

Remarks of President George W. Bush at the Conference, “The Presidency and the Courts,” held October 6, 2008, in Cincinnati, under the auspices of the Ashbrook Center and the Cincinnati Lawyers Chapter of the Federalist Society

On October 6, 2008, the Ashbrook Center hosted, in cooperation with the Cincinnati Lawyers Chapter of the Federalist Society, a conference on “The Presidency and the Courts.” The culminating address was delivered by President George W. Bush, who arrived in Cincinnati, after a morning spent reviewing final details of the financial rescue plan, to greet the scholars, lawyers and jurists who had gathered to discuss the responsibilities and interacting roles of the judicial and executive branches in the light of the U.S. Constitution.

After speaking to the conference at large, the President and Mrs. Laura Bush met with a group of over one hundred Ashbrook Scholars who had traveled to Cincinnati by bus to spend the day at the conference. Students were moved by his interest in them and their studies in the rigorous Ashbrook Scholar program. “He admired our education and wondered aloud if perhaps he was looking at a future President of the United States,” recalled Joshua Distel, a sophomore from Ashland, Ohio. Emphasizing the importance of community service, a key value of the Ashbrook program, the President “told us service is as simple as teaching someone to read or buying a sandwich for someone who is hungry,” Distel continued. “It was truly an honor to spend a few moments with a man who has led our nation in some of the most trying times of our history.”

My subject today is of paramount importance to our entire Nation: the proper role of federal judges. Few issues are more hotly debated or have a more lasting impact on our country. Today I will share my views on the proper role of the courts, the kind of judges I have nominated, and the urgent need to reform the way we treat judicial nominees in the United States Senate.

Before Oliver Wendell Holmes took his seat on the Supreme Court, he met a supporter who wished him well in his new duties. The supporter expressed satisfaction that Holmes would be going to Washington to administer justice. Holmes replied: “Don’t be too sure. I am going there to administer the law.” Holmes was trying to make clear what he believed was the proper role of judges: to apply the



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laws as written, and not to advance their own agendas. He knew that it was up to elected officials, and not appointed judges, to represent the popular will.

Our Founders gave the judicial branch enormous power. It is the only branch of government whose officers are unelected. That means judges on the federal bench must exercise their power prudently . . . cautiously . . . you might even say, conservatively. And that means that the selection and confirmation of good judges should be a high priority for every American.

We have seen the profound impact that judges can have on the daily lives of every citizen.

We saw the power of judges in 2002, when the Ninth Circuit Court of Appeals declared the Pledge of Allegiance unconstitutional because it contained the words “under God.”

We saw the power of judges in the Kelo decision. A 5-4 majority of the Supreme Court ruled that governments could seize people’s homes for private development – if the government decided the seizure was for the greater good.

We saw the power of judges in *Boumediene v. Bush*. There, a 5-4 majority rejected the carefully crafted procedures Congress established for detainees held at Guantanamo Bay in response to a prior Supreme Court decision. And for the first time, the Court awarded foreign terrorists held overseas legal rights previously reserved for American citizens.

Recently, we have also seen the important role of judges in the rulings of a very different 5-4 majority:

We saw this last year, when five members of the Supreme Court upheld a law banning the grisly practice of partial birth abortion.

And we saw it again this June, when that same slender majority stood up for the

plain meaning of our Constitution and upheld the rights of citizens under the Second Amendment.

The lesson is clear: judges matter to every American. That means the selection of good judges should be a priority for all our citizens. I appreciate that many people listening today have worked hard to recruit more Americans to this cause. This work is in all our interests, because our belief in judicial restraint is shared by the vast majority of the American people.

Eight years ago when I sought the presidency, there was a heated debate over the kind of judges presidents should appoint. On one side were those who sought judges who looked at the Constitution as “a document that grows with our country and our history.” This concept of a “living Constitution” gives unelected judges wide latitude in creating new laws and policies without accountability to the people.

I had a different view. I said America needed judges who believed that the Constitution means what it says. When asked if I had any idea in mind of the kind of judges I would appoint, I had a ready answer: We need more judges like Clarence Thomas and Antonin Scalia. Recently, Justice Scalia gave an interview on the television show “60 Minutes.” He talked about the schoolchildren who visit the Supreme Court and proudly recite what they have been taught about “the living Constitution.” Justice Scalia noted that he usually had the sad duty of telling the children that the Constitution was never alive. He believed, as I do, that the Constitution is not a living document, it is an enduring document, and good judges know the difference.

When I took office, I promised the American people that my Administration would seek out judicial nominees who follow that philosophy. We would search



bachelor's degree from Harvard in just three years and was managing editor of the *Harvard Law Review*. He later clerked for William H. Rehnquist, the man he would replace as Chief Justice. At his confirmation hearing, this outstanding jurist put his philosophy this way: "Judges are like umpires. Umpires don't make the rules, they apply them. . . .It is a limited role. Nobody ever went to a ball game to see the umpire." I was very proud to nominate for the Supreme Court a man of decency, integrity, and good judgment: the Chief Justice of the United States, John Roberts.

Chief Justice Roberts was so obviously well qualified that he received overwhelming support

from a diverse array of candidates and nominate those who met the highest standards of competence. We would not impose any litmus tests concerning particular issues or cases. Instead we would seek judges who would faithfully interpret the Constitution – not use the courts to invent laws or dictate social policy. With your support, we have kept that pledge for the past eight years. I have appointed more than one-third of all judges now sitting on the federal bench, and these men and women are jurists of the highest caliber, with an abiding belief in the sanctity of our Constitution.

My judicial philosophy is demonstrated most clearly by the many outstanding judges I have appointed to the bench.

One of them is the son of Italian-American school teachers from Trenton, New Jersey. He graduated from Princeton and Yale Law School, worked in Ronald Reagan's Justice Department, was the U.S. Attorney for New Jersey, and served as a distinguished circuit court judge. When I announced his nomination, this good man was hailed by Democrats and Republicans alike for his keen mind and impeccable credentials. America is well served by the 110th justice of the United States Supreme Court – Samuel A. Alito.

