

## How Interest Groups Poison Judicial Confirmations

*The Alliance for Justice, the Leadership Conference on Civil Rights, and People For the American Way*

By Joseph de Feo

**Summary:** *Judicial watchdog groups failed to block Chief Justice John Roberts's confirmation, but their aggressive tactics and shrill rhetoric have shifted the terms and tone of the debate on judicial nominations. How are they affecting the Senate's ability to confirm qualified and independent judges?*

**W**hen three Democrats on the Judiciary Committee voted to recommend Judge John Roberts's nomination to be Chief Justice, Alliance for Justice executive director Nan Aron confessed, "I guess it would be fair to say I was shocked." The Associated Press reported that Ralph Neas, head of People For the American Way, found Senator Leahy's vote for Roberts "inexplicable and deeply disappointing." Wade Henderson of the Leadership Conference on Civil Rights announced that he was "profoundly disappointed that the committee, as a whole, ignored compelling evidence against his nomination." Though many took it for granted that the Senate would confirm Roberts, these groups have a right to be surprised. They have a high—and not unjustified—estimation of their own influence.

### The Troika

**People for the American Way (PFAW)** has good reason to be confident. With a \$12 million budget and a staff of 100, PFAW can mobilize large, expensive campaigns with ease. Its influence on senators is formidable. For example, in 2003 PFAW set up meetings with Senator Dianne Feinstein to discuss the nomination of Carolyn Kuhl to the 9<sup>th</sup> Circuit Court of Appeals. PFAW researchers seized on one of Kuhl's decisions as a superior



Ralph Neas, president of People For the American Way since 2000, was head of the Leadership Conference on Civil Rights during the battle over Robert Bork's nomination to the High Court

court judge that was reversed on appeal—despite Kuhl's admission that she had decided it wrongly. PFAW operatives in California worked overtime to persuade Californians to contact Feinstein; 21,367 faxes, e-mails, and phone calls later, Feinstein decided to oppose Kuhl. Though Kuhl made it out of the Judiciary Committee on a party-line vote, Senate Democrats—under PFAW pressure—filibustered the nomination, and Kuhl withdrew herself from consideration in late 2004. The PFAW formula of massive attack worked.

Norman Lear, producer of the television show "All in the Family," founded People For the American Way in 1981 as a counterweight to Jerry Falwell's Moral Majority (which had attacked Lear for his controversial TV shows). The group continues to maintain close ties to Hollywood. Lear reportedly lectured Sena-

tors Dick Durbin and Charles Schumer on the Democrats' hesitancy on the Roberts nomination at a September meeting in Los Angeles attended mostly by entertainment industry figures. Though on the far Left, PFAW enjoys a mainstream reputation, and its media award ceremonies attract donors from the media and major corporations.

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Although mostly silent on President Reagan's 1986 nominations of Antonin Scalia to the High Court and then-associate justice William Rehnquist to be chief justice, PFAW picked on other judicial nominees. Shortly before Scalia's nomination PFAW helped defeat the nomination of U.S. Attorney (now Alabama Senator) Jeff Sessions to the federal bench; it nearly did the same to Daniel A. Manion, who squeaked his way to a federal appeals court in Chicago by a 51-49 vote; and it helped mastermind the vicious campaign against Robert Bork, whose 1987 nomination to the Supreme Court went down to defeat on a 58-42 vote in the U.S. Senate. The group's current president, Ralph Neas, who took over PFAW in 2000, was head of the Leadership Conference on Civil Rights at the time of the Bork nomination. Neas, who started out his career as chief counsel to several Republican Senators in the 1970s, led hundreds of activist groups in the campaign against Bork. He subsequently taught a course on "borking" at Harvard's Kennedy School of Government. Neas claims to have increased PFAW's membership from 300,000 to 750,000 during his tenure.

