AND THE AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY PRESENT:

A POLICY ADDRESS BY U.S. SENATOR CHARLES E. SCHUMER (D–NY)

"THE ROLE OF JUDICIAL PHILOSOPHY IN THE CONFIRMATION PROCESS"

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11:30 PM – 1:00 PM
THURSDAY, JULY 14, 2005

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MARK AGRAST: Good morning. I'm Mark D. Agrast, a senior fellow at the Center for American Progress. On behalf of the Center, our president John Podesta, and our co-sponsoring organization, the American Constitution Society for Law and Policy, I have the honor of welcoming you to this forum on "The Role of Judicial Philosophy in the Confirmation Process." The Center for American Progress is a nonprofit research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. The American Constitution Society is one of the nation's leading progressive legal organizations working to ensure that the fundamental principles of human dignity, individual rights and liberties, genuine equality, and access to justice have their rightful place in American law.

Before we start, let me please ask that you turn off cell phones and pagers and beepers so that they don't interrupt the senator's presentation or those of our panelists.

MR. : Good idea. (Laughter.)

MR. AGRAST: Let me also note that a video and transcript of this program will be posted on our site at www.americanprogress.org. With the president and Congress poised to select a successor to Justice O'Connor, the issue of what information the Senate is entitled to have with regard to the views and attitudes of nominees to the federal courts has take center stage. There's been much discussion of late regarding the need for prior consultation between the two branches before nominees are submitted to the Senate. Today's discussion concerns the process that should occur after a nomination's been submitted for the Senate's consideration.

Some have claimed that questions about a nominee's constitutional and judicial philosophy are out of bounds, and a nominee shouldn't be expected to answer them. Others respond that presidents takes such factors into account in making their nominations and unless the Senate is in a position to do likewise, it cannot perform its constitutional role as a coequal partner in the confirmation process; that it's only through a searching enquiry into the views of a nominee on the constitution and the judicial process that senators can assure themselves that the nominee does not harbor ideological preconceptions that are outside the constitutional mainstream and would make it difficult for him or her to follow precedent or consider each case with an open mind.

That's the conclusion that's been reached by the over 100 legal scholars who have signed a letter to the Judiciary Committee that's being released to this event today. That letter urges senators to give careful consideration to nominees' views about the Constitution and the judicial process and proposes a set of 10 questions that should be asked of every nominee. You'll be hearing more about that letter shortly.

Before I introduce our keynote speaker, let me just note for the record the three distinguished American law professors who jointly were responsible for generating that

letter: Professors William P. Marshall and Michael Gerhardt of the University of North Carolina School of Law, and Professor Erwin Chemerinsky of Duke University School of Law. We're delighted that Professor Marshall is here with us today. You'll be hearing from him later. We look forward to his remarks and those of our fellow panelists.

But now it is my distinct honor to introduce our very distinguished keynote speaker. A great New Yorker once observed that the first duty of society is justice. That man was Alexander Hamilton. Today, another great New Yorker is working to ensure that our nation does not forsake that duty. His name is Senator Charles Schumer. At a time when extremists boast that their prospects for seizing control of the Supreme Court are waxing, Senator Schumer reminds us that the Senate is charged with ensuring that those entrusted with lifetime appointments to the federal bench owe their allegiance not to a narrow ideology, but to the Constitution of the United States. Senator Chuck Schumer has defended the Constitution as a public servant for three decades, for most of time as a member of the House and the Senate.

I first met the Senator when I was a staffer for one of his former colleagues on the House Judiciary Committee, Congressman Delahunt. And as some of you may know – some of you insiders may know, they also share living quarters a few blocks away from here. And from that vantage point, I had an opportunity to see him in action as he fought to pass the Freedom of Access to Clinic Entrances Act, the Violence Against Women Act, the Brady Bill, the Assault Weapon Ban, the Omnibus Crime Control Act of 1994, and on and on. Today as the ranking member of the Judiciary Subcommittee on Administrative Oversight and the Courts, Senator Schumer is recognized as a preeminent authority on the Senate's role in the confirmation process and an eloquent advocate for the appointment of judges who will apply the law with reverence for the constitution, respect for precedent, and perhaps more importantly an open mind.

Please join me in welcoming a great defender of the Constitution and the rule of law, Senator Chuck Schumer. (Applause.)

SENATOR CHARLES SCHUMER: Thank you. Thank you very much and again for apologize for being late and so I'm going to get right with my speech. I will try to abbreviate it a little bit since you've been waiting long enough, but it obviously is something of great importance to me personally but far more important to the country.

First, I want to thank the Center for American Progress and the American Constitution Society for sponsoring this important event at this important time on this important issue. And as speculation swirls about who might replace Sandra Day O'Connor, it's important that we're taking this morning to discuss a fundamental issue no matter how many vacancies we face on the Supreme Court. And that fundamental issue is this: once we have a nominee testifying before the Senate Judiciary Committee, what kind of questions can be put to that nominee and what kind of answers should the nominee give. I have long believed that federal court candidates who serve for life should explain their judicial philosophy and their method of legal reasoning. They should be prepared to explain their views of the Constitution, of decided cases, of

federalism, and a host of other issues relevant to that lifetime post. They should talk about their views freely, openly on things like the First Amendment and civil rights and environmental rights and religious liberty and the establishment of religion and workers' rights and women's rights and more.

So this morning, ladies and gentlemen, let me address two points. First, why it's good and proper to ask a nominee detailed questions about his or her views of the Constitution and substantive issues, and second what questions I will personally ask any nominee to the Supreme Court.

First, why should senators ask and nominees answer searching questions? Why? It's very simple: because it's the single most important thing we can learn about a justice who will serve for life. The Supreme Court has a profound impact on people's lives and the influence of a single justice can far outlast that of a president over his or her lifetime. With a stroke of the pen, a justice can affect, for good or for ill, millions of people's lives in dozens and dozens of ways. One Supreme Court can mean the difference between equality and opportunity: Brown v. Board. One Supreme Court decision can make the difference between profit and bankruptcy for a whole class of businesses: Grokster and Granholm v. Heald. One Supreme Court decision can make a difference between life and death for criminal defendants: Atkins versus Virginia, or Roper versus Simmons. One decision can mean a difference between a home and homelessness, between a job and unemployment line, between clean air and a fouled up planet. And of course, as we have seen, just by one vote by one justice in one case we can decide whether a Democrat or a Republican is in the White House: Bush v. Gore.