Serving with Justice Alito on the High Court is the former captain of a high school football team who worked summers in a steel mill to help pay for college. He received his

from members of the Senate including many Senators generally considered to be well left-of-center.

Unfortunately, the broad, bipartisan, and timely support for Chief Justice Roberts has increasingly become the exception. Over the years, the "Advice and Consent Clause" of our Constitution has been subjected to serious abuse. Members of the Senate seem to have embraced the "advice" part. It's the "consent" part that seems to be the problem.

Perhaps the best demonstration of this problem is the story of Miguel Estrada. Miguel was one of my first nominees to the courts, and he had an inspiring personal history. He was an immigrant from Latin America who came to the United States with little knowledge of English. But he studied, worked hard, and made his way to Columbia University, then Harvard Law School. He was a Supreme Court clerk, prosecuted crimes in the U.S. Attorney's office in New York, and served in the Justice Department under President Bill Clinton. When Miguel Estrada was nominated for a seat on the D.C. Circuit Court, he received a unanimous well-qualified rating from the American Bar Association. Yet for more than two years he awaited a simple up-or-down vote in the United States Senate. He never got one. For the first time in its history, the Senate used a filibuster to block a nominee to the Court of Appeals. This fine American endured years of

delay, had his character unfairly attacked, and ultimately withdrew his name from consideration – all because a minority of senators thought they would not like his rulings on the bench and worried that a president might one day elevate him to the Supreme Court.

Miguel Estrada deserved better treatment from the United States Senate. And the American people deserve better behavior from those they send to represent them in Washington, D.C.

Unfortunately, Miguel Estrada's experience is not an isolated one. Many other well-qualified nominees have endured uncertainty and withering attacks on their character simply because they accepted the call to public service. Those waiting in limbo include: Peter Keisler for the D.C. Circuit, Rod Rosenstein for the Fourth Circuit, and dozens of other nom-

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– Chief Justice John Roberts

inees to district and circuit courts across this country. Some of these nominees waiting for a simple up-or-down vote would fill court vacancies that have been designated “judicial emergencies.” While these vacancies remain unfilled, legal disputes are left unresolved, the backlog of cases grows larger, and the rule of law is delayed for millions of Americans.

The broken confirmation process has other consequences that Americans never see. Lawyers approached about being nominated will politely decline because of the uncertainty, delay, and ruthlessness that now characterize the confirmation process. Some worry about the impact a nomination might have on their children, who would hear their dad or mom's name dragged through the mud. This situation is unacceptable, and it is wrong. A judicial nomination should be a moment of pride for nominees and their families – not the beginning of an ugly battle. And the confirmation process should befit the greatest democracy in the world.

It is clear we need to improve the process for confirming qualified judicial nominees. This process will always be some-

what contentious. But there are a few things that the American people expect us to agree on:

The American people expect nominees and their families to be treated with dignity. Nominees should not have to wait years for the up-or-down vote the United States Senate owes them.

The American people expect their elected officials to do the job of screening judicial nominees. We should not cede to any one legal association the exclusive power to veto a nominee before he or she can make their case to members of the Senate.

The American people expect the nomination process to be as free of partisanship as possible and for senators to rise above tricks and gimmicks designed to thwart nominees. For example, senators have invented a new rule that bans the election-year confirmation of anyone not considered a “consensus nominee” – with “consensus” defined as only the nominees they happen to choose.

In the end, the people hurt most by these partisan maneuvers are not the nominees, but the American people. That is not what our Founders intended, and presidents and senators from both parties ought to say so.

In Washington, it can be easy to get caught up in the politics of the moment. Yet if we do not act to improve the confirmation process, those who are today deploying harmful tactics and maneuvers to thwart nominees will sooner or later find the tables turned. There are things more important, even in Washington, than politics as usual.

Next month, the Senate will hold a “lame duck” session to finish their legislative business for the year. One item that should be at the top of their agenda is a long list of qualified judicial nominees still waiting for Senate action. If Democrats truly seek a more productive and cooperative relationship in Washington, then they have a perfect opportunity to prove it – by giving these nominees the up-or-down vote they deserve.

Our democracy requires us to come together and to get things done for the citizens of this great republic. I am confident we can do that. And I am grateful that there are dedicated people like you who are working so hard to help us put good judges on the courts and to help invest the American people in the process. I salute you for your good work. I appreciate your friendship and support over the past eight years. May God bless you. And may He continue to bless our wonderful country.

What Would the Founders Think of the Supreme Court Today?

Excerpts of an address by Attorney General Ed Meese

Ashbrook Scholars attend many on- and off-campus events sponsored by the Ashbrook Center, featuring prominent speakers from universities, public policy organizations, and government offices from across the nation. At these events, Ashbrook Scholars always have the opportunity to meet in private, off the record question-and-answer sessions with guest speakers. Ryan Brown, an Ashbrook Scholar from Grove City, Ohio, found the Cincinnati conference “full of practical information about judicial affairs,” and very pertinent to the imminent presidential election and “the lasting impact our 44th President will have on the Federal Courts.” He profited especially, he said, from Attorney General Meese's speech, because of its clear explication of “the functions the Supreme Court was originally intended to serve.”

The Founders . . . understood, looking back on previous democracies that had failed, that it was the concentration of power that had led to oppression. It's for this reason that they divided power. . . . horizontally and vertically: vertically by giving certain limited, enumerated powers to the federal government, and horizontally by leaving the rest of governmental power to the states, and again horizontally by dividing the power that was in the central government among the three branches. . . .

They saw the states as the governments closest to the people. Indeed, the states had been there before the national government was formed. It was important that the states be able to adapt the laws to the needs of the people, since they were closest to the people in their day-to-day activities.