**The Leadership Conference on Civil Rights (LCCR)** was founded in 1950 by A. Philip Randolph, founder of the Brotherhood

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of Sleeping Car Porters; Roy Wilkins, executive secretary of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. A coalition of 190 advocacy groups, LCCR works with but does not govern these member groups, which are quite disparate: the National Farmers Union, National Bar Association, Anti-Defamation League, and U.S. Conference of Catholic Bishops are all members. Groups pay membership dues that vary by annual revenue and "must share LCCR's principles and purposes, be national in scope, and conduct an ongoing civil rights program." LCCR's revenue was \$5.4 million in 2003, according to the latest available tax records.

Like PFAW, LCCR cleverly uses the tax law to combine the advantages of a political lobbying organization with a public charity (see the August 2004 Philanthropy Notes). LCCR is a 501(c)(4) lobby organization that "share[s] staff and office space" with the Leadership Conference Education Fund, a 501(c)(3) charity. Only donations to the latter are tax-deductible.

While the (c)(3) Education Fund is prohibited from substantial lobbying on legislation, it managed to spend \$1.7 million "to educate within the civil rights coalition, as well as providing information to policy makers, the press, and the general public." An illustration of that blurry line: LCCR Education Fund paid \$125,000 in 2003 to Podesta Mattoon, a "government relations and public affairs firm." *The Hill*, a Washington, D.C. newspaper that covers insider politics, named its head, Anthony T. Podesta, "one of the best-connected Democratic lobbyists" in 2004. Previously, Podesta was the founding president of People For the American Way. That's how these things work.

LCCR's leadership in the Bork battle cemented its power over the judicial nominations process. On September 15 during the Roberts hearings it made sure that Senate Minority Leader Harry Reid met with over three dozen advocacy groups to discuss the nomination, and LCCR executive director Wade Henderson was one of the fifteen witnesses Senate Democrats had testify against John Roberts. Henderson, the Joseph L. Rauh Professor of Public Interest Law at the University of the District of Columbia School of Law, was previously Washington director of the NAACP and associate director of the ACLU's DC office.

**The Alliance for Justice (AJ)** is the third nexus of left-wing power over judicial nominations. Founded and led by Nan Aron since 1979, it is a coalition like LCCR of some 70 independent powerhouses that pay membership dues to support its activities. Member groups include the League of Conservation Voters Education Fund, NARAL Pro-Choice America, the National Education Association, the National Organization for Women Legal Defense and Education Fund, and the Natural Resources Defense Council. The Alliance is a 501(c)(3) public charity (2003 revenue: \$5.3 million) with an allied 501(c)(4) lobby, the Alliance for Justice Action Fund. The Alliance's IRS 990 tax form for 2003 notes "reimbursement arrangements" and "loans or loan guarantees" with the Action Fund and reports that it "share[s]

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*Neas led hundreds of activist groups in the campaign against Judge Robert Bork, and subsequently taught a course on "borking" at Harvard's Kennedy School of Government.*

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management and board of directors." It also notes a transfer of non-cash assets to "a noncharitable exempt organization"—most likely the Action Fund. AJ did not return calls seeking clarification.

The 2003 Alliance tax form reports \$872,081 in expenditures on its Judicial Selection Project, which Aron launched at the beginning of President Reagan's second term. According to AJ, it "promotes the appointment of fair and compassionate judges, develops criteria for determining when a judge meets the highest standards for a judicial appointment, and opposes applying political ideology to the selection or confirmation of judicial candidates." During the battle over Bork the Alliance churned out letters to nearly every newspaper in the country opposing the nomination, and Aron met with representatives of the American

Bar Association to persuade them to give him an unfavorable rating.

During Clarence Thomas's 1991 hearings Aron outdid herself. It was Aron who found Anita Hill after hearing dinner party gossip about her, and Aron who tipped off Senate staffers about her accusations. More recently, the Alliance unleashed reams of innuendo and near-libelous statements about Charles Pickering, nominee for the 5th Circuit Court, even calling him a "throwback to the old, segregated South" in the *New York Times*. This gave Senate Democrats enough ammunition to stall Pickering's nomination for several years, before President Bush had to circumvent the Senate with a recess appointment.