Because of the momentousness of all the High Court considers, we simply cannot and should not avoid delving into judicial philosophy. I discussed this in a 2001 op-ed piece in the *New York Times* and it created quite a stir. And I think we basically have won the argument except for those who for their own reasons don't want the views of the nominees exposed. I'll talk a little more about that later.

The idea, however, that there is a machine called the law and every person put on the bench interprets the law in the same way makes no sense. We know that's not true from just our own intuition and observations, but Cass Sunstein of the University of Chicago found in a very comprehensive study, unsurprisingly, that in ideological contested cases appointees tended to vote more conservatively or more liberally depending on the party of the president who appointed them. For all these reasons, the process should not be a rote and robotic view of a résumé. The idea that, well, you went to the right law school, practiced law in the right firm, were a judge for a certain amount of time, didn't break the law, didn't do anything – any crime of moral turpitude, you're in. That's out. That should not be what we are doing and saying.

A good résumé is important but not dispositive. It is a necessary, but certainly not sufficient, prerequisite for serving a lifetime appointment. There are many people who boast impressive résumés and academic credentials but who would mis-serve the American people from the bench because of their views, judicial philosophy, or

disrespect for the Constitution. And the people agree. The American people care less about whether a nominee went to Utah Law School or Harvard Law School, and more about who he or she will affect their lives.

Indeed, close consideration of a Supreme Court's judicial philosophy, ideology and views on substantive tradition, on views on substantive issues has a long and rich tradition in American history even before nominees appeared in person before the Judiciary Committee. There was a period in the '50s and '60s – sort of an era of good feeling – where there were not a lot of questions about nominees' views and ideologies, in part because there was consensus in the country, but that was an exception. From the beginning of the republic, everyone has understood that these kinds of questions were vitally important. In 1795 when George Washington nominated John Rutledge to be Chief Justice, he was defeated not because he smoked opium as a teenager or failed to pay his nanny tax to the British, but because of his views on the Jay Treaty. And – and this is notable – his opposition was led by Alexander Hamilton, who was the originator of the advise and consent procedure. So the idea that the founding fathers didn't want to consider a nominee's views and ideologies is dispelled by the founding fathers themselves in their actions in the early years of our republic.

Ideological examination has been a feature of the nomination process forever, but often that ideological questioning goes on furtively behind closed doors by members of the party of the proposed nominee. Justice O'Connor, for example, was questioned by the Reagan White House at length on her views in private. As reported in the *New York Times* in 1981, in a closed door session she was asked specific questions by Reagan officials; among others, whom she felt was closest to on court philosophically. Her opinions on the exclusionary rule, for instance.

And that kind of closed-door questioning isn't a thing of the past. Senator Brownback, hardly my ideological soul mate, member of the Judiciary Committee, asked to meet with Attorney General Alberto Gonzales. When asked whether he'd be a good nominee, Brownback said, "I need to talk with him about his view of the constitution to tell." That's what I hope to do this week. If the nominees' ideology, judicial philosophy, and constitutional views are central considerations in a president's decision to nominate, and these days they certainly are – George Bush's nominees do not span the breadth of the ideological spectrum, they by and large come from a part of it. That's not coincidence. They didn't just look at those people's ability to be good lawyers. Of course we know they are choosing with ideology in mind, and it takes something of gall to then suggest that the senators shouldn't ask questions about that when the president – this president has chosen nominees more through ideological spectrum than just about any other in history.

Now, let me review the breadth of support from all quarters for the proposition that questions about judicial philosophy are fair game. Let me begin with the letter that's being released today by 100 legal scholars. They say it's critical that the Senate in giving its advise and consent undertake a searching inquiry to assure itself that judicial nominees meet the highest standards of character and integrity and that their views are within the

constitutional mainstream. They are not alone. Arlen Specter, chairman of Judiciary Committee, agrees. He wrote in 2000 in his book *Passion for Truth*: "The Senate should resist, if not refuse, to confirm Supreme Court nominees who refuse to answer questions on fundamental issues. In voting on whether or not to confirm a nominee, senators should not have to gamble or guess about the candidate's philosophy but should be able to judge on the basis of the candidate's views."

Senator John Cornyn himself mentioned as a possible Supreme Court nominee, a member of the Judiciary Committee – again, hardly of my viewpoint – when pressed on television last week, Senator Cornyn conceded, quote, "I think it's an appropriate question to ask what nominees' views are on cases that have been decided and judicial opinions that have been written." And Senator Hatch in 1996: "Differences in judicial philosophy have real consequences for the safety of Americans in their streets, homes and work places." Senator Hatch himself repeatedly asked nominees about their views. He pressed Ruth Bader Ginsburg, among other things, on her views on the death penalty. And even President Bush endorsed this proposition when he talked about the importance of philosophy in choosing a Supreme Court nominee; quote, "I'm going to deliberate in the process because I want the American people to know that when I finally make a decision, it's going be one based on a lot of research and a lot of thought about the character, person – character of the person, the integrity of the person, the ability of the person to do the job, and" – my emphasis – "the philosophy of the person."

And even the Supreme Court agrees with the proposition that nominees to the Supreme Court will naturally have to express opinions on legal issues of the day. In Republican Party of Minnesota v. White, the Court made its views clear that questions about constitutional views and decided questions are completely proper. Listen to Justice Scalia in 2002 quoting Justice Rehnquist in 1972 – it doesn't get much better for conservatives than that – and he said, "Proof that a justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of a lack of qualification, not a lack of bias."

In all, this impressive group is in support of this simple proposition: logical and legal precedent confirm what senators and Supreme Court justices all agree on: questions about judicial philosophy are legitimate and proper. Ideology matters, judicial philosophy matters, and questions about them are not only appropriate, but obligatory. And yet despite Supreme Court precedent, despite logic and reason, there are those who insist that such questions are inappropriate, unnecessary, unseemly, or even unethical. When some say "Don't make the hearings into a circus," what they are really saying is don't ask the tough questions.