In terms of the national government . . . just having a structure [of divided powers] was not enough. . . . The written Constitution, with its checks and balances and its allocation of authority was an important thing. As lawyers would say, they got it in writing.

. . . Now, the idea of an independent judiciary was a new idea. . . . If you look at the Declaration of Independence [you find] a list of complaints against the . . . King's judges: "He has obstructed the administration of justice by refusing his assent to laws establishing judicial powers," in other words, limiting how judges can act. It further says, "He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries."

That is why the Constitution provides a judiciary that is independent of the elected branches, so that they would not be influenced by politics or by the popular whims at a particular time in history. It's also why the Constitution



provides specifically that, "the judges would hold their offices during good behavior"—in other words, life terms—"and their compensation will not be diminished during their continuance in office."

. . . The judges were to administer the laws independent of politics or interests, but they were not to be independent of the Constitution. They were not to make policy or determine what the laws should be, because in a democratic republic that was the job of the peoples' elected representatives.



Attorney General Meese, seated next to Wendy Long and Circuit Court Judge Alice Batchelder, listens to the afternoon panelists.

Ronald Reagan put this very well, when he was presiding over the investiture of Judge William Rehnquist as the Chief Justice and Antonin Scalia as an Associate Justice in 1986:

The Founders settled on a judiciary that would be independent and strong, but one whose power would also, they believed, be confined within the boundaries of a written constitution and the laws. In the Constitutional Convention and during the Debates on the Ratification, some said that there was a danger of the courts making laws rather than interpreting them. The Framers of our Constitution believed, however, that the judiciary they envisioned would be the least dangerous branch of the government, because, as Alexander Hamilton wrote in The Federalist Papers, "It had neither force nor will, but merely judgment."

. . . . He went on to say, "The Founding Fathers were clear on one issue: for them the question involved in judicial restraint was not and is not, 'Will we have liberal or conservative courts?' . . . The question was and is, 'Will we have

government by the people?' And this is why the principle of judicial restraint has had an honored place in our tradition."

The opposite of judicial restraint and of constitutional fidelity . . . is, of course, judicial activism. . . . We have a very good example of judicial activism in the recent case of *Kelo v. The City of New London*. There, the Court—or a majority of the Court in a 5-4 decision—decided that "public use" would be expanded to mean, "public purpose," in which they would allow the city to take the home of a private citizen and give that property to another private entity only because that new entity would erect buildings that would bring more tax revenues to the city—a direct violation of what the words "public use" had always meant up until that time and certainly in the view of the Founders.

. . . . Judges also commit judicial activism when they usurp executive authority. Today we have the spectacle of judges running all kinds of executive functions—prisons, schools, even police departments, and many other executive agencies. That they have neither the legitimacy nor the competence to perform such a role doesn't seem to bother them. This is despite what John Marshall himself said on this subject, when he declared in *Marbury v. Madison* that "the province of the court is solely to

decide on the rights of individuals, not to inquire how the executive, or the executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and the laws, submitted to the executive can never be made in this court."

Numerous examples of judicial activism that would seem strange to the Founders exist today. In the 1960s in the cases of *Baker v. Carr* and *Reynolds v. Sims* . . . they required the states to [change] the structure of their legislatures. The states had organized legislatures before the Constitution was even written and before the national government was formed. As a matter of fact, the two-tiered legislature was the model for the Constitutional Congress itself, having one house based on political subdivisions and the other based on proportion of population. And yet, this 1960s legislation required the representation of both houses to be allocated on the basis of population.

I happened to be coming into state government at that time under then Governor Reagan, and I can assure you that

this not only overrode the authority of the states and their ability to determine how they would run their legislative bodies, but also changed dramatically the political balance and the civic culture of the states throughout the country.

Another example, of course, involved criminal procedure. In 1961 in *Mapp v. Ohio*, and in 1966 in *Miranda v. Arizona*, the Supreme Court literally nationalized criminal procedure and imposed requirements relating to the admissibility of evidence that had never been thought before that time to be within the province of the federal government. This was in direct violation of the promises contained in *The Federalist Papers*, where Hamilton wrote in *Federalist #17*, "there is one transcendent advantage belonging to the province of the state governments which alone suffices to place the matter [of relative power between the state and federal government] in a clear and satisfactory light. I mean the ordinary administration of civil and criminal justice."

In recent years we have seen . . . the Court [go] far beyond anything that the Founders would have envisioned in their wildest dreams, [using] foreign law as a basis for interpreting the Constitution.

We've had Justice Breyer, for example, talking about foreign decisions from Jamaica and Zimbabwe and India. We've had Justice Stevens talking about . . . the world community. We've had Justice Kennedy refer to the Court of Human Rights in Europe and the European Convention on Human Rights. And he's referred in one case to what he called foreign law and international materials, including treaties that the United States Senate has not ratified, as "instructive interpretation of the Eighth Amendment."

Obviously, if you look at what the Founders had in mind, it is hard to understand how the Constitution could be subject to interpretation based on foreign law such as this. Indeed, Justice Scalia said, "The prize for the Court's most feeble effort to fabricate a national consensus must go to its appeal to the views of members of the so-called world community. Irrelevant are the practices of the world community, whose notions of justice are thankfully not always those of our own people." And in another case, "The Court's discussion of these foreign views is therefore meaningless dicta. Dangerous dicta, however, since the Court should not impose foreign moods, fads, or fashions on Americans."

The use of foreign law is of course fraudulent. But, even worse, the Court too often has had a very selective and subjective use of foreign law, citing only those instances that

agree with the particular justices' position and ignoring foreign law, often more voluminous, that would be taking the opposite position. Again, Scalia says, "to invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making but sophistry." Well, the result of this use of foreign law has been to expand judicial discretionary power as well as to erode United States cultural and legal sovereignty. Why do the judges do this? They do it because they can't find any basis in United States law in the Constitution, or in any precedent. It reminds one of the old story about the drunk at midnight leaning against a lamppost—he is seeking support rather than light.

