

know Julia's children Susie, Gabriel, Adolfo, and her grandchildren and great grandchild will be glad to be able to spend more time with her. As she begins her well-deserved retirement, I extend my best wishes to Julia and her family. Julia, for all you have done for me, and for all you have done for the people of New Mexico, you have my utmost respect and deepest gratitude. Thank you, for a job well done. We will miss those tamales at the office.

JUDICIAL PHILOSOPHY

Mr. HATCH. Mr. President I rise to make a few remarks about a matter relating to judicial philosophy that has been discussed by some during the course of this year in connection with the public debate over Supreme Court vacancies that have occurred this year.

Some have attempted to create a false conclusion by criticizing a school of judicial philosophy sometimes referred to as the "constitution in exile".

For example, earlier this year, my esteemed colleague from Delaware, Senator BIDEN, who, I understand, teaches constitutional law at the University of Delaware, entered into this debate. My friend from Delaware specifically asked us to reflect upon the judicial philosophy of one of our Nation's most respected Federal appellate judges, Chief Judge Douglas Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit.

I was recently in attendance at the DC Circuit for the formal swearing in of Judge Thomas Griffith and was once again impressed with the quality of jurists of this extremely important and influential court.

I commend Senator BIDEN for his support for the nomination of Judge Griffith.

As I will explain, I do take exception to some of the characterizations that the former chairman of the Judiciary Committee made about the views of Chief Judge Ginsburg.

The senior Senator from Delaware invited us to "read Judge Ginsburg's ideas about the 'Constitution in Exile'. . . [and to] read what Judge Ginsburg has written" about the "fifth amendment's taking clause, the non-delegation doctrine, the 11th amendment, and the 10th Amendment." Since the Chief Judge of the DC Circuit is one of our Nation's finest jurists, I welcomed this opportunity to acquaint myself with his opinions and writings. I was surprised and somewhat dismayed, then, to discover that this was such a short assignment.

Considering the sharp criticism by my Judiciary Committee colleague, Senator BIDEN, of Chief Judge Ginsburg's views as "radical," I was taken aback to discover how little he had actually written on the specified subjects.

It is no exaggeration to say that on most of these issues, Judge Ginsburg had written nothing of substance.

That being said, having considered what little he did write on these topics,

the characterization of his views as "radical" is, at best, a stretch.

If the research that I have seen is correct, Chief Judge Ginsburg has authored only two opinions that even refer to the takings clause of the Constitution. In neither did he decide the takings claim being presented.

In *Corporation of Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 381, DC Cir. 1987, Chief Judge Ginsburg, writing for the court, noted that "[t]he question of whether courts, as opposed to legislative bodies, can ever 'take' property in violation of the Fifth Amendment is an interesting and by no means a settled issue of law." He determined, however, that the court did not need to decide this issue. Similarly, in *City of Los Angeles v. United States Dept. of Transp.*, 90 F.3d 591, D.C. Cir. 1996, unpublished, Chief Judge Ginsburg, writing for the court, determined that the takings claims were not ripe for resolution.

Many of my colleagues have denounced ideological decision-making by judges who are eager to promote their own speculative constitutional understanding at the expense of the American people's traditional views. I actually think that is a fair description of judicial activism, and it is clear that Chief Judge Ginsburg has not engaged in it. Quite the contrary, in these cases where he declined the opportunity to reach for and resolve constitutional questions prematurely, he exhibited the moderation and prudence we should expect of our judges.

Similarly, Chief Judge Ginsburg does not appear to have written anything of significance on the tenth or eleventh amendments. In the one and only case in which he even mentions the tenth amendment, *Chenoweth v. Clinton*, 181 F.3d 112, D.C. Cir. 1999, Chief Judge Ginsburg, writing for the court, did not address the merits of the claim because the court had determined that the party lacked standing. As for the eleventh amendment, Chief Judge Ginsburg's "radical" contribution was to note, in *Brown v. Secretary of Army*, 78 F.3d 645, 653, D.C. Cir. 1996, that a case referred to by the appellant citing the eleventh amendment was inapposite to the case before the court. This is hardly the controversial statement in support of State sovereign immunity one would expect given my colleague's remarks.

So, as far as I am aware, Chief Judge Ginsburg has not written substantively on the tenth amendment, the eleventh amendment, or the takings clause. How then can anyone fairly conclude that Chief Judge Ginsburg has such radical views about the constitutionally limited powers of the national government? Perhaps some are reading between the lines and seeing emanations and penumbras that others do not discern.

