



A Fair and Balanced Judiciary

The American Association of University Women “supports constitutional protection for the civil rights of all individuals, including the right to privacy.”¹ Civil and constitutional rights and individual liberties are protected by the judiciary; therefore, AAUW’s 2009-2011 Public Policy Program actively supports “a fair and balanced and independent judiciary.”²

AAUW monitors the judicial nominations process because so many of our fundamental rights and liberties have been established and are protected by the federal courts. Our courts need judges who will uphold our Constitutional values of liberty, equality, and justice for all. This is the best way to ensure that the clock is not turned back on decades of progress that has been achieved for women and girls.

The American people deserve federal judges who are committed to upholding the hard-fought constitutional rights secured through Supreme Court precedents. Individual nominees should have views and records that are within the mainstream of legal thought. AAUW believes the federal judiciary, and through it the country as a whole, is best served by the nomination and confirmation of moderate judges.

The American people entrust the federal judiciary with the responsibility of upholding and adhering to a wide variety of legal precedents, such as those that protect civil and constitutional rights and individual liberties related to education, employment, health, safety, and privacy. Protection of the rights of the people is paramount and should take precedence over the political goals of either party or the aspirations of any judicial nominee.

All candidates should be subjected to the highest standard of scrutiny, and the integrity of the process should not be hastened or tainted by the agenda of either political party. With so much at stake, AAUW will remain vigilant and outspoken in urging that the president and Senate work together in a consultative process to ensure that only jurists who are committed to upholding the rights of all Americans—in word and in deed—are considered for these esteemed, lifetime appointments.

Ensuring the Moderate Balance of the Courts

Both the president and the Senate have constitutional responsibilities in the federal judicial nomination and confirmation process. In our system of checks and balances, the Senate has the constitutional role to advise and consent on federal judicial nominations. It is the president’s prerogative to select nominees who are deemed qualified and who reflect his judicial philosophy. In carrying out its role, the Senate must ensure that judicial nominees are subject to the highest standard of scrutiny.

Because these appointments are for life, and because the Senate has a constitutionally mandated role in this process, nominees bear the burden of establishing that they meet the strict criteria appropriately applied to nominees to these esteemed positions. Each nominee’s

record must be given careful examination, including unpublished opinions and other information that may not yet have been made public. Senators must carefully review each candidate's record on privacy, civil rights and liberties, disability rights, environmental protections, education and employment rights, and worker and consumer safety. The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation. Of particular concern is each candidate's approach to settled law, or *stare decisis*.³ This long-established legal principle represents the weight that should be given to legal precedent. The strong emphasis the legal system gives to following precedent is meant to protect society from jarring changes to settled law.

No nominee is presumptively entitled to confirmation. No president has a mandate to secure the appointment of immoderate individuals to the bench who are hostile to the protection of civil and constitutional rights and individual liberties. Because confirmations to the federal bench are permanent, nominations should be considered in a thoughtful and thorough manner and should be exempt from the standard political and partisan jockeying.

The Importance of the U.S. Circuit Courts of Appeals and District Courts

The lower federal courts are extremely important, deciding thousands of cases that affect the lives of millions of Americans. Due to a dramatically reduced Supreme Court docket, which handed down only 83 opinions in 2008-09⁴ compared to 107 in 1991-92 and 141 in 1981-82,⁵ the federal circuit courts of appeals have been the final arbiter for the vast majority of federal cases on many important issues. In fact, according to the Administrative Offices of U.S. Courts, during fiscal year 2009 the federal circuit courts of appeals received filings for more than 57,000 cases and district courts received filings for more than 353,000,⁶ handing down thousands of important rulings on employment, health, safety, and privacy. It is therefore critical that judges confirmed to all levels of the federal courts are moderate and committed to upholding valued rights, protections, and established legal precedents.

The U.S. Supreme Court

The U.S. Supreme Court is the highest court in the land. There is no authority in our republic that can overrule the U.S. Supreme Court. Like other members of the federal judiciary, Supreme Court justices are given lifetime appointments and cannot be fired. For this reason, it is especially important to understand nominees' positions on constitutional issues, such as due process and limits of government power. It is also important to understand the weight nominees' give to the principles of *stare decisis*, or respect for settled law. AAUW believes that any new justices confirmed to the Supreme Court must be moderate, fair-minded, and committed to the key Constitutional principles that have resulted in decades of progress for women and girls. Justice Sonia Sotomayor, who replaced Justice David Souter on the Supreme Court in August 2009, fits that description.

Hard-fought civil rights need protection, and will be bolstered if the current delicate balance of the U.S. Supreme Court shifts toward protection of civil rights and liberties. Many recent decisions have been decided by a margin of just one vote. Any future changes to the current

balance, which arguably may have already occurred with the previous confirmations of Chief Justice John Roberts and Justice Samuel Alito, must put recent decisions like the following—decided by a 5-4 vote—on more solid footing:

- ***Jackson v. Birmingham Board of Education***

The U.S. Supreme Court held that individuals who protest sex discrimination may sue under Title IX if their schools retaliate against them. (March 29, 2005)

- ***Grutter v. Bollinger***

The U.S. Supreme Court held that a school's interest in attaining a diverse student body is a compelling justification for affirmative action. (June 23, 2003)

- ***Davis v. Monroe County Board of Education***

The U.S. Supreme Court held that schools have a responsibility under Title IX to remedy student-on-student sexual harassment. (May 24, 1999)

- ***Madsen v. Women's Health Center***

The U.S. Supreme Court upheld a Florida injunction creating a 36-foot buffer zone outside the entrance of an abortion clinic and prohibited excessive noise that could be heard inside the clinic. (June 30, 1994)

Filibusters and the “Nuclear Option”

Senate rules require 60 senators to vote in favor of ending debate before the Senate can move to a final vote on a judicial nomination or legislation (a procedural move called a cloture vote). If this cloture vote fails, debate continues indefinitely and a final vote cannot be taken; this extended debate is called a filibuster.