With balance sheets and track records like these, how could these groups not have confidence in their ability to prevail against under-funded and ill-organized opponents? The activists on the Left frequently emerge from their morning huddles using lines from the same playbook. On September 22, Ralph Neas said in a statement to the press, "We should not be gambling with Americans' rights and freedoms." Wade Henderson's news release said, "[W]e strongly urge senators... to reject his nomination when it reaches the floor. The stakes are too high and the consequences too great to gamble." The Planned Parenthood Federation of America chimed in: "Without knowing Judge Roberts' views on reproductive rights, confirming him to the most influential position in our judicial system is a gamble." Professor Ronald Dworkin, Sommer Professor of Law and Philosophy at NYU, wrote in the October 20 edition of the *New York Review of Books* (published September 21 on the web): "The Senate has no right to gamble with the nation's constitution and its future." The week before, Senator Joseph Biden (D-Del) said senators were "rolling the dice with you, Judge." New York's Chuck Schumer went further: "This isn't just rolling the dice. It's betting the whole house." On September 22, Schumer's metaphor shifted slightly to the bookmaker's odds: "It is not that I am certain that [Roberts] will be a Thomas, it's not even that it's more than 50 percent, but the risk that he might be a Thomas... is too great to bear."

The judicial advocacy groups monitor Judiciary Committee hearings to check whether Democrats dutifully toe the activ-

ist line. And therein lies the mixed meaning of the activists' recent defeat: even though they failed to block John Roberts's nomination, they succeeded by dint of their influence and visibility in poisoning the debate over judicial nominees. While some in the Senate are working to preserve (or revive) the collegial atmosphere that allowed Justice Antonin Scalia to sail through on a vote of 98 to 0 and Justice Ruth Bader Ginsburg on a 96 to 3 vote, activist groups urge total political war. They exhort senators to filibuster judicial nominees; they demand that senators ask ideological questions; and they require specific answers on issues that might come before nominees as judges. The Senate's duty is to see that nominees are impartial, professionally qualified, possessed of a judicial temperament, and committed to equal justice under law. But the activist groups draw wild conclusions about candidates based upon their previous case work, clients, memos, and even (in the case of Chief Justice Roberts) marginalia. Whether or not their tactics succeed, their very use corrupts the judicial nomination process.

## Threats and other lobbying techniques

It was undoubtedly with an eye toward the next nomination that Ralph Neas began dropping veiled threats against Democrats who dared to vote for John Roberts's nomination. The *Washington Times* reported (9/26) that Neas fired "a warning shot across the

will make him complicit in those rulings, and in the retreat from our constitutional rights and liberties."

And after Senator Russ Feingold (D-WI) voted to send Judge Roberts's nomination to the full Senate, the Associated Press reported that PFAW thought his vote might "have [an] impact on potential higher aspirations." Neas commented, "I think countless progressives across the country are going to be so disappointed when they find this out." Wade Henderson commented on September 22, "Senators who voted for John Roberts may one day regret their vote."

Neas and Henderson are too smart to lash out in desperation; statements like these are calculated to be both a sop to their liberal base and a way of telling Democrats they had better make up for this next time around. Still, threatening U.S. senators does little to inspire confidence in the judicial selection process or its results; such well-publicized, heavy-handed pressure creates a public impression that the Senate may have something on its mind other than the qualifications of nominees who come before it. And the impression of corruption is as harmful to the judiciary and the legislative branch of government as the real thing.

The activists' own cynical post-mortems of the Roberts vote confirm that impression. *National Review's* Byron York reported that Nan Aron dismissed the possibility that Senate Democrats cared about Roberts' qualifi-

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Democrats' bow... telling reporters last week that any Democratic vote for Judge Roberts 'would never be forgotten.'"

After Senator Patrick Leahy (D-VT) announced his support for Roberts, Neas issued a warning: "When John Roberts becomes Chief Justice and votes to erode or overturn longstanding Supreme Court precedents protecting fundamental civil rights, women's rights, privacy, religious liberty, reproductive rights and environmental safeguards, Senator Leahy's support for Roberts

cations: "Hovering over this entire proceeding was the second vote... and I think the senators simply made a calculation as to how a yes vote or a no vote would affect their standing to fight the next nomination. Some concluded yes, and some concluded no." Neas thought that "more votes against the nominee would be a better signal, because the White House has time and again misled the Congress, intimidated the Congress... and I think that Rove and Bush respond to strength. They don't respond to weakness."

