American Constitution Society Symposium on Judicial Nominations
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Thank you for your invitation to speak here today, on the Obama Administration and Judicial Nominations in 2011.

I have been free to make of this topic what I would—my hosts kindly did not specify any particular interpretation of or approach to the topic. This, then, is what I propose to do: to lay out what I hope we can accomplish this year, in cooperation with the Senate, against the history of the last two years' experience with judicial nominations.

What I will not do is rehearse the familiar litany of complaints about the nomination and confirmation process. There is plentiful commentary on the subject, some part of which is learned and useful, and some part of which is the now dreary exchange of accusations about who is behaving badly. Or, my favorite: the charge that someone behaved badly *first*, this apparently being enough to lessen the culpability of the person who was only the second to behave badly.

The facts speak for themselves and require little rhetorical embroidery. Here are essential ones, and as participants in sports debates like to say: you can look it up.

The confirmation rate is perilously low, and one result is the large number of seats designated as judicial emergencies. More than one half of the nominations now pending in the Senate are judicial emergencies—the state of emergency being that, by the standards of the Judicial Conference, the cases filed exceed the capacity of the court system to absorb them.

The vacancy rate overall has come to hover around a historic 12%. This is twice the more or less structural rate—more than twice the 5% rate that we might expect in the normal course as seats become vacant by resignation, retirement or death.

And yet we have nominees who waited historically long periods for a vote. There are now a total of 49 nominees before the Senate, nominated in the last Congress and now re-nominated, or nominated for the first time just this last week.

The Chief Justice of the United States has taken appropriate note, correctly stating that the underlying problem has persisted for many years, and the need to address it has become, in his words, "urgent".

This Chief is the second to take up the call against this breakdown in the nominations and confirmations process: Chief Justice Rehnquist did the same, in l997, and for him, the consequence was a growing, unattended judicial workload, and the threat it presented of an erosion in the quality of justice.

And over time these concerns have been registered by a range of task forces and special commissions, like the Miller Commission in l996 which opened its report by stating: "[T]he federal judicial system continues to be plagued by a troubling accretion of unfilled judicial vacancies, delays in the appointment process, and backlogs of pending appointments."

The effect of this state of judicial emergency is predictable and it is pernicious: a massive backlog of cases, causing egregious delays for Americans seeking their days in courts around the country. Trials are delayed for months; some courts lacking the necessary capacity have had to outsource portions of their caseload to others; and individual judges on courts with numerous vacancies have had to take on hundreds and sometimes more than a thousand more filings.

What is most striking, what is most disturbing, about this state of affairs is the general absence in the political sphere of that sense of urgency expressed by the Chief Justices. There are exceptions, to be sure: Senator Leahy, the Chairman of the Judiciary Committee, has spoken forcefully and eloquently to this problem, and his concerns are certainly shared by the Democratic Leadership. But I have noticed in recent months, in the course of my conversations with Members, that this concern is spreading, and it is by no means limited to one side of the aisle. Republicans as well as Democrats increasingly acknowledge—some publicly, some privately—that we are witnessing something profoundly troubling.

It is true, as many have pointed out, that there are institutional and structural explanations for the woefully inadequate pace of confirmations. For example, the Senate Rules for all practical purposes permit a single Senator to freeze the process for any particular nomination in its tracks. We are all familiar with the laments about the procedural tools available to accomplish delay, or the means by which delay becomes the functional equivalent of fatal opposition.

These are all important in any discussion of the confirmation process, but they are significant largely as expressions of the problem—not its primary source. The problem, as I see it, is at once more subtle and more profound. It is the very climate now enveloping the confirmation process, a climate—many years in the

making—in which it is widely accepted that this the way things go and that the costs cited by the Chiefs are bearable.

Distinguish this climate from the charged one of highly contested, individual nominations. In the latter, we see proponents and opponents claiming that large consequences will flow from confirming—or rejecting—a specific nominee. This type of conflict is far from the subdued setting for the confirmation struggles of today. If it is a war—a trope I don't much care for—it is a cold and not a hot war.

Two examples of how today's broader climate manifests itself may be useful.

First, nominees left to languish on the floor for as much as hundreds of days without a vote are basically ignored, not put to the side in punishment for their perceived sins or shortcomings. It is a quiet blow to the process, but a heavy blow nonetheless. No shouting on the floor; simply nothing on the floor.
It is as if—and apparently to some—it does not matter.

But of course it matters a great deal—to the nominees, to the courts to which they were nominated to serve, and to the parties before those courts. Chief Justice Rehnquist quite rightly pointed to the grave loss in the quality of justice when we don't have enough judges for the cases to be decided. And it is a loss in the quality of justice when this very proposition—the proposition that we urgently need judges to have effective, responsive justice—draws a limited or intermittently attentive audience.

Second, in our selection of potential nominees and in our consultation with Senators, and in some cases Representatives, we have been forced to give up on qualified candidates, in part because the opposition has been expressed as a concern about quality or qualifications. But in my experience, those concerns, however strongly expressed, are all too often hard to pin down. Sometimes it is just a question of personal preference: the President has selected a candidate and a particular Member would have chosen differently. And this stalls progress on filling the vacancy. And if it stalls, well, it stalls—because, it seems, the delay *does not matter*.

This is a new world. A confirmation process once characterized by hard-fought battles waged around specific nominees has been more broadly disabled by steady resistance to moving nominees across-the-board, as a class. This can

happen, and it can only continue, if the effects are seen, somehow, not to matter very much. Or not to matter enough.

