

# Ideology and the Selection of Federal Judges

*Erwin Chemerinsky*<sup>\*</sup>

## TABLE OF CONTENTS

INTRODUCTION.....	620
I.  COMPETING VISIONS FOR HOW TO EVALUATE JUDICIAL CANDIDATES.....	621
II. IDEOLOGY ALWAYS HAS MATTERED IN JUDICIAL SELECTION.....	624
III. IDEOLOGY SHOULD BE CONSIDERED IN THE JUDICIAL SELECTION AND CONFIRMATION PROCESS .....	627
CONCLUSION.....	631

---

<sup>\*</sup> Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California Law School. Portions of this article appeared in a recent essay: Erwin Chemerinsky, *Of Course, Ideology Should Matter in Judicial Selection*, 7 NEXUS J. OP. 3 (2002).

## INTRODUCTION

I once saw it written that every generation believes that it is the first to really discover sex. So, too, it seems that every generation has the sense that it is the first to uncover that ideology has a role in the judicial selection process. This is nonsense. Every President in American history, to a greater or lesser extent, has chosen federal judges, in part, based on their ideology. Likewise, since the earliest days of the nation, the United States Senate also has looked to ideology in the confirmation process. This is exactly how it should be. An individual's beliefs influence how he or she will decide cases once on the bench. Therefore, it is appropriate, and indeed essential, for the appointing and confirming authorities to consider ideology.

My sense is that this issue is being raised now because Republicans are trying to prevent a Democratically controlled Senate from using ideology as a criterion in evaluating President George W. Bush's nominees for the federal bench. They are trying to wrap themselves in the cloak of neutrality by saying that it is inappropriate for the Senate to consider a nominee's ideology in the confirmation process. This is blatantly disingenuous and just plain wrong. During the last six years of the Clinton presidency, the Republican-controlled Senate repeatedly held up and blocked Clinton nominees who it thought were too liberal and whom it accused of being "judicial activists." Now that the tables are turned, and the Republicans control the White House and the Democrats control the Senate, Republicans proclaim that ideology should not be considered in the nomination process. This is just plain hypocrisy.

Nor can it be justified, as some have tried to do, by saying that it is different now because the Republicans were blocking nominees who "would not uphold the law." All of the Clinton and Bush nominees would have upheld the law, though they certainly differ in their views about what the law means and requires. Both during the Clinton administration and today, the entire confirmation process centers around the Senate using ideology to reject nominees; during the Clinton presidency, to deny seats on the bench to those whom Republicans perceived as too liberal; now, to block those whom Democrats view as too conservative.

There is no doubt that President Bush is using ideology as an important factor in selecting federal judges. He has nominated for the federal bench very conservative individuals such as Charles Pickering, Priscilla Owens, Dennis Shedd, Carolyn Kuhl, Michael McConnell, Jeffrey Sutton, and Miguel Estrada. Certainly, the President has the power to pick anyone he wishes and it is perfectly acceptable for him to

select those whose views he shares. But there is no doubt that the Bush White House considers ideology a key factor in its judicial selections. The Senate, then, is equally justified in considering ideology and rejecting those whose views it regards as too conservative. Filling the federal bench is not an exclusive presidential prerogative; the Constitution explicitly requires both presidential appointment and Senate confirmation. Each can and should consider ideology, as well as other factors.

In this essay, I want to make two points, one descriptive and the other normative. Descriptively, I will argue that Presidents and Senates always have considered ideology in the judicial selection process. I also will offer some thoughts as to why the fights over judicial selection seem to have increased in recent years. Normatively, I will argue that the consideration of ideology, by Presidents and Senates, is desirable.

Throughout this paper, I am defining "ideology" as the views of a judicial candidate that influence his or her likely decisions as a judge. This includes, for example, the individual's philosophy of judging and constitutional interpretation, such as whether the person would be an originalist or a non-originalist in interpreting the Constitution. Ideology also includes the individual's views on disputed legal questions, such as current controversies over the right to abortion, affirmative action, the death penalty, and separation of church and state.

The focus of this article is solely on whether ideology is an appropriate consideration in the judicial selection process. The article does not consider the separate question of the appropriate procedures in the Senate, such as whether the Senate has a constitutional duty to provide hearings for nominees and, if so, within what time frame. Nor does the article consider whether the current Senate is proceeding more or less quickly than the Republican Senate did during the Clinton years.

