

1993

Supreme Court Nominations - Should President Clinton Apply a Litmus Test At Issue

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Recommended Citation

79 A.B.A. J. 42 (1993)

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Supreme Court Nominations

Should President Clinton apply a litmus test?

As soon as election returns were in, the speculation began over how many Supreme Court vacancies President Bill Clinton would be able to fill during his four-year tenure: Would he be able to reverse the pendulum that swung the High Court over to the right in the last 12 years?

In statements made to this magazine and elsewhere, Clinton proclaimed his intention to nominate justices who were committed to "individual rights protected by our Constitution, including the right to privacy."

All indications are that the litmus test for judges in this administration will be the opposite of

that of the previous one: A likelihood to preserve *Roe v. Wade*, rather than overturn it, will be the new yardstick.

Nadine Strossen, president of the American Civil Liberties Union and a professor at New York Law School, is comfortable with that particular test, because she believes it will result in judges with a commitment to minority, rather than majoritarian, interests.

Conservative commentator Bruce Fein, however, disagrees. He warns that any case-specific litmus test is dangerous and inevitably politicizes the judiciary.

Yes: A Solemn Duty

BY NADINE STROSSEN

In the October 1992 *ABA Journal*, Bill Clinton said he would nominate as federal judges "only men and women [with] a demonstrated ... commitment to the individual rights protected by our Constitution, including the right to privacy."

By contrast, the last two administrations systematically named federal judges with narrow views about individual rights in general, who—consistent with Republican Party platforms—opposed *Roe v. Wade*, which recognized that the right to privacy encompasses a woman's decision to have an abortion.

Two justices who were appointed by these presidents voted in *Planned Parenthood v. Casey* to overturn *Roe* altogether. Three other Reagan-Bush appointees bitterly disappointed many conservatives by refusing to go quite so far. Nevertheless, their opinion so sharply limited *Roe* that Chief Justice Rehnquist mocked what remains of that important ruling as "a mere facade."

Ironically, many conservatives who applauded the Reagan-Bush "litmus test" now criticize President Clinton for his pledge to name judges who will respect the essential privacy right recognized in *Roe*. They protest that it is inappropriate to seek to ascertain judicial candidates' views on issues they might well face on the bench.

Their silence up until now suggests that their real quarrel is with the specific nature of Clinton's judicial "litmus test," rather than with such tests generally. Would even the most adamant professed foe of "litmus tests" object, for example, to a president's commitment to nominate only judges who believed that the Court's *Dred Scott* decision wrongly upheld slavery, or that its decision in *Brown* rightly invalidated segregated public schools?

Reveals Views on Rights

Under our constitutional system, all federal judges have substantial power to affect human rights. The Supreme Court, as the ultimate constitutional interpreter, can either expand or truncate the rights of all Americans. This power is exercised by judges with lifetime tenure, subject to removal only through impeachment. Therefore, the appointment of a federal judge—and especially the appointment of a Supreme Court justice—has vast consequences for years to come.

In light of this, presidents have a responsibility to nominate, and senators have a responsibility to confirm, only women and men whom they believe will uphold fundamental constitutional rights.

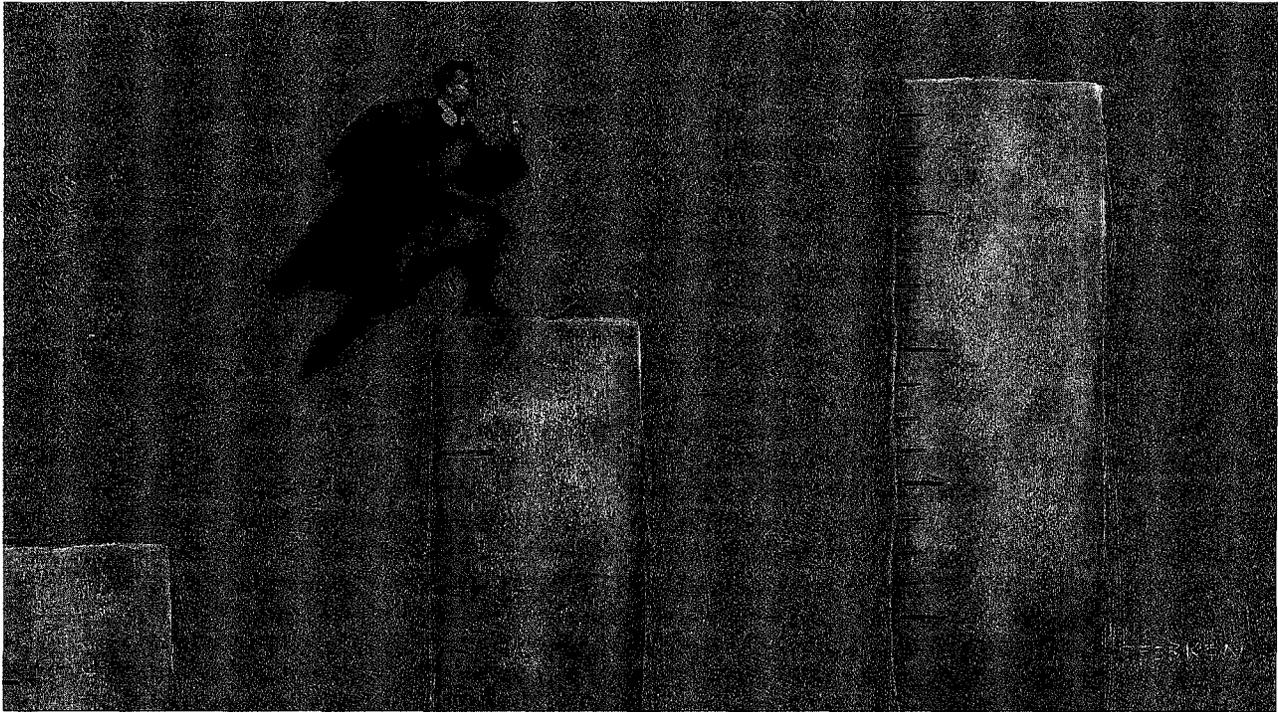
Although all government officials swear to uphold the Constitution, those who are elected by majority vote often reflect majoritarian