Every time I look at these arguments, I become more perplexed. I think the American people join me in scratching their heads at those who will question whether we should ask those kinds of questions. Why do opponents – do the opponents of questioning about ideology even believe their own arguments? I don't think so. I think those who are seeking to avoid asking these key questions are doing so because they fear

or know that the answer the nominee gives may be so out of touch with the American people that the nominee, if his or her views were public, might never be approved.

Frankly, they want someone out of the mainstream but they know if the views of that nominee were to come forward, the nominee would never be chosen. And so they seek to argue, even intimidate us from asking the key questions, but we're not going to be intimidated.

Now, some have argued that questioning a nominee about his or her views of the Constitution compels prejudgment about a future case. They say somehow asking a nominee about an old case or the judicial philosophy means they won't be impartial if a similar issue ever comes up. They even cite the canons of judicial ethics in support of this argument. But that's not the case. One should not ask – what you shouldn't ask is how you're going to rule on a prospective specific fact situation. One should not ask specifically about Enron because there might be an Enron case before the Supreme Court in the next few years, but one can certainly ask about the nominees' views on corporate responsibility and the proper role of the federal government in enforcing it. One shouldn't ask about drilling in a particular oil field in Alaska, but one can certainly enquire about the proper constitutional role of the federal government in balancing environmental against energy interests. A dozen legal ethicists confirmed in a letter to me last week that there is nothing inappropriate with senators asking questions about the constitutional issues. The professors relied on Justice Scalia's opinion in White and in the speech is a quote from them, which I'll skip.

So, again, I wonder the motives of the opponents of these type of questions. What is their rationale and what is their reasoning? Again I would posit to you that some may want a nominee so far out of the mainstream, they want to hide the candidates' views from the American people. They are afraid if the nominee provided his or her honest views of the Constitution and the way it should be interpreted, that nominee would never be confirmed.

Now, what I support, what many of my fellow senators support, what these 100 scholars support is a dignified and respectful hearing process: open, fair, thorough, full, and above board; a hearing process dominated by direct questioning about substantive constitutional issues rather than nitpicking about personal peccadilloes. Ten years ago when you weren't supposed to ask about ideology, Democrats would search to see if a Republican nominee smoked marijuana in high school. Republicans would search to see if a Democratic nominee took the wrong video out of the movie shop or out of the video shop. It was demeaning. And then somehow the Democrats were outraged when the Republicans smoked marijuana and only the Republicans were outraged when the Democrats smoked marijuana. It was a kabuki game, demeaning to the Court. We don't want to do that. We want a hearing process that casts light on the nominees' judicial views rather than one that generates heat about their personal lives. A hearing process that lets the American people understand the kinds of questions they are getting.

To do this, Senate questioners have certain ethical obligations: to treat nominees with respect and avoid the kind of "gotcha" questions that debase the proceedings. On the other hand, the nominee has certain obligations: to answer questions fully and honestly without prevarication or equivocation, to provide relevant opinions and writings to the committee, all of them without delay. Miguel Estrada, nominated by President Bush to the D.C. Court of Appeals, was defeated, frankly, not because of his views – we never got to know what they were – but because he was neither forthright in his answers nor forthcoming in his writings. He may have been a brilliant legal mind with a stellar résumé, but his stubborn evasion and dissembling about his judicial philosophy and his legal views spelled disaster for his nomination, and I believe would spell disaster for a future Supreme Court nominee's nomination.

Now let me set forth some of the questions that I would personally ask of a Supreme Court nominee. This is neither a comprehensive nor obligatory list. I may not ask all of these questions and of course I'll ask many others not listed here, but these questions form a groundwork, I think, for a proper examination of a candidate for the highest court in the land. Some of my questions are similar to the ten proposed in the letter from the legal scholars being released today. I may not ask all of the same ten questions proposed in the letter but I'll certainly ask many of them, and every one of the questions proposed is appropriate for a senator to ask.

First Amendment and freedom of expression. What, if any, are the limitations on freedoms guaranteed by the First Amendment to the Constitution? When can government regulate public speech by individuals? When does speech cross the line between constitutionally protective free expression and slander? In what way does the First Amendment protect the spending and raising of money by individuals in politics? Can government regulate hate speech? What about sexually explicit materials?

And then on specific cases. Do you agree with the landmark decision in *New York Times* v. Sullivan which held that public criticism of public figures is acceptable unless motivated by malice? What do you believe constitutes a public figure under this standard? Do you believe the Supreme Court was correct to strike down the Communications Decency Act in Reno v. ACLU on the grounds that pornography on the internet is protected by the First Amendment? What's your view on the distinction of the Supreme Court that the Supreme Court drew in Republican Party v. White and versus White and McConnell between contributions and expenditures in the course of political campaigns?

The first establishment and the Establishment Clause. We have so many issues swirling about, we have to know the nominees' views. Under the Establishment Clause, for instance, what, if any, is the appropriate role of religion in government? Must the government avoid involvement with religion as a whole or is the prohibition just on government involvement with a specific religion? What so you see as the constitutionally protected or limited role of faith-based groups in government activity?

And then cases. I want to know the nominees' views on the recently decided Ten Commandments cases. What were their views on both of those cases? What's the nominee's view on Santa Fe School District versus Doe, which held that public prayer in public schools is prohibited, even when it is student-organized, nondenominational and at a football game? Can the states regulate activities at religious ceremonies, as this Court ruled in Employment Division versus Smith?

An issue of great concern to me is the Commerce Clause. I think one of the thrusts of this Court that I disagree with is the limitation of the Commerce Clause, and thereby the limitation of the federal government in regulating commerce. Beginning in 1937, the Supreme Court has granted Congress great latitude in passing laws under the Commerce Clause. This stayed true for over 50 years, but now there have been cutbacks. Do you think trends towards striking down laws on this basis is desirable? What do you believe is the extent of Congress's authority to legislate under the Commerce Clause? Can Congress regulate local trade in a product that's used nationally? Can Congress regulate labor standards for states and cities under the Commerce Clause? How closely regulated must the regulated action to interstate commerce be for Congress to have authority? Where would you look for evidence that Congress is properly legislating under its Commerce Clause authority? Do you rely on the – exclusively on the text of the legislation? Do you look at legislative history? Do you consider the nature of regulated activity?