Part I of this article seeks to clarify the debate over judicial selection by suggesting possible models for evaluating judicial nominees. Part II argues that one of these models, which uses ideology, always has been used throughout American history. Part III defends this model and argues that ideology should matter in the judicial selection process.

## I. COMPETING VISIONS FOR HOW TO EVALUATE JUDICIAL CANDIDATES

Underlying the debate over the appropriate role of ideology in judicial selection is the question of how judges should be evaluated. Three different models have been advanced as to how judicial candidates should be selected and evaluated. Each has its strong supporters. One might be termed the *professional qualifications model*. Under this

approach, candidates for judicial office — state or federal — should be evaluated only on the basis of their credentials: their education, the nature of their practice, their prior judicial experience, and any other indicia of their competence and ability to serve as a judge. The professional qualifications model expressly excludes consideration of an individual's ideology or likely voting in particular cases.

The criteria, which the American Bar Association (ABA) use in evaluating nominees, reflects this model. The ABA's rating of a judicial candidate is based on the individual's "integrity, professional competence and judicial temperament;" evaluation is not supposed to include consideration of the individual's views or ideology.<sup>1</sup> Likewise, a report of the Twentieth Century Fund's Task Force on Judicial Selection declared that "choosing candidates for anything other than their legal qualifications damages the public's perception of the institutional prestige of the judiciary and calls into question the high ideals of judicial independence."<sup>2</sup>

After Robert Bork was rejected for a seat on the United States Supreme Court, Professor Bruce Ackerman lamented this as a "tragedy" on the grounds that Bork was "among the best qualified candidates for the Supreme Court of this or any other era. Few nominees in our history compare with him in the range of their professional accomplishments."<sup>3</sup> Obviously, Ackerman was using this professional qualifications model in defending Bork.

A second model can be termed the *judging skills model*. Under this approach, in addition to professional qualifications, it is permissible for the evaluator — be it the voter in a judicial election, the Executive, or the Senate — to examine the candidate's skills as a judge, assuming that the candidate has served in a prior judicial position. Supporters of this approach look to factors such as the judicial candidate's use of precedent, the quality of his or her written opinions, and his or her temperament on the bench. As with the professional qualifications approach, the judging skills model expressly excludes consideration of an individual's ideology in evaluating potential judges.

For example, during the fight over whether Chief Justice Rose Bird should be retained on the California Supreme Court, Professor Michael Moore argued against her retention, but expressly disclaimed that his

---

<sup>1</sup> American Bar Association, *The ABA's Standing Committee on the Federal Judiciary: What it is and How it Works* 2 (1991).

<sup>2</sup> Twentieth Century Fund, Report of the Task Force on Judicial Selection, in DAVID M. O'BRIEN, *JUDICIAL ROULETTE* 4 (Priority Press Publications 1988).

<sup>3</sup> Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164 (1988).

position was based on an ideological disagreement.<sup>4</sup> Professor Moore maintained that Chief Justice Bird should have been rejected because he believed that her vote to reverse every death penalty to come before her reflected closed-mindedness and impermissibly result-oriented judging. Similarly, Professor Judith Resnik in her Senate testimony against Robert Bork focused on his judging skills and not on his ideology.<sup>5</sup> She criticized the breadth of Bork's opinions and his resolution of questions not raised in the specific cases before him.

A third approach can be termed the *ideological orientation model*. Although this model certainly includes evaluation of professional qualifications and judging skills, it differs from the first two approaches because it expressly permits consideration of an individual's ideology in the selection process. Specifically, the evaluator is allowed to examine a judicial candidate's views on important issues in deciding whether to approve or reject the individual. For example, Chief Justice Rose Bird was opposed for retention because of her opposition to capital punishment and also for her liberal rulings protecting employees and consumers.<sup>6</sup> Judge Robert Bork was opposed because of his writings criticizing Supreme Court decisions protecting the right of privacy, applying the equal protection clause to gender discrimination, and using the First Amendment to protect speech not concerned with the political process.

Admittedly, these three models are oversimplifications and are descriptions of approaches in very general terms. Within each there are many specific questions that must be answered, including: how to appropriately measure professional qualifications; how to evaluate judicial behavior; what are the permissible ways for determining ideology? Also, it is not always possible, in practice, to neatly separate the models. Professional qualifications are looked to, in large part, as a way of predicting judging skills.