interests. In contrast, federal judges' lifetime appointments insulate them from politics and facilitate neutral protection of all rights.

For this reason, federal courts are uniquely situated as the guardians of individual and minority group rights. Correspondingly, presidents and senators have a duty to appoint as federal judges only individuals who will fulfill that special role. These elected officials cannot carry out that duty unless they are familiar with the judicial candidates' views about the nature of that role.

Judicial candidates are, of course, free to refuse to disclose any of their views, or to assert that they have not formulated definitive opinions on particular issues. But this raises questions about the credibility and significance of any such assertions. A candidate's denial of any firm views on broad issues of constitutional philosophy and interpretation addressed in *Roe* should be far more troubling than the denial of an opinion on whether a specific restriction on abortion should survive constitutional muster.

Judicial powers of interpretation often are tantamount to the power to restrict or expand the Constitution's reach. Our elected representatives should not vest such lifelong power in any individual unless they are satisfied that it will be exercised with respect for fundamental rights. ■



No: Don't Get Down to Cases

BY BRUCE FEIN

President Bill Clinton's case-specific *Roe v. Wade* litmus test for Supreme Court nominees is worse than President Franklin Roosevelt's discredited court-packing scheme.

Clinton should be emulating President Abraham Lincoln. When he nominated Salmon P. Chase as chief justice, the two burning constitutional issues of the day were slavery and legal tender laws. Asked whether his nominee would cast a politically correct vote in such cases, Lincoln retorted: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."

Last June, the Court reaffirmed *Roe* by a 5-4 margin in *Planned Parenthood v. Casey*. Spurred by a vaulting ambition worthy of Shakespeare's Macbeth, Clinton instantly pandered to his pro-choice constituency by vowing to extort from his Court nominees a commitment to *Roe*. He voiced no reservations about de facto coercion of Supreme Court justices by exploiting their ambition for appointment during the selection process leading to nomination.

Clinton's plan to annex the judiciary as a partisan arm of the executive would subvert the legitimacy of High Court rulings, enlightened law, and the ability of the judiciary to check the excesses of popular government. Even more lamentable, Jus-

tice Harry Blackmun has endorsed Clinton's benighted case-specific litmus test in his concurrence to *Casey*.

As Justice Felix Frankfurter said in *Offutt v. United States* (1954), "[J]ustice requires the appearance of justice." That appearance is destroyed if justices have committed their votes in the Oval Office in particular cases before hearing the litigants argue, deliberating with their colleagues, and enjoying the intellectual independence secured by life tenure. Their votes would smack of the Queen of Hearts' jurisprudence in "Alice's Adventures in Wonderland": "Sentence first, verdict afterwards."

Induces Political Correctness

Without the appearance of justice, voluntary compliance with High Court decrees is problematical. And the rule of law would crumble if every controversial ruling required enforcement by bayonets à la Little Rock, Ark., after the Court's desegregation decisions.

Clinton's promise of voting commitments would also debase the quality of decision-making. When confronted with pledging a politically correct vote, a nominee seduced by an ordinary amount of ambition is unlikely to proffer intellectually pure views. The wish becomes father to the thought. To paraphrase Justice Oliver Wendell Holmes, the lust for judicial power "distorts the judgment," "makes what previously was

clear seem doubtful," and bends "even well-settled principles of law."

Specific constitutional decisions should not be warped by the uninformed and result-oriented views of the president. That understanding was a cornerstone in the defeat of President Roosevelt's 1937 court-packing scheme.

Roosevelt's maneuver was correctly perceived as lethal to the Court's independence and its check against majoritarian tyranny. Congress decisively rejected the measure, and the judgment of history has condemned Roosevelt.

If Presidents Ronald Reagan and George Bush had extracted promises from their Supreme Court nominees to overrule *Roe*, they would have been properly denounced by the media, and might properly have been impeached by the House and convicted by the Senate. But Reagan and Bush renounced any case-specific litmus tests, a fact corroborated by the votes of Justices O'Connor, Kennedy and Souter to reaffirm *Roe* last June.

Presidential inquiry into the philosophies of Supreme Court candidates is unobjectionable, even if the responses give clues as to voting in prospective cases. That is a time-honored practice that has not compromised judicial independence. Case-specific inquiries, in contrast, would breach that delicate wall of separation between law and politics. ■