And then cases. I'm not going to go into the details, but I certainly want to know the nominees' views in Heart of Atlanta Hotel versus the United States, and U.S. v. Lopez, something near and dear to me. It struck down the Gun-free Zone School Act because they said education is local.

Another issue – this is important, very important – under what circumstances is it appropriate for the Supreme Court to overturn a well-settled precedent upon which Americans have come to rely? And does the nominee's answer depend at all on the length of time the precedent has been in the books? Does the answer depend on how widely criticized or accepted the precedent is? What if you agree with the results but disagree with the legal reasoning? Justice Ginsburg talked about that about Roe when she was nominated. Does that make a difference? And does it matter if that the precedent was five-four in deciding whether to overturn it?

So many cases are here. Again, to save time I'm not going to describe them. But important cases the National League of Cities versus Usury, which on the one hand said that the Congress could not extend Fair Labor Standards Acts to state and city employees; or Garcia versus San Antonio, 1985, overruling that case. Which one do you agree with? Do you agree with the 1989 decision in which the Court held it was constitutional to execute minors or with the 2005 decision that it wasn't? Do you agree with the 1986 decision in which the Supreme Court held that states could criminalize private sex acts between consulting adults or the 2003 decision which held that states could not – Lawrence v. Texas?

Another category: under what circumstances should the Supreme Court invalidate the law duly passed by Congress? We've seen this Court, under Justice Scalia's leadership, invalidate laws that Congress passed based on the Eleventh Amendment or the Commerce Clause. A thorough exploration of that, I think, is vitally important before passing on a judge, and I'd want to know the deference – the amount of deference the Court gives or the nominee would give to congressional action and do certain laws deserve greater deference than others – regulatory laws, criminal laws? Again, I'd want to ask them about U.S. v. Morrison, which struck down provisions of the Violence Against Women Act.

I think it's crucial that we ask a nominee about the right to privacy and, if so, under what circumstances does it apply? The word "privacy" is not mentioned anywhere in the Constitution. I will ask the nominee: "In you view, does that mean it's wrong for the Supreme Court to interpret the Constitution as conferring such a right?" Do you believe the United States Congress or the states can regulate the sexual behavior of individuals within the privacy of their home? Do you agree the reasoning in Griswold v. Connecticut, which held the Constitution protects the right to privacy in the bedroom? Do you believe that Roe v. Wade was correctly decided? What is your view of the quality of the legal reasoning in that case? Do you believe that the Court reached the right result? Once the right to privacy has been found and in Griswold and Roe, under what circumstances should the Supreme Court revisit that right?

And then issues on so many different cases on so many different specific issues and questions. I'm not going to get into them now to save time. The federal role in enacting laws to protect the environment; the federal role in enacting rights to protect the rights of the disabled; the proper relationship between Congress and States and laws to protect the rights of patients; the proper constitutional role of government in enacting laws to regulate education.

I also want to ask the nominee how they define "judicial activism." I'm going to ask them three examples of Supreme Court cases that they consider the product of judicial activism. I want to know is activist label limited to more liberal leaning judges or can there be conservative activist judges. Cite an example of conservative judicial activism if they can think of one. In cases where the federal law and the state law may be in conflict, who is the activist, the judge who vote to strike down the federal law or the judge who invalidated the state law? Do you believe the Supreme Court was engaging in judicial activism when it struck down the provisions of the Gun-Free Schools Act or the Violence Against Women Act? I'm going to ask them: "Was the Supreme Court engaging in judicial activism in Brown v. Board, Miranda v. Arizona, Dread-Scott, civil rights cases of 1883, Lochner v. New York, Furman v. Georgia, Bush v. Gore? And what distinguishes one case from the other?

I would ask them their particular school of judicial philosophy. I want to know what they think of strict constructionism, their notion of original intent and original meaning. I want to ask someone who tends to believe in original intent with the acceptance – how they square that with the acceptance of the institution of slavery at the

time the Constitution was adopted. If you believed only in the writings of the Constitution, you still might believe that slavery is legal. Now, no one does but then if slavery isn't the original intent of the Constitution had to grow or be changed. What about for so many other issues?

We're going to have to talk about the Equal Protection and Due Process Clause of the Fourteenth Amendment. Cases like Troxel v. Granville. We're going to have to talk about the line between civil rights questions that are political and questions that are appropriate for the Court to decide. What do they think of the reasoning in Powell v. McCormack or Baker v. Carr or Bush v. Gore?

I'm going to ask them which Supreme Court justice do they believe their jurisprudence most closely resembles and why? I'm going to ask them, are they closer – since there are so many non-unanimous decisions on the Court – to Justice Scalia or Justice Ginsburg? And I want to ask them three Supreme Court cases that have not been reversed where they're been critical of the Court's holding, what they would do about it, and to discuss their reasoning.

And these are just a few of the topics that are available. The sheer number of substantive areas for legitimate and important questioning is staggering. It's actually – when you think about it, as I have really begun to do, it's awesome, not in the sense that my kids would use the word but in the biblical sense. (Laughter.) It is just utterly amazing. It underscores why the Supreme Court is so important, why the hearings are so central and why these questions are so vital. And the answer to each and every one of these questions – every single question I asked could have a profound effect on the day-to-day lives of hundreds of thousands if not millions of people. That is why asking these questions is not a whim, not a political game, not even a privilege, but a solemn obligation to the Senate and to the country.

Thank you. (Applause.)

MR. : (Off mike) – take some questions.

SEN. SCHUMER: Okay. That's fine. I'm now happy to answer some questions that people might have.

Yes, ma'am?

Q: Just wondering if you can give a little bit of insight as to the procedure on how the questioning of these nominees might take place. Is it just in the committee? Is it the full Senate? Is there a time limit?

SEN. SCHUMER: Yeah. Well, it's always in the Judiciary Committee and now people can submit written questions, I suppose, to the nominees, but it's mainly in the Judiciary Committee. And thus far there have been preliminary discussions between Senators Specter and Leahy, and Senator Specter has indicated that he understands that

there has to be full hearings, not to rush them; first to allow for a period of time to do the research, to read just about every opinion that a nominee has written if they are a sitting judge, all the other evidence about them if they are or are not. And to have a law – we would prefer, and I think Senator Specter agrees, long rounds of questioning, not this five or seven minutes but maybe a half hour at a time. And unlimited rounds; as you can see, I'm going to take a long time. (Laughter.) And I think most of my other colleagues are too, but to – in a genuine search for what the nominee thinks.