The only topic singled out for criticism by my friend from Delaware that I could find was, in fact, substantively

addressed by Chief Judge Ginsburg is the non-delegation doctrine. In a 1995 book review of David Schoenbrod's "Power Without Responsibility", Chief Judge Ginsburg employed the term "Constitution-in-exile."

Apparently some liberal critics of the President's judicial nominees have seized on this expression, perhaps in the hope that it will scare the American people into fearing some super-secret rightwing led by wayward judges.

Of course, this is nonsense.

But it is worth noting that the many of the critics who talk today about the Constitution-in-exile have completely unmoored that term from Chief Justice Ginsburg's original formulation.

In an article in the journal *Regulation*, Chief Judge Ginsburg wrote the following:

[F]or 60 years the non-delegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. David Schoenbrod, "Power Without Responsibility: How Congress Abuses the People Through Delegation," *Regulation Magazine* (1995 No. 1) (Book Review), at 84.

He went on to explain that, "The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hopes of a restoration, a second coming of the Constitution of liberty—even if perhaps not in their own lifetimes." *Id.*

So two sentences equal a judicial scheme to advance substantive economic liberty and restrain Federal authority? For a careful reader, it is clear that Chief Judge Ginsburg promotes no such agenda. First, he was referring only to the non-delegation doctrine, the supposedly radical proposition that Congress, not unelected bureaucrats, should be responsible for making our laws. And second, Chief Judge Ginsburg was writing a book review, and his reference to those "few scholars" was obviously not a reference to himself because he had not written on this subject.

His point was that the author of the book he was reviewing was misguided in thinking that the Supreme Court was likely to put teeth back into the non-delegation doctrine. Far from arguing that courts should strip Congress of their authority to delegate its lawmaking authority, he suggested that it would be more productive to ask Congress to change the way it delegates lawmaking authority to administrative agencies. Chief Judge Ginsburg was Administrator of Information and Regulatory Affairs of the Office of Management and Budget during the Reagan administration. This is the office with in the Executive Office of the President charged with reviewing all Federal regulations. So Chief Judge Ginsburg has considerable experience and expertise in these matters.

In the referenced book review, Chief Judge Ginsburg endorses then-Judge

Breyer's suggestion that "[p]roposed regulations, or at least those that would impose a burden in excess of a specified amount, say \$100 million, would not take effect unless affirmatively approved by both houses of Congress." In this regard, I would note that Justice Breyer was one of the seminal thinkers in the field of regulatory reform and I would recommend that everyone read his 1982 book, "Regulation and Its Reform" in which he lays out a comprehensive analysis of, and suggestions for, regulatory reform.

In Chief Judge Ginsburg's speech, *On Constitutionalism*, published in the *Cato Supreme Court Review* in 2003, he articulates much the same position, stating that the separation of powers doctrine clearly indicates that "there must be a limit upon the ability of Congress to delegate lawmaking functions to the executive branch." *Id.* at 16. That is, the Constitution does seem to prohibit legislators from simply delegating their constitutional authority to legislate to an executive branch agency and then go home. Yet he also notes the Supreme Court's failure since the mid 1930's to find any act of Congress a violation of the non-delegation doctrine, demonstrating the High Court's reluctance to give meaning to the doctrine. So this is the view some have characterized as radical, the Constitution assigns the legislative power to Congress, and it violates the principle of separation of powers to have unlimited delegation of that law-making authority to executive branch agencies. Yet because the courts have been reluctant to adjudicate these arrangements, any remedy must come through political persuasion.

Chief Judge Ginsburg did join an opinion, the relevant part of which was written by another judge, in which the court held that the Environmental Protection Agency had interpreted sections of the Clean Air Act authorizing the national ambient air quality standards, NAAQS, for ozone and particulate matter so loosely as to render them unconstitutional delegations of legislative power. See *American Trucking Ass'n. v. EPA*, 175 F.3d 1027, 1034-40, D.C. Cir. 1999. More specifically, the court determined that it was unclear what in EPA's view was the "intelligible principle" the Congress had directed the agency to follow and no such principle was apparent to the court on the face of the act.

The court therefore remanded the cases to the EPA so that it could detail the principle limiting the agency's discretion. The full DC Circuit then denied the EPA's petition for rehearing en banc. See 195 F.3d 4, DC Cir. 1999. It is true, however, the Supreme Court granted the EPA's petition for certiorari and held that the act's delegation of authority to the EPA to set the NAAQS at the level "requisite to protect the public health", although broad, provided an "intelligible principle" for setting air quality standards and was therefore constitutional with-

out further delineation by the agency. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 473, 2001. But this is hardly the first time the Supreme Court overruled an appellate court and, in any case, is a pretty thin reed on which to reach a conclusion that the lower court decision represented a radical break with constitutional jurisprudence.

