

**CONSIDERING THE ROLE OF JUDGES UNDER THE  
CONSTITUTION OF THE UNITED STATES**

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**HEARING**

BEFORE THE

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

ONE HUNDRED TWELFTH CONGRESS

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# CONSIDERING THE ROLE OF JUDGES UNDER THE CONSTITUTION OF THE UNITED STATES

WEDNESDAY, OCTOBER 5, 2011

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Committee met, pursuant to notice, at 2:34 p.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Durbin, Whitehouse, Coons, Blumenthal, Grassley, Sessions, Hatch, Graham, Cornyn, Lee, and Coburn.

## OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good afternoon. First, I just want to express my appreciation to both Justice Scalia and Justice Breyer for being back here in the Senate Judiciary Committee. Having been there for both your confirmation hearings, we did not have this great room at that time. I also want to thank all the students who are here. I know when I was at Georgetown Law School, I would have loved to have done something like this.

We have scores of students and we have other Americans who are attending this hearing and following the proceedings over the Internet and on television who are interested in hearing what I hope is going to be a civic-minded conversation about the role of judges under our Constitution.

I actually believe that such public discussions serve our democracy. As public officials, we owe it to all Americans to be transparent about what we do in our official capacities. We justify their trust by demonstrating how our Government works to uphold our common values, how we are guided by the Constitution, and how that Constitution has served over the years to make our great Nation more inclusive and more protective of individual rights in our continuing effort to become that "more perfect union."

As the great Chief Justice John Marshall acknowledged many years ago, our Constitution is "intended to endure for ages . . . and consequently, to be adapted to the various crises of human affairs."

In recent months, there has been renewed focus on our Constitution. Almost every week, I open the newspaper or see an electronic posting that involves some radical invocation of the Constitution that certainly differs from what I was taught at Georgetown Law Center many years ago. It could be someone suggesting that Con-

gress should just get rid of dozens of judges if that strikes our fancy, or it might be the assertion that the three branches of our Federal Government are not of equal importance under the Constitution; or even the assertion that our fundamental charter was drafted solely to limit the Federal Government's ability to solve national problems. These comments show the need for more opportunities to increase understanding of our democracy. That is what gave me the idea to invite two of the Nation's leading jurists to speak with us today about the role that judges play under our Constitution.

I know in the Court both Chief Justice Roberts and Justice Scalia have remarked that the fundamental genius of the Constitution is its separation of powers. The legislative, the executive, and the judicial branches each have different powers and are limited or checked by the other branches, and the three branches interact frequently. We recently observed the 222nd anniversary of Congressional enactment of the first Judiciary Act, which established both the Supreme Court and the Federal judiciary. We in the Senate have an obligation to provide our advice and consent to the President to fill a growing number of judicial vacancies. And on this committee, we are working diligently to address the serious judicial vacancy crisis that the Chief Justice highlighted in his most recent annual report. And I thank the Senator from Iowa for his help in that regard.

We have also worked to pass legislation recommended by the Judicial Conference of the United States in order to help the third branch operate fairly and efficiently. We also appropriated resources to fund the important work of our independent judiciary.

The judicial branch, including the Supreme Court, decides cases to resolve controversies in accordance with the rule of law. It is called upon to interpret and apply statutes passed by Congress to specific disputes and to review acts of the other branches to determine whether those acts violate the Constitution. On rare occasions, court decisions can be overturned with legislation or with an amendment to the Constitution.

Now, many of you remember that 4 years ago I invited Justice Anthony Kennedy to appear before this committee to discuss judicial security and judicial independence. It was a great day. That appearance renewed a tradition of Justices testifying before Congress on matters other than their appropriation requests, a tradition which included appearances by Chief Justice Taft and Chief Justice Hughes in the 1920s and 1930s, as well as by Justice Jackson in 1941, among others.

I would note that one of my friends said, "Well, you probably remember those," and I assure you I do not. But, fortunately, the staff found it.

Justice Kennedy recognized that the Supreme Court's rulings would be debated and criticized but noted "that is the democratic dialog that makes democracy work."

In furtherance of that democratic dialog, the committee has held several hearings highlighting the significant impact of recent Supreme Court hearings on hard-working Americans. This has been an effort to raise awareness about the relevance of the Court's interpretations of laws that Congress enacted with the intent of pro-

tecting American workers, retirees, consumers, and small business owners.

Today's hearing is designed to have a different focus. Rather than examining recent or upcoming decisions of the Supreme Court, which we will not, we will discuss the proper role that judges play in our democracy. In a time of increasing political rancor, some like to emphasize divisions as though they were between warring factions. Although the witnesses before us approach decisionmaking in many cases in different ways, I know as a personal matter they demonstrate a profound respect for each other. That is also the example that the ranking member and I have tried to achieve in our work together on this committee. The American people expect their Government to work for them, and that requires us to uphold our National values. We all need to work together to uphold the predictable rule of law where liberty and prosperity can thrive.

Let me conclude with what Judge Learned Hand said: "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women." That is this spirit that we open this with today, and again, I cannot tell you how much I appreciate both Justices for being here.

I will yield to Senator Grassley, and then we can yield to the witnesses.

**STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR  
FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you, Mr. Chairman, for holding this very important hearing. I appreciate your efforts to secure the testimony of our distinguished witnesses. This hearing will be an enlightening experience in which we will discuss the role of judges in our constitutional system. And, of course, this is a question as old as the Constitution itself, and it will always be debated.

I welcome each of our witnesses, and for you, Justice Breyer, you ought to feel right at home here since you served a long time as Chief Counsel of this committee. I remind you of your statement in your recent book, "Criticism of judges and judicial systems"—no, let me start over again.

Chairman LEAHY. Yes, you have to get it right.

Senator GRASSLEY. "Criticism of judges and judicial decisions traces back to our founding. It is a healthy thing in a democracy." I hope you will feel that way at the end of the hearing.

Senator GRASSLEY. Justice Scalia, I am also glad to see you here today. As Judge Posner recently remarked, you have "a real flair for judging." That is an understatement, as I see it. You as much as anyone have strongly advanced the traditional views that a judge's role under the Constitution is to interpret the law according to the text.

For my own part, I believe that the role of judges under the Constitution is an important but limited one. Unless the Constitution provides otherwise, the people through their elected representatives govern themselves.

In determining the meaning of the Constitution, judges are to apply the intent of the Framers since that is the extent of the limi-

tation on self-government that the people have agreed to impose on themselves.

When judges change the meaning of the Constitution and create new rights or grant Government powers that it was not intended to have, they reduce the right of people to govern themselves through the representative government process. Historically, these are the circumstances in which judges and their decisions have been fairly criticized.

It is rare for sitting Supreme Court Justices to appear before the Senate Judiciary Committee, so I thank both of you for sharing with us.

Thank you very much.

Chairman LEAHY. Thank you. You know, these two distinguished jurists have a lot in common. Both received their law degrees from Harvard. Both serve as Associate Justices of the Supreme Court. Prior to their confirmation by the Senate, both were well-respected administrative law scholars. They are both elevated from positions on the Federal appellate bench. Justice Breyer served in the First Circuit; Justice Scalia, on the D.C. Circuit. Actually, I am probably one of the few here who had a chance—I voted for both of you on the circuit court and both of you on the Supreme Court, and I was there for the hearings both times.

Now, despite their different perspectives on constitutional interpretation, they were confirmed by a whopping margin. In the past, they have agreed on the importance of precedent, judicial independence, and respect for democratic decisionmaking. Justice Breyer has been on the Supreme Court for 17 years; Justice Scalia, a quarter of a century. And I understand—we left it up to you who you wanted to go first, and I just got the word from Justice Scalia, and in case I ever have to practice law again, I am listening. So Justice Breyer goes first. Is your microphone on?

**STATEMENT OF HON. STEPHEN BREYER, ASSOCIATE JUSTICE,  
THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, DC**

Justice BREYER. We both agreed I would go first to introduce the question as we see it. And we are both very glad to be here; I particularly because I did work here, which I loved, but also because you have invited high school students, college students, law school students, and we both talk to those groups of students a lot, and we want to do that. And the reason we do in special part is because there is a lot of skepticism and cynicism about Government in the United States. And I will say to the students, I understand that, and probably some of that is justified. But if there is too much of it, well, the Government just will not work, because you are part of the Government, and if you are not going to be part, we do not have a Government. That is what I want to tell them.

Now, how can I tell them that, how can I do my bit on this? I am a judge. You know, I do not run for office. It is hard to get people's attention on a general question like that. But my bit consists of trying to explain my institution. What is it I do? What is it that Justice Scalia does? What do we do every day? What do we do that affects those students and that they will have to understand and explain to their parents and to others?



The way I put the question—and this is really all I am going to say first, is how I think of the question. And I think from my institutional point of view; I want to tell people why maybe they would give our institution support.

Suppose I have the attention of a man or a woman who is going into a supermarket. Now, it is tough to get their attention. That woman stays pretty busy. They may have two jobs. They may have a growing family. They have bills coming in every month. And they do not have too much time to listen to judges.

But suppose I get their attention on this question for just a few minutes. What would I say? The first thing I would say is the question. I would say I have tell you what the question is. The question is this: The nine of us are not elected, but we live in a democracy, and we do decide matters that will affect you. So why should nine people who are not elected have that authority?

And it is worse than that, because if you look at why Hamilton gave us the power and why the Founders gave us the power to set aside a law of Congress as contrary to the document, the Constitution—read Federalist 78. Well, you know, she may be asleep by this time, but I have to get her attention. In Federalist 78, here is what he says.

He says, first, look at the document. It is a great document, and it is. But if nobody is going to say when anybody else goes beyond its boundaries, let us hang it up in a museum. Let us put it in the National Gallery. He actually did not say the National Gallery because it was not built at that time, but, nonetheless, you understand the point. He said somebody should have that power. Who? The President? Since the President has an awful lot of power, he could become a tyrant with that as well.

Well, what about Congress? Congress is elected. He said, yes, that is the advantage, but that is also the problem, because Congress will have just passed a law because it is popular. This document gives the least popular person in the United States the same rights as the most popular. Are you sure Congress, having just passed that law, will turn around and say it is unconstitutional when it is very unpopular to do so?

But here we have some judges. They are sort of bureaucrats. Nobody knows who they are. Fabulous. This has something to do with law, doesn't it? And they do not have the power of the purse, and they do not have the power of the sword. Wonderful. They do not have much power. And, in addition, they are sort of judges, and it is not Congress and not the President. And he stops there.

So I say, ma'am or sir, we are not elected. We are supposed to decide things that are unpopular on some occasion. And you know what? Do not tell anyone. We are human beings, and we may be wrong. Indeed, when I am in dissent, I do think the majority is wrong, and so does Justice Scalia. And we cannot both be right if we are on opposite sides.

So there we are—unelected, doing unpopular things, and quite possibly wrong. Why should you ever give us your support? And that is the question. And I get that question not just from people in supermarkets, not just from students or their teachers. I get that question from people all over the world. They are judges at our Court that come to visit. They are Latin American judges or

Asian judges. There was a woman who was Chief Justice of Ghana, and she posed that very question. She said, "Why do people do what you say?"

You know, they have Henry IV over here. It is sort of Hotspur's question. Hotspur says, "I can call spirits from the vasty deep." Or Glendower says that. And Hotspur says, "Why, so can I, or so can any man; But will they come when you do call for them?" And to answer that question, I have to give a little synopsis of history. But all I was doing in these 4 minutes was sketching out the question, and then I will turn to my colleague who can address that or anything else he would like.

Chairman LEAHY. Justice Scalia.

**STATEMENT OF HON. ANTONIN SCALIA, ASSOCIATE JUSTICE,  
THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, DC**

Justice SCALIA. Thank you, Mr. Chairman, members of the committee. I am happy to be back in front of the Judiciary Committee where I started this pilgrimage.

I am going to get even more fundamental than my good friend and colleague. Like him, I speak to students, especially law students but also college students and even high school students, quite frequently about the Constitution because I feel that we are not teaching it very well. I speak to law students from the best law schools, people presumably especially interested in the law, and I ask them: how many of you have read the Federalist papers? Well, a lot of hands will go up. No, not just No. 48 and the big ones. How many of you have read the Federalist Papers cover to cover? Never more than about 5 percent. And that is very sad, especially if you are interested in the Constitution.

Here is a document that says what the Framers of the Constitution thought they were doing. It is such a profound exposition of political science that it is studied in political science courses in Europe. And yet we have raised a generation of Americans who are not familiar with it.