Now, obviously, once they get on the bench, their thoughts can evolve. That's the beauty of the Constitution; the amazingness of the founding fathers. The longer I'm around, the more my hair stands on edge at the wisdom of the founding fathers, and we've seen nominees change. We've seen some people on the hard right rail that Souter or Kennedy wasn't what they thought, or Earl Warren or Brennan. Eisenhower said those were his two greatest mistakes. (Laughter.) Many would disagree, but people do evolve. But just because they evolve doesn't mean you shouldn't know the way they think. And then some don't evolve; there are as many Supreme Court nominees who didn't evolve on the benches as who did.

Yes?

Q: Yes. I was wondering, I don't recall on your list of questions, (do you?) think it would be important to raise the question of the recent Supreme Court decision regarding eminent domain.

SEN. SCHUMER: Definitely. And by the way, I don't expect I'll be raising all of these myself. I'm sure some of my colleagues will. But that is of course a question that has to be in play, and it's a very important question, and it's a new area for the Court. It's the first time – we've been a republic now for 200 and some odd years, and it's the first time public use – the definition of public use was addressed.

Q: Do you agree with the –

SEN. SCHUMER: Well, I'm not going to get into my specific views here. (Laughter.) I'm not – unless I'm nominated – (laughter) – but don't hold your breath.

Yeah, David?

Q: Do you believe that a nominee should answer questions about a specific case that they will be hearing?

SEN. SCHUMER: Okay. I think they should answer questions about specific cases that have already been heard, but when it comes to a specific future case, no, I do not. In other words, as I said, even if the case hasn't yet been drawn, I would not want to ask them what they think Enron did, or – you know, that's an example – a good example, what they think what Enron did was wrong. That would vitiate their impartiality, and I

think that violates the canons. But asking them general views so you get an idea how they might rule? You bet.

And while you might – I think it's debatable, this is one that there's division on should you ask them will you overturn such and such a case? Roe v. Wade is the one that obviously comes to mind. That's a touchy one, but I think you can ask the question and you can get a really full idea of the nominee's views, provided they're honest and they're not dissembling, and I think our standard in terms of nominees being straightforward and not dissembling is going to be quite high. I can speak for me, for somebody who says, well, they had never thought about Roe v. Wade, as nominee Thomas did, that would count against them from my point of view because it's just incredulous to believe.

Chuck?

Q: Senator, given the recent history of the ways that nominees, including Democratic-appointed nominees such as Ginsburg, have not indicated (inaudible), what realistic hope do you have that you'll get meaningful responses?

SEN. SCHUMER: Okay. I'd point out a few things, Chuck. First, I think that there is so much focus now. You know, when Justice Ginsberg was nominated there had been seven Republican appointees to the Court in a row, and there's usually a warp and woof here. There was also a consensus with Justice Ginsburg in the sense that Orrin Hatch had already touched base with a number of his colleagues and asked, "Would you support this nominee?" And so I do think there's a push and pull here. If it's a consensus nominee, if there's been a real process of consultation – and by the way, I would say I don't think we've entered the real process of consultation yet. We have a good first step, but I've now asked about 20 of my colleagues, "Has the White House bounced names off of you, not just asked you for names?" That has not happened, and that's real consultation. That's what has been done time and time and time again. So it depends on consultation. It depends on sort of the time in history. The time in history and Sandra Day O'Connor's removal means the focus on real questions will be greater than it has ever been because she was a swing nominee at a time of a divided court and a divided country.

I would say this, though: I would say to nominees they ought to look at the example of Miguel Estrada, a man who had a great résumé, but was – I mean, he was disingenuous in my opinion or at least that's how his questions – his answers appeared. When you asked him any of the questions I asked here, his form, boilerplate answer was "I can't answer the question because it might violate – because it would violate Canon 5 and interfere with my impartiality when I got the case." Well, that would mean – if that was the case then it would – I think we checked in those days; it would mean six of the nine sitting judges would have violated Canon 9 – or Canon 5. And so I would urge nominees to look at the case of Miguel Estrada. I think one of the things that would unite probably a sufficient number of senators is a callous refusal, is a – to answer questions in a real way. And the opposite happened, too. There were some very conservative nominees; one that I can think of is McConnell, one of the most conservative nominees,

but he was passed because he was so candid. So I think that has a pretty real influence on how nominees – how senators vote.

Q: (Inaudible) just a follow-up question: Estrada was (inaudible) filibuster. Are you suggesting that a Supreme Court import nominee who does not answer questions in the vein that he did not might be the subject to a filibuster (unintelligible)?

SEN. SCHUMER: Look, I can only give you my view. I believe filibuster is not off the table. I believe that the agreement of the 14 says that extraordinary circumstances are within the discretion of each individual senator, and I've talked to a lot of the 14, so that my view would be that a nominee who refused abjectly to answer the kind of questions I made would face a real difficulty and the possibility of a filibuster.

MR. AGRAST: We have time for one more.

SEN. SCHUMER: Okay.

Yes?

Q: Senator, if I may bounce a name off you? What about Mike McConnell?

SEN. SCHUMER: Yeah, I'm not going to – (laughter) – I have religiously abstained from discussing any nominee. And I think that doesn't – it doesn't behoove the process well. I'd be happy to discuss nominees privately with the White House should they ask, but I don't think it helps the process for us to talk about nominees now.

And the idea that we have – we Democrats have said we're going to be against any nominee, the opposite is true. We are very eager – would be even a mild way of putting it – for the president to nominate a nominee that would be a consensus nominee. We are very much aware of the fact that that consensus nominee would not have our views, my views, or any other single Democrat's views, but someone within the mainstream. And that's our hope, and that's what we've been working towards.

Yes?

Q: Could you define what a (potential nominee?) (inaudible)?