And, yes, each party can always suspect the other of partisanship, of simply cutting back one party's number of successful confirmations even where there is no great divide in any one case of competence or ideology.

But this is the point, is it not—that if this is acceptable, even in the absence of major disagreements about competence or ideology—if it is OK to keep the courts short of the judges needed to administer justice—then this only goes to show how the costs have become bearable, and how the loss in the quality of justice somehow *seems not to matter*.

One question raised from time to time is whether this Administration can do more to elevate the issue—to call more attention to this grave problem, from varying directions and in different ways. Be assured that we have made, and will continue to make the case, as the President did forcefully in his letter to Congress in October of last year. There he highlighted this "dramatic shift" in the confirmations process—a change, he stated, that could produce a "crisis in the judiciary." "If there is a genuine concern about the qualifications about judicial nominees," he wrote, "that is a debate I welcome. But the consistent refusal to move promptly to have that debate, or confirm those nominees with broad bipartisan support, does a disservice to the greatest traditions of this body and the American people it serves."

In this new Congress, we will continue to make this case for treating the confirmation of judges as the priority, the urgent priority, that it is—we will make this case from today through the end of this session and the next. And our goal is to do so in a way that sharply, clearly defines the issue; seeks to raise the sense of urgency; and calls on the good faith and shared commitment to our system of justice that can be found among Democrats and Republicans alike.

For our part, in the Administration, we continue to devote our energies to removing obstacles, and excuses, for delay. We have appreciated that the process by which nominations are made presents challenges of its own. As the citation to the Miller Center Report of some years ago reflects, this is nothing new, but we are not sanguine about it. Identification of the candidate, consultation with the Congress, coordination with the American Bar Association, and the ever-exacting

vetting process consume more time than they should. We have made adjustments. We will make more.

But the number of nominations in the last year has been steady: 71in 2010, an increase of 73% over 2009 for a total of 112 overall, and as I noted, some 49 now before the Senate. The Judiciary Committee hearing schedule is booked into the spring.

It is not for want of nominations that we do not have confirmations.

Now I appreciate that there are occasions where there are major differences over the jurisprudential outlook that one or the other nominee might bring to their post. Very often, these differences are absurdly overstated, and each side of the debate would do well to take up a measured stance on the true stakes in the choice. I understand that my wish here is unlikely to be granted, but we can always hang on to the slim thread of hope.

But eventually, after full and fair deliberations, a President's nominee should receive a vote. This principle goes to the heart of the advice and consent process—to the President's constitutional authority to nominate, and to the Senate's constitutional authority to give or withhold consent. Stepping back from old controversies and eschewing the habitual finger-pointing, originalists and living constitutionalists and all those in between should find common ground in upholding a process—a constitutional process—that moves from nomination to debate to a vote.

In this respect, returning to the theme that we should treat the confirmations process as if it really matters, one way, certainly, is to respect constitutional form. The case in which a vote is denied should be the rare one, truly exceptional in character, and serious rather than casual discussion should be devoted to the question of what such a rare case might be.

Of course, some Senators may fear that committing to an eventual vote will give the game away, removing any serious incentive on the part of the Administration to heed concerns and consult about particular nominees.

Fair enough. This is essentially a question about good faith, and this Administration is committed, and I believe has shown, that it will consult in good faith. We have endeavored to do this: We have agreed to review a second time—

occasionally a third time—the issues raised about a particular nomination. But if, in the end, the objection is simply that a Senator or Senators would prefer a different nominee, or would insist on one who would have decided past cases differently, on a different reading of the law, then the objection should be put to a vote.

Against this background, this is what the Administration hopes to accomplish—believes that it can accomplish—in the year ahead, in close collaboration with the Senate and House leadership.

We will work with Democrats and Republicans alike to re-examine seriously where we stand on individual nominations, and on the process generally. This has to be a bi-partisan process, and I am convinced, through conversations with Republican as well as Democratic Senators, that there is a growing recognition that however we got to this point, over how many years, we cannot in good conscience remain here. I have heard the same from sitting judges, a group including nominees from both Democratic and Republican Administrations.

The principles on which we might expect agreement are:

1. Judicial nominations are an undertaking in <u>public administration</u>—the administration of justice—and this is a first principle to which we have to repair at all times.

2. The current slow crawl cannot be reconciled with acceptable standards for maintaining our system of justice in good order.

3. The Administration will continue to consult closely with Senators in full recognition of their legitimate interests and prerogatives, while expecting that differences about particular nominations can be explored on a common understanding about what constitutes a legitimate, reasonable ground of difference.

4. Where legitimate differences remain—and this will affect a small number of nominations—the nominee should have a vote anyway.

None of these principles should be beyond the reach of good faith agreement and implementation.

And at a time when the American public is asking with particular intensity that the parties work together to solve problems, this problem—the problem of our damaged confirmations process—should not be left out of the bi-partisan work to be done. To refuse or neglect this work would be to affirm that *it does not matter*.

And certainly there should be agreement that this is not true—that a process so vital to the administration of justice does matter, very much. As the President stated last year:

> *The real harm of this political game-playing falls on the American people, who turn to the courts for justice. . . . All Americans depend on having well-qualified men and women on the bench to resolve important legal matters—from working mothers seeking timely compensation for their employment discrimination claims to communities hoping for swift punishment for perpetrators of crimes to small business owners seeking protection from unfair and anticompetitive practices.*

In 2011, the task, urgently, is to have the performance of the judicial confirmations process rise to the level of its importance.