Wade Henderson announced, “We applaud the five judiciary members who voted their conscience and took a principled position in opposition to the nomination of John Roberts....” Henderson implies that the Democratic senators who voted for Roberts did not follow their consciences, but treated their votes like chess moves.

Senator Lindsay Graham (R-SC) also hinted at ulterior motives during the Roberts hearings: “[W]e’re already talking about the next nominee in code.” To say that all this politicizes the confirmation process is an understatement: suggesting that senators calculate how their vote may affect other nomina-

tions, or any other presidential actions, is no way to stock a fair and independent judiciary—at least, no one will *believe* it’s independent.

## **Crying Wolf**

The activists’ reliance on hyperbole as a tactic certainly demeans the process of judicial selection. A good example is PFAW’s August 24 50-page report on Roberts, a work without nuance or coherence; it seems designed primarily to rile up faithful donors. An even more hysterical 125-page report released September 2 warns that “John Roberts would be particularly perilous for Americans’ rights and freedoms.” His confirmation would “shift the balance of the Court to the great and

lasting detriment of Americans and the constitutional principles and legal safeguards that protect their families and communities.” At an August press conference Neas said he had hoped President Bush would “maintain the current balance on the court, [with] a nominee all Americans could count on to uphold our rights and liberties.” That idea of *balance*, constantly repeated by the Left, makes it sound as though Americans are in a precarious position on the brink of civil war.

LCCR pointed with alarm at Roberts’ 1982 memos against expanding the Voting Rights Act. Henderson told the Judiciary Committee that Roberts’ opposition to the bill twenty-

## **Feeding the Watchdogs**

The following are a few notable left-wing foundations that have provided grants to judicial watchdog groups in recent years. All grants listed were awarded to the organizations’ 501(c)(3) charitable arms and not the 501(c)(4) lobbying organizations.

### **Alliance for Justice**

**Carnegie Corporation:** \$200,000 in 2001  
**Ford Foundation:** \$1,487,000 between 2001 and 2004  
**Joyce Foundation:** \$150,000 between 2001 and 2002  
**W.K. Kellogg Foundation:** \$150,000 in 2002  
**John S. and James L. Knight Foundation:** \$150,000 in 2003  
**John D. and Catherine T. MacArthur Foundation:** \$425,000 between 2001 and 2003  
**John Merck Fund:** \$225,000 between 2001 and 2002  
**Open Society Institute:** \$250,000 between 2002 and 2003  
**Overbrook Foundation:** \$200,000 between 2001 and 2002  
**David and Lucile Packard Foundation:** \$500,000 in 2003  
**Rockefeller Brothers Fund:** \$75,000 in 2001  
**Turner Foundation:** \$100,000 in 2001  
**Norman and Rosita Winston Foundation:** \$310,000 between 2001 and 2003

### **Leadership Conference on Civil Rights Education Fund**

**Carnegie Corporation:** \$175,000 in 2003  
**Ford Foundation:** \$3,810,000 between 2002 and 2004  
**Charles Stewart Mott Foundation:** \$1,322,800 between 2003 and 2004  
**Open Society Institute:** \$628,500 between 2001 and 2003  
**Rockefeller Foundation:** \$100,000 in 2003

### **People For the American Way Foundation**

**Carnegie Corporation:** \$500,000 between 2002 and 2004  
**Chartwell Charitable Foundation:** \$200,000 in 2002  
**Eastman Kodak Charitable Trust:** \$360,000 between 2001 and 2003  
**Ford Foundation:** \$50,000 in 2001  
**Horace W. Goldsmith Foundation:** \$400,000 between 2001 and 2003  
**John S. and James L. Knight Foundation:** \$250,000 in 2001  
**Open Society Institute:** \$250,000 between 2002 and 2003  
**Norman and Rosita Winston Foundation:** \$410,000 between 2001 and 2003