So when I speak to these groups, the first point I make—and I think it is even a little more fundamental than the one that Stephen has just put forward—I ask them, what do you think is the reason that America is such a free country? What is it in our Constitution that makes us what we are? And the response I get—and you will get this from almost any American, including the woman that Stephen was talking to at the supermarket—is freedom of speech, freedom of the press, no unreasonable searches and seizures, no quartering of troops in homes, etc.—the marvelous provisions of the Bill of Rights.

But then I tell them, if you think that the Bill of Rights is what sets us apart, you are crazy. Every banana republic has a bill of rights. Every president for life has a bill of rights. The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. I mean that literally. It was much better. We guarantee freedom of speech and of the press. Big deal. They guaranteed freedom of speech, of the press, of street demonstrations and protests, and anyone who is caught trying to sup-

press criticism of the government will be called to account. Whoa, that is wonderful stuff.

Of course, they were just words on paper, what our Framers would have called “a parchment guarantee.” And the reason is that the real constitution of the Soviet Union—think of the word “constitution;” it does not mean a bill of rights, it means structure. When you say a person has a sound constitution, you mean he has a sound structure. Structure is what our Framers debated that whole summer in Philadelphia, in 1787. They did not talk about a Bill of Rights; that was an afterthought, wasn’t it? The real constitution of the Soviet Union did not prevent the centralization of power in one person or in one party. And when that happens, the game is over. The bill of rights becomes what our Framers would call “a parchment guarantee.”

So the real key to the distinctiveness of America is the structure of our Government. One part of it, of course, is the independence of the judiciary, but there is a lot more. There are very few countries in the world, for example, that have a bicameral legislature. England has a House of Lords for the time being, but the House of Lords has no substantial power. It can just make the Commons pass a bill a second time. France has a senate; it is honorific. Italy has a senate; it is honorific. Very few countries have two separate bodies in the legislature equally powerful. It is a lot of trouble, as you gentlemen doubtless know, to get the same language through two different bodies elected in a different fashion.

Very few countries in the world have a separately elected chief executive. Sometimes I go to Europe to speak in a seminar on separation of powers, and when I get there, I find that all we are talking about is independence of the judiciary. Because the Europeans do not even try to divide the two political powers, the two political branches—the legislature and the chief executive. In all of the parliamentary countries, the chief executive is the creature of the legislature. There is never any disagreement between the majority in the legislature and the prime minister, as there is sometimes between you and the President. When there is a disagreement, they just kick him out. They have a no-confidence vote, a new election, and they get a prime minister who agrees with the legislature.

You know, the Europeans look at our system and they say, well, the bill passes one House, it does not pass the other House (sometimes the other House is in the control of a different party). It passes both Houses, and then this President, who has a veto power, vetoes it. They look at this and they say, “It is gridlock.”

And I hear Americans saying this nowadays, and there is a lot of that going around. They talk about a dysfunctional Government because there is disagreement. And the Framers would have said, “Yes, that is exactly the way we set it up. We wanted this to be power contradicting power because the main ill that besets us,” as Hamilton said in the Federalist paper when he justified the inconvenience of a separate Senate, is an excess of legislation.” This is 1787. They did not know what an excess of legislation was.

So unless Americans should appreciate that and learn to love the separation of powers, which means learning to love the gridlock that it sometimes produces. The Framers believed that would be the main protection of minorities—the main protection. If a bill is

about to pass that really comes down hard on some minority, so that they think it terribly unfair, it does not take much to throw a monkey wrench into this complex system.

So Americans should appreciate that, and they should learn to love the gridlock. It is there for a reason: so that the legislation that gets out will be good legislation.

And thus I conclude my opening remarks.

Chairman LEAHY. You may not get total unanimity on the issue of gridlock, but I found listening to both of you to be fascinating. I made a little note to myself. Everything that might go wrong this week, and all of this makes up for it, just having both of you here. So I do appreciate that.

Justice SCALIA, the Court, of course, often reviews laws passed by Congress—and I apologize for the voice. It is an allergy. But when the Court reviews a law passed by Congress and you want to find out whether it comports with the Constitution, do you have a different standard if it was a law that passed by the slimmest of margins or if it is a law that passes overwhelmingly? And I will ask that question of both of you.

Justice SCALIA. No, sir. A law is a law. If it meets the requirements of the Constitution, having passed both Houses, and either being signed by the President or having been passed by two-thirds over his veto, it is a law. And what we do is law.

Chairman LEAHY. Justice Breyer.

Justice BREYER. Yes. Yes, sir, I agree.

Chairman LEAHY. And, Justice Scalia, under our Constitution what is the role, if any, that the judges play in making budgetary choices or determining what is the best allocation of taxpayer resources? Is that within their proper role or is that somewhere else in the—

Justice SCALIA. You know it is not within our proper roles, Mr. Chairman. Of course it is not. Of course it is not.

Justice BREYER. It is a worthwhile question for this reason: When we try to talk about this document in general, what I say—and he will have some version of it—is: What does this document do, the Constitution? I cannot tell you in one word, but I can tell you in about five. It creates a structure for democracy. That is the first part. That is the whole seven articles. It is a structure so people can make their own decisions through their representatives and decide what kind of cities, towns, States, and Nation they want. But it is a special kind of democracy. It guarantees basic and fundamental rights. It assures a degree of equality. It does, as Justice Scalia has emphasized, separate power, both vertically, state, federal, and horizontally, three branches, so no group of government officials can become too powerful. And it insists upon a rule of law. So now we have five basic things, and I tend to think the rest of it elaborates those five basic points, and I think probably Justice Scalia and the others, we are not in disagreement at that level. Very rarely.

So what people do not understand very often are given those broad boundaries in this democratic process, we are the boundary patrol. There used to be some kind of radio program called “Sky King of the Mounties” or something. It was something like that.

Chairman LEAHY. I think it was before my time.

Justice BREYER. But, look, it said—

Justice SCALIA. It was Sky King, and Sergeant Preston of the Mounties.

Justice BREYER. Sergeant Preston of the Yukon, that is it. The Yukon. It was cold. It is on the boundary. It is very cold. Life on the boundary is tough. And we are in a sense the boundary patrol, and those issues are very tough. Is the choice inside, outside? What about prayer in schools? What about this or that? There are two sides to these questions. They are tough ones. And what people forget is just what you were emphasizing with the budget question, that inside those boundaries there is a vast democratic space where it is up to the average American to decide what kind of cities, towns, State, and Nation he or she want. And those decisions are not ours. All we can say, with a forum like this, is please participate in that democratic decisionmaking, which is not our institutional job.

Chairman LEAHY. With the smile on Justice Scalia's face when I asked the question, I think he was probably anticipating some of the next questions, and so I will start first with you, Justice Breyer. In your book, "Making Democracy Work," you describe how the court system relies on public confidence because it has neither the power of the purse nor the sword, as you both alluded to earlier. And so then people ask, well, is the rule of law predictable? Because Americans rely on certain programs and so forth. Do you feel the public's confidence is affected when judges overturn longstanding precedent when there is settled expectation if they have something that people relied on for generations and then suddenly it is overturned? What does that do with public confidence? And what does that for the rule of law? You have neither the purse nor the sword. You have, however, a question of what confidence the American public has. So, Justice Breyer, do you want to try that first?

Justice BREYER. On that I think there is no definite answer. You want to say never—what you give is reasons against overturning something or strong reasons. But *Plessy v. Ferguson*, which said separate but equal, should have been overturned, and *Brown v. Board of Education*, which said no more racial discrimination, was absolutely right to overturn it. So I think your advice is good. It means that the judge has to remember not too much, not too fast, not too often, be careful, people have relied on formal law. But you cannot say never.

Chairman LEAHY. Justice Scalia.

Justice SCALIA. Yes, I think part of the jurisprudence of my Court and all Federal courts is stare decisis. It is not an absolute rule, but it is a subject that should be given careful attention. And all Federal courts have given stare decisis very much more weight in statutory questions. It is very rare that my Court would overrule a prior decision on a statutory point, the reason being if we got that wrong, you can fix it. You can amend the statute. But when we get something wrong with respect to the Constitution, there is nobody that can fix it unless you are going to go through the huge trouble of enacting a constitutional amendment.

So throughout our history, there has been a rule of stare decisis, but beginning with the Marshall Court, it has been less strict in

constitutional questions than it is in statutory questions, and I think that is as it should be.

Chairman LEAHY. Well, and, of course, it is easier for the lower courts if there is a binding—the district courts, if there is a binding circuit court opinion, and for the circuit courts, if there is a binding Supreme Court opinion. But the buck really stops with you, with you nine.

Now, you talk about amending the Constitution. We have obviously amended it. The 13th Amendment got rid of the stain of slavery. Nobody could think of that, having now a 15th, racial discrimination; the 19th, giving women the right to vote; the 24th, young adults and so on.

Justice SCALIA, I have read some of your works, and I hope I am paraphrasing you correctly. We should not mess with the Constitution by amending it. Since I have been here in the Senate, I have seen probably 1,500 to 2,000 constitutional amendments that have been proposed. It is probably even more than that. You get them from things that I think a board of aldermen in a small town would not have thought of doing because it was so ridiculous. And some have serious issues. But is it in our country's interest to be tampering with the Constitution if that can be avoided?

Justice SCALIA. Well, no. This is another respect, by the way, in which we differ from most of the countries of the world. Many foreigners cannot understand our affection for the Constitution. It is no big deal to amend the constitution in most of the countries of the world. In most of them, all you need is to have the legislature, a unicameral legislature, pass the amendment. Then there has to be an intervening election. And then they have to pass the amendment again.

Chairman LEAHY. But their constitution is almost like a statute.

Justice SCALIA. It is almost like a statute except that it has to be passed twice with an intervening election.

Chairman LEAHY. Sure.

Justice SCALIA. Ours is very much more difficult to amend. And you are right, I have said that that is a good thing. Indeed, I have said that the only provision I am sure I would think about amending is the amendment provision because that sets a very, very high bar. But that is not going to happen, so I am not worried about it.

Chairman LEAHY. Justice Breyer, my time has run out, but would you like to respond on that, too?

Justice BREYER. I tend to agree with that.

Chairman LEAHY. It is going to surprise the rest of the Court to find out how much you two—

Justice BREYER. Look, we are unanimous in our Court 40 percent of the time. Our 5–4's are about 20 to 25 percent and, surprisingly enough, it is not always the same 5 and the same 4.

Justice SCALIA. And you should be suspicious if we do not have a lot of 5–4 decisions, because the main reason we take a case is that there is a circuit conflict below—that is, very good Federal judges who have been appointed the same way Justice Breyer and I were appointed have disagreed. So you would smell something wrong if there are these disagreements below and the Supreme Court always comes out 9–0 one way or the other. You should expect a lot of 5–4 decisions.

Chairman LEAHY. Thank you.

Senator GRASSLEY.

Senator GRASSLEY. I will start with Justice Breyer, a couple questions based upon a recent C-SPAN interview that you had. You remarked that although judging is not entirely about politics, you would “not say zero politics never.”

Justice BREYER. That is one of the hardest things to explain, and that is part of what I have written about in this book. I think there are two great questions that I want to get across to the audience, if it is high school, college, law school particularly.

First is the one we mentioned. When you call them, will they come? Why is it that Americans over the course of 200 years have begun to have responded to the Supreme Court? And there are some good stories on that, but I put that to the side.

The other thing I put this way: I say I know you are being very polite, but I also know a lot of you are thinking this. You are thinking in those tough 5–4 cases that we really are junior league politicians. And I say that would be ridiculous. For one thing that is not the job. Didn’t Hamilton give us the job because he thought we would not be politicians?

And, second, read a case like *Dred Scott*, one of the worst, probably the worst ever. There the most you can think of why they were doing this is they were trying to act like politicians. But judges are terrible politicians. If you wanted to give this job to politicians, give it to Congress. I mean, we know nothing of—we are not—all right, in any case.

So how do I explain it? I explain it this way. I say in the 17 years since I have been a judge, do I see a decision turn on political considerations? I did work in this Committee. I have an instinct that politics consists of who has got the votes. Is it the Democrats or the Republicans? Who is popular? Who is going to win the election? And in that sense, I have to say my answer is never. And I know you will think of this case or that case where you think that is wrong. I’d need an hour to explain it to you, but I think I could bring you around.

What about ideology? Ideology. Are you, you know, an Adam Smith free enterpriser? Are you a Marxist, Maoist troublemaker? You know, what is good in general for the world? I say if I am thinking of it that way, I know I am doing the wrong thing. But I can tell you, there is a third thing. I was born in San Francisco. I went to Lowell High School, a public high school. I went to the university out there. I have lived the life I have led. And by the time you have 40 or 50 years in any profession, you begin to formulate very, very general views. What is America about? What are the people of America about? How in this country does law related to the average human being? How should it?