SEN. SCHUMER: Well, everyone has to define it in his or her own way. My number one test, if you will, or standard is a better word than test, is somebody who will interpret law, not make law. I have been very much against nominees at the extremes. Obviously, I have opposed some that I thought were extreme on the far right side here, but I have a judicial committee in New York – by the way, we've worked very well on the process of consultation. I've consulted – I've sat down in the room several times with Alberto Gonzalez when he was the counsel to the president, and we went over New York names, New York names that he would nominate. This is not only for the district courts, but for the Second Circuit which New York is the overwhelming contributor to. We have

Vermont as well, but – and Puerto Rico. But on my committee when they bring up names that I consider out of the mainstream from the left, I knock them out too.

So it's somebody within the mainstream who will interpret law, not make it. Ideologues tend to feel things so passionately that they decide to impose their views; their views on the elected bodies, Congress and the president; their views on jurisprudence. I mean, to me the archetype of it was Janice Rogers Brown, who basically said that I believe there's a higher law than the Constitution and I will follow it. Now for many people, and probably most Americans, there may be a higher law than the Constitution: their relationship to God. But the tradition of this country – and that's a wonderful thing, but the tradition of this country is that doesn't influence the government, or doesn't dictate to the government what should happen. The Constitution is the highest authority. Yes?

Q: Do you agree with the assessment coming out of the White House meeting earlier this week that a sitting senator should be looked at, and if so, how would their voting record play into –

SEN. SCHUMER: That's a good question. Yeah, I – you know, there's a lot of talk and it comes actually from many, many people in very high authority that somebody with practical experience, whether they be a sitting senator, but a non-judge is the way I've heard it put, makes a good deal of sense. I agree. I look on my judicial panel for people with practical experience. The bar doesn't like that. The New York Bar and the American Bar Association, they only look at the legal experience and they don't look at ideology, and that's fine. They measure a certain thing, which is necessary but not sufficient. So a sitting senator would probably be a good idea, and is probably more likely, all things being equal, to have a greater chance of being passed than somebody who's not because they've worked with their colleagues.

Thank you, everybody. (Applause.)

MR. AGRAST: Thank you, Senator Schumer, for that inspiring address. Senator Schumer's remarks are available – his prepared remarks are available outside and will also be posted again on our site where you can see this program once again.

I'd like to turn now to our panel, and before I introduce them, I'd like to introduce another distinguished member of our community, the executive director of the American Constitution Society, my colleague and friend, Lisa Brown. (Applause.)

LISA BROWN: In the interest of time, I'm going to be very short. I really just wanted to welcome all of you on behalf of the American Constitution Society. We are honored to be cosponsoring this event with CAP. This is an – CAP and ACS are natural partners on issues like this, and I have to say that ACS has a terrific friend in Mark Agrast. We could not ask for somebody more supportive. I also want to add my thanks and welcome to our panelists, that's Jeff and Bill, who I know personally so I know we're

going to have some very interesting insights and thoughts on the impact of judicial philosophy on the confirmation process.

As you read the paper right now, the public both inside and outside the beltway is riveted about the prospect of a Supreme Court nomination and for very good reasons. Senator Schumer put it far more eloquently than I will, but who sits on our courts will have – they have the ability to define not just the scope, but also the very existence, of the rights and liberties that we hold dear. Supreme Court justices, as you could hear from the litany of cases described by Senator Schumer will have an – will impact our lives in important and often very, very personal ways, so it's absolutely vital right now that we focus attention on the constitutional role of both the president in nominating justices and of the Senate in providing their advice and consent. And that discussion by necessity requires us to also talk about the role of the nominee himself or herself in the confirmation process. So Senator Schumer's remarks and this panel discussion could not happen at a more important time given that we are about to have the first Supreme Court nomination in over a decade.

So with no further ado, Mark and our panel, thanks and welcome.

MR. AGRAST: And I'm going to shift to be part of this panel now, and give a very brief introduction of our panelists since we are running late. You have full biographies on each of them in your materials.

William Marshall is the William R. Cannon Distinguished Professor of Law at the University of North Carolina School of Law, and he served as deputy White House counsel and deputy assistant to the president of the United States during the Clinton administration.

Jeffrey H. Blattner served on the Senate Judiciary Committee staff under Senator Edward M. Kennedy from 1987 to '95, and was Senator Kennedy's chief counsel from '92 to '95. During his service on the committee, he worked on six Supreme Court nominations. He later was a deputy assistant attorney general in the Justice Department, and he now has his own consulting firm in Washington, where his clients include organizations active on Supreme Court nominations.

Beth Nolan served as the White – in the White House as counsel to the president from 1999 to 2001, where she oversaw the judicial selection process for President Clinton. She served as deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice and was associate counsel to the president. She is also a former associate professor of law at George Washington University School of Law and is currently a partner in a litigation group at Crowell & Moring LLP.

We've asked Professor Marshall to begin by discussing the role of judicial philosophy in the modern confirmation process and the kinds of questions that senators are entitled to ask. Next, Jeff Blattner will offer his perspective based on his long involvement with the process on the Senate Judiciary Committee. And finally, Beth

Nolan will offer a White House perspective on the process and will discuss the extent to which ethical considerations should or should not constrain a nominee from responding to certain types of questions.

Professor Marshall?

WILLIAM MARSHALL: Thank you. First of all, let me thank Lisa Brown, Mark Agrast, Senator Schumer. Actually, maybe I shouldn't think ACS and CAP because being asked to speak right after Senator Schumer speaks is more than its – creates more than its set of challenges.

As Senator Schumer alluded to, Senate inquiry is particularly necessary when the president has made clear that his nominations are being made to effectuate a specific agenda. The Senate response you can look at is actually a function of the president's nomination agenda, and here it is quite clear that there is a very strong agenda that the president is attempting to achieve through his judicial nominations. You see this in the support and the outcry by various groups in support of choosing particular nominees by the president. And even more accurately, you also see it based in history.

For some time, conservative forces have had as their political agenda the rewriting of constitutional law. As Professor Dawn Johnsen has documented, in the late 1980s, the Reagan-Meese Justice Department prepared a series of memoranda calling for judiciary results to be effectuated by the appointment of conservative judges. The memoranda identified specific areas of constitutional law as needing substantial overhaul and deemed appointing judges with specific philosophical views as the way to get there. In the words of the Justice Department memorandum, quote, "There are few factors that are more critical to determining the course of the nation, and yet more overlooked, than the values and philosophies of the men and women who populate the third coequal branch of the national government: the federal judiciary."

