 and court scholars see him as the embodiment of the Warren Court's concern for individual rights. Criticized over the years - - and with particular intensity during the Reagan Administration - - for his "judicial activism", he rejected the view of conservatives and some of his own court colleagues that the original intent of the Constitution's drafters should dictate the interpretation of that document. He stressed, instead, the need to read the text in the context of the times. (The National Law Journal, August 13, 1990). A few years ago, Brennan wrote to a law professor that he struggled daily as a judge with whether to rely simply on "reason" or to go "beyond sterile [rationality] and have government treat its citizens with dignity". He added, "A judge who operates on the basis of reason alone risks cutting himself off from the wellspring from which concepts such as dignity, decency and fairness flow". (Wall Street Journal, July 23, 1990). Of course, conservative critics attack this approach as judicial activism which leads the judges to legislate their personal views from the bench and can lead to the idea that the Constitution is nothing more than what five justices say it is. To those who have called in recent years for a return to emphasis on the intent of those who originally ratified the Constitution, Brennan said in a 1985 speech: "We current justices read the Constitution in the only way we can: as 20th Century Americans. . . . The ultimate question must be,

what do the words of the text mean in our time?" (WSJ July 23, 1990). As the The New Republic (August 13, 1990) said: "With the retirement of Justice Brennan, the long period during which liberals could count on the Supreme Court to do much of their political work for them is drawing to a close.". On the human side, and again I must hasten to add that all judges came from the ranks of "human beings" and most still retain human characteristics, Brennan has the reputation of being personable, patient, possessing good intellectual insight, and having the ability to adapt to changing times. One of his law clerks paid him a wonderful compliment when she said "He just never got old." (The National Law Journal, August 13, 1990) Even the conservative columnist, James Kilpatrick, expressed high personal regard for a man he described as having ". . . over the past 10 years, . . . pursued a course of unabashed judicial activism, and who ". . . never apologized for his role. On the contrary, he loved it." (The News and Daily Advance, July 29, 1990). According to Kilpatrick, perhaps a dozen justices, by reason of their influence, may be classified as "great". "In this select group, right down Bill Brennan's name, he often struck out, but by God, he struck out swinging."

In contrast to the judicial activism of Brennan, it has been more fashionable in recent years to talk about judicial conservatism. Several of the Court's most distinguished members have been judicial conservatives, including Justices Frankfurter, Harlan, Lewis Powell and Brandeis. Brandeis in particular labored throughout his tenure on the Court to

articulate rules of judicial self-restraint that would keep the Court from interfering in the affairs of the other branches of government and from making policy decisions on social issues (Robert Glennon, ABA Journal/August, 1990, p. 49)

This concept of judicial restraint is the keynote of judicial conservatism. This philosophy holds that the text of the Constitution or a statute should limit judicial discretion - - Judges should avoid unnecessary Constitutional rulings - - Decisions should be narrowly focused - - and deference should be given to other branches of government. (id.)

The philosophy of judicial conservatism has developed familiar rules over the years. For example, rules of restraint have developed where courts decline to rule on an issue because the party lacks the standing to sue - - or that the issue is a political question - - or that the matter involves giving an advisory opinion rather than settling disputed facts. (id.)

Judicial conservatives generally believe it is critical to avoid tests or doctrines that substitute the Court's judgment for that of the legislature. In the area of equal protection and due process, for example, judicial conservatives would prefer a test that upholds the Constitutionality of legislation so long as there is a rational connection between the legislative goal and the statutory means chosen by the legislature to meet that goal (Glennon, ABA Journal/August, 1990) On the other hand, judicial activists would be more inclined to scrutinize activities of other

branches of government. This is particularly so in areas where individual freedoms are concerned. Judicial activists pioneered the "strict scrutiny" test of laws affecting civil rights and civil liberties which, in effect, places the burden on the legislative branch to justify what it has done from a Constitutional standpoint. An excellent history of the doctrine of judicial restraint is found in the 1987 book by Lincoln Caplan entitled The Tenth Justice - - The Solicitor General and the Rule of Law. Caplan notes that during the Carter Administration, the Justice Department commissioned a bipartisan group of lawyers, judges, and scholars to prepare a report on the changing role of courts in the United States. This 1984 study found the most prominent change was in "major constitutional reform.". Beginning in the early 1950's with the school desegregation opinion of Brown v. Board of Education in 1954, the Justices "taught in a dramatic and visible way that when other institutions failed to respond, constitutional claims can be vindicated in American courts.". Political attitudes were changing during this period. Congress contributed to this change by being "prolific in recognizing new claims and entitlements" and passing "dozen of major statutes" to protect civil rights, such as the 1964 Civil Rights Act under Lyndon Johnson, as well as the environment, and a wide range of other social interests. The change in the role of courts causing the most controversy was the redefinition by judges of the role of federal courts centering mainly on the treatment by the courts of lawsuits brought to reform public institutions like schools,