(Source: [www.guidestar.org](http://www.guidestar.org), [www.fdncenter.org](http://www.fdncenter.org))

three years before “raises serious questions about his commitment to equal opportunity and the protection of civil and human rights for all Americans.” He competely ignored Roberts’ forthright testimony two days earlier in response to badgering questions from Senator Kennedy: “I’d certainly agree that the Voting Rights Act should be extended.” Henderson also used Roberts’s views on the limits of federal power to infer his indifference to suffering: “And as we have seen over the past two weeks in the wake of Hurricane Katrina, when the federal government’s role is diminished, the least among us suffer the most.” NARAL Pro-Choice America even released a television ad that falsely claimed Roberts had defended abortion clinic bombers. These and other ominous warnings are meant to polarize discussion, which makes it easy for either side to lapse into dogmatism and refuse to admit that there can be any reasoned debate over the judiciary’s duties in ruling on cases involving abortion, affirmative action, and the like.

For instance, LCCR’s Henderson warned the Committee that Roberts would end Affirmative Action: “If confirmed to the Supreme Court, the evidence strongly suggests that Roberts would use his position to abolish policies that have long been used to remedy past discrimination

Orleans and the Gulf Coast. Who’s the zealot here: Roberts or Henderson?”

Another favored political tactic among judicial watchdog groups is to demand that judicial nominees prove themselves innocent of unfounded charges. Ralph Neas stopped short of accusing Charles Pickering of racism, but said Pickering’s record “does not demonstrate an affirmative commitment to civil rights protections.” Wade Henderson’s Judiciary Committee testimony on John Roberts asserted, “We have heard nothing demonstrating his commitment to ensuring that the federal government will continue to play a strong role in protecting civil and human rights of all Americans.” LCCR also sent out a frantic e-mail begging in bold letters: “Urge Senators to Oppose Confirmation of John Roberts to Chief Justice of the United States!” The reason: He “*Failed to Demonstrate Commitment to Protecting the Rights and Freedoms of All Americans*” (emphasis in original). In other words, the activists have no evidence that nominees are racist, but they don’t have evidence that they aren’t—this from groups that denounce “McCarthyism” on the Right. Moreover, the tactic aims to ensnare Republican defenders of the nominee in a debate about political ideology. The debate in the Senate should be about the nominee’s basic qualification for office.

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and advance racial, ethnic, and gender diversity.” Might not a reasonable person question whether the end (remedying discrimination) justifies the means (more discrimination)? An example of Henderson’s dogmatism: when the Labor Department’s Office of Federal Contract Compliance Programs (OFCCP) waived affirmative action program requirements for federal contracts to handle Hurricane Katrina relief, Henderson called it “doubly shameful.” Setting up a system of racial and gender preferences and getting it approved by the OFCCP takes time, which is why the agency issued a three-month waiver allowing new contractors to get to work rebuilding New

### Nothing more than feelings

One particularly mindless tactic used by judicial watchdog groups is to claim that a judicial nominee exhibits “disturbing patterns of thinking” or seems to lack evidence of “compassion” and “sensitivity.” The Alliance for Justice railed against the nomination of William H. Pryor to the U.S. Court of Appeals for the 11<sup>th</sup> Circuit: “Nothing in William Pryor’s record suggests that he possesses... compassion, open-mindedness, temperament, freedom from bias, or commitment to equal justice under the law....” Similarly, LCCR’s Henderson explained the need to explore the “disturbing pattern to Roberts’

thinking.” He “explained that activists need to remain vigilant because conservatives have not fully embraced civil rights protections” (*Hartford Courant*, August 8).



Nan Aron has led the Alliance for Justice since its 1979 founding.

Senators have taken cues from activist groups. Biden tried to tug Roberts’s heartstrings: “Do you think the state—well, just talk to me as a father. Don’t talk to me—just tell me, just philosophically, what do you think? Do you think that is—not what the Constitution says, what do you feel?” Schumer pleaded, “The American people... need to understand that your first-class education and your advantaged life will not blind you to live the plight of those who need help”; and in his final statement before the judicial committee: “[I]t is important to determine not just the quality of your mind, but the fullness of your heart....” Senator Kennedy said during the hearings that he was “deeply troubled” by Roberts’s “narrow and cramped and perhaps even a mean-spirited view of the law.” Senator Feinstein asked the L.A. County Bar Association: “Does he have the compassion and empathy for the real-life problems that people face?” Senator Durbin’s was the most breathtaking statement; quoting the Bible, he recounted what King Solomon asked of God (1 Kings 3:5): “So give your servant an understanding heart to judge your people, to discern between good and evil.”