I want to emphasize that there is no relationship between these models and political viewpoints. I saw this dramatically during the mid-1980s as I participated in debates over whether Chief Justice Rose Bird should

---

<sup>4</sup> See Michael Moore, *Politics is Not the Basis for Judging the Judges*, L.A. TIMES, July 29, 1985, Part II at 5, col. 1; Michael Moore, *Justices' Personal Values Must at Times Give Way*, L.A. TIMES, July 30, 1985, Part II, at 5, col. 4; Michael Moore, *Rose Bird Should Go: On the Death Penalty She has Taken the Law Into Her Own Hands*, L.A. TIMES, July 31, 1985, Part II, at 5, col. 3.

<sup>5</sup> *Hearing on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, (100th Cong. 1987) (testimony of Professor Judith Resnik).

<sup>6</sup> See, e.g., PHILLIP JOHNSON, *THE COURT ON TRIAL* (1985).

be retained on the California Supreme Court and whether Judge Robert Bork should be confirmed for a seat on the United States Supreme Court. In California, in 1986, conservatives argued that Bird, and two other Justices, Joseph Grodin and Cruz Reynoso, should be rejected because of their liberal views and prior votes, especially in death penalty cases. Liberals in California argued that assuring judicial independence required that evaluation be limited to the justices' competence; that the individual's ideology and prior votes should play no role in the retention process. But the sides were reversed a year later in a battle over the Bork confirmation. It was the liberals who argued that Bork should be rejected because of his conservative views and prior votes as a court of appeals judge. Conservatives argued that evaluation should be limited to the nominee's competence — that his ideology and prior votes should play no role in the Senate's confirmation decision.

In the last decade, the same phenomenon has been evident in the federal judicial selection and confirmation process. During the Clinton years, the Republican Senate used ideology to delay and deny confirmation to those it regarded as too liberal. In the current Bush presidency, the Democratic Senate has rejected Charles Pickering and Priscilla Owens largely because of their conservative ideology. My point is simply that both sides of the ideological spectrum use each of these models when it serves their purpose.

## II. IDEOLOGY ALWAYS HAS MATTERED IN JUDICIAL SELECTION

The debate over whether ideology should matter in the judicial selection process has been about whether it is appropriate for the United States Senate to consider the views of the prospective judge during the confirmation process. No one seems to deny that it is completely appropriate for the President to consider ideology in making appointments. Presidents, of course, always have done so. Every President has appointed primarily, if not almost exclusively, individuals from the President's political party. Ever since George Washington, Presidents have looked to ideology in making judicial picks. Some Presidents are more ideological than others; not surprisingly, these Presidents focus more on ideology in their judicial nominations. President Franklin Roosevelt, for example, wanted judges who would uphold his "New Deal" programs and President Ronald Reagan emphasized selecting conservative jurists.

Senates always have done the same, using ideology as a basis for evaluating presidential nominees for the federal bench. Early in American history, President George Washington appointed John

Rutledge to be the second Chief Justice of the United States.<sup>7</sup> Rutledge was impeccably qualified; he already had been confirmed by the Senate as an Associate Justice (although he never actually sat in that capacity). The Senate rejected Rutledge for the position as Chief Justice because of its disagreement with Rutledge's views on the United States treaty with Great Britain.

During the nineteenth century, the Senate rejected twenty-one presidential nominations for the United States Supreme Court. The vast majority of these individuals were defeated because of Senate disagreement with their ideology. Professor Grover Rees explains that "during the nineteenth century only four Supreme Court Justices were rejected on the ground that they lacked the requisite credentials, whereas seventeen were rejected for political or philosophical reasons."<sup>8</sup>

During the twentieth century, nominees for the Supreme Court also were rejected solely because of their ideology. In 1930, a federal court of appeals judge, John Parker, was denied a seat on the high Court because of his anti-labor, anti-civil rights views.<sup>9</sup> In 1970, the Senate rejected United States Court of Appeals judge Clement Haynsworth largely because of his anti-union views.<sup>10</sup> The Senate then rejected President Nixon's next pick for the Supreme Court, federal court of appeals judge Harold Carswell.