At that level of generality, people may have somewhat different outlooks, and there is no way that those different outlooks can fail to influence them some. And is that a bad thing? No. I think it is a good thing. This is a very big country. We have 309 million people, 308 million of whom, to everyone’s surprise, are not lawyers. And they have many different views, and it is a good thing, not a bad thing, that people’s outlook on that Court is not always the same. And by outlook, I mean those very, very basic ideas of judi-

cial philosophy, if you like, or about the country and its people and about the law and how judges are there to act and what they are to do and what not. So that is what I meant by that word there.

Senator GRASSLEY. Okay. And I will start with Justice Scalia on my second question. Why would it ever be appropriate for American judges to consider foreign law in interpreting the meaning of the United States Constitution? And Justice Breyer can respond as well.

Justice SCALIA. Senator, I am afraid we are getting beyond what I had planned to discuss with you gentlemen, the role of the courts, and we are getting into the manner in which the courts go about deciding their cases. And I have a view on that, and Justice Breyer probably has a different view. But I have not prepared any testimony on that, and I would rather pass. Of course, it is an issue, and I think my views on that issue are known. But that is not the level of—what should I say?

Senator GRASSLEY. Let us move on then.

Justice SCALIA. Okay.

Senator GRASSLEY. To both of you, discussing the Supreme Court, Justice Brandeis stated, “The most important thing that we do is doing nothing.” To what extent do each of you agree with that?

Justice BREYER. It depends on the case. It is important, yes. I do not know if it is the most important. I am not sure what he was thinking of.

What do you think?

Justice SCALIA. Well, yes, I think the normal state of things is rest. Leave things alone unless there is reason to change.

I served in the executive branch for a while, and when I was there, there was something that came to be known as the “Moscow option,” which sounded, you know, like CIA stuff. It was named after a fellow named Mike Moscow, who was one of the President’s assistants, and he observed that whenever action memos went in to the President, they always gave the President three options: number one: Do X; number two: Do the opposite of X; and, number three: Do what whoever wrote the memo wanted, which is somewhere between X and the opposite of X. And Moscow noted that you will never see among the options number four: Do Nothing. And that that very often is the right answer.

But it is certainly the case for courts. Do not make waves unless there is a reason for a change. Unless what the Congress has done or what an agency has done is wrong, you leave it alone.

Justice BREYER. What your question brought to my mind was something in Tocqueville, which is really—you know, I like the students to read Tocqueville, too, because it is amazing in 1840 what he is writing, and you think, My God, he wrote it yesterday, about this country. And one of the things he says which really stuck is he says, “Whenever I come to the United States, the first thing that strikes me is the clamor.” Well, what is he thinking of? Everybody is screaming at each other is what he meant? And what he really meant is they are debating. They are talking about things; they are disagreeing. And he thinks that is good, and I do, too, because that is—you have a really tough problem sometimes. Let us imagine when you are trying to figure out some bill and it has to



do with privacy and it has to do with free expression, and there are all kinds of tensions right there with the Internet and the new methods of communication and Twitter and Facebook or whatever they are and people's privacy, and you are more familiar with all those than I. How do we decide those in this country?

I think the general word I use to talk to about that is the word "bubbling up." The first thing that happens, people start to talk. They talk in newspapers. They talk in classrooms. They talk in articles. They talk in small groups. They talk with the policemen. They talk with the firemen. They talk with the civil liberties groups. They talk to everybody under the sun, and they begin to debate, and they get into arguments. Eventually it gets to you. You have hearings. You eventually decide maybe an agency should do it. Maybe we should have a statute. Maybe we change our mind five times. And eventually things will settle down.

And what I say about my Court, it is really wonderful if we do not get involved until it settles down, because our only job is going to be to decide if what you decide is within the boundaries. And it is going to be a subject where we will know less about it than those Americans who have gone into it in depth, so be careful of intervening before this big debate, this clamor that Tocqueville is talking about, has a chance to take over, take effect, scream, change, try it on, try it off. And I think that is really the wisdom that underlies this view of do not decide too much too fast.

Justice SCALIA. We do a lot of nothing.

Justice SCALIA. I told you that the main reason we take a case is because there is disagreement below. But if there is no disagreement below, we do not get involved. We do not go prowling around looking for Congressional statutes that are unconstitutional. It is only when there is disagreement below that we take a case, with rare exceptions. If a lower court has found one of your laws to be unconstitutional, we will take that case even though no other court has held the opposite. But except for rare situations like that, we let sleeping dogs lie, which is the way one should live his life, I think.

Chairman LEAHY. Thank you.

Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Justice Scalia, in your opening remarks you talked about how brilliant our system is, our Constitution, and the kind of disagreement it provokes and how difficult it is to get things done. That is the greatness of the American Constitution in contrast to so many other countries. And yet we are described now by people all over the country as dysfunctional, as unable to get anything done, and the level of dissatisfaction is up to about 88 or 90 percent now among the American people because they say we cannot get anything done, that the system does not work. How do you respond to that?

Justice SCALIA. Well, I suppose there is a point at which you do reach unbearable, dysfunctional gridlock. However, I think the attitude of the American people—and this is the point I was making—is largely a product of the fact that they do not understand our Constitution, that its genius is precisely this power contradicting power, which makes it difficult to enact legislation.

It is so much easier to enact legislation in France or in England, but, you know, the consequence of that is you have swings from one extreme to another as the legislature changes. That does not happen that much here, largely because of the fact that, as a general matter, only laws on which there is general agreement will get through.

So, I think that this is one of the reasons why we have to educate the American people, as we have not been doing for decades, about what our Constitution produces and what it is designed to produce.

Justice BREYER. It is same problem Sandra O'Connor is always talking about. I mean, we are limited in what we can do, and probably you are, but she is out there non-stop trying to get civics restored to the high school curriculum. I mean, what do most people think about taking a case which we were just discussing? I bet if you did a survey, those who know anything about it would say, "Oh, they sit up in that big building, and they just decide, 'This would be an interesting subject. Let us decide it.'" And that is very far from the truth. We have a system, as you have heard described.

So what we try to do is talk to people. Annenberg does that, the foundation. They are in 55,000 classrooms. And Sandra and I, and sometimes Nino, have discovered that it is very useful to get a film taken of a case or something, of something in the past, and have us come and try and get it in the high schools. Vartan Gregorian is trying to do that with Carnegie. You have a very different institution, but you do try to communicate with the public quite a lot, and all I can say is it is probably harder for you than it is for us. But to get across the idea that the student today has to know how Government works, they have to know something about their history, and they have to be willing to participate, it is very easy to say, and it is very hard to get across.

Senator KOHL. Gentlemen, as you know, you have the power to decide cases themselves, but your power is also to decide which cases you are going to hear. And you have some 8,000 opportunities to make decisions every year on the cases you are going to hear, and last year you decided to hear 77 cases, which is just 1 percent or less than 1 percent.

So what goes through your minds collectively when you decide on which 1 percent you are going to hear? And what do you say to the 99 percent who do not get heard?

Justice SCALIA. To the latter, we say, "Denied."

Justice SCALIA. But for the former, you are quite right; there ought to be some rules. It should not be random. It should not be whatever tickles my fancy. And that is why we have a general rule that unless there is a circuit conflict, you are wasting your time and your client's money to file a petition for certiorari. It is overwhelmingly likely that we will not grant it.

It is not the case, I assure you, that we prowl about looking for an issue that we want to get up to the Court. I do not know any of my colleagues who behaves that way. I think they all have standards. Is there a circuit conflict? Is there a significant issue on which the lower courts are divided? And for the other cases—I am surprised the number of petitions is only 8,000. I thought it was up to 9,000 by now. And, by the way, when I first joined the Court, it was only 4,000. That is how much that has increased. So it is

now a fairly large part of our job just deciding what we are going to decide. Every one of us looks at at least summaries of all 9,000 of those petitions.

Justice BREYER. There are 150 a week in memo form that come into the office, and the originals are back there on my shelf. Now, I bet if we sat down tomorrow, the two of us, even though it is not part of your job, I will make an initial cut, and maybe it will be like 140 and 10, and I bet if we were there together, the cut that you would make would not be much different from the one I would make. It is interesting. Why? Because they sort of speak out.

And the only other thing I will add is in the Conference—I know there are groups of lawyers who particularly would like to see us take more cases, and the people who would like to take more cases in a sense is us. When Sandra was on the Court—and I think she has said this publicly, “We have got to get more cases here.” Nobody is making an effort to take fewer. That is not the attitude in the Conference. The attitude in the Conference is there is a split, let us take it, we have room, we have room to hear more. Nobody is thinking that there is not the room.

Senator KOHL. Well, let me just respectfully disagree, and perhaps you can respond. When you came on the Court in 1987, you heard 277 cases that year. And when you came on the Court, Justice Breyer, that year you heard 105 cases. Last year you heard 77 cases. So I do not understand.

Justice SCALIA. Senator, we never heard 277. When I came on the Court, I think we were deciding about 150. And I will tell you, I do not think we can decide 150 well. If you go back and look at our opinions in those days, and you read an opinion in which the majority opinion and the dissent are like ships passing in the night—they never quite meet each other—you turn to the first page and will find that it is a June opinion. The month when we were rushing out opinions at the end of the term. I do not think we can do 150 well. I think we could do 100 well. And, frankly, I am probably voting to take some cases that I would not have voted to take 10 or 15 years ago.

But it is not as though we sit down at the end of the year and say, Okay, let us take 75 cases, let us pick the best 75. That is not what happens. They trickle in week by week, and we vote on the ones that week that seem worth taking. And at the end of the term, they have added up to whatever they have added up to.

If my standards have changed, it is only because I am trying to take more rather than trying to take less. I suspect that the major reason for the decline is that when I first came on the Court, there was a lot of really breathtakingly important new legislation—a new bankruptcy code, Title VII, ERISA. In the last 10 years, there has been very little legislation of that magnitude. The major generator of circuit conflicts below is new legislation because it always has some ambiguities that have to be decided by the courts. So where there has not been a whole lot of major new legislation, you would expect our load to go down.

Justice BREYER. I agree with that. But it is just a theory. We have not measured. But every word in a bill is an argument. Every word you pass, there are lawyers who can debate. And so if a lot of legislation is passed, then I think with a 5- or 10-year lag, you

will suddenly see a lot of cases in the Supreme Court. And if you go 5 or 10 years and there is less legislation passed, fewer words, you will discover a diminished number of conflicts among the circuits.

When you passed the habeas law, then go back 2 or 3 years and suddenly you will see lots of habeas cases coming up to that. And the same is true with IIRIRA, the immigration thing. So you are now passing laws with thousands of pages, not budgetary laws but laws, you know, that are likely to come to us. My guess is with the lag that caseload will start going up.

Senator KOHL. Thank you.

Chairman LEAHY. We are about to go to Senator Hatch, and I have been sitting here trying to resist temptation, and I will not. When you mentioned from Henry IV the discussion of Glendower, you have that in your book, and I noticed it earlier when I was going through your book. It is one of my all-time favorites quotes, usually to express exasperation somewhere.

Senator Hatch.

Senator HATCH. Well, thank you. I personally appreciate both of you being willing to do this. I think it is a very good thing. And I know that it is unusual for you, and so I am grateful to the Chairman for calling this particular meeting. And I am particularly grateful to both of you. You both have been great Justices. You have been on the Court for a long time, and you have decided a lot of important cases, and we now have this year, it looks like, a docket that is going to be pretty doggone important compared even to past years. Let me just say this—

Justice SCALIA. You sound happy about it, Senator. I am not sure I am.

Senator HATCH. Well, I am very happy. I want you working really hard, Justice Scalia.

Senator HATCH. And you, too, Justice Breyer. I have great hope for you. There is no question about that.

Senator HATCH. No, I remember when you were here on the Committee. You were a terrific chief of staff for Senator Kennedy, and you meant a lot to us then, and you mean a lot to us now.

Let me just say, when Federal judges construe our statutes, they try to figure out what we meant by what we said. Legislators on both sides of the aisle would object if judges changed the meaning of the statutes we enact. And as you know, we even differ on that. But who knows? We might even hold a hearing about it. You never know.

But the point is that even if we do not express clearly what we mean, it is still our meaning that counts. Should the basic approach be any different when judges interpret the Constitution? In other words, if statutes do not mean whatsoever judges say they mean, how can the Constitution mean whatever judges say it means?