Republican senators felt compelled to respond in kind, emphasizing Roberts’ com-

passion. But their remarks also cheapen the nomination process. *Slate's* Dahlia Lithwick commented tartly, "Maybe we should do away with this whole Senate confirmation process and just appoint a cardiac surgeon to issue a ruling on the state of the nominee's heart."

### Full Disclosure

Full disclosure of "all relevant documents" is another predictable demand of activist groups—when it suits their purposes. PFAW and AJ demanded that the White House release all memos and documents written by John Roberts when he was an official in the Reagan and George H.W. Bush administrations. But interestingly, that was contrary to their position on document disclosure under different circumstances. In 1989 the Alliance and PFAW filed *amicus curiae* briefs defending the secrecy of the American Bar Association's judicial screening process in a case before the U.S. Supreme Court. The plaintiff, the Washington Legal Foundation (WLF), sought disclosure of ABA memos, arguing that the Bar Association was a government advisory group and therefore subject to a 1972 federal disclosure law that applied to such groups. WLF wanted to know whether PFAW and the Alliance had colluded with the ABA to influence its ratings of conservative judicial picks. Secrecy won out when the Court ruled by a vote of 8-0 (Justice Scalia did not participate) that the sunshine law did not apply to the ABA.

More recently, Republicans asked that 4,000 Democratic memos in the hands of the

Senate's sergeant-at-arms be released to the public. Memos from 2003 were confiscated after a few leaked to the press; they detailed how liberal interest groups coordinated their activities with members of the Senate Judiciary Committee. The most notorious was an April 2002 memo by a former Kennedy aide reporting that Elaine Jones, head of the NAACP Legal Defense Fund, had asked

### Will the real judicial activist please stand up?

Aware of the widespread popular sentiment against activist judges, PFAW, LCCR, and AJ are attempting to turn the tables on defenders of judicial restraint by calling the Rehnquist court "conservative" and "activist" and by urging the Bush Administration to

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Senate Democrats to postpone the nomination of Judge Julia Gibbons to the 6th Circuit Court until after the court decided a particular case on affirmative action. Republicans argued that documents stored electronically by the Judiciary Committee are supposed to be archived and released to the public at the end of the congressional session. Once again, the judicial activist groups opposed full disclosure.

Of course, there can be good reasons to withhold documents. In 2002 all seven living former solicitors general—three appointed by Republicans and four by Democrats—sent a letter opposing demands by Democrats for Justice Department memos written by Miguel Estrada, who was nominated to the U.S. Court of Appeals for the District of Columbia. Their letter stated: "[U]nbridled, open exchange of ideas... simply cannot take place if attorneys have reason to fear that their private recommendations are not private at all, but vulnerable to public disclosure"; and "[h]igh-level decision making requires candor, and candor in turn requires confidentiality." Senate Democrats did not share their concern and, after a Democratic filibuster, Estrada withdrew his nomination.

refrain from nominating "ideological" and "activist" judges. Senator Schumer was quick to don this fig leaf; the *Financial Times* reported September 23: "Charles Schumer of New York said that although [Roberts's] 'demeanour indicated that he may well not be an ideologue,' he could not be sure enough to cast a vote in favour."



Senator Dick Durbin claimed to doubt that Chief Justice John Roberts has "an understanding heart" like King Solomon.

Such arguments are disingenuous. PFAW and the other groups oppose court actions that have attempted to restrain the other branches of government from violating federalism, property rights, and other Constitutionally sanctioned principles. But by describing adherence to the Constitution as judicial activism or the work of ideologues, the groups provide

a convenient cover for their own political litmus tests.