In 1987, the Senate rejected Robert Bork, even though he had impeccable professional qualifications and unquestioned ability. Bork was rejected because of his unduly restrictive views of constitutional law, including rejecting constitutional protection of a right to privacy, limiting freedom of speech to political expression, and denying protection for women under equal protection. The defeat of Robert Bork was in line with a tradition as old as the republic itself.

Those who contend that ideology should play no role in judicial selection are arguing for a radical change from how the process has worked from the earliest days of the nation. Never has the selection or confirmation process focused solely on whether the candidate has sufficient professional credentials.

There is a widespread sense that the focus on ideology has increased in recent years. Indeed, this symposium, and others like it, are a

---

<sup>7</sup> LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 87, 90-91 (1985).

<sup>8</sup> Grover Rees, *Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution*, 17 GA. L. REV. 913, 944 (1983).

<sup>9</sup> DAVID M. O'BRIEN, "Background Paper," in *JUDICIAL ROULETTE: Twentieth Century Fund, Report of the Task Force on Judicial Selection* 77 (1988).

<sup>10</sup> *Id.*

response to this concern. There are several explanations for why there is intense focus on ideology at this point in American history. First, the demise in a belief in formalism by the general public encourages a focus on ideology. People increasingly have come to recognize that law is not mechanical, that judges often have great discretion in deciding cases. People realize that how judges rule on questions like abortion and affirmative action and the death penalty and countless other issues is a reflection of the individual jurist's views. *Bush v. Gore* simply reinforced the widespread belief that the political views of judges often determine how they vote in important cases.<sup>11</sup> Thus, Democratic voters want Democratic Senators to block conservative nominees and Republican voters want Republican Senators to block liberal nominees. This creates a political incentive for Senators to do so, and means that they certainly do not risk alienating their core constituency by using ideology in evaluating nominees.

Second, the lack of "party government" in recent years explains the increased focus on ideology. During the last six years of the Clinton presidency, the Republicans controlled the Senate. During at least the first two years of the current Bush presidency, the Democrats have controlled the Senate. If the Senate is of the same political party as the President, there obviously will be many fewer fights over judicial nominations. Certainly, confirmation battles are still possible, such as through filibusters, or if the President lacks support from a faction of his own party. But the reality is that confirmation fights are usually a product of the Senate and the President being from different political parties.

Finally, confirmation fights occur when there is the perception of deep ideological divisions over issues likely to be decided by the courts. Now, for example, conservatives and liberals deeply disagree over countless issues: the appropriate method of constitutional interpretation; the desirable scope of Congress' power and the judicial role in limiting it; the content of individual rights, such as privacy. It is widely recognized that the outcome of cases concerning these questions will be determined by who is on the bench. Therefore, senators know, and voters recognize, that the confirmation process is enormously important in deciding the content of the law. Interest groups on both sides of the ideological divide have strong reasons for making judicial confirmation a high priority because they know what is at stake in who occupies the federal bench.

---

<sup>11</sup> 531 U.S. 98 (2000).

### III. IDEOLOGY SHOULD BE CONSIDERED IN THE JUDICIAL SELECTION AND CONFIRMATION PROCESS

Of course, the above description is not a normative defense of the desirability of considering ideology in evaluating judicial nominees. Normatively, there are many reasons why ideology should be considered in the judicial selection process.

First, most simply and most importantly, ideology should be considered because ideology matters. Judges are not fungible; a person's ideology influences how he or she will vote on important issues. It is appropriate for an evaluator — the President, the Senate, the voters in states with judicial elections — to pay careful attention to the likely consequences of an individual's presence on the court.

This seems so obvious as to hardly require elaboration. Imagine that the President appoints someone who turns out to be an active member of the Ku Klux Klan or the American Nazi Party and repeatedly has expressed racist or anti-semitic views. Assume that the individual has impeccable professional qualifications: a degree from a prestigious university, years of experience in high level law practice, and a strong record of bar service. I would think that virtually everyone would agree that the nominee should be rejected. If I am correct in this assumption, then everyone agrees that ideology should matter and the only issue is what views should be a basis for excluding a person from holding judicial office.