Justice BREYER. In a sense the answer is it should not when I have a statute. I think all judges when they have a text and the text is not particularly clear or there are questions, they all have the same weapons. You read the text. You look at the history. You look to the traditions around the words. Say it is habeas corpus. A lot of tradition there. You look to the precedents. You look to

what I would call the purposes or the values. And you look to the consequences read in terms of the purposes or values.

So if I have a statute, the first thing I want to know is somebody wrote that statute. These words may be hard to figure out what they mean one way or the other, but somebody had something in mind in Congress, and I want to find out what that is and I want to stick to it.

Now, when you are talking about the Constitution because there are words like "liberty," or because there are words like "freedom of speech," "the freedom of speech," it is not so much purposes that I would use to describe that. I would describe that as basic values. And I think those basic values that were enacted in the 18th century have not changed, or at least not much. The values are virtually eternal, but the circumstances change.

So I say, you know, sometimes when we discuss this, which Justice Scalia certainly knows and agrees with, George Washington did not know about the Internet, and a lot of our job is to apply the values that are there in the Constitution, which really do not change, or at least not much, to circumstances that change all the time, every 5 minutes. And that is not so easy to do.

But put at the level you have put it at, which I think is a very good level, should we follow those purposes in terms of the values of the Framers? Absolutely yes. In terms of trying to apply it to situations that they did not foresee? Well, there I think you cannot do that. I think you have to figure out how those basic values apply to the world today, a world that is international and national in terms of commerce, in terms of the Internet, in terms of a thousand different things that face you every day. And then how much emphasis you give to what in trying to answer that question is a matter that sometimes divides judges. But the need to answer it I think is a matter that unites them.

Justice SCALIA. I do not agree with most of that.

Justice SCALIA. In fact, I hate to say this, but I am not sure I agree with the premise that our object is to figure out what Congress meant. I think our object is to figure out what the law says. If Congress meant one thing but enacted a law that says something else that is promulgated to the people, I am bound to apply the law. That is what it means to have a Government of laws, not of men. And that is why I do not use legislative history. (I am glad Senator Grassley is gone because I think this is one of his pet peeves.) That is why I do not use legislative history, but Justice Breyer does. I think we are governed by laws, and when I approach a statute or the Constitution, I ask myself, What do these words mean to the people to which they were promulgated? And once I figure that out, I can sleep at night.

Senator HATCH. Well, I think it may take a few more years, but I am confident you will.

Let me just say it is common today for people to evaluate judges and their decisions based on what people want judges to do or on whether they like a judge's decision. Both liberals and conservatives do that. I am looking for a more principled or objective job description for judges. You know, given the title of this hearing, does the Constitution itself offer anything to help define the role of judges? And is there some practical, concrete guidance we can

draw from the Constitution itself as a way of defining what judges are supposed to do? Justice Scalia?

Justice SCALIA. Do you want me to start?

Senator HATCH. Sure.

Justice SCALIA. Boy, that is a hard problem. Your intro suggests a point that I wanted to make to the Committee. One of the difficult things about the job that Steve and I have is that we are criticized in the press for our opinions, but cannot respond to press criticism. That is just the tradition. But usually the criticism in the press and the reaction of the public to the opinion has nothing to do with the law. If they like the result, it is a wonderful opinion and these are wonderful judges. And if they dislike the result, it is a terrible opinion. They do not look to see what the text of the statute is that was before us and whether this result is indeed a reasonable interpretation. None of that will appear in the press reports, which will just tell you who the plaintiff was, what the issue was, and who won. And if you like the result, it is a great opinion. If you do not like it, it is terrible.

That is just one of the disabilities we operate under, and that is one of the reasons we are not supposed to advert to whether the public likes our opinions or not. We are supposed to just go down the middle and interpret the text as we think it ought to be interpreted.

Now, you are quite right that those who do not like one of our opinions will call it "judicial activism." Judicial activism always consists of the Court's doing what you do not like it to do. I suppose there is—

Senator HATCH. We understand that.

Justice SCALIA. I know that. I do not know any solution for it, Senator.

Justice BREYER. There is not a solution. I mean, we are both judges. We have been judges for a while. We have a rough idea of what it is to be a judge, and we both know that what we are trying to do is apply the law and interpret the law. No one at that level disagrees.

All right. But you say, well, how do you do that? And I think I can get a little more specific before I will find disagreement, and that is why I mentioned those things of reading the text. You know, if the text says fish, that does not mean carrot. A carrot is not a fish no matter what your intent. You have to follow those words, and it rules out a lot of things. So the words are there. And the history is there. And the tradition is there, and the precedent is there. And the purpose—it may be hard to find sometimes, but sometimes it is not. And the consequences, you do not know all of them, but you know some of them, and you said some evaluation in terms of those purposes, so we will try to do that.

And Justice Scalia may place more weight on some of those things, and I will place more weight on purposes and consequences, but that is putting different weight on different parts of tools that we all have. And then when we get into the constitutional area, I might say, look, I am looking to values and how they apply today. And he might think he can find more in history. But I can see that. I am not going to say history is irrelevant. And I do not think he

will say that sometimes you just do not find that much there. At least sometimes.

And so it is a question of degree and so forth, but the bottom line for an appeals court judge—and it is a very useful bottom line—is you have to write an opinion, and that opinion is going to be based on reason. You cannot prove it. It is not logic. We are not computers. But I can honestly set forth my reasons for saying it is this way rather than that way. And he does the same. And one of the great things about dissenting opinions, if he writes a dissent or I write a dissent, he will read it, and I will read it, and I will respond, because I am not going to let him, put in quotes, “get away with that,” or I am not going to let him—he has pointed out something, I do not know how that got in my opinion, I better change it. And so this strengthens the opinions, and ultimately they can be read by the public, and they are read by some of the public. And the strength there is in its reasoning tied back to the documents and tied back to this country and tied back to a lot of things. But there is the basis there for criticizing and for valid criticism and valid praise or blame of a particular judge. And, of course, we love it if people take the opinion at that level rather than responding simply to a press report. But I think pretty much that is what we see as the job.

Chairman LEAHY. You know, in some ways I feel like I am back in my favorite seminars in law school, which is a lot more fun than sometimes being in the Appropriations Committee or some of the other things doing this. But I do want to move this along—I have tried to give extra time to everybody—just because of the Justices’ time.

I will go now to Senator Feinstein. Just so we will know what the order is, I have received this from Senator Grassley on the Republican side. It will be Senators Graham, Cornyn, Lee, Coburn, and Sessions. On our side it is Senators Feinstein, Blumenthal, Durbin, Whitehouse, and Coons.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and thank you for holding this hearing, and, Justices, thank you very much for being here.

I was looking at the faces in the audience, most of them young, all of them listening and interested. And I think really what it says is the respect that we have for the rule of law in this country and that that highest order of the rule of law rests with the authority that you have. And I for one am very, very proud of it and am always proud when I travel that America is represented by the distinction of this great Court.

Now, I want to ask you something about the 14th Amendment, and if both of you could respond to it. It is simple. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

Is a woman included within that definition?

Justice BREYER. Yes. A woman is a person. I think that is well established.

Justice SCALIA. Yes, the issue is not whether a woman is a person. The issue is—

Senator FEINSTEIN. You know where I am going.

Justice SCALIA. The issue is what constitutes equal protection.

Senator FEINSTEIN. Yes, all right. Are women included?

Justice SCALIA. Yes, of course, they are included.

Justice BREYER. Yes.

Senator FEINSTEIN. Well, let me ask you—

Justice SCALIA. But does equal protection mean that you have to have unisex toilets? I mean, that is the kind of question you have to get into.

Senator FEINSTEIN. Your quote, Mr. Justice, in California, “Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that is what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey, we have things called legislatures, and they enact things called laws.”

So why doesn’t the 14th Amendment then cover women in this respect?

Justice SCALIA. The 14th Amendment, Senator, does not apply to private discrimination. I was speaking of Title VII and laws that prohibit private discrimination. The 14th Amendment says nothing about private discrimination, only discrimination by Government.

Justice BREYER. Yes.

Senator FEINSTEIN. Oh, I see. I see what you meant.

Justice SCALIA. Yes.

Senator FEINSTEIN. Okay. All right. If I can, let us go to—Justice Scalia, I think in the past you have advocated a constitutional interpretation called “originalism” in which the meaning of a constitutional provision is determined based on the provision’s meaning in 1789. You have also said that Government, even at the Supreme Court level, is a practical exercise, and that—well, let me just say what I am trying to think. In other words, that the Constitution should be interpreted for its meaning at its origin. And, Justice Breyer, you have taken the position that the Constitution is a living document and, therefore, it adjusts to times and changes within the time period.

Could each of you give us your legal interpretation of that and how you approach it?

Justice SCALIA. You start. I started last time.

Justice BREYER. It is not quite as starkly different as it is sometimes painted.

Justice SCALIA. It is pretty different.

Justice BREYER. It is pretty different. All right. I tend to think that the values, as I say, in the Constitution—you have to go back and find out those values. They have not changed a lot. The fact that freedom of expression was important in the enlightenment, it was. So was freedom of religion. So were a lot of those things. And those are the values that underlie the word “liberty,” et cetera.

But in my own view, to use sort of a slightly rhetorical example, which I did, George Washington was not aware of the Internet. I think we agree on that. And so most of our job is applying those values which do not change very much to a world that changes a lot. And “the freedom of speech,” those words do not explain them-



selves. They do not tell you how they are going to apply to a really tough case where the Internet wants to communicate something that is private information about an individual. Which is it? The right of privacy or is it the right of expression that predominates there? Very hard.

And so if I had to incorporate four words, I would go back to a judge who was in the 18th century—I found it in Gordon Woods' book—in Connecticut, near Rhode Island, but in Connecticut, who said—Root, I think his name was, and he said, “The American tradition of judging involves prudence and pragmatism, reasonableness and utility.” Well, I think those are elements of an effort by a judge in a difficult case to work out how those ancient values apply to modern circumstances.

Justice SCALIA. I have no problem with applying ancient values as they were understood at the time to new modern circumstances. Originalism does not mean that the radio is not covered by the First Amendment. Of course, you have to apply the text of the Constitution to new phenomena. But what originalism suggests is that as to those phenomena that existed at the time, the understanding of the society as to what the Constitution prohibited at that time subsists. Take for example, the death penalty. Now, there are good arguments for and against the death penalty. Is it prohibited by the Eighth Amendment? For an originalist the answer is easy: Of course it is not because it was the only penalty for a felony when the Eighth Amendment was adopted. Nobody thought that the death penalty was prohibited. It continued to be used in all the States. Nonetheless, I have sat with four colleagues, all off the Court now, who thought the death penalty is unconstitutional. That is the difference, essentially, between a living Constitution approach and an originalist approach. When I apply the text of the Eighth Amendment, I apply it as it was understood by the people who adopted it. What they thought was prohibited is still prohibited, and forms the basis for assessing the Amendment's application to new phenomena. Since hanging was not considered cruel, for example, execution by lethal injection it surely not.

That is the basic difference between originalism and the living Constitution. I do not trust myself to be a good—what should I say? A good interpreter of what modern American values are. You people are much better at that than I am. I have very little contact with the American people, I am sorry to say. You do, and the Members of the House probably even more. So if you want to keep the Constitution up to date with current American values, you ought to decide what it means and you could, you know, kiss us goodbye.

Senator FEINSTEIN. Thank you.

Justice BREYER. I would add one thing, that we have this discussion from time to time in public. We have had it before. It is very interesting, I think. I do not know if the audience thinks so. And I have a lot of good arguments and counterarguments. But I cannot resist asking him to make what I think is one of his best arguments, because it is so funny.

Justice BREYER. When I produce really, really very good arguments, I think, he responds with a joke.

Justice SCALIA. Not the bear?

Justice BREYER. Yes, the bear.

Justice SCALIA. What bear?

Justice BREYER. He cannot remember his joke. This is what his joke is.

Justice BREYER. Every time I think I have really got very good arguments here, what he says, "Well, it is like the two hunters," his view about what I say.

Justice SCALIA. Oh, Okay. I will tell it.

Justice SCALIA. There are those people who are always criticizing originalism because it is not perfect. You know, you have to figure out history and whatnot, and that is so difficult. And my point is I do not have to show that originalism is perfect. I just have to show that it is better than anything else. And the story to exemplify that point is about the two hunters who are out in the woods in their tent, and there is growling in the brush near them. And they open the tent flap, and there is a huge grizzly bear, and they start running. And the guy who is a little heavier and is running behind, says, "It's no use. We are never going to outrun that bear." And the guy who is running in front says, "I do not have to outrun the bear. I just have to outrun you."