These judicial activists force nominees to debate political ideology, then quickly deny that they have done any such thing. Since they have a dogmatic view of hot-button legal issues, they claim any dissenter must be motivated by ideology rather than by a respect for the rule of law. The activists further distort the judicial nominations process by demanding explicit answers on pet legal issues that will come before the court again.

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Nan Aron said Roberts gave “the illusion of candor and the appearance of openness. But in question after question, he dodged giving the answer and evaded responding to senators’ real questions.”

In 1993 Senator Biden advised Ruth Bader Ginsburg that she didn’t have to answer questions about how she might rule in future cases, but he voiced Aron’s exasperation when Roberts used the Ginsburg standard. Similarly, Senator Russ Feingold asked, “But why shouldn’t the committee and the public have some idea of where he stands or at least what his instincts are on recent controversial decisions?”

The answer is that examinations of political ideology harm the judicial process. Overtly politicized nominations undermine the appearance of impartiality that is the hallmark of the court system. Roberts provided an apt response: “I need to decide those questions with an open mind, on the basis of the arguments presented, on the basis of the

record presented in the case and on the basis of the rule of law... not on the basis of any commitments during the hearing process.”

When special interest can make political ideology the test for judicial confirmation they corrupt judicial independence. Advocates—whether from the abortion lobby, disabled or minority groups, industry or union representatives, or the media—that seek to pressure the Senate only give an incentive to evasion or dishonesty by all participants in judicial hearings. Stuart Taylor Jr., senior fellow at the Brookings Institution, wrote in a July 30 *National Journal* article: “If [Democrats] ever succeed in forcing nominees to detail their views, it will not only corrupt the integrity and independence of new justices. It will also, perhaps, open the way for presidents to pack the court with people who have virtually pledged their votes on a long list of issues.”



Before joining LCCR, Wade Henderson was Washington Bureau director of the NAACP and associate director of the Washington national office of the ACLU.

## A Tyranny of the (Imagined) Majority

When judicial watchdogs issue their statements and make their demands, they claim to speak for all right-thinking Americans, often calling nominees “outside the mainstream.” Wade Henderson told the senators, “Given the size and diversity of the LCCR coalition, unanimity among our members is rare, and does not exist today with regard to our position on Judge Roberts’ nomination. However, our conclusion today *reflects the consensus* of our more than 190 member organizations” (emphasis added).

(It would be interesting to know how the views of the U.S. Conference of Catholic Bishops (USCCB), a member of the Leadership Conference, are reflected in that consensus. Calls to LCCR and USCCB were not returned.) Several senators echoed this rhetoric, which is quite majoritarian for a group so eager to use filibusters to thwart a majority

in the Senate. Said Senator Biden: “[T]he judge pointed out he’s not standing for election. In truth, he is standing for election, through the representatives of the American people, the United States Senate. That’s how it was intended.” No, Senator, he is *not* standing for election.

### Conclusion

After President Bush nominated Harriet Miers to replace Justice Sandra Day O’Connor the advocacy groups geared up for another fight. Ralph Neas said PFAW had organized twenty-five state grassroots coalitions that his group would mobilize. He said of Miers’s nomination what he seems to say of every nomination: “The stakes could not be higher.” Wade Henderson agreed: “The stakes for this nomination are enormous.” Nan Aron promised, “We expect the next

nomination to ignite a firestorm of opposition. ... We’ve just begun to fight.”

At this printing, it remains to be seen what will become of the Miers nomination. Even if the activists lose this battle, it is far from clear that they have lost the war. Activist organizations, with their slanted polls and studies and their multi-million dollar multimedia campaigns, seek to influence the public. They have every right to do that—in politics. But the great harm in expecting a judge to represent the popular majority is similar to the harm caused by expecting a judge to pass a litmus test on political ideology: It presumes that judges are political operators—men standing for election—and not impartial arbiters of the law. It also supposes that the meaning of the Constitution is subject to the will of a majority, when in fact it is against the tyranny of such majorities that the Constitution is meant to stand.

