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## **THE ABORTION LITMUS TEST**

**A Commentary by Thomas L. Jipping, J.D.**

The leftist jihad against John Ashcroft was not about defeating his nomination to be Attorney General of the United States. Rather, according to Senator Charles Schumer, D-N.Y., it was “a shot across the bow in terms of Supreme Court nominations.”

The far left will oppose Supreme Court nominees who do not pledge to uphold *Roe v. Wade*, the decision legalizing abortion. This political litmus test strategy, which requires judicial nominees preemptively to violate their judicial oath of impartiality, will politicize the judiciary, undermine judicial independence, and erode the rule of law.

After the Ashcroft vote, Senator Ted Kennedy, D-Mass., laid out the new confirmation rules. Though the Senate’s traditional confirmation criteria included qualifications, judicial temperament, and integrity, Kennedy said now “there’s going to be an additional test, and that is a commitment to the core values of the Constitution. And the core values of the Constitution now include...a woman’s right to choose” abortion.

Just as judicial precedents mean nothing to the far left until they see precedents they like, they now require adherence to what they call “core values of the Constitution” once the list includes values they like. This confirmation regime is about creating a judiciary that will produce politically correct results. As President Ronald Reagan once said, “There you go again.”

Understanding where this strategy comes from reveals where it is going. To the far left, the judiciary is just another political institution through which to pursue its political agenda. Thus the judicial selection process exists to install judges who will deliver that political agenda. No less a legal legend than Harvard Law School Professor Laurence Tribe charted the strategy for radically changing the judicial selection process in his 1985 book, *God Save This Honorable Court*.

Professor Tribe had long written that the legitimacy of Supreme Court decisions depends on their results rather than the process of reaching those results. In the book, Professor Tribe extended his politicized view of the judiciary to judicial selection. If politically correct results make legitimate judicial decisions, the commitment to produce politically correct results makes legitimate judicial appointments. Democrat presidents could be trusted to choose nominees likely to deliver such results. Republican presidents, however, talk of appointing judges who would impartially apply the law no matter what the results. Needless-to-say, the Tribe strategy required determining how Republican judicial nominees would rule on particular issues.

Far-left groups and their Senate allies sang from the Tribe song sheet when President Reagan nominated Robert Bork to the Supreme Court in 1987. Senator Patrick Leahy, D-Vermont, now the Judiciary

Committee's ranking Democrat, asked Judge Bork whether "the cases establishing a constitutional right to privacy" had become "part of our law, and that ... it is too late" to reverse them. In other words, would Judge Bork vote to overturn *Roe v. Wade*?

The Senate litmus testers went underground with Bill Clinton's election. In March 1993, with a Democrat Senate evaluating Democrat nominees, Senator Joseph Biden, D-Del., vowed there would now be no "ideological blood test" and even criticized Clinton for saying he would impose a "litmus test on the abortion issue" in choosing Supreme Court nominees. Biden could afford that since, with Democrats in charge of both nomination and confirmation, explicit political litmus tests were unnecessary. With a Republican in the White House today, however, the Senate litmus testers are back at work.

Though Democrats lack the absolute Senate majority they enjoyed a decade ago, the current 50-50 Senate split is the next best thing. Senate rules allow 41 determined litmus testing senators to defeat a nominee through a filibuster. That is why the 42 votes against John Ashcroft amounted to such a "shot across the bow." The phalanx of far-left groups demanding that senators secure commitments from Republican nominees such as Judge Bork and Clarence Thomas regrouped against John Ashcroft and sent that "shot across the bow" that they will demand the same from future Republican nominees.

The litmus testers are serious this time, trying to prevent any nomination litmus tests while preparing their own confirmation ones. Responding to a question from Senator Maria Cantwell, D-Wash., during his hearing, Mr. Ashcroft said that "the standard for judicial nominations" would be "no issue litmus tests."

Similarly, Senator Arlen Specter, R-Penn., asked Mr. Ashcroft to "make a commitment not to employ a litmus test on the pro-choice, pro-life distinction" for Supreme Court nominations. The nominee agreed, saying President Bush "has indicated that...no litmus test would exist." In an interview last month with C-SPAN, however, Specter said his inclination would be to "withhold confirmation" from nominees refusing fidelity to *Roe v. Wade* or refusing to divulge how they would rule on such issues.

The problems with this politicizing approach are legion. Simply asserting that, at least under a Republican president, an abortion litmus test is legitimate for confirmations but not nominations exposes its own hypocrisy.

In a September 1997 report, the far-left People for the American Way denounced criticism of judicial decisions they favor as an effort to "undermine judicial independence by intimidating sitting judges into taking more conservative positions in the cases that come before them." As threats to judicial independence go, criticizing judges who already have life tenure pales next to conditioning such life tenure on pre-judging issues that will later come before them.

Imposing a political litmus test on nominees requires that they promise to violate their judicial oath before they actually take it. Congress has prescribed that new federal judges swear to "administer justice without respect to persons" and to "impartially discharge and perform all the duties incumbent" upon them. Indeed, litigants have the right to an impartial judge who has not already made commitments on the issues they raise before him. Requiring judicial nominees publicly to take a position on any issue that may come before them as judges violates not only their own oath but also the right of citizens to impartial justice.

No matter what your position on abortion, politicizing the judiciary is wrong. Making nominees compromise their impartiality to get a job is wrong. Directly undermining judicial independence is wrong. Manipulating the judiciary to dispense politically correct results rather than fairly administer justice is wrong.

Perhaps the best repudiation of the Tribe-Kennedy-Leahy-Schumer litmus test strategy comes from the liberal Brennan Center for Justice. Its paper titled “Why Litmus Tests Threaten the Integrity of our Courts” concludes that, “Senators seeking to advance their own political agendas have therefore pushed the limits of their constitutional authority by making ideological orthodoxy on controversial issues a prerequisite for judicial confirmation.”

Noting that the most common litmus test “asks whether potential judges have made a commitment to overrule or uphold *Roe v. Wade*,” the Brennan Center concludes that this approach impedes judicial independence, distorts Senate debate on judicial nominees, reduces the pool of distinguished candidates, trivializes the judicial selection process, pressures judges to be “proponents of ideology” rather than “impartial adjudicators of disputes,” promotes biased decision-making, erodes “public trust in the fundamental fairness of our justice system” and diminishes appropriate reliance on the courts to defend individual rights against the government.

The Brennan Center correctly says that political litmus tests “should be rejected by the left and the right, Democrats and Republicans alike.” They have no place in either the nomination or the confirmation phase of the judicial selection process.

The Brennan Center provides the appropriate response when, as they surely will, Senate Democrats employ their abortion litmus test against Bush nominees: “Politicians who advocate the use of litmus tests in the selection of federal judges should be pressed to explain why their views of the third branch of government differ so starkly from the conviction espoused by the framers of our Constitution.”

Now that’s a debate worth having.

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