prisons, hospitals, and police departments. According to Caplan, instead of simply forbidding unlawful actions or awarding damages for wrongs, which was their traditional and historical function, the courts gradually took to telling the Executive Branch, states and local governments what to do and how - - what Archibald Cox, a former Solicitor General, called "an unprecedented judicial undertaking." Caplan goes on to say that the traditional notion that judges should serve as referees in disputes between parties.was challenged by a new breed of activist lawyer and a new concept of the activist judge in which courts guided the parties to shape a solution to a problem - - as the study on the role of courts described it, "to take on social grievances left festering by indicisive political institutions.". The report went on to say that instead of weakening public confidence in courts, "judicial decrees ha[d] arguably increased respect for the judiciary in general." The report concluded by saying courts had stirred a "deep and durable demand for justice in our society" and assured the vindication of rights that otherwise would have gone unprotected.

But, when the Reagan Administration came to power, Caplan says it expressed a much less tolerant view of this expansion in the role of courts and, in the words of then Attorney General William French Smith in 1981, the conservatism evidenced by the 1980 election of Reagan was an appropriate time to urge upon the courts diminished judicial activism, a movement which is continuing.

In researching this paper, it became obvious, as Caplan also observes, that there is a "deep conflict [among legal theorists] about the role of courts in the American version of democracy. According to Caplan, of the main opposing views among legal theorists, one side sees judicial review of the constitutionality of legislation as a crucial part of the federal system of checks and balances and affords the ability to protect the freedom of minorities from the tyranny of the majority. This view supports the idea that courts are necessarily engaged in politics and that judicial review is a basic function of a democratic government. The other side sees review by judges as undermining the fundamental freedom of the majority to govern and so its scope must be sharply limited. Caplan goes on to say that to ease the tension between the reality that judicial review occurs and the majority rule roots of American government, lawyers and judges from the second school have promoted, over time, a philosophy of judicial restraint. James Bradley Thayer, a Harvard Law School professor, stated the philosophy in the 1890's by saying that judges should restrict their findings of unconstitutionality to laws that can't fulfill any legitimate purpose. In the first decade of this century, Justices Oliver Wendell Holmes and Louis Brandeis articulated this theme when they dissented from Supreme Court rulings striking down social legislation viewed by the conservative majority as anti-business.

Judicial restraint became a preoccupation during the constitutional crisis of the 1930's. Some of our members will recall the infamous effort of

Franklin D. Roosevelt to "pack" the Court. When Roosevelt took office, the Supreme Court was controlled by a quartet of pro-business conservative Justices known as the Four Horsemen. While Roosevelt was likely to win the backing of Brandeis, Harlan Stone and Benjamin Cardozo, who followed the philosophy of judicial restraint, only one vote could overturn Roosevelt's program of social and economic revival. In the spring of 1935, when the Depression remained severe, one Justice joined the Four Horsemen to strike down several pieces of important New Deal legislation. On a day known by historians as Black Monday, the Justices unanimously outlawed a key piece of legislation called the National Industrial Recovery Act. With no other recourse at the time, Roosevelt proposed his Court- packing scheme to overcome the road block. If a Justice did not retire or resign within six months after his 70th birthday, the President proposed to add a new judge to the same bench. Since there were six Justices near or over 70, the plan would give Roosevelt the authority to choose a half-dozen new Justices almost immediately and control the Court. The proposal caused a national furor and was eventually voted down in 1937. The question was settled the next month however. Justice Roberts, perhaps responding to the Court-packing threat, voted for a minimum wage law that was hard to distinguish from the one he had voted against not long before and swung the Court in favor of the Roosevelt-backed law. The Court never overturned another piece of New Deal business regulation, and the Roosevelt scheme died in

Congress. By 1941, Roosevelt had appointed seven Supreme Court Justices to fill vacancies that occurred naturally over time, and any need for his questionable scheme was passed.

As an interesting sidelight, President Harry Truman said that "Packing the Supreme Court simply can't be done," after two of his appointees voted against his wishes. "I've tried it and it won't work."

To prevent a return of the crisis and to keep their power in check, judges who were sympathetic to the liberal aims of the New Deal embraced the conservative doctrine of restraint and allowed much new legislation to stand. Because of the eminence of the judges who led this movement, the canons of restraint that they developed came to be associated with objective standards of good lawyering as much or more so than with a particular judicial philosophy.