More recently, the Court has done something that for the last two hundred years would have been thought to be far beyond the imagination of most scholars, and that is their invasion of the province of the Executive and Legislative

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branches in regard to the conduct of war. Writing in his concurrence in *Youngstown Sheet and Tube Company v. Sawyer*, shortly after the end of World War Two, Justice Robert Jackson stated that, "executive decisions concerning defense in foreign policy are not judicial, but should be left to the President and Congress." He said they are and should be undertaken only by "those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility."

I pointed out that in some law schools the Constitution is hardly ever taught [and that] in the leading Constitutional law casebook, the Constitution isn't even . . . set out in print until you get to Appendix H.

Beginning in 2004, in four major cases the Supreme Court has invaded the province of the executive and Congress . . . Again, to quote Justice Robert Jackson, this time in *Johnson v. Eisentrager*,

Granting access to the civilian courts to enemy prisoners is contrary to common sense as well as contrary to the Constitution. . . . Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our Commanders, not only with enemies, but with wavering neutrals. It would be difficult to devise more effective fettering of a field Commander, than to allow the very enemies he has ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinions highly comforting to enemies of the United States.

In the most recent case, *Boumediene v. Bush*, the Court even went so far as to grant the enemy aliens captured in war the writ of habeas corpus as a defense that they could use against their capture. . . . In a dissent that was joined by the Chief Justice, Justice Thomas, and Justice Alito, Justice Scalia

said, "Today, for the first time in our nation's history, the Court confers a constitutional right to habeas corpus on alien enemies, enemies that are detained abroad by our military forces in the course of an ongoing war. . . . The game of bait and switch, that today's opinion plays upon the nation's Commander-in-Chief, will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if it was necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this court's blatant abandonment of such a principle that produces the decision today."

. . . How then do we revive the Constitution in the vision of the Founders? . . . It is true . . . that the public generally adopts the view that in matters of the Constitution the Supreme Court is supreme in every way. As a matter of fact, the Supreme Court was so arrogant in the case of *Cooper v. Aaron*, that they themselves said that the decisions of the Supreme Court are the supreme law of the land. Well, anyone who has read the Constitution knows that's not true, and that there is a basic distinction between Constitutional law, the decision made by the court, and the Constitution itself.

I had an interesting experience in a speech I gave. . . . I pointed out that in some law schools the Constitution is hardly ever taught, and that Constitutional law is all that the law schools put out. In the leading Constitutional law casebook, the Constitution isn't even . . . set out in print until you get to Appendix H. About two weeks later I got a letter from a professor, who will go unnamed, who said, "You talked about the leading Constitutional law case book, so you must have meant mine." He continued, "I want you to know that in the next edition I'm moving the Constitution itself up to Appendix A."

The legal profession has a real job to do in educating the public on what the roles of the various branches are in regard to the Constitution We must hope they learn what is at stake, not just in this election, but in terms of the continuing effort. . . .

The Founders gave us a truly great Constitution. . . . We in the legal profession have a special responsibility to revive the Constitution as the Founders adopted it some two centuries or more ago. It is our duty to preserve, protect and pass on to future generations this magnificent founding document which has done so much to preserve the liberty of our people, that it may continue to be not only a beacon and an example to other nations, but something that will preserve liberty for all the future generations in this country.

The Presidency and the Courts: Historical Reflections

The morning panelists were **Jeffrey Sikkenga**, Associate Professor of Political Science at Ashland University; **Louis D. Billionis**, Dean and Nippert Professor of Law at the University of Cincinnati; **Wendy Long**, legal counsel to the Judicial Confirmation Network; and **M. Edward Whelan III**, President of the Ethics and Public Policy Center. Moderating the panel was **Charles M. Miller**, an Associate of Keating, Muething & Klekamp and President of the Cincinnati Lawyers Chapter of the Federalist Society.

Jeffrey Sikkenga explains how the Founders understood the role of the judiciary:

What is the job of the federal courts? Let's start with what we know. We live in a constitutional republic. Here the American people—"We the people"—govern ourselves by putting our original authority in the Constitution, which then gives power to the three branches of the federal government. Now we've all been taught from childhood . . . that the Supreme Court's "judicial power" gives it the authority to be the final authoritative interpreter of the Constitution – the idea sometimes called in legal circles "judicial supremacy." In fact today we're so sure of this that sometimes people mistake the Supreme Court for the Constitution.

A lot of people think that the confirmation process for federal judges and especially the Supreme Court has become so contentious because of judicial activism. That is, because the courts now rule on many hot button issues – abortion, gun control, the President's powers on the war on terror. That's true, but not the whole story. Maybe not even the most important part of the story. The judicial confirmation process . . . has become so poisonous not just because of judicial activism but also because of judicial supremacy—because everyone believes that judges have the final word on the meaning of the Constitution. That raises the stakes enormously about who will sit on the federal bench, because it lets judges set the terms of political debate in this country. . . .

From a historical point of view, our acceptance of judicial supremacy is surprising. As you all know, especially you Ashbrook Scholars, the Constitution does not declare that the Supreme Court is the final interpreter of the Constitution. Article III simply says that the Supreme Court shall have "the



*Jeffrey Sikkenga talks with
Federalist Society President Eugene Meyer*

judicial power;" it does not say what that power includes. The modern Supreme Court, however, has tried to trace its supremacy back to 1803, and the famous decision of Chief Justice John Marshall in *Marbury v. Madison*. But that case has been misunderstood . . . sometimes very deeply misunderstood. Chief Justice Marshall did not say in that case that the Supreme Court's interpretation is supreme. He simply declared that the Court has the power to interpret the Constitution. As Marshall made clear, the Supreme Court is a court of law, not a constitutional court. . . .