Justice SCALIA. It is the same thing with originalism. I just have to show it is better than his theory.

Chairman LEAHY. Justice Scalia, you remember my son, Mark, who used to play, when he was 8 or 9 years old, soccer with your son. We used to stand sometimes on rainy Saturday mornings watching these games. Then he went into the Marine Corps. One of his Marine buddies ran a marathon through a game park in South Africa with lions roaming around. He remembered that. He used your line.

Chairman LEAHY. And I must admit, in 35 years on this Committee, this is the most unique discussion we have had in the Committee.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. Yes, this is unique, and fun, too.

Let us talk a little bit—there are some high school students out in the audience. How do you become a judge at the Federal level?

Justice BREYER. Be appointed by the President of the United States.

Senator GRAHAM. Okay.

Justice SCALIA. There is an Irish saying, Senator: "Good luck beats early rising."

Justice BREYER. Often on a recommendation of a Senator.

Senator GRAHAM. And from a politician's point of view, when you pick a judge, you make one ingrate and ten people mad at you. So it is a political decision under our Constitution? Is it fair, Justice Scalia, for a President to look at the philosophy of a person they would like to nominate to the judiciary?

Justice SCALIA. You know, I—

Senator GRAHAM. Who appointed you?

Justice SCALIA. Ronald Reagan appointed me.

Senator GRAHAM. Do you think it was an accident Ronald Reagan picked you?

Senator GRAHAM. Do you think he went through the phone book and said, "Hey, this looks like a good guy"?

Justice SCALIA. The Europeans sometimes criticize our system because of the political appointment of judges. When you place the appointment in the President and in the Senate—anything the President or the Senate touches becomes political. It should be political.

Senator GRAHAM. And to any high school student out there, I think it should be. And we are going to have an election in 2012, and one of the issues will be what kind of judges will you pick if you get to be President of the United States.

Justice SCALIA. There is nothing wrong with that.

Senator GRAHAM. As a matter of fact, I think it is healthy for the public to say, “When I vote, the Supreme Court does matter”—the lady at the supermarket—I really should think about who I am voting for because the Court does have a lot of power, and I am going to consider that.” Is that Okay, Justice Breyer?

Justice BREYER. Yes, but you have to keep a couple of things into account, and one is when you put on the robes, you take off the politics. And that is over and over. But that is not your—I am not going to disagree—

Senator GRAHAM. That is not where I am going, if you would just hang in there with me. Okay. So the whole idea that a Republican conservative would campaign on picking conservative judges is not only Okay, I think that is to be expected. Do you both agree with that? And a liberal Democrat—

Justice BREYER. Well, here are my caveats. One, very often at any level of detail, Presidents have been disappointed. Teddy Roosevelt said of Oliver Wendell Holmes who in 3 months decided the opposite way on an antitrust case, he said, “I can carve a judge with more backbone out of a banana.” And Presidents are sometimes disappointed even at the level of general philosophy.

Senator GRAHAM. Absolutely.

Justice BREYER. And that can happen. But as far as asking me in a way about the rest of it is I have said—I say this a lot, so I might as well repeat this joke because it has some point to it. When I am asked about the confirmation process and the nomination process, I remind people that I was the person who was nominated. I was not the nominating person. I was the person who was confirmed. I was not the confirming person. And to ask me about those processes is slightly like asking the recipe for chicken a la king from the point of view of the chicken.

Senator GRAHAM. Okay. Fair enough.

Senator GRAHAM. But that does not mean I cannot keep asking.

Justice BREYER. No, no.

Justice SCALIA. Senator, can I? I agree that politics is a check on the Court. When the Court gets too big for its britches, the one check is the political confirmation process and appointment process.

However, in my view, when the Court is operating properly, when it is not applying its own view of what the Constitution ought to be but is interpreting the legal text, as lawyers do, understanding the meaning of those words and the history behind those words, there is a lot less need for politics to intervene I mean, there is no such thing as a Republican good lawyer and a Democrat good lawyer. You are either a good lawyer or you are a bad lawyer.

Senator GRAHAM. I could not agree more, but the point I am trying to make is that we do have a political person appointing judges and political people confirm the judges. That is the way it works.

From a Federalist point of view, Justice Scalia, since I have not read all the Federalist Papers and do not expect to—and that probably says bad things about me, but at least I am being honest—should a Senator say no to an appointment because it is of a different philosophy than the Senator himself or herself would have chosen?

Justice SCALIA. Senator, I have views on that, but I do not think it is appropriate for me to express them.

Senator GRAHAM. Okay.

Justice SCALIA. I leave you alone, and you generally leave me alone.

Senator GRAHAM. Okay. Well, let us talk about the confirmation process. You both have been through it. How many votes did you get, Justice Scalia?

Justice SCALIA. 98, Senator.

Senator GRAHAM. How many did you get, Justice Breyer?

Justice BREYER. I think I only got 88, but who is counting?

Senator GRAHAM. Okay. I bet you remember the 12, too, don't you?

Senator GRAHAM. The point I am making is that since I have been here, it is getting more and more difficult to get someone through the process. Do you worry at all that the confirmation process, if it gets too out of hand, will have a chilling effect on recruiting the best and the brightest? Is that a concern at all to members of the Court?

Justice SCALIA. Oh, I think it has had that effect already at the court of appeals level.

Senator GRAHAM. What is the biggest threat to an independent judiciary as you see it in America right now?

Justice SCALIA. Well, this will surprise you. My view is that Federal judges ain't what they used to be. When I got out of law school, there were 67 court of appeals judges, two-thirds as many as Senators. It was a big deal to be a Federal court of appeals judge.

Senator GRAHAM. Can I interrupt you?

Justice SCALIA. Yes.

Senator GRAHAM. And I hate to do this. Two-thirds of the people coming to the judiciary today come from the public sector. Thirty years ago, two-thirds came from the private sector.

Justice SCALIA. I was getting to that.

Senator GRAHAM. We are becoming a European model.

Justice SCALIA. That was my point.

Senator GRAHAM. Good.

Senator GRAHAM. I have only got 18 seconds, so we have got to get there.

Justice SCALIA. Okay. That is exactly my point. And the main difference in my mind between the common law system and the European system is the difference in the character of the judges. In the European system, a judge is a bureaucrat who has been a judge all his life—

Senator GRAHAM. And I would argue that we are creating—because of pay problems, confirmation problems, we are going to gut our judiciary of the best and the brightest if we do not watch our politics and the way we take care of our judges. Would you please comment, Justice Breyer?

Justice BREYER. I would think there is much truth to that. Much truth to that. The great thing, I think, in the Federal judge is that the Federal judge always was, and I would hope always will be—the Federal district judge is where it is important, too. You know, a Federal district judge is a local person, and he understands or she understands that community. And he or she will sit on the bench, and this is a fairly high level official, and that official will make it apparent to the community that he or she is willing to give up that personal time face to face with anyone in that community, rich or poor, who has a problem that calls for the work of the judge and that time is given. That is not a bureaucrat. That is not an administrator. It is not an elected official. It is a different job. But here in this country, this person who is supposed to be and is a pretty high level official gives you the time, Mr. or Mrs., that your problem calls for. And that is shown in the way the courthouse looks. It is shown in the attitude of the judge. It is shown in the way the community responds to the judge. And all of that is part of an institution, and institutions are not built overnight, and they can be hurt.

And so the thrust of your question is how do we maintain the strength of what has really been a unique institution in the world, and it is not just the Supreme Court now. It is that entire Federal judiciary at all levels. And I am glad you are interested in that, and I think it is a problem. And I do not have a definite solution, but some of the things you have mentioned are certainly part of the mix.

Justice SCALIA. It is not just the pay. It is also the numerosity, and the numerosity goes back to the laws you pass. I think it was a great mistake to put routine drug offenses into the Federal courts. That is just routine stuff that used to be handled by State courts. If you want excellent Federal judges, you want an elite group, and it is not as elite as it used to be.

Chairman LEAHY. I would note that I agree with you on that. Having been a prosecutor in the State system, there are too many things going to the Federal system.

I would also note Senator Graham raises some very good questions on this, and I know we have pending right now, waiting to be confirmed, stalled on the floor by objections I guess somewhere, judges that would represent over 100 million Americans who have vacancies today. The Chief Justice has said that we ought to—he has called it critically—he spoke of the critically overworked districts. Frankly, I think we have to do a better job of getting these people confirmed; I do not care who is President. But also, Justice Scalia, there are too many things before Federal courts that should be in the State courts. It is like the old days of J. Edgar Hoover. If you found a stolen car, they wanted to claim it so they could say how much money they had recovered. It is not the place.

Senator Durbin, Senator Blumenthal has yielded to you to go first and he will go next. Senator Durbin?

Senator DURBIN. I want to thank my colleague from Connecticut. I am in his debt.

Thank you both for being here for this historic meeting of the Senate Judiciary Committee. Most people are not aware of the fact that we have a rather unique dinner where the Senate visits the Supreme Court and we have a chance to break bread with our families and have an informal moment. And I will not give this Justice's name, but the last time we got together, I mentioned to one of your colleagues, who has been on the bench for some period of time, that I was Chair of the Subcommittee on the Constitution, Civil Rights, and Human Rights. And I asked your colleague, without attribution, if I could ask you: "What do you think I should be taking a look at in that Constitution Subcommittee, gauging the issues that come before your Court, the constitutional questions that present themselves to our generation, under the civil rights/human rights category?" And it was interesting. That Justice's response was, "You ought to take a look at the number of people who are in prison in the United States of America."

I am aware of it, and I am sure you are, too. Over 2 million people incarcerated in our jails and prisons; more prisoners per capita than any other country in the world; obvious overcrowding; and terrible racial disparities in terms of those who end up in prison in our country. African-Americans six times the rate of Caucasians' incarceration. A 2009 study showed that one out of every 11 African-Americans is in prison, on parole, or on probation.

Senator Sessions and I joined forces in a rare bipartisan show here and addressed the crack cocaine sentencing disparity. I think we could have done it differently, but we reached an agreement—and that is pretty historic when you consider the different philosophies that were part of that agreement—in an attempt to reduce some of this incarceration. I am not going to hold you to that particular issue but ask you if you would like to comment. Where do you think we should be making inquiry at the Congressional level when it comes to our Constitution and the challenges we face today?

Justice BREYER. What would we think? I would think it is fine that you are going into that. Sentencing is part of that; mandatory minimums are part of that. There are a whole range of things. There have been articles in the newspapers about all kinds of elements which are not within our control necessarily, but, I mean, that are really within your control in the sentencing area, the prosecution area, the criminal area. That is a huge matter, and I am glad you are going into it.

Senator DURBIN. I do not want to confine you to that if there are other issues that you think are worthy of at least inquiry at this point.

Justice SCALIA. I am going to pass. This is within the category of, you know, I leave you alone, you leave me alone. It is your call. It is a policy question.

Justice BREYER. It is a policy question.

Justice SCALIA. I do not really want to get into it.

Senator DURBIN. All right. I have another question, and this relates to the question of ethics, which it turns out is handled differently in our different branches of Government. As someone who

has been involved in political campaigns and public service for a long time, I obviously know the need for us to not only be honest in our dealings, but to have the appearance of honesty in our work. Our major ethics laws accomplish this by imposing certain restrictions. For example, every other Member of Congress, our staffs, the entire executive branch of Government, and all Federal judges are restricted from receiving certain gifts and outside income under the Ethics Reform Act of 1989. The members of the Supreme Court and its employees are the only employees of the Federal Government who are exempt from these restrictions.

Do you believe the Supreme Court should be required by law to follow the same financial restrictions as everyone else in Government?

Justice BREYER. Oh, no, no. We are. I certainly have thought so. We file these long reports every year, quite expensive to prepare, where every penny that I take in, or my wife or my minor children, every asset has to be listed in depth, and it is all filed. And the amount of money that you can take from anyone outside is far more limited, I believe, under the codes of ethics than people who are not judges. Judges have special restrictions there. And so I do not think that the life of the judge in terms of ethics is less restricted than the life of any other member of the Government, to my knowledge.

Senator DURBIN. Incidentally, I should preface this by saying no reflection on either one of you.

Justice BREYER. I understand.

Senator DURBIN. But I would just say I anticipated that answer, and I understand that the Court is bound by these restrictions by a Court resolution adopted 20 years ago in 1991, and I wonder if you could tell me about that resolution. It is not public law like the Ethics Reform Act. Would you agree that this resolution should be more public?