According to Caplan, the idea of judicial restraint embraced by the Reagan Administration was radically different from the traditional view of Brandeis and others. It was distilled by Judge Richard Posner, of the U. S. Court of Appeals for the Seventh Circuit in Chicago. Posner said, "I believe judicial restraint refers to a policy of reducing the power of the federal courts vis-a-vis the other branches of government." By Posner's logic, if believers in the new substantive version of restraint applied the old-style standards, they would end up extending decisions of the "activists" - - that is, liberal - - judges they opposed. Frankfurter and others had warned that judges should be reluctant to expand their power.

Posner urged that judges dramatically cut it back. In place of restraint, he counseled what might be called "judicial retrenchment," and, along with other Reagan judicial appointees like Robert Bork and Antonin Scalia, he acted on this philosophy. Under this theory, Reagan judges should be "activists" in the sense that they must undo prior decisions before becoming "judicial conservatives" to follow what should have been the law in the first place.

For the last 20 years or so, Presidents and conservative commentators have been calling for the repudiation of judicial activism. (Glennon - ABA Journal/August, 1990). First was the call for "strict construction" - - a theory that the Court should not recognize or create rights unless the Constitution specifically mentioned them. More recently, former Attorney General Edwin Meese urged that the Court be bound by the " original intent" of the Framers of the Constitution. Despite these pleas, the repudiation of the philosophy judicial activism has not yet occurred.

Perhaps, no single event in the last 20 years has focused the debate over judicial philosophy more than the Supreme Court decision in 1973 in the abortion case of Roe v. Wade. A political liberal might view the fundamental issue in Roe v. Wade as the freedom of choice and opposition to government forcing a narrow religious or moral view, even though it may be a majority view as determined by the electorate, into state law. The political conservative might view the issue as government

and the Courts dealing with the clash of rights between a woman who wants the personal freedom to choose to have an abortion and the public's interest in protecting the unborn, that is, a clash of rights between the woman's freedom of choice and the unborn's right to life.

Regardless of one's religious, moral or ethical view on abortion, the issue from the standpoint of judicial philosophy is the creation by the Court in 1973 of the constitutional right to privacy as the basis for its decision. In 1961, the State of Connecticut passed a law against the use of contraceptives. The Supreme Court saw this law as violating one's individual liberty guaranteed by the 14th Amendment. In 1973, the Court expanded the principle stated in the Connecticut case and found that Jane Roe had a constitutional right of privacy implied by the 14th Amendment. By a 7 - 2 vote, the Court overturned the Texas abortion law and judicial philosophy hasn't been the same since.

One of the hallmarks of conservatism, whether political or judicial, is a respect for and deference to tradition. In the legal field, this respect for precedent is known as stare decisis. Under this principle, a court follows prior court decisions and the burden rests on those who would change a decision to persuade the court why it should do so.

In his confirmation hearings, Robert Bork was in the unusual position in his role as an arch-conservative judge, writer and lecturer for the "strict construction" or "original intent" school of Constitutional interpretation, of having to become a "judicial activist" to overrule Roe v.

Wade on the basis that a right of privacy is found nowhere in the Constitution. This resulted in Bork having to defend his disregard of the conservative tradition of following precedent in the name of judicial conservatism. As The New Republic (August 13, 1990) said, "Bork was defeated not because his principles were too firm but because they were too often elastic or obnoxious."

Let us now return to our new Justice. Many of us in this room have at one time or another in our lives been through a difficult interview process. Our judicial members have even been through the confirmation process in the General Assembly. But think of our quiet, New England friend Justice Souter. In an article in the Wall Street Journal (October 3, 1990) the comparatively effortless confirmation by the Senate actually took months of study and preparation. From the announcement of his nomination on July 23 until completion of his job interview in September, Souter plowed through 26 books of briefing materials, watched video tapes of previous confirmation hearings, benefitted from the research of 10 Justice Department and White House lawyers, as well as other lawyers in New Hampshire, and heard from several sitting Justices on the Supreme Court. He himself produced 1600 pages of material in response to inquiries from the Senate - - something Souter said was "not bad for a guy with no paper trail". Souter, who always seemed to look haggard in his chalk strip dark suit and stripped tie, somehow maintained his sense of humour. For example, he told a reporter that he believed in the right to

privacy but it was violated when he was nominated to the Court. After three days of testifying, Souter finished his performance and celebrated his birthday at the Palm in Washington by ordering a big steak and two glasses of scotch and water. Somehow, Souter avoided having to take a position on the abortion issue and satisfied 90 members of the Senate that his judicial philosophy, whatever that may be, is sound.