Prior to the Civil War and maybe even the twentieth century . . . a number of important presidents also shared this view. Thomas Jefferson, for example, didn't like the decision

in *Marbury v. Madison*, but not because he rejected the idea that federal courts can review the constitutionality of laws. What he hated was the idea “that the judges are invested with exclusive authority to decide on the constitutionality of the law.” In Jefferson’s view, just as the Supreme Court is not bound by the president’s interpretation of the document, so too the president is not bound by the Supreme Court’s interpretation. No branch is the ruler of the other; each branch is ruled by the Constitution. Each branch, therefore, should interpret the Constitution for itself, and not be bound by the other’s interpretation. In particular, each branch should be its own final authoritative interpreter of its powers. . . .

Jefferson was not the only president prior to the Civil War to reject judicial supremacy. In 1819 the Supreme Court ruled in *McCullough v. Maryland* . . . that Congress had constitutional power to charter a Bank of the United States. In 1892 Congress passed a bill re-chartering the bank, but Andrew Jackson as president thought the bank was unconstitutional, and he vetoed the bill. In his veto message, Jackson argued “the opinion of the Supreme Court ought not to control the coordinate authorities of this government. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.” Supreme Court interpretations, Jackson thought, should have only such influence on the president as the force of their reasoning may deserve. In his view, the Supreme Court’s interpretations have to be right in order to be binding.

This view of the Supreme Court was not limited to one party. Running for Senate in 1858, Abraham Lincoln was denounced very severely for questioning the Supreme Court’s infamous decision in *Dred Scott v. Sanford*, which Lincoln thought was a horrible misinterpretation of the Constitution. Lincoln replied that in the specific legal case of Dred Scott against Sanford, the Supreme Court’s decision was final. But that didn’t mean that the Dred Scott decision was the final word on the meaning of the Constitution. For Lincoln, the Supreme Court is the ultimate decider of a case, but not the ultimate decider of the Constitution. According to him, Supreme Court interpretations are binding only when they are what he called “fully settled.” Lincoln, as a good lawyer, then articulates what it means to be fully settled: “Decisions must be unanimous. They can have no partisan bias, and they cannot be based on any novel constitutional theory.” (Run down through your mind the modern decisions of the

Supreme Court. How many meet Lincoln’s criteria?) Going on, Lincoln said, “Failing that, the decision must be reaffirmed over and over again by different courts.” Only then, in Lincoln’s view, would the president have to follow the Supreme Court’s interpretation. And as support for this view, it might not surprise you that Lincoln explicitly cited the words of none other than Andrew Jackson.

Of course, in our day, the views of Presidents Jefferson, Jackson and Lincoln seem radical If presidents today vehemently disagree with a particular Supreme Court decision, they don’t deny the general power of the Court. But I don’t think we should forget that they do resist it. For example, at the height of the crisis over the Supreme Court’s rejection of key pieces of the New Deal, FDR never disputed the Court’s authority. But he openly sought to overturn their decisions by packing the court. . . . Resistance to judicial supremacy has kept some constitutional balance in the relationship between the presidency and the courts, without ever [publicly discrediting] the idea of judicial supremacy.

Louis Bilionis speaks on the potential impact of a President’s Constitutional vision, citing FDR and Nixon:

The president can profoundly affect the interpretation and application of constitutional law, but his ability to do so hinges on three key factors. The first key factor is the president’s Constitutional vision—its content, its quality, its clarity, its sincerity, its precision. The second key factor is the strength of the political warrants that are backing that Constitutional vision: the degree to which that vision has been championed by the president and embraced and galvanized by the political process The third key factor is the array of opportunities the president has to bring his vision to bear on the Court, especially . . . the opportunities afforded by vacancies on the Court and new appointments. . . .

Franklin Delano Roosevelt certainly had a precise vision that called for Constitutional change. During his 1932 campaign, he sharply criticized the Supreme Court majority for its restrictive view of federal regulatory power, and he presented the nation a bolder alternative vision of the government’s power to reach the nation’s economic life. Once elected, he acted on that vision with an ambitious legislative package that challenged the Constitutional status quo. . . . The Court put up resistance, handing FDR . . . losses in cases that began to divide the Court.

Buoyed by a landslide victory in 1936, a determined FDR turned to his Attorney General, Homer Cummings, and asked him to devise a plan to obtain a Court majority. The product, of course, was the famous “court-packing” plan. It was actually a bill to add one new Justice to the High Court for every sitting Justice who reached the age of seventy, up to a total of six new Justices. The stated rationale was the effect of an increasing workload on an aged and aging court, but no one misunderstood. When the “court-packing bill” was introduced in February of 1937 it rocked Washington. Opposition was widespread, but a powerful FDR still appeared to have the votes necessary to push the bill to passage. Now we all know what happened. . . . Within just a few months, the Court signaled a turn in direction with its famous decisions in the *West Coast Hotel*, the *Jones and Laughlin* cases. As the lore has it, the swing vote at the time – Justice Owen Roberts – crossed over to make a new majority, ready to follow FDR’s vision of broader federal power. As one pundit memorably wrote . . . it was the “switch in time that saved the nine.”

[FDR had] championed his strong and precise vision for Constitutional change, communicated it powerfully, in plain words that the public could appreciate, and won compelling backing for that vision at the ballot box and in the halls of Congress over an extended period of time. In short, two of the three key factors affecting presidential influence on the Court—vision and political warrants—were plentifully present. But . . . what about the president’s opportunity to bring his vision to bear on the Court? . . .

Less than two years [later,] vacancies gave Roosevelt four appointments to the Supreme Court: Hugo Black, Stanley Reed, Felix Frankfurter, and William Douglas. By 1943, four more FDR nominees would take the oath—Frank Murphy, Jimmy Byrnes, Robert Jackson, and Wiley Rutledge. . . . FDR also named a new Chief Justice, elevating Harlan Stone to succeed Hughes in 1941. . . . These appointments helped Roosevelt perfect what really was deep transformation of American Constitutional Law . . .