On the Supreme Court, the decisions in a large proportion of cases are a product of the judges' views. The federalism decisions of recent years — limiting the scope of Congress' powers under the commerce clause and section five of the Fourteenth Amendment, reviving the Tenth Amendment as a limit on federal power, and the expansion of sovereign immunity — almost all have been 5-4 rulings that reflect the ideology of the Justices.<sup>12</sup> Beyond the obvious controversial issues, like abortion, affirmative action, and the death penalty, virtually all cases about individual liberties and civil rights are a product of who is on the bench. Criminal procedure cases often require balancing the government's interests in law enforcement against the rights of individuals; this balancing will reflect the individual Justice's views. Decisions in statutory cases, too, are a result of the ideology of the Justices. Frequently, in statutory civil rights cases, the Court is split exactly along

---

<sup>12</sup> See, e.g., *University of Alabama v. Farrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

ideological lines.<sup>13</sup>

Nor, of course, is this ideological divide limited to the Supreme Court. Every case before the Supreme Court was first decided by the lower federal courts and ideology matters there just as much. There are more cases in the lower courts where ideology does not matter in determining outcomes — that is, where any judge, regardless of ideology, would come to the same conclusion — but that does not deny the large number of cases in which the judge's views matter greatly in decisions. When I talk to a lawyer who is about to have an argument before a federal court of appeals, the first question I always ask is: who is your panel? That is because ideology matters so much in determining the result in so many cases.

Second, the Senate should use ideology precisely because the President uses it. Republicans, who today are arguing for the Senate to approve nominations without regard to their views, are being disingenuous when there is a President who is basing his picks so much on ideology. Under the Constitution, the Senate should not be a rubber-stamp and should not treat judicial selection as a presidential prerogative. The Senate owes no duty of deference to the president and, as explained above, never has shown such deference through American history.

Finally, ideology should be considered because the judicial selection process is the key majoritarian check on an anti-majoritarian institution. Once confirmed, federal judges have life tenure. A crucial democratic check is the process of determining who will hold these appointments. A great deal of constitutional scholarship in the last quarter of a century has focused on what Professor Alexander Bickel termed the "counter-majoritarian difficulty" — the exercise of substantial power by unelected judges who can invalidate the decisions of elected officials.<sup>14</sup> The most significant majoritarian check is at the nomination and confirmation stage. Selection by the President and confirmation by the Senate properly exists to have majoritarian control over the composition of the

---

<sup>13</sup> See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (stating that there is no private cause of action under Title VI of 1964 Civil Rights Act against recipients of federal funds for practices that have discriminatory impact in violation of regulations promulgated under that provision); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (stating that Federal Arbitration Act requires arbitration of state law employment discrimination claims); *Buckhannon Bd. v. W.V. Dep't of Health and Human Servs.*, 532 U.S. 598 (2001) (holding that to be "prevailing party" under attorney's fee's statute, it is not sufficient that plaintiff in lawsuit is catalyst for legislative action — there must be court ordered relief, via judgment or consent decree).

<sup>14</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

federal courts.

Opponents to the use of ideology in the judicial selection process must sustain one of two arguments: either that an individual's ideology is unlikely to affect his or her decisions on the bench, or that even if ideology will influence decisions, it should not be examined because disadvantages to such consideration will outweigh any advantage.

The former argument, that a person's ideology is unlikely to affect performance in office, is impossible to sustain. Unless one believes in truly mechanistic judging, it is clear that judges possess discretion and that the exercise of discretion is strongly influenced by an individual's preexisting ideological beliefs. In cases involving questions of constitutional or statutory interpretation, the language of the document and the intent of the drafters often will be unclear. Judges have to decide the meaning, and this often will be a product of their views. Many cases, especially in constitutional law, require a balancing of interests. The relative weight assigned to the respective claims often turns on the judge's values. Given the reality of judicial decision making, it is impossible to claim that a judge's ideology will not impact his or her decisions.

Opposition to considering ideology must be based on the latter argument: that even though ideology matters, it is undesirable to consider it. One argument is that having the Senate consider ideology will undermine judicial independence. Professor Stephen Carter makes this argument:

[I]f a nominee's ideas fall within the very broad range of judicial views that are not radical in any nontrivial sense — and Robert Bork has as much right to that middle ground as any other nominee in recent decades — the Senate enacts a terrible threat to the independence of the judiciary if a substantive review of the nominee's legal theories brings about a rejection.<sup>15</sup>