Even beyond this concerted effort, it is unrealistic to assume that preconceived notions about the law will not matter to a sitting judge, and there is no greater authority than this than Justice Scalia. Senator Schumer referred to this case, Republican Party of Minnesota v. White. In that case, a First Amendment challenge was brought to a Minnesota rule which prevented judicial candidates from announcing their particular positions. It would be unethical under this rule for a candidate to say, for example, vote for me because I am the pro-life candidate or vote for me because I am the pro-choice candidate.

Responding to the claim that the state rule was designed to promote impartiality on the part of the judge, Scalia pointed out that eliminating preconceptions is virtually unattainable. Let me quote him: "For one thing," he said, "it is virtually impossible to find a judge who does not have preconceptions about the law." Then, quoting Justice Rehnquist, Scalia added, "Since most justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretations of the sweeping

clauses of the Constitution and their interaction with one another. It would not be merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so," end quote. And he went on, "because picking people who hadn't thought about the important legal issues would probably not be qualified to sit on the Court."

Scalia's position in this case could not be clearer. Judges will decide cases based at least in part on their preconsisting views and philosophies. And as the Minnesota voters were entitled to know the views of their judicial candidates, so should the American people be entitled to know the views of their Supreme Court nominees.

This brings us to the letter that Senator Schumer referred to that was signed by 100 law professors that raised ten questions that we believe would be appropriate to ask potential nominees to the Supreme Court. Some of these questions – and I'm not going to go through the questions here, but just give you a brief indication of what they were about. Some involved judicial philosophy: does the candidate ascribe to a particular philosophy? Another dealt with the question of how the candidate defined judicial activism. Senator Schumer was going to – said he was going to ask that. But, in fact, preexisting Senate judicial questionnaires have asked that question for some time and I should point out that it was the Republicans who put that question in the Senate judiciary questionnaire that is sent out to prospective judicial nominees.

The letter also asks us to look at key – asks the senators to ask about key constitutional law questions such as individual liberties, economic liberties, the limits of congressional power, the limits of presidential power, which is particularly important and sometimes ignored, but it's particularly important in this era where this president's legal advisors have suggested a virtually unchecked power for the president in certain areas.

Finally, some of the questions are attempts to discern whether the nominee will be likely to apply his or her legal theory consistently. One of the ironies in the decisions of the justices that President Bush points to as models for his nominees – the so-called strict constructionists – is that they have a tendency to be inconsistent as to how they apply their strict constructionist approach. For example, while they have been very critical of non-textual interpretation with respect to the expansion of individual liberties, they have been quite expansive in finding non-textual bases for defending the rights of developers against environmental regulations or the rights of states to be free from civil rights actions brought by the aged or the disabled. Similarly, while they have had very narrow views or relatively narrow views of congressional power to remedy societal harms, they have an incredibly expansive view of presidential power.

The American public, it seems to us, deserve to know if a new justice will be expected to apply a consistent mode of understanding for all issues or whether they are likely to be selective in the types of constitutional provisions and the type of constitutional theory that they apply to the cases before them.

MR. AGRAST: Thank you. (Applause.)

Jeff Blattner?

JEFFREY BLATTNER: Thanks very much, Mark, and thanks to the Center and to ACS for inviting me to participate today. As Mark said, I've been asked to speak briefly about the history of the Judiciary Committee's questioning of nominees about judicial philosophy and to identify some factors that might be taken into account in determining the appropriateness of questions put to nominees by members of the Committee.

A few short moments on history; I'll do this as quick as I can. The Judiciary Committee itself wasn't even created until 1816, and it wasn't until after the Civil War that the Senate actually started referring all nominations to the Committee. There were no hearings at all on Supreme Court nominees until 1873, when the Committee actually held a closed hearing on President Grant's unsuccessful nomination of George Williams to be chief justice. The Senate stalled consideration of the Williams nomination without an up-or-down vote, by the way, and Grant ultimately withdrew it.

An open hearing on a Supreme Court nomination was held for the first time in 1916: the Brandeis nomination. Harlan Fiske Stone was the first nominee to appear personally before the Committee; that in 1925. During the period from 1925 through 1955, the record was spotty. Some nominees appear; Felix Frankfurter did for example. Other nominees declined to appear; Sherman Minton being an example of that. And William O. Douglas actually waited outside the room, waiting to be called, and was never called. Since Justice Harlan's nomination in 1955, all Supreme Court nominees have testified before the Committee. In all, at least according to one account, only 24 of the 149 nominees have actually been questioned by the Committee. All but a tiny portion of those 24 have appeared, as I said, in the last 50 years.

But let's turn now to the substance of the questioning of Supreme Court nominees on philosophy. I'll defer here to Senator Schumer and to Bill Marshall. Judicial philosophy is clearly in bounds for senators reviewing Supreme Court nominations, and the senators clearly are entitled, within limits, to obtain information about a nominee's judicial philosophy in the hearings. The key questions, I would argue, are relatively specific. It's easy enough for nominees to serve up slogans, to say they are against legislating from the bench, that they repudiate judicial activism, and that they will interpret that the law and not make it; but to understand a nominee's judicial philosophy, one must learn how a nominee approaches real legal issues.

The best evidence, I would submit, is the nominee's pre-nomination writings and speeches, legal opinions, law review articles, et cetera. What is written and said in circumstances when a nominee is likely to express his or her real views, before the White House handlers get involved, before they TV lights come on – these are generally more probative of how a nominee will act as a justice then what is said before the Judiciary Committee.

Sure enough, nominees who have extensive legal writings have literally had a lot to answer for when they appeared before the Judiciary Committee. The foremost example, of course, is Judge Robert Bork, and that was the first Supreme Court nomination on which I worked for Senator Kennedy way back when. To paraphrase Judge Bork, his extensive writings and speeches over a 25-year period on constitutional issues provided the Committee with an intellectual feast of subjects on which to question the nominee. And the controversial positions taken in those writings effectively required the nominee to answer questions on all aspects of his judicial philosophy, and Judge Bork did so over several days of testimony.