The question of Constitutional vision and change would return to the presidential political stage . . . in the late 1960s. By then . . . the liberal Warren court had reached full

flower, transforming Constitutional law well beyond anything that could be traced to presidential or congressional initiative. The cries to rein in the Court were growing in frequency and volume, social unrest was escalating, and the vision for conservative Constitutional reform was . . . taking hold in the world of electoral politics.

At the core of that vision was the call for law and order that President Nixon embraced as a centerpiece of his campaign in 1968. He promised to appoint judges who would help to restore law and order to the nation by adhering to strict construction of the Constitution. Nixon’s decisive victory in ‘68 gave him the political warrants to make good on his promise and the opportunities to act came soon enough. Indeed, one was already waiting for him – the chance to appoint a new Chief Justice, thanks to the failure of the LBJ nomination of Abe Fortas. . . .

Nixon would see three other promising law and order conservatives confirmed before his landslide victory in 1972: Blackmun, Powell, and Rehnquist Thanks to William Rehnquist’s leadership, the Court’s criminal justice jurisprudence was substantially reworked. . . .

Wendy Long praises the legacy of President George W. Bush:

. . . That brings us to the current President, George W. Bush, whose nominations of Chief Justice Roberts and Justice Alito will stand as perhaps his greatest and most enduring legacy. President Bush was very up front about the criteria for his nominees in both his campaigns. He said he



Louis Bilionis, seated next to Wendy Long, responds to a question posed to the morning panelists.

was looking for nominees who represented academic and legal excellence, personal integrity and who would not legislate from the bench. And he repeatedly promised to nominate justices in the mold of Scalia and Thomas. He kept that promise with Roberts and Alito. Although it was well known that the President would have loved to appoint a woman or Hispanic to the court, to his credit such a consideration did not trump the overriding concerns with intellect, judicial excellence, and a demonstrable record of adherence to the principles of judicial restraint.

This last criterion . . . is very important. President Bush's nominees had a record we could all see and have confidence in; there was a high degree of transparency about those nominations. That . . . is his great contribution here. He deserves great credit; so far from looking back as Eisenhower did on the Court to his two greatest mistakes, President Bush can look back at two great victories. Beyond that, I think he gave us a model that all should follow who want to implant that same vision at the Court when they appoint Supreme Court Justices: intellectual and legal quality, a proven record of judicial restraint, and faithfulness to the Constitution.

*M. Edward Whelan III
describes the Constitutional vision
of the 2008 presidential candidates:*

Let's discuss the competing visions of John McCain and Barack Obama. . . . What Obama has said is that deciding the truly difficult cases . . . requires resort to "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy." In short, he says, "The critical ingredient is applied by what is in the judge's heart." Not by what is in his brain, not by his knowledge of the law, but by what is in his heart. No clearer prescription for lawless judicial activism is possible. [Moreover,] he is going to have, at least in his first couple years, a Senate that is heavily Democratic. I think it is a safe bet that anyone that he nominates will be easily confirmed.

John McCain, by contrast, has made clear . . . that he [would] seek Supreme Court nominees who have a proven record of judicial restraint. He is not a lawyer, does not have the deep knowledge of recent Supreme Court decisions that Obama has – that's probably a plus.

Interpreting the Constitution: The Founders and Today

Afternoon panelists were **David Forte**, Professor of Law at Cleveland-Marshall College and chief counsel to the United States delegation to the United Nations during the Reagan administration; **Robert D. Alt**, Senior Legal Fellow and Deputy Director of the Center for Legal and Judicial Studies at The Heritage Foundation; **Michael J. Gerhardt**, Samuel Ashe Distinguished Professor in Constitutional Law, University of North Carolina; and **Paul Clement**, Former U.S. Solicitor General and visiting professor at the Georgetown University Law Center. The panel was moderated by **Doug Cole**, a partner of Jones Day law firm and former State Solicitor for Ohio.

David Forte explains why judicial power was not feared by the Framers of the Constitution:

In those extraordinary three and a half months in 1787, when the charter of our government and of our liberty was being drafted, the Framers spoke relatively little about the judiciary. True, there is little doubt that they expected the courts to exercise judicial review of legislation, and certainly the Anti-Federalists agreed that there would be judicial review. . . . But compared to the Framers' concern with the legislative

branches, with the executive, and with the states, the Framers were not much bothered about the judiciary. . . .

Most of the Framers were lawyers. . . . Most in that litigious society had been to court and had seen firsthand how judges act. Even when they lost a case, these men retained respect for the Court. Their experience was that there was a set of ethical norms integral to being a judge that made a judge a keeper of the rule of law and not a threat to it. . . .

Take Chief Justice Marshall for example. In *Marbury v. Madison*, Marshall turned aside his party's invitation to engage

in the political wars with President Jefferson. Overtly deferring to the intention of the Framers, Marshall insisted that, “The Framers of the Constitution contemplated [intended] that instrument as a rule for the government of courts, as well as of the legislature.” In words that judges and academics might well contemplate today, Marshall said, “Why, otherwise, does the Constitution direct judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official behavior, [their craft]. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments”—take note legal realists—“for violating what they swear to support.”



Paul Clement speaks during the afternoon panel discussion.

Robert Alt notes recent attention given by the Court to “originalism” but cautions that it is still not the dominant mode of constitutional interpretation:

It was largely Meese's speech before the American Bar Association in July of 1985 that rejuvenated the discussion [of originalism]. There General Meese made the startling claim that it had been and would continue to be the policy of the Reagan administration to press for a jurisprudence of original intention. In the cases they would file, and those they would join as amicus, they would endeavor to resurrect the original meaning of Constitutional provisions and statutes, which serve as the only reliable guide for judgment. You would have thought he had thrown a skunk into the room.

[Beginning under the Reagan administration,] a series of judicial appointments, of judges who took originalism seriously, certainly impacted the way the courts have addressed this issue—first, obviously, Justice Scalia, and then later on, the habitually underestimated Justice Thomas. . . . Thomas has continued to push his colleagues—in part due to his willingness to review erroneous precedent. Following that, of course, come the more recent nominations and confirmations of Justices Roberts and Alito, both of whom have expressed a fidelity to the textualist, originalist approach. And joining with these originalist Justices are a slew of circuit judges too numerous to mention. . . .