Justice BREYER. I think there are several different things. I think one is what money you can take, or cannot take for the most part, the reporting requirements, and some of the general ethics requirements that you cannot sit in cases. Those are statutory, and I think they bind us, period. I have always thought so. I mean, I have never heard to the—now, there are some that are just in this ethics volume. That is probably what you are thinking of. If you were to ask me which ones are they specifically, I could not answer. I do not know. But there are some that fall in that category.

So probably like most of us, I have this whole—it used to be seven volumes. Before, if I had an ethical question, when I would recuse myself or something, I would go look and see what they say. And I did not distinguish in my own mind whether they are legally binding or whether they are something I just follow. And so I read them, and if I have a problem, I call an ethics professor. Everybody has some such system. You know, they have to figure out—there is no one who wants to violate any of those rules.

Now, there is a big difference between the Supreme Court and the lower courts, and the difference is simply this: When I was on the court of appeals, if I had a close question, I would take myself out of the case. They will put someone else in. One judge is as good as another, frankly. But if I take myself out of the case in the Su-

preme Court, that could change the result because there is no one else to put in. And the parties, knowing that—I am not saying they would, but it is possible to try to choose your panel, which is undesirable in the Supreme Court.

So what that means is that there is an obligation to sit where you are not recused as well as an obligation to recuse. And sometimes those questions are tough, and I really have to think them through, and I have to make up my own mind. Others cannot make it up for me. And that is a very important part, I think, of being an independent judge. We are given tough questions to answer.

And so the answer is, A, there is a big set where we are bound by law; B, there is a set where we may not be bound by law, but we are bound in practice; and, C, in that set, whether it is law or practice, we, I think, have to think it through and try to work out which is the predominant force there.

Senator DURBIN. I do not have any more time left, and I do not want to disadvantage Senator Blumenthal, but my next line of questioning was how much of this should be known to the public.

Justice BREYER. I have just made it known to the public.

Senator DURBIN. The question is whether—for example, we make disclosure as Members of Congress that would lead to conclusions as to whether we are in a conflict situation. I do not believe the same public disclosure is made at the Supreme Court level, is it?

Justice BREYER. It is pretty much—I cannot say 100 percent, but, I mean, if there is a difficult question, usually there is a press inquiry. And I know, you know, sometimes we write opinions about it, and usually the press gets an answer. So I am not sure that there are things that matter where—you know, like I have to take myself out of quite a few cases because my brother is a judge in San Francisco, and so if I recuse—or I take myself out because he was sitting on the case, I usually tell Kathy Arberg, our press officer. I say—well, this is normally off the record because I do not want a long article, but I will say, “Just tell them the reason I am not in that one is because my brother is in it, Okay?” And so I do not think there is some kind of secret thing that goes on. I cannot prove it so in every case, but I cannot think of any case.

Senator DURBIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. I am going to go to Senator Lee, but at this point, if I might have your indulgence, and you can answer this one very quickly. You talked about if one of you has to step out, there is nobody else to step in. We have three retired Supreme Court Justices now. In all our courts of appeals and our district courts, those who have taken senior status can step in if there has been a recusal or a necessity. How would you feel about allowing former Supreme Court Justices to step in if there is a recusal?

Justice BREYER. I have not thought that one through.

Justice SCALIA. Who is going to pick the former Supreme Court Justice to step in?

Chairman LEAHY. I would assume the Chief.

Justice SCALIA. Well, I do not think that would make anybody happy, to tell you the truth.

Chairman LEAHY. Well, then, how about the remaining eight?

Justice BREYER. I do not know.



Chairman LEAHY. By a majority vote.

Justice SCALIA. I do not know that that would make anybody happy either. What if it is 4–4?

Chairman LEAHY. Then you do not have somebody.

Justice SCALIA. No, I think we can stumble along the way we are.

Justice BREYER. You are getting the reaction, you know, do not change anything, but that is the—I have not really thought that one through. It sounds—there might be problems. I do not know.

Chairman LEAHY. I may chat with you more about this one.

Senator Lee, thank you very much.

Justice SCALIA. I do not think it is much of a problem, Senator. There are very few cases where we affirm by an equally divided Court. How many the last term?

Justice BREYER. Very few. There are some occasionally.

Justice SCALIA. It is very rare that that happens.

Chairman LEAHY. Thank you. Senator Lee?

Senator LEE. Thank you, Justice Scalia and Justice Breyer, for joining us. It is an honor to have you here today.

Justice Scalia, I wanted to follow up on some things you had said in your opening statement along the lines that it is, and properly should be, a difficult, cumbersome, time-consuming process in our constitutional republic to enact legislation. I think the courts can and should play a significant role in ensuring that that is always the case. The Court certainly has played a role in the past in cases like *INS v. Chadha*, in which the Court has stepped in and said, notwithstanding the fact that you, Congress, may have found something that makes the process of legislating easier or perhaps even more efficient, you have not dotted your I's and crossed your T's in the same way that we contemplated under Article I, Section 7, Clause 2, requiring bicameral passage and then presentment, and so this provision is invalid.

So let me ask the question: Is there also a role for the courts, can you foresee a role for the courts in other situations in which Congress, some future hypothetical Congress, might do something different that would prove easier and more efficient, but perhaps in a way that is antithetical to the Constitution?

For instance, let us suppose that Congress, when legislating on the delicate and pressing issue of maintaining the proper records in the dog-breeding industry, since we are talking about Federal legislation, these would, of course, be dogs either moving in commerce or taking advantage of some channel or instrumentality of interstate commerce, but a law in which Congress just passes a law saying we are outsourcing, we are delegating the authority to regulate dog breeding and recordkeeping for purebred dogs to the board of directors of the American Kennel Club. That passes both Houses of Congress. It goes to the President. It is signed into law, and we then have outsourced the regulation of this practice to the American Kennel Club. Is that a situation in which you can anticipate the Court might step in?

Justice SCALIA. Well, I would step in. I do not know if the Court would. I was the dissenting vote in the first case involving the constitutionality of the Sentencing Commission. I hate to mention this with my friend Stephen here since he was on the Sentencing Com-

mission. When Congress created a Sentencing Commission with no other function than to decide how many years everybody should spend in jail because, presumably, Congress did not have the time to figure it out for themselves, I did not think that that was constitutional. So I am sure I would not like your dog-breeding body either. But I cannot speak for the Court. I do not know what the Court would allow.

Senator LEE. But for you personally looking at it, notwithstanding the fact that it is more efficient, notwithstanding the fact that you do have bicameral passage and you have presentment of this hypothetical law, the problem is that you have delegated the lawmaking power.

Justice SCALIA. Exactly.

Justice BREYER. You have to be careful because John Jay—I just read this in John Stevens' book. It is pretty good. In the first chapter, he says John Jay, first Chief Justice, and George Washington went to him and said, "I have a lot of questions here. I do not want to do anything unconstitutional. Here are a bunch of them. Will you answer them?" And John Jay said, "No. No advisory opinions. I am not giving any"—but the real reason, of course, is he did not know the answer.

Senator LEE. And he was right. And his tenure on the Court proved to be short-lived, in any event.

Justice SCALIA. Now, the situation you pose is quite different, of course, from your leaving it to an agency to—

Senator LEE. How is it different then? How do those differ?

Justice SCALIA. Well, because when you leave it to an agency, you are giving it to the executive. The executive can make rules. You cannot run an executive operation without making rules. The doors open at 8 o'clock. If you are running the Interior Department, say that no fires are allowed on public land, or that private cattle can be grazed on it. It is up to the agency to make rules. But there is an obstacle that discourages you from giving too much power to the executive agency because you are increasing the power of the President—your competitor, the President. You know, the separation of powers with different branches competing. And there is no such disincentive when you leave it to this private group that you are talking about. That is just a pure delegation of legislative power. You are not authorizing an executive to act like an executive, but you are delegating legislative power to a group that has no executive responsibilities.

Senator LEE. So the difference, you would insist, is based on the fact that this is an executive branch agency, which at least in theory is subject to the disposition, subject to the control, to the direction of the Chief Executive?

Justice SCALIA. I think that is right. We are talking here about the doctrine of unconstitutional delegation of legislative authority, which is a bad name for it because there is no such thing as a constitutional delegation of legislative authority. You cannot delegate legislative authority.

Now, when you give rulemaking to an agency, how far can you go? Can Congress just get together and say the President can do anything he wants and adjourn? Of course not. That has to be unconstitutional. But is it up to the courts to decide where the line

is drawn between giving enough authority to the Chief Executive and too much authority? It is simply a non-justiciable question, and I for one would not apply—would not let the courts apply the doctrine of unconstitutional delegation where the delegation is to the executive.

Senator LEE. As long as it is to the executive branch agency, then even—

Justice SCALIA. I would not get into it. Some of my colleagues would, I suppose.

Senator LEE. Even in the extreme situation where we passed a law saying, for example, we shall have good law, the power to make good law is hereby delegated to the Department of Good Law, which is hereby created?

Justice SCALIA. Oh, you got me. I would do that one. All right. But that is not going to happen.

Justice SCALIA. I am talking about any real situation. I cannot imagine my sticking my toe in that water.

Senator LEE. Okay. Okay. And, Justice Breyer, I had a question for you. I have really enjoyed reading parts of your new book, “Making Our Democracy Work.” It is very well written and fascinating. I think it is good reading for any law student or lawyer or American who wants to learn more about the system.

You suggest in your book at page 126 that there is rarely an easy answer to the question of what level of Government should be primarily responsible for helping to resolve the problems that potentially call for legislation and that the question usually turns on empirical information such that facts help determine the answers.

You go on to explain on pages 125 and 126 that very often this means that the courts ought to step aside and, if I am understanding you correctly, have Congress more or less decide the precise contours of the boundaries of federalism. Am I understanding the book correctly in that regard?

Justice BREYER. Yes, that is right. You go into the abstract, but if you start talking abstractly, the trouble is you can characterize any individual situation usually in 15 different ways at different levels of abstraction. And depending on how you characterize it, it will seem appropriate for a Federal answer, or it will seem appropriate for a State answer or local answer. Is it a police department problem? You say, well, it is arresting somebody; yes, yes, but you are arresting him for having guns. Well, it is a State problem. Well, but the guns are torpedoes and they are only made internationally. You know, and so that is so complicated and difficult that it is hard for the courts to find a general principle there. That is my point there.

Senator LEE. So if that is the case and if it is also the case that, as we are reading Federalist No. 45, the powers of the Federal Government are few and defined, whereas those of the States are numerous and indefinite and Members of Congress should read the Constitution, decide what those contours are, and restrain ourselves rather than waiting for the courts to step in and say, no, you have overstepped the bounds—

Justice BREYER. My point that I was making there is you are elected by officials in a State, and so you will make such judgments on such matters as you believe are appropriate in light of how peo-

ple—partly how they feel and partly what you are trying to represent, but a lot of that is your decision.

Justice SCALIA. Senator, of course you have to make those constitutional decisions. You take the very same oath that I take. The only reason I can look at a Federal statute and say I have to disregard this because it does not comport with the Constitution, the only reason is that I have taken an oath to uphold the Constitution. You take the same oath. And we give deference to legislation on the assumption that the Members of the Senate and of the House have tried to be faithful to their oath. And if indeed they are not even looking at or even thinking about the constitutionality of it, that presumption should not exist. So, yes, of course, you—

Senator LEE. So in that respect and to that degree, our oath to uphold the Constitution, our commitment not to overstep the bounds of federalism means more than simply doing that which *NLRB v. Jones and Laughlin Steel* or *Wickard v. Filburn* might say that we can get away with in court.

Justice SCALIA. Well, I think you have to make your own decision about constitutionality. In normal times you follow what the Supreme Court law has said. But we do not strike down any of your laws. People sometimes say, “It got struck down.” We never strike down your laws, gentlemen. We just ignore them.

Justice SCALIA. Where your law does not comport with the Constitution, it seems to be a law but really is not, and so we ignore it and apply the rest of the law, the statute notwithstanding, as one of our early cases put it. But it is really you—you have the first cut, and the most important cut.

Senator LEE. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Next we will go to Senator Blumenthal, and I thank you again for letting Senator Durbin go out of order.

Senator BLUMENTHAL. Thank you. Thank you, Mr. Chairman, and thank you for having this hearing. Thank you, Justice Breyer and Justice Scalia, for spending so much time with us and having so much patience with our questions.

Before coming here—and as you may know, I am one of the more junior Senators—I was Attorney General of the State of Connecticut—I did not have the honor of knowing Mr. Root—for about 20 years, and the highlight of those 20 years was the cases that I argued before your Court, so I have been waiting for the day—

Justice SCALIA. This is payback?

Senator BLUMENTHAL [continuing]. When I could interrupt you as mercilessly and relentlessly as you did me.