But Professor Carter never explains why judicial independence requires blindness to ideology during the confirmation or selection of a federal judge. Judicial independence means that a judge should feel free to decide cases according to his or her view of the law and not in response to popular pressure. As such, Article III's assurance of life tenure and its protection against a reduction in salaries, provide independence. Judges are free to decide each case according to their

---

<sup>15</sup> Stephen Carter, *Essays on the Supreme Court Appointment Process: The Confirmation Mess*, 101 HARV. L. REV. 1185, 1198 (1988).

conscience and best judgment; they need not worry that their rulings will cause them to be ousted from office. Professor Carter never justifies why this is insufficient to protect judicial independence. He subtly shifts the definition of independence from autonomy while in office to autonomy from scrutiny before taking office. But he does not explain why the latter, freedom from evaluation before ascending to the bench, is a prerequisite for judicial independence in the former, far more meaningful sense.

Another argument against considering ideology is that it will deadlock the selection process — liberals will block conservatives and vice versa. The reality is that this is a risk only when the Senate and the President are from different political parties. Even then, every Senate — including the Republican Senate during the Clinton years and the Democratic Senate today — has approved a large number of presidential nominations for the federal bench. There have been times when a number of nominations have been rejected, such as the Senate defeating every pick for the Supreme Court by President Tyler and rejecting two nominations in a row by President Nixon. But in over 200 years of history, deadlocks have been rare.

Most importantly, at times like now, when the Senate and the President are controlled by different parties, the solution to deadlocks is in the President's hands: nominate individuals who will be acceptable to the Senate. Presidents will have to select more moderate individuals than if the Senate was controlled by their political party. President Clinton undoubtedly was forced to select less liberal, more moderate judges, because the Senate was Republican-controlled for the last six years of his presidency. President Bush would be far more successful in getting his nominations through the Senate if he chose less conservative individuals. The President has the prerogative to pick conservatives like Charles Pickering, Priscilla Owens, Carolyn Kuhl, and Miguel Estrada, but he should expect resistance in a Democratic Senate that would not be there if Bush selected more moderate nominees. When President Bush has picked moderates for the federal courts of appeals, they have sailed through the confirmation process. For example, the Senate quickly confirmed Bush's selections of Reena Raggi for the Second Circuit and Harrison Hartz for the Tenth Circuit.

Finally, some suggest that using ideology is undesirable because it will encourage judges to base their rulings on ideology. The argument is that ideology has to be hidden from the process to limit the likelihood that once on the bench judges will base their decisions on ideology. This argument is based on numerous unsupportable assumptions: it assumes

that it is possible for judges to decide cases apart from their views and ideology; it assumes that judges do not already often decide cases because of their views and ideology; it assumes that considering ideology in the selection process will increase this in deciding cases. All of these are simply false. Long ago, the Legal Realists exploded the myth of formalistic value-neutral judging. Having the judicial confirmation process recognize the demise of formalism won't change a thing in how judges behave on the bench.

In summary, the argument for considering ideology in judicial selection is simple: people should care about the decisions likely to come from a court on important issues; the ideological composition of the court will determine those decisions; and the appropriate place for majoritarian influences in the judicial process is at the selection stage.

#### CONCLUSION

I bring some personal experience to this topic. Twice during the Clinton years, I was under serious consideration for a federal judgeship. Once, the press reported that I was on a list of three names being considered to fill two vacancies on the federal bench. The other two individuals were picked. Another time, I received a call from the White House Counsel's office that I was being considered for the Ninth Circuit.

In each instance, I was told that I was not selected because the Republican-controlled Senate would find me too liberal and not confirm me. In the latter instance, I was informed that my opposition to Proposition 209, which eliminated affirmative action in California, would likely prevent Republicans from confirming me.

I confess to being disappointed, but not at all surprised. I knew from the outset that ideology always has been a key part of the confirmation process. But now I feel outrage when I hear Republicans say that it is wrong for a Democratic-controlled Senate to look at ideology when that is exactly what Republicans did for the last six years of the Clinton presidency. If I was too liberal for a Republican Senate, then nominees such as Miguel Estrada, Carolyn Kuhl, Michael McConnell, and Jeffrey Sutton should be regarded as too conservative by a Democratic Senate.

Ultimately, disputes over confirmations are battles over the proper content of the law. This is as it should be and attention should not be diverted by claims that it is improper to consider a nominee's ideological orientation. Of course, ideology should and must be considered in the judicial selection process.

\*\*\*