Other factors have also added to the appeal of originalism. The two groups sponsoring this event today should receive special attention. The contributions of organizations

like the Federalist Society, which enable debate on law school campuses which have previously been shrines to living constitutionalism, should not be overlooked, as well as the efforts of organizations like the Ashbrook Center, which through its Ashbrook Scholars program for college students, and its Masters in American History and Government program, which is tailored to high school teachers, teaches students to take texts seriously, including the Constitution.

After this cheery opening, perhaps you might feel inclined to join in a paraphrase of Ron Dworkin and say, “Are we all originalists now?” Of course not. If anyone had any question about that, the Supreme Court reaffirmed that this is not the common mode last term, in its order in the case of *Kennedy v. Louisiana*. This is the case that involved whether the death penalty is constitutionally permissible in cases in which someone rapes but does not kill a child. The Court ruled last term that allowing death in these cases would be cruel and unusual violation of the Eighth Amendment. It did so . . . by surveying the state and federal laws and attempting to see if there was an actual consensus, ultimately applying the court's independent judgment.

There was one problem, of course, which was that there actually was a federal law—the Uniform Code of Military Justice, which provided the death penalty for these kinds of offenders—and the Court had not taken notice of the fact. After a briefing on rehearing, the Court opted not to rehear the case—they seldom like to admit that they're wrong—and in a statement last week . . . after an unpersuasive attempt to show that a consensus against the penalty existed . . . the majority [said]: “the Constitution contemplates that in the end our

judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Of course, the Constitution contemplates no such thing. The proposed Eighth Amendment would have been laughed to scorn if it had read, “No criminal penalty shall be imposed which the Supreme Court deems unacceptable.”



Afternoon panelists sharing a final word (left to right): Michael Gerhardt, David Forte (partially hidden), Robert Alt, Paul Clement, and Doug Cole.

A majority of the Supreme Court are not originalists. Four Justices – Stevens, Ginsburg, Kennedy and Souter – I would call case-pragmatists, which is to say they have no guiding interpretive philosophy and sample interpretive theories on a case-by-case basis. A fifth, Justice Breyer, is a philosophical pragmatist

Originalism on the Court is therefore in some question. . . . Add to this the fact that six Justices will be 73 or older before Election Day in 2012, and eight of nine Justices will be age 65 or older by Election Day 2016 . . . and you can see that there could be a massive flux on the Court. . . .

Michael Gerhardt argues the importance of Constitutional actors besides the courts, and insists on the weight given to precedent in Supreme Court interpretations of law:

The President and Congress are, to say the least, important Constitutional actors In fact . . . they may have even more to say about the Constitution than the Supreme Court does. . . Most people who work in the executive branch end up making a lot more Constitutional decisions in any given

year than the Supreme Court does, and over a wider realm of topics than even the Supreme Court does. Just a small sample—decisions to sign laws . . . pardons . . . proposing legislation, nominations (not just to courts of all levels but, of course, to executive offices and to administrative agencies), and removal decisions.

What about negotiating and rescinding treaties? . . . What about the very important decisions made about the priorities under which to enforce law? All of those are areas over which the president has discretion that’s invested in him by virtue of the Constitution, and these are things over which the judiciary hasn’t much say at all. . . .

The Court also relies rather heavily on . . . precedent. . . . After all, the Constitution says that the Court is empowered to decide cases of controversy. What is a decided case of controversy but a precedent? . . . If you look at the way the Constitution is structured . . . you . . . recognize that it might not only allow for the power of judicial review, but for that power to stand until or unless it is overruled through either a Supreme Court decision or Constitutional amendment. . . .

My research assistants and I, over the last couple of terms, took a look at what the Supreme Court Justices cite as their authority in cases. . . . Original meaning ends up not being very important It’s barely appeared at all in opinions signed by Chief Justice Roberts or Justice Alito. The only justice who cites it more than two or three times a term is Justice Thomas. . . .

The source that’s cited more than any other is precedent. . . . Probably what comes in second is historical practices. . . . how Congress or how the president understood their powers or how the States have understood their respective powers. And I would suggest that historical practices constitute another form of precedent, the precedent that’s made outside the Court by other branches.

Paul Clement describes the challenge facing the advocate who argues before a Supreme Court with divided views on interpretive methodology:

Everyone can agree that there is more than one dominant mode of interpretive methodology represented on the

Supreme Court these days. . . . Two different books, written by two different Justices, advocate different modes of [interpretation]: Justice Scalia's, *A Method of Interpretation*, adopts what can be fairly called an originalist or textualist approach, and Justice Breyer's *Active Liberty*, is . . . styled as a response to Justice Scalia. . . . Justice Scalia's view of originalism or textualism is an effort to discern "the original meaning of the text," though he distinguishes that from "not what the original draftsmen intended, but what their words actually meant and would have been understood [to mean] at the time."

Now I'll let Justice Breyer's position speak for itself. He says, "The judge, whether applying statute or Constitution, should reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for . . . decision. Since law is connected to life, judges in applying a text in light of its purpose should look to its consequences, including contemporary conditions—social, industrial, and political—of the community to be affected. And since the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. . . ."

You have other Justices on the court . . . whose interpretive methodology is . . . beyond categorization. And what that means in practice for the lawyer, is that sometimes, because you have two divided camps on interpretive methodology and a Justice or two that have their own approach to these issues, the surest path for the advocate to get four votes is also the surest path to get no more than four votes. You have to be careful as an advocate in that respect because . . . at the end of the day, the job of the advocate is to try getting five votes, not four, for his or her client.