Senator BLUMENTHAL. And give you as hard a time. But, fortunately, in those cases—I think there were four in all that I argued—you decided the right way, so I am going to avoid the temptation. But I was very impressed and moved by your explanation as to why you think it is so important for the public to understand and appreciate what judging is and what role it plays in our system. And I agree with you totally that not only is there the need, but there now is the lack, really, of that understanding.

And so I guess I say as not only one who has argued but also as a former law clerk who sat through a year of arguments and

learned so much about the system in that process, why not open it to video recordings? Why not in the Federal courts give the public the benefit of seeing it firsthand in your Court and other Federal courts and so appreciate really the quality as well as the diversity and the extraordinarily often excruciating difficulty of what you do?

Justice SCALIA. I will start. Senator, when I first came on the Court, I was in favor of—you are just talking about televising the arguments, right?

Senator BLUMENTHAL. Correct.

Justice SCALIA. Not the conference. You know, the Brazilian Supreme Court televises their conference.

Senator BLUMENTHAL. I would never presume or think of televising the conference.

Justice SCALIA. Thank you.

Chairman LEAHY. Nor would I.

Justice SCALIA. I was initially in favor of televising argument, but the longer I have been there, the less good an idea I think it is.

The justification usually put forward is we want to educate the American people about what the Court is and does. Now, if I really thought the American people would get educated, I would be all for it. And if they sat through a day of our proceedings gavel to gavel, boy, would it teach them a lot. They would learn that we are not most of the time looking up at the sky and saying, “Should there be a right to this or that?” but that we are doing real law, the Bankruptcy Code, the Internal Revenue Code. People would never again come up to me and ask, as they sometimes do, “Justice Scalia, why do you have to be a lawyer to be on the Supreme Court? The Constitution does not say so.” No of course it does not. But 99 percent of what we do is law. It is stuff that only lawyers can do. And if the people would learn that, it would be a great piece of education.

But for every ten people who sat through our proceedings gavel to gavel, there would be 10,000 who would see nothing but a 30-second outtake from one of the proceedings, which I guarantee you would not be representative of what we do. So they would, in effect, be given a misimpression of the Supreme Court. I am very sure that that would be the consequence, and, therefore, I am not in favor of televising.

Senator BLUMENTHAL. But it would for high school students or even middle school students and for the general public who were interested in an important and pertinent case provide a means for them to see what right now only a very limited audience can view because of the size of the Court.

Justice SCALIA. Yes, but for those who are interested in it for those intellectual reasons, surely the tapes are good enough.

Senator BLUMENTHAL. Well, the tapes, with all due respect—and I understand your argument—do not convey in the same way with as much interest the kind of debate, the back-and-forth, the visual sense of the action in Court, and I know and you know really how dramatic it can be.

Justice SCALIA. Yes, well, we just sit there like nine sticks on chairs. I mean, there is not a whole lot of visual motion. There really is not. It is mostly intellectual motion. That is all I—

Senator BLUMENTHAL. Well, I can say it certainly is gripping if you are answering questions.

Senator BLUMENTHAL. Justice Breyer, do you have a different view.

Justice BREYER. Sort of, a little, but it is that we are conservative. And you would be too, if you were there. The Court has lasted the country well and served the country well over a long period of time. We are there for a short time. We are trustees. And we do not want to make a decision that will be non-reversible and hurt the Court. So you start there. And then sometimes I think—you know, when we had the term limits case out of Arkansas, I just wish people could have seen that. It was such a good case. You had Jefferson and Story on one side and Madison and Hamilton on the other side, and it was the term limits. And what you saw is everything evenly balanced with the precedents and are the—I will not go into the case, but if they could have seen that across the country, people would have been able to see in that oral argument nine individuals struggling with a really difficult and important constitutional question. That would have been good for the Court and everybody.

All right. So what is the problem? Well, one problem is that we are a symbol, and if it were us in our Court, you could probably be in every criminal case in the country, and you would get rid of what? What would we do with jurors? What about the criminal witnesses, et cetera? And you do not know what happens with symbols. Or would people come up with a misimpression, namely, the oral argument is 5 percent of the case, 3 percent of the case. It is really done in writing, and they do not see that. And, more importantly, people relate to people. You relate to people. I do. When you see them, they are your friends or not your friends, or whatever. But we are making decisions that are there to affect 309 million people who are not there. And in our minds, we have to take those 309 million into account. And will that come across?

And then there is the problem that Justice Scalia mentioned, which is, Nino says quite right, you know, you can make people look good or you can make them look bad, depending on what 30 seconds you take, and it is already cult and personality, and let us not make it worse. We wear black robes because we are speaking for the law, not for ourselves as individuals, and that is a good thing.

So add those up, and you say I do not know. I would like to know more. I really would. There are places that have it and do not have it. There are courts that have it and others that do not have it. There is Canada that has it. There is California in some situations. You have a hundred different situations in respect to that. Why can't we get some real information, not paid for by anybody that has an interest in this, but Pew or some of the foundations, and see what happens to attitudes, to judicial attitudes, to others.

So what you are getting, I think—and maybe eventually, you know, it is going to be there is no other way to see things but visually, and everybody is doing that, and then it will not even—it

will just seem weird, what we do now, and it will all change. But before that time, I think—it is a little boring, but I think information is something that would make me easier. And until I become easy about it, until we become reasonably convinced that will not hurt the institution, you are going to get a conservative reaction. That is what I think is the truth of it.

Justice SCALIA. Senator, it may be unfair to put this question to you since you are such a youngster here, but do you really—

Senator BLUMENTHAL. That is the best thing that has been said about me in a long time.

Justice SCALIA. Do you really think the process in the Senate has been improved since the proceedings have been televised?

Senator BLUMENTHAL. Well, just as you took a pass earlier—

Senator BLUMENTHAL. I think that there are mixed views, but in general, I think that openness and transparency improves institutions. And for all the reasons that you have so eloquently talked about your role in educating the American public, I think that an audio and visual recording of Supreme Court proceedings would potentially do the same. And I think that whatever the result of televising Senate proceedings—and I was only facetious when I said I would take a pass—I do think that it has been a step in the right direction of providing more transparency and disclosure and understanding on the part of the public.

Now, I will let you and the public be the judge of how it views us, but I think in general Americans should understand the challenges as well as the role that their institutions face. And since my time has expired, I want to thank you again for being here, and I am not at all dismissive of the points that you have made. On the contrary, I have great respect for them. But perhaps we can provide you with some more information that would be persuasive in the advantages and the positives in those kinds of greater availability or accessibility.

So thank you for being here today, and I also want to thank you for raising the issue of State courts, because I am one who has spent a lot of time in State court. You often have to consider the results of State courts, and all too often, we in this body fail to understand how integral the State courts are to dispensing justice in this country.

Thank you.

Chairman LEAHY. Thank you very much.

Senator SESSIONS, you have been waiting patiently.

Senator SESSIONS. Thank you, Mr. Chairman, and I thank both of you for attending and your good comments and insight. I hope the young people have appreciated this.

I would say to the young people, having traveled around the world in this role for a number of years, we have the greatest legal system in the history of the world. We really do. It is a marvelous thing of inestimable value to this republic. People can rely on fair dealing in court. They can invest large amounts of money. They can place their liberty at risk and feel like consistently they are getting a fair day in court.

I practiced virtually full-time before Federal judges as United States Attorney and Assistant United States Attorney for 14 years, and when I had the law on my side, I almost always won. The rul-

ings were for me. If the law was not with me, I lost. I think that happens in courts pretty much all over America, and judges try to do that.

Justice SCALIA, I do believe it is law, and it does take a lawyer some time to dig through these matters and understand the precedent. But I guess what I would say is the American people do care. They have a high opinion of the Court. They believe that you should follow the law. And the greatest threat to the Court, in my opinion, is if the American people believe that judges are consistently redefining the meaning of words to advance their agenda, their views, whether conservative or liberal, and that law is not the essence of what you do. And that is just my own observation from the political world and the legal world.

With regard to Senator Graham's comment, I think there is an area which we can respect as to the more activist or the more living constitutional view of the Constitution. But if it goes beyond that, in my view the judge should not be confirmed. The nominee should not be confirmed. I have to know that when they say that they understand they will serve, as the oath does, under the Constitution and under the law, that they are willing to comply with that. So that is how we wrestle with these issues, and each Senator has a different standard.

Justice SCALIA. You do not scare me, Senator.

Senator SESSIONS. No. Professor Van Alstyne made a speech to the 11th Circuit one time, and he said, the essence, what he called on the judges to do was, in his view, to enforce this Constitution. He concludes with, "We established this Constitution for the United States." And he said, "The good and bad parts, whether you like it or not, in the long run that document will be stronger and a greater bulwark if the courts enforce it as it is written, this Constitution." Would you agree with that? I will ask you both just to discuss that point.

Justice SCALIA. Yes, sir, I certainly do agree, and I think—I have said this in some talks—I think that the—what shall I say?—controversial nature of recent confirmation proceedings is attributable, to some extent, to the doctrine of the living Constitution. When you indeed have a Supreme Court that believes that the Constitution means what it ought to mean in today's times, it seems to me a very fair question for the Senate to ask or for the President to ask when he selects the nominee: What kind of new Constitution would you write? You know, do you believe this new right is there or this old right is not there? It seems to me it is much less important whether the person is a good lawyer, whether the person has a judicial temperament. What is most important is what kind of a new Constitution are you going to write? And that is crazy. I mean, that is like having a mini-constitutional convention every time you select a new judge.

So, you know, I am hopeful that the living Constitution will die, and—

Justice BREYER. I know what you said, of course I agree with that. It is this Constitution. I said "Constitution" because I want you to think of John Marshall's famous words. "It is a Constitution that we are expounding." And he is thinking that that document has to last us for 200 years. And as I say, that does not mean you



change the words. But the hardest problem in real cases is that the words “life, liberty, or property” do not explain themselves, “liberty,” nor does “the freedom of speech” say specifically what counts as the freedom of speech. And, therefore, there is a job, and lower court judges come to different conclusions on the same difficult question of what happens when you are on the Internet and you reveal somebody’s personal information and then it is picked up in a newspaper and how does the freedom of expression invade there? Does it extend to that invasion of something the person would like to keep personal? And does it depend on who he is, da, da, da? In other words, it is very complicated. And trying to apply this Constitution with those values underlying the words, to circumstances that are continuously changing, is not something that can be done by a computer. Neither of us thinks that. No one thinks that. And, therefore, it calls for human judgment, and as soon as human judgment enters the picture, fallibility is possible.

And then some of us think that, oh, but by really reading that history carefully, we can get answers, and beware of the judge like me, all right, who tries to look to see what are circumstances now and how does it fit today, because there is a risk with me that unbeknownst to me myself, I will become too subjective and will tend to substitute what I think is good for the Constitution as it was written and intended to apply. And what I say is, yes, you are right about that, and all I can do is be on my guard, write my opinions, try to look to objective circumstances.

And I see the opposite danger. The opposite danger is called rigidity. The opposite danger is interpreting those words in a way that they will not longer work for a country of 308 million Americans who are living in the 21st century, work in the way those Framers would have wanted them to work had they been able to understand our society. And all that is in those words. It is a Constitution we are expounding.

Senator SESSIONS. Well, do you do polling data or do you have a hearing to determine whether it will work or not like Congress does? Or do you just—

Justice BREYER. What do you do? I mean, you have to look at the examples there. What is a good example where we did not agree? I mean, you know, there are cases when you say, “Will it work?” What you are doing is looking to what are the free speech consequences? We had a case where somebody took a tape recording of something that was in the public interest but it involved somebody’s personal conversation, and then threw it over the transom into a newspaper. And they printed it, and there was a law saying you could not wiretap to get that information. And how did that all fit within the framework of free expression?

And so what you try to do is try to see what are the risks to the expression, what are the expectations of the individual, and you have 42 briefs filed that are helping you on that. So I said that—

Justice SCALIA. Those are new phenomena, Stephen. We are not talking—you and I do not disagree very much on new phenomena.

Justice BREYER. You see, he is right with me on that. I do not know why he did not join my opinion.

Justice SCALIA. On new phenomena you have to calculate the trajectory of the First—let us take as an example the First Amend-

ment, the freedom of speech. It was absolutely clear when the people ratified the First Amendment that libel was not part of the freedom of speech, and that included libel of public figures such as you gentlemen. But the Supreme Court in a case called *New York Times v. Sullivan*, a marvelous example of the living Constitution, just decided it would be a good idea if there were no such thing as libeling a public figure so long as you have good reason to believe the lie you tell about him.