I encourage everyone to examine Chief Judge Ginsburg's writings pertaining to the takings clause, the non-delegation doctrine, and the tenth and eleventh amendments. A fair reading warrants a conclusion that there is nothing radical about his reasoning or conclusions. Chief Judge Ginsburg's writings on these matters are neither extensive nor extreme. Characterizing them as a "stark departure from current constitutional law" is not justified.

I also might add that the issue of non-delegation is not as black or white as many have come to believe in recent times. Some appear—including many advocates of the liberal welfare state administered by so many Federal agencies—to argue, contrary to the Constitution's clear commitment to limited government, that there should be little, if any, judicial oversight over congressional actions and claim that even modest judicial requirements that Congress act within its constitutional authority are radical changes to our law. It seems counterintuitive then that these same people argue for an unlimited congressional authority to delegate their lawmaking power to another branch of Government. On the one hand, Congress is all powerful. On the other hand, they can give that power away.

The record reflects that Chief Judge Ginsburg is a mainstream conservative judge, who applies the Constitution faithfully. He is no judicial radical. He is one of the most respected judges in the Federal judiciary. Suggestions to the contrary are not supported by the facts.

NOTICE OF CHANGE IN INTERNET SERVICES USAGE RULES AND REGULATIONS

Mr. LOTT. Mr. President, I am taking this opportunity to announce that in accordance with Title V of the Rules of Procedure of the Committee on Rules and Administration, the committee intends to update the "U.S. Senate Internet Services Usage Rules and Regulations."

Based on the committee's review of the 1996 regulations and the October 8, 2003 amendments to the regulations, the following changes to these policies have been adopted effective today, December 21, 2005. The changes primarily affect the activities of a Senator who is running for election, section C.

Set forth below are the updated Internet Usage Rules and Regulations:

A. SCOPE AND RESPONSIBILITY

1. Senate Internet Services ("World Wide Web and Electronic mail, BLOGS,

Podcasting, streaming media, etc.") may only be used for official purposes. The use of Senate Internet Services for personal, promotional, commercial, or partisan political/campaign purposes is prohibited.

2. Members of the Senate, as well as Committee Chairmen and Officers of the Senate may post to the Internet Servers information files which contain matter relating to their official business, activities, and duties. All other offices must request approval from the Committee on Rules and Administration before posting material on the Internet Information Servers.

3. Websites covered by this policy must be located in the SENATE.GOV host-domain.

4. It is the responsibility of each Senator, Committee Chairman (on behalf of the committee), Officer of the Senate, or office head to oversee the use of the Internet Services by his or her office and to ensure that the use of the services is consistent with the requirements established by this policy and applicable laws and regulations.

5. Official records may not be placed on the Internet Servers unless otherwise approved by the Secretary of the Senate and prepared in accordance with Section 501 of Title 44 of the United States Code. Such records include, but are not limited to: bills, public laws, committee reports, and other legislative materials.

B. POSTING OR LINKING TO THE FOLLOWING MATTER IS PROHIBITED

1. Political Matter

a. Matter which specifically solicits political support for the sender or any other person or political party, or a vote or financial assistance for any candidate for any political office is prohibited.

b. Matter which mentions a Senator or an employee of a Senator as a candidate for political office, or which constitutes electioneering, or which advocates the election or defeat of any individuals, or a political party is prohibited.

2. Personal Matter

a. Matter which by its nature is purely personal and is unrelated to the official business activities and duties of the sender is prohibited.

b. Matter which constitutes or includes any article, account, sketch, narration, or other text laudatory and complimentary of any Senator on a purely personal or political basis rather than on the basis of performance of official duties as a Senator is prohibited.

c. Reports of how or when a Senator, the Senator's spouse, or any other member of the Senator's family spends time other than in the performance of, or in connection with, the legislative, representative, and other official functions of such Senator is prohibited.

d. Any transmission expressing holiday greetings from a Senator is prohibited. This prohibition does not preclude an expression of holiday greetings at the commencement or conclusion of an otherwise proper transmission.

3. Promotional Matter

a. The solicitation of funds for any purpose is prohibited.

b. The placement of logos or links used for personal, promotional, commercial, or partisan political/campaign purposes is prohibited.

C. RESTRICTIONS ON THE USE OF INTERNET SERVICES

1. During the 60 day period immediately preceding the date of any primary or general election (whether regular, special, or runoff) for any national, state, or local office in which the Senator is a candidate, no Member may solicit constituent input or inquiries (such as online petitions or opinion polls or issue alerts) using a Senate Internet Server ("World Wide Web and Electronic mail,