After watching the Bork, Anthony Kennedy and Souter nomination hearings, one asks the question does, or should, the confirmation process reveal the human qualities, positive and negative, of the candidate or does it stifle discovery through efforts of the President and his staff to produce a neutral, non-controversial candidate. It is all too evident that any candidate will attract the immediate attention of special interest groups. These special interest groups are just that! They tend to oversimplify complex topics, such as abortion, and, in Souter's case, dig out court cases 16 years old and feed their findings to media sources that thrive on conflict. But, this is a fact of our political life and I doubt that it will go away.

Obviously, any member of the Supreme Court will have a profound, long-term impact on all of our institutions. Any candidate should withstand legitimate public scrutiny of elected Senators. The Senate Judiciary Committee should vigorously inquire into a candidate's education, personal conduct, training, experience and temperament - - qualities which are commonly believed to determine fitness for the position.

But what of an inquiry into a nominee's judicial philosophy? One editorial writer (The Christian Century, August 8-15, 1990, James M. Wall, Editor) said: "The only thing the Senate should do is determine whether. . . [the nominee]. . . is fit to serve on the Supreme Court. And fitness does not have to do with ideology. The ideology decision is made in campaigns." In other words, how a candidate would select a nominee is and has been a campaign issue in the 1980 Carter-Reagan campaign and the 1988 Dukakis-Bush campaign. As Chief Justice Rehnquist said in his book (The Supreme Court): "When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the president, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who shall become judges of the Supreme Court."

Perhaps, under our unique political system, to the victor should go the spoils and the winning President has the right to "pack" the Court with nominees who he feels will reflect his political philosophy. On balance, it is my view that full inquiry into both fitness and judicial philosophy is healthy and consistent with our enlightened self-government. Our history seems to support the view that public debate and compromise have had a fairly good success rate of avoiding extremism.

But what of the future with our friend, Justice Souter. Even though critics may call him bland and inexperienced in constitutional issues, as Hugh Sidey said (Time, August 6, 1990): "One of the

envigorating and, in most cases gratifying aspects of court history is how appointees, once in their black robes, see the nation and events independently. Often they have exasperated or disappointed the Presidents who appointed them.". It wasn't long after Theodore Roosevelt named Oliver Wendell Holmes to the Supreme Court that he wished he hadn't. Holmes cast an important vote against Roosevelt's trust busting efforts. Roosevelt is supposed to have said "I could carve out of a banana a judge with more backbone.". "The News and Daily Advance, July 29, 1990. Perhaps it is an omen that Justice Souter is said to emulate the values and philosophy of Holmes. At Harvard, his senior thesis was on Holmes' judicial philosophy and he still follows a course of reading laid out by his fellow New Englander. (The News, July 29, 1990). But, as Dwight Eisenhower found out to his regret, judicial independence can result in a person changing his views. In this regard, Justice Felix Frankfurter, when asked if a person changed his views once he was appointed to the court, supposedly said: "If he is any good he does." (Scholastic Update, January 26, 1990) Eisenhower had hoped Warren would exert a conservative influence on the Court and there was little in his background to suggest that he would do otherwise. As a district attorney in San Francisco, Warren became known for his crusades against crime and corruption; he strongly urged the Japanese-Americans on the West Coast be moved to detention camps after Pearl Harbor in 1941, and served three terms as republican governor of California. But once on the

bench, Warren in the 1950's and 60's moved rapidly to the left, transforming the Supreme Court into a champion of liberal social reform. Eisenhower was so surprised by Warren's liberalism that he called his appointment of the Chief Justice "the biggest damnfool mistake I ever made."

Although Earl Warren and William Brennan dismayed Ike with their liberalism, Sidey says "Their's was the clearer view of the country". Ironically, Warren Burger, who wrote the opinion that freed up the Watergate tapes, was appointed with much fanfare by Richard Nixon himself.

In summary, we have once again invoked the nomination process. Justice Souter has been sworn in and is now a member of our independent judiciary, and this judicial independence I submit, is one of the great strengths of our judicial system. If you were to ask me in what direction the remarkable mind of Justice Souter might take him, I would have to paraphrase Mark Twain when he said "I was gratified to be able to answer promptly, and I did, I said I . . . [don't]. . . know." (Twain, Life on the Mississippi). We can only hope, as Twain also said, that our new Justice will "always do right. This will gratify some people, and astonish the rest." (Twain, To The Young People's Society, Greenpoint Presbyterian Church, Brooklyn, New York, February 16, 1901).