What is the advocate to do? Generally, at oral argument in the Supreme Court, the advocate is given thirty minutes at most to make his or her case. Now, you can use your thirty minutes in a valiant effort to try to convince Justice Breyer or Justice Scalia to fundamentally rethink their interpretive methodology when it comes to the Constitution. I would

not recommend that approach. Instead, the real challenge of the advocate is to try to develop a theory of the case that can appeal to five, ideally nine, but at least five Justices. What that requires in practice is a willingness to articulate a position, that may appeal to the pure form of one or the other of [the two dominant] interpretive methodologies; but also, at the same time, to try to have enough balance, enough flexibility in the position, to accommodate Justices that may not squarely [embrace] one interpretive methodology over the other. . . .

Sometimes the most difficult challenge for the advocate in the Supreme Court is to field a friendly question. You would think friendly questions . . . are the easy thing to deal with But in reality, sometimes a justice who very much agrees with the advocate's position will ask a friendly question that itself includes, as an assumption, an interpretive methodology that's only going to appeal to two, three, or four justices, and if the advocate buys on to the theory embracing that question, the advocate may lose the case.

The other practical thing it means for the advocate is that in approaching the podium for oral argument, you have to have the interpretive methodologies of the various justices in mind and be prepared, especially if you are making an argument that conflicts with their methodology, to fend off the questions that will come. . . . One of the greatest challenges for any advocate is to go in front of the Supreme Court with a position that is firmly supported by legislative history and make your argument to a court that includes Justice Scalia. It's not a matter of if the question will come, it's simply a matter of when and in what form. The advocate has to be ready to respond.



President Bush and First Lady Laura Bush stand with the Ashbrook Scholars.

The Expectations that Gray Presidential Hair



Peter W. Schramm
Executive Director, Ashbrook Center

I first met President Bush about four months after he took office. I had been invited to watch him deliver an award to an elementary school that had accomplished some good work.

In a small school room in Columbus, twenty guests sat shoulder-to-shoulder in chairs made for seven year old children, while an equal number of reporters, some holding large cameras, crowded around

the walls. As the President came walking in, I noticed that he was conferring with aides, and that he looked young and vigorous.

He took his seat a few feet from me. On his left sat the Governor and the local Congressman, and on his right sat a teacher and the school principal. The latter stood to introduce the President, who would then say a few words and make the award. The nervous principal tried to speak. The cameras were rolling. She stammered and halted and stammered again. No understandable sound fell from her lips. Bravely she tried again, but still she couldn't speak. We watched her, helpless and aghast.

Then President Bush gently elbowed her and asked, "What's the matter?" She looked down toward him and said, "I, I, I am ner, nervous, Mr. President." President Bush replied without hesitation, "You're nervous? You should try sitting in my chair." This friendly and witty note—delivered with perfect timing—loosened her tongue and she was able to start her speech.

The second time I saw the President was in Cincinnati this October. Because I was to introduce him, I met him back stage and observed this moment in his day. Two things struck me that Monday afternoon. Even as he was walking toward the podium, he was conferring with aides, but not about the upcoming talk; and his hair was now white. I later found out that just five minutes before he entered the building, the stock market had dropped 900 points; if it had stayed there for the next hour—during which he would be on stage giving the talk printed here on the Courts—it would have been the greatest collapse of the market, both in points and percentage, in history (As it turned out, the market finished the day down only 370 points). When I learned the reason for the frenzied consultation between the President and his aides, I marveled that he had maintained such composure and focus on a topic that, compared to the urgent concerns just brought to him, seemed almost theoretical.

Recollecting these two meetings, I'm reminded that the current duties of a president—not all of which were envisioned by the Framers of the Constitution—arise in part from what we the people expect from him. No wonder presidents turn prematurely gray.

The president alone, we think, must lead the nation, embody the will of the people, shape the economy, guard our liberties, and even author legislation while, of course, commanding our armed forces. The late November Sunday talk shows are full of otherwise rational people calling for the immediate resignation of President

Bush so that President-elect Obama may take over the reigns of government and address the current crisis. These deep thinkers would cast aside constitutional provisions to hasten the day of salvation when the new President arrives to fix the economy, decreeing which businesses will survive or die. And while he's at it, he will persuade the other countries of the world to fix their economies as well. After all, they remind us, he is the great international leader, the president of the only super-power. Is it any wonder that Mr. Obama is being compared to Abraham Lincoln and Franklin Roosevelt, even before taking office?

The incoming President would be well served to lower our expectations. He could do this right after he takes the oath to uphold the Constitution of the United States. He could remind us that—despite our elevated and unfair expectations—his powers are limited by the document we still hold to be our fundamental law. That "the executive Power shall be vested in a President of the United States of America" (Article II) is true enough, but that does not mean that he will be the nation's chief economist, psychologist, or even social worker. By reminding us of this, President-elect Obama would not only do his fellow citizens some good; he would also worry less, and avoid premature gray hair.

The new President, appropriately, is surrounded by much good-will. He should take advantage of this by doing the hard things first, those things that may not bring immediate applause, but will build a wholesome future. During the campaign he promised, for example, to take a scalpel to the federal budget and carefully excise the waste. As an especially persuasive leader, he could tell us that we don't really have the right to retire at age 65 and get full Social Security benefits; since people live longer and stay healthy longer, he could move the retirement age to 68. He could make judicial appointments that demonstrate he is willing to take the hard road of effecting change not through judicial activism, but through the legislative process—he does have, after all, a solid majority in both houses of Congress. Instead of just leading a hasty pull-out from Iraq, he could implement reforms in the national security process. Statesmanship demands that he try to persuade opponents and even disappoint friends, in order to promote the greater good.

The authors of *The Federalist Papers* hoped that the presidential selection process would give us a president who is "pre-eminent for ability and virtue." Let us hope that this process still works, and as we thank President Bush for his great exertions, let us hope that President Obama will become the kind of president that our constitutional regime of self-governments requires, especially in this time of crisis.



To learn more about the Ashbrook Scholar Program, please visit www.ashbrook.org/scholar.