Now, some have concluded that the defeat of the Bork nomination has encouraged the nomination of candidates without an extensive paper record, but there are countervailing considerations and one can see them at work today when some organizations on the right have insisted that President Bush nominate someone whose prior writings demonstrate unequivocally support for their particular special interests. And several of the post-Bork nominees who have been confirmed had extensive and distinguished legal writings themselves, notably Justices Ginsburg and Breyer.

But what of nominees with less of a paper trail? Well, there has been considerable variance in their willingness to answer questions about their judicial philosophy. Every one of the last six nominees – the six in my tenure – have answered at least a few questions regarding their views on specific legal issues. The variety of responses was summed up well by Senator Specter, now the chairman, of course, of the Committee, in an exchange with Justice Breyer during his confirmation hearings, Senator Specter had asked Justice Breyer about his views of the Congress's power to strip the Supreme Court of jurisdiction to decide particular constitutional issues. That, by the way, is an issue that is currently before the Congress even today.

Justice Breyer gave a responsive answer, and Senator Specter responded, and I quote, "I had questioned Chief Justice Rehnquist on this issue, and he declined to answer, and finally did answer that the Congress could not take away the jurisdiction of the Supreme Court on First Amendment issues. I then asked him about the Fourth Amendment, and he declined to answer; declined on the Fifth; declined on the Sixth. I then asked him why he would answer on the First Amendment, but not on the Fourth, Fifth, and Sixth. He declined to answer that question too." (Laughter.) "He went considerably farther, however, than Justice Scalia did, who would not answer a question on Marbury v. Madison, and Chief Justice Rehnquist went considerably further than Justice Souter, who would not answer my question on whether the Korean War was a war. Most of them went farther than Justice Ginsburg did as a generalization."

You heard Senator Schumer talk about the Ginsburg nomination; the fact that she was the subject of consultation. I'm not going to go further into that at the moment. Senator Specter concluded his exchange with Judge Briar with a very telling observation, one that he repeats to this day. "It has been my conclusion," Senator Specter said, "that nominees answer about as many questions as they think they have to." Senator Specter's

observation has obvious merit. Some nominees have ducked, others have not. My favorite non-answer, very quickly, when asked a question by a member of the Judiciary Committee, this is a member now of the one of the federal courts of appeal, said, "Senator, I would love to answer that because my answer is exactly what you would like to hear. I again hesitate to answer questions that very possibly may come before me."

Beth is going to talk in detail about the ethical issues. And all I'd like to say about it is that the judicial Fifth Amendment, the nominee's Fifth Amendment – I refuse to answer on the grounds that this legal issue may come before the Court – is contrary to the experience of numerous justices of the Supreme Court, including Frankfurter, including Black, including Charles Evans Hughes, including Chief Justice Rehnquist himself, all of whom who had expressed views about legal issues and who then sat on those very issues on the Supreme Court. Justice Jackson, by the way, took one view of an issue while he was in government before he was confirmed to the Supreme Court and actually decided the opposite way when he got to the Court.

Let me just say what happens when a nominee does not answer a question. It seems to me the Committee cannot hold the witness in contempt; even if they've talked to Karl Rove they can't be forced to answer. (Laughter.) But the fact of the matter is senators are clearly within their rights, and you heard Senator Schumer quote Senator Specter on this, to take a nominee's responsiveness into account in deciding whether or not to vote for a nominee.

Thanks very much.

MR. AGRAST: Thank you.

Beth Nolan?

BETH NOLAN: Jeff promised you that I would talk in detail about the ethics rules, but I'm not going to talk in detail about anything because we only have a few more minutes. But fortunately we're at that point where almost everything has been said, just not everyone has said it, and I'm going to not repeat those things.

I do want to just take a couple of minutes with my advice to a nominee. You have heard, and if you haven't, I hope someone will show you, that Senator Schumer has a long list of questions he would like to ask at your confirmation hearing. And you may hear or think or have people tell you that it would be unethical or improper for you to answer some of those questions, and my advice is this: you are free to speak your mind as long as you don't make pledges, promises, or commitments about how you will decide specific cases likely to come before the Court and, in fact, only if it would be detrimental to the fairer administration of justice, so you could say, "I will decide this fairly. I will decide that" – you can even speak that way, but you shouldn't give a specific commitment about how you're going to decide a case.

Other than that, you are free to address your views on a range of legal and constitutional issues, and you are free, unlike me, to go into great detail at your hearing. You need not to – you need not decline to opine whether Marbury v. Madison was correctly decided. If you have a view on that, you may provide it.

Of course, as Jeff mentioned, this is ultimately a political process. So you will want, no doubt, to edit your thoughts, both at your confirmation hearing and before and after it. You will be urged, no doubt, to be circumspect in how you express your views. You will at times be more polite or less polite than your natural inclinations during the process, depending on what people suggest might be helpful here. But what you are trying to do is persuade the Senate Judiciary Committee, the Senate, and even the American people that you have the character, the experience, the sophisticated legal knowledge, and the open-mindedness to decide hard cases and make tough choices for us. Ultimately, you are trying to persuade the Senate, who are charged with this decision on our behalf, that you are worthy of being only one of nine people in this entire country who has the final say – the last word – on fundamental issues that affect how we live our lives. The Senate is entitled to hear your views and ask tough questions about them, and you are entitled to give answers.

I agree with the letter from the ethics professor – Stephen Gillers's letter that you'll find in your packets, that this is perfectly consistent with the code of judicial conduct, and I just note that this – it will be the first Supreme Court nomination in the post-White era, the post-Republican Party of Minnesota v. White Supreme Court case that Senator Schumer and others have mentioned. If the nominee chooses to demure, it's up to the senators to decide how hard they will push, or what the consequences of non-discussion will be, as Jeff mentioned, but what a nominee should not be able to do is claim a legal or ethical impediment to answering legitimate questions about the nominee's legal positions and views.

MR. AGRAST: Thank you very much.

I'd like to thank all of our panelists for their presentations, and if you'd join me in expressing our appreciation to them. (Applause.) I'm sorry to say that we now must vacate the room, so we aren't going to have a chance to have the kind of conversation with you that we had hoped, but we invite you to continue to stay engaged on this issue with us, with our colleagues at the American Constitution Society, and with our panelists, and I thank you for being with us.

(END)