Now, I think, Who authorized the Supreme Court to change the law? That may indeed be a very good rule, and the people are free to adopt that rule by legislation. New York could have amended its laws to eliminate libel for public figures. So do not charge the prior system with inflexibility. What is inflexible is the inability now to change the libel law that the Supreme Court has instituted throughout *New York Times v. Sullivan*. It may be a good law, it may be a bad law, but you cannot change. Nobody can change it. I guess we can change it.

Senator SESSIONS. Mr. Chairman, could I just thank both of these witnesses for their great comments? I would note, Justice Breyer, that I voted for well over 90 percent of President Obama's nominees, but I do think we have a range in which if you believe they are too flexible about interpreting the Constitution, then I would conclude they are not faithful to the Constitution and, therefore, I could not support them, even though they may be wonderful, decent people, intellectually gifted in that regard. And one of my standards is a death penalty case. Any judge that says the U.S. Constitution calls for the elimination of the death penalty really should not be on the bench. At least they will not get my vote for the bench.

But we all have individual standards, and we wrestle with that. But all in all, we have got a great judicial system. I congratulate you.

Justice SCALIA. Thank you, Senator.

Justice BREYER. Thank you.

Chairman LEAHY. I am resisting a temptation.

Senator Whitehouse will be our last person to question. I cannot thank the two of you enough for being here, and I will say something after he finished.

Senator Whitehouse.

Senator WHITEHOUSE. Gentlemen, let me join the Chairman in thanking you for being here. As two individuals who have been here for the confirmation process, I am impressed that you are willing to return.

Justice SCALIA. It was not bad for either of us, I do not think.

Senator WHITEHOUSE. It has gotten livelier.

We have talked a lot today about the role of the judiciary in the larger American system and architecture of Government, and I wish you would say a few words about the role of the jury within that architecture and whether or not you see the jury as just a little piece of fact-finding machinery for dispute resolution or whether the Founders and you saw and see a larger role for it as a political, small "P," institution in our system of Government. Is it an important piece of our governmental architecture as well as opposed to our dispute resolution system? And if so, how?

Justice SCALIA. Absolutely is, which is why it is guaranteed in the Bill of Rights in criminal cases and, indeed, in all civil cases at common law involving more than \$20. The jury is a check on us. It is a check on the judges. I think the Framers were not willing to trust the judges to find the facts.

Indeed, you know, at the beginning, or when the Constitution was ratified, juries used to find not only the facts but the law. And this was a way of reducing the power of the judges to condemn somebody to prison. So it absolutely is a structural guarantee of the Constitution.

Senator WHITEHOUSE. Justice Breyer.

Justice BREYER. Yes, I think it is very important. I have never been a district judge. I was an appeals court judge. But my brother is a trial court judge, and I was there a while ago in San Francisco, and he said, "I want you to see me select a jury. You should not go through your"—I was on a jury in Massachusetts, actually. I got selected. But he said, "You should not go through your life without seeing that." And he said, "Congratulations," at the end. "You and Justice Sotomayor now know how to select a jury. At least a little."

All right. I saw a morning pass which was just terrific. You take 12 people randomly from that community and two alternates, and by the time they are finished, they are thinking that the future of this individual who is the defendant is all likelihood in our hands, and they take that because of the instructions and the way the lawyer behaves as a very, very, very serious matter. And they are participating, they are part of the Government of the United States. And you begin to think, you know, it is really a wonderful thing that before you deprive a person of his or her liberty, you go through this process where the community is brought in as really judges of the facts.

So they are not just a fact-finding machine. This is a way of saying to people in a community, it is all of you in this democratic system who will participate in this terribly important matter, a matter of depriving an individual of his freedom. And just listening to the instructions and noticing the jury's reaction, they take that in.

And I saw the same thing in the courthouse in Boston where a room is set aside for that, and they have things for people to read in that room, and the judges talk to them in a way that when the person comes away from the jury—and I think most of them do—they are very proud to have participated as a citizen in this exercise of application of community power.

So I find that partly fact-finding, partly showing people how they, too, are part of the Government of the United States in its most important processes, and a way of overcoming isolation and bringing an entire community into the legal process. A very good thing.

Senator WHITEHOUSE. At the time that the Constitution and Bill of Rights were adopted, my understanding is that the Founders also had a fairly skeptical view of Governors. The colonial Governors had shown considerable arrogance and high-handedness. They were skeptical of assemblies. Thomas Jefferson had described the Virginia Assembly as, I think, 207 tyrants replacing one, and that was not a big improvement. I probably have the number wrong. And I wonder if the stature of the jury in the architecture

of American Government could not just be as a check on judges, but also as sort of the last bastion where somebody who is put upon or set upon by political forces can get away from the political forces that most lend themselves to corruption, governors, assemblies, and get themselves before a random group of their peers if the case is right, and that it has a slightly larger significance than just as a check on you all, it is also a check on all of us and the rest of the system of Government?

Justice SCALIA. Well, I think that is probably right if you believe that jurors can ignore the law where they think that in this case the law is producing a terrible result—they do that sometimes, I am quite sure. And that makes them a check not just on the judges but, of course, on the legislature that enacted the law to apply in this particular situation.

I am a big fan of the jury, and I think our Court is, too.

Senator WHITEHOUSE. Let me ask a final question about—you know, the jury has this fact-finding role. What is the role of a court of final appeal with respect to fact finding? And hypothesize that you have a case in front of you from a State Supreme Court, and the State Supreme Court has indulged in fact finding at the Supreme Court level. What standard of review or deference do you as the United States Supreme Court accord findings of fact that have been indulged in by a State Supreme Court that is before you—whose decision is before you on review?

Justice SCALIA. You mean the State Supreme Court has overruled the jury's finding of fact, or just—

Senator WHITEHOUSE. It has just made a finding of fact in the course of its discussion. It does not have a record to support it, so that is not the issue. Do you credential that at all or is that by the boards?

Justice SCALIA. I think if it is a criminal case that somehow is being appealed to us for a violation of a Federal constitutional provision, and if the State Supreme Court has made a finding of fact that is not supported in the record, and if that finding of fact is crucial to the conviction, we would set the conviction aside. Would we not set the—

Justice BREYER. There is a rule that says if there are two lower courts that hold a particular finding of fact, we will not go into it further. It is an area that I sort of noticed over time, like finding facts we are particularly bad at. You have nine people and to try to get people to read this enormous record and come to a conclusion, we are just not very good at it. And so we have a lot of rules. So you can never say never. You never say never about anything. But, by and large, we stay away from the fact finding.

Senator WHITEHOUSE. Well, as the last Senator, I stand between you and the exits, and I will not trespass on your patience with us further. Again, I do appreciate very much that you have returned to this chamber and shared your thoughts with us this afternoon.

Justice SCALIA. Thank you, Senator. I think both my colleague and I have enjoyed it—to our surprise, I might add.

Justice BREYER. Yes, we did enjoy it.

Chairman LEAHY. You know what? One, I appreciate you accepting the invitation, and I will put into the record the letter from the

Chief Justice, what he was saying very approvingly of these hearings.

[The letter appears as a submission for the record.]

Chairman LEAHY. I think I can speak for all the Senators here in both parties. This means a lot that you did this. What I hope it means, too—and I look at the students here, but I hope high schools will look at this, I hope colleges will look at this, not just law schools—that is why we have streamed it. We have made a copy and everything else. We are in a Nation where too many times people look for a bumper sticker solution to everything, I do not care on the right or the left. Things are a little bit more complex than that, and a sense of history never hurt anybody. The two of you have given us a sense of history. I applaud you both for that.

If there is nothing further, we will standing in recess.

Justice SCALIA. Thank you, Mr. Chairman.

Justice BREYER. Thank you.

[Whereupon, at 4:54 p.m., the Committee was adjourned.]

[Submissions for the record follow.]

**SUBMISSIONS FOR THE RECORD**

**Statement Of Senator Patrick Leahy (D-Vt.),  
Chairman, Senate Judiciary Committee,  
“Considering The Role Of Judges Under The Constitution Of The United States”  
October 5, 2011**

I welcome Justice Scalia and Justice Breyer back to the Senate Judiciary Committee. We are honored to have you with us today. We are also joined by scores of students and other Americans attending this hearing and following these proceedings over the Internet and on television who are interested in hearing what I hope will be a civic-minded conversation about the role of judges under our Constitution.

I believe that public discussions like this serve our democracy. As public officials, we owe it to all Americans to be transparent about what we do in our official capacities. We justify their trust by demonstrating how our Government works to uphold our common values, how we are guided by the Constitution, and how that Constitution has served over the years to make our great Nation more inclusive and more protective of individual rights in our continuing effort to become that “more perfect union.” As the great Chief Justice John Marshall acknowledged many years ago, our Constitution is “intended to endure for ages . . . and consequently, to be adapted to the various crises of human affairs.”

In recent months, there has been renewed focus on our Constitution. Almost every week, I open the newspaper or see an electronic posting that involves some radical invocation of the Constitution that differs from what I was taught at Georgetown Law many years ago. It could be someone suggesting that Congress should just get rid of dozens of judges if that strikes our fancy, or it might be the assertion that the three branches of our Federal Government are not of equal importance under our Constitution. Or even the assertion that our fundamental charter was drafted solely to limit the Federal Government’s ability to solve national problems. These comments show the need for more opportunities to increase understanding of our democracy. That is what gave me the idea to invite some of the Nation’s leading jurists to speak with us today about the role that judges play under our Constitution.

Both Chief Justice Roberts and Justice Scalia have remarked that the fundamental genius of the Constitution is its separation of powers. The legislative, the executive, and the judicial branches each have different powers and are limited or checked by the other branches. The three branches interact frequently. We recently observed the 222<sup>nd</sup> anniversary of congressional enactment of the first Judiciary Act, establishing the Supreme Court and Federal judiciary. We in the Senate have an obligation to provide our advice and consent to the President to fill a growing number of judicial vacancies. On this Committee, we are working diligently to address the serious judicial vacancy crisis that the Chief Justice highlighted in his most recent annual report. This Committee also works to pass legislation recommended by the Judicial Conference of the United States in order to help the third branch operate fairly and efficiently. Congress also appropriates resources to fund the important work of our independent judiciary.

The judicial branch, including the Supreme Court, decides cases to resolve controversies in accordance with the rule of law. The judiciary is called upon to interpret and apply statutes passed by Congress to specific disputes, and to review acts of the other branches to determine

whether those acts violate the Constitution. On rare occasions, court decisions can be overturned with legislation or with an amendment to the Constitution.

Four years ago, I invited Justice Anthony Kennedy to appear before this Committee to discuss judicial security and judicial independence. That appearance renewed a tradition of Justices testifying before Congress on matters other than their appropriation requests, a tradition which included appearances by Chief Justice Taft and Chief Justice Hughes in the 1920s and '30s, as well as by Justice Jackson in 1941, among others. Justice Kennedy recognized that the Supreme Court's rulings would be debated and criticized but noted "that is the democratic dialogue that makes democracy work."

In furtherance of that democratic dialogue, this Committee has held several hearings highlighting the significant impact of recent Supreme Court hearings on hardworking Americans. This has been an effort to raise awareness about the relevance of the Court's cramped interpretations of laws that Congress enacted with the intent of protecting American workers, retirees, consumers, and small business owners.

Today's hearing is designed to have a different focus. Rather than examining recent or upcoming decisions of the Supreme Court, we will discuss the proper role that judges play in our democracy. In a time of increasing political rancor, some like to emphasize divisions as though they were between warring factions. Although the witnesses before us approach decision-making in different ways, they demonstrate a profound respect for each other. That is the example that the Ranking Member and I also strive to achieve in our work together on this Committee. The American people expect their Government to work for them, and that requires us to work together to uphold our national values. Despite different perspectives, we all need to work together to uphold the predictable rule of law where liberty and prosperity can thrive.

Judge Learned Hand said: "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women." It is this spirit that I hope will guide our discussion today.

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*Supreme Court of the United States*  
*Washington, D. C. 20543*

CHAMBERS OF  
THE CHIEF JUSTICE

September 28, 2011

Honorable Patrick Leahy  
United States Senate  
Chairman, Committee on the Judiciary  
Washington, DC 20510-6275

Dear Senator Leahy:

It was a pleasure seeing you at the Judicial Conference. I appreciate your faithful attendance at those meetings, and I know the assembled judges do as well.

Thank you for the kind invitation to appear before your committee on October 5. While I will not be able to join you at that time for your commemoration of the signing of the Constitution, I am grateful for your efforts to increase civic awareness about our Constitution. It is important work incumbent on all of us in public service.

With best regards,

Sincerely,



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