**OT**

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# BrieflyNoted

**PETA** recently retaliated against *Vogue* editor **Anna Wintour** for refusing to run PETA's anti-fur messages while running fur ads. On October 10, protesters outside a Paris fashion show hit the editor with a pie. The flavor? Tofu. First, throwing pies at the mighty is getting a bit old. Second, would it have killed them to throw something edible?

From a September 22 **ACLU** press release: "The ACLU... demanded the release of all records sought by lawmakers to allow them to fully consider [then-**Judge John Roberts**], and criticized White House efforts to stonewall the documents' release." From an October 22 release: "'The right to consult with an attorney freely and without government intrusion is one of the bedrock principles of our legal system,' said **Caroline Fredrickson**, Director of the ACLU Washington Legislative Office. 'Our Constitution ensures due process and yet we see a continued assault on that fundamental right. Attorneys cannot effectively represent their clients if they know that Big Brother is listening....'"

On October 10, the trustees of **American University** voted to dismiss its president, **Benjamin Ladner**, after a controversy over his profligate spending of University money—over \$600k in three years, in addition to salary and benefits of over \$800,000 a year (according to the *Chronicle of Philanthropy*). Among the questionable expenses: "professional development" trips to Europe for Ladner's personal chef, private parties featuring 13-course meals to the tune of \$43,000, and a \$22,000 first-class ticket to **Nigeria**—not bad for the head of a non-profit. The AU board is negotiating the terms of Ladner's golden parachute, which may include a \$1 million settlement and a tenured professorship. Maybe it's cheaper to keep him on as president.

Public confidence in nonprofit groups is low, says a study released by **New York University's Robert F. Wagner Graduate School of Public Service**. The *Chronicle of Philanthropy* reports that 66 percent of those polled said charities waste money; 10 percent said charities spend their money wisely, and half said they pay leaders too much. **Professor Paul Light**, who conducted the study, advises against cutting management and overhead expenses: "You can't increase donor confidence in your ability to spend money wisely unless you can show that you have made some investments to help you do so." Does a \$22,000 flight to Nigeria count as an investment?

**Karma Banque (KB)**, a hedge fund-cum-activist organization, encourages investors and members to boycott corporations based on their green-friendliness, political leanings, and vulnerability to consumer pressure. On **CRC's Greenwatch** weblog, editor **David Hogberg** drew attention to the hysterical rhetoric of KB chief **Max Keiser** on his online radio broadcast; he said that free-market figures **Steve Milloy** and **Tom Borelli** of the **Free Enterprise Action Fund** should be "knifed." For merely pointing this out, Karma Banque called the Capital Research Center "digital brownshirts." We report. You decide.

On September 26, eco-terrorist **Christopher W. McIntosh** pleaded guilty to setting fire to a **McDonald's** restaurant near Seattle's Space Needle in 2003. He will avoid a possible thirty-year sentence, instead serving eight to ten. McIntosh, who claimed to be acting on behalf of the radical **Earth Liberation Front (ELF)** and **Animal Liberation Front (ALF)**, left a message with the police after his arson: "There was an E-L-F-A-L-F hit at McDonald's across from the Space Needle. There will be more. ... As long as mother Earth is pillaged, raped, destroyed. As long as McDonald's keeps hurting our furry brothers, there will be more." On October 14, three **Sierra College** students pleaded guilty to attempted arson, and one of them to arson as well, in connection with several attempted fire-bombings in Placer and Amador counties, California. Earth Liberation Front had taken responsibility for those attacks as well. ELF is responsible for attacks causing over \$100 million in damages since 1996, according to the **FBI**, whose Seattle office, in conjunction with the **Building Industry Association of Washington**, recently announced a bounty of \$100,000 for information leading to the arrest of ELF members and other eco-terrorists. That's a start.

"We need to be vigilant against this type of recklessness," warned **Daniel Patterson** of the **Center for Biological Diversity**. He offered a \$1000 reward for information leading to the apprehension of a criminal responsible for what he breathlessly called "a crime against nature and our quality of life." What did this lawbreaker do? He chopped down three cactuses—"mature saguaros"—in a Tucson, Arizona park. There is just *so much evil* in the world.