During the administration of George W. Bush, 326 of his judicial nominations were confirmed by the Senate—over one-third of the 875 judges in the federal judiciary.⁷ In the 108th Congress, 10 of President George W. Bush’s judicial nominees were filibustered by Senate Democrats, while 95 percent of judicial nominees were confirmed. This represented the highest confirmation rate of any president in the last 20 years.⁸ During the 109th Congress, rather than make new nominations that were more likely to be confirmed, President Bush chose to challenge Senate Democrats by renominating most of the filibustered nominees. Controversy over these and a few of President Bush’s new nominees slowed the confirmation process almost to a halt, resulting in only 54 of 99 nominations being confirmed.

In response, then-Senate Majority Leader Bill Frist (R-TN) threatened to push through a change to long-standing Senate rules to end filibusters on judicial nominations—including Supreme Court nominations. This proposed procedural change became known as the “nuclear option” because of the dramatically negative effect it would have on bipartisan relations in the Senate.

The threat to use the “nuclear option” was averted during debate on the confirmation of Priscilla Richman Owen to the U.S. Court of Appeals for the Fifth Circuit. A bipartisan group of

senators, the so-called Gang of 14, signed a memorandum of understanding on May 23, 2005 that cleared the way for confirmation of several controversial judicial nominees and prevented the enactment of the nuclear option. The seven Democratic signers of the “Memorandum of Understanding on Judicial Nominations” agreed to vote for the cloture motion on Owen, thus giving it the votes needed to pass and move to a final vote. They agreed to cast similar votes for two other controversial nominees, Janice Rogers Brown and William Pryor. In exchange, seven Republicans promised not to invoke the nuclear option for the remainder of the 109th Congress. The Gang of 14 all promised they would filibuster future nominations only in “extraordinary circumstances,” the definition of which was not spelled out in the agreement. The prevailing sentiment is that the definition of extraordinary circumstances was left up to each senator. AAUW opposed all three of the nominees included in the deal, finding their records extraordinary enough to prompt that rare action.

Following the 2006 and 2008 elections, the Gang of 14 lost a few of its members, so the influence of the group on future judicial nominations negotiations is unpredictable.⁹ However, the 2006 election saw the leadership of the Senate change parties, which had an immediate impact on judicial nominations. Several of the Bush administration’s most controversial nominees, after languishing in the 109th Congress, withdrew their names. Further, the Democrats reinstated the “blue slip” policy, a long standing Judiciary Committee tradition abolished in the 108th Congress that allows the home state senators of judicial nominees substantial input into the process.¹⁰

No matter which party controls the White House or Senate, AAUW opposes the nuclear option because it would impede the maintenance of a fair and balanced judiciary. Its implementation would overturn two centuries of the valuable Senate tradition of extended debate. This tradition is unique to the chamber and has long been a tool to facilitate bipartisan compromise. To abolish the filibuster would undermine this legacy of bipartisan cooperation and rules that have historically protected the rights of the minority—whichever party or group that may be—to have a voice in the outcome.

The Obama Administration

AAUW welcomed President Obama’s nomination and the Senate’s confirmation of Justice Sonia Sotomayor, who in August 2009 further broke through barriers for women by becoming the first Latina and only the third woman in American history to be confirmed to a seat on the U.S. Supreme Court when she replaced retiring Justice David Souter.¹¹ Based on Justice Sotomayor’s depth of legal experience—more federal judicial experience than any Supreme Court nominee in more than 100 years¹²—her stellar academic credentials, and her mainstream judicial record, AAUW believes she is a strong addition to the highest court in the land. As a nonpartisan organization with members from both sides of the aisle, AAUW was especially pleased to note that Justice Sotomayor holds the unique distinction of being nominated to three federal judicial positions by three different presidents representing different political parties.¹³ This fact is a testament to her legal experience, judicial acumen and temperament, and overall professionalism. With the announcement of Justice John Paul Stevens’ retirement in April 2010, AAUW urges President Obama to make a similarly qualified choice for the second Supreme

Court vacancy of his administration.

Unfortunately, a number of well-qualified nominees to the federal circuit and district courts have been held up by various procedural and political delays. As of April 2010, only 20 of President Obama's nominees have been confirmed to these critical positions¹⁴—by contrast, at the same point in their respective terms, President George W. Bush had 43 circuit and district court nominees confirmed, while President Bill Clinton had 46.¹⁵ The administration is not without responsibility for this unacceptable state of affairs, however: for example, of the 103 currently vacant federal judicial positions, the White House has submitted only 43 nominees for these lifetime slots.¹⁶ AAUW thus urges the Senate to move nominees more expeditiously and the administration to move more quickly in submitting outstanding nominations.

Resources for Advocates

It is AAUW advocates across the country who speak their minds on issues important to them that truly advance AAUW's mission. Stay informed with updates on judicial nominations and other issues by subscribing to AAUW's Action Network. Make your voice heard in Washington and at home by using AAUW's Two-Minute Activist to urge your members of Congress to support a fair and balanced and independent judiciary. Write a letter to the editor of your local paper to educate and motivate other members of your community. Attend town hall meetings for [your members of Congress](#), or set up a meeting with your elected official's district office near you to discuss these issues. AAUW members can also subscribe to *Washington Update*, our free, weekly e-bulletin that offers an insider's view on the latest policy news, resources for advocates, and programming ideas. For details on these and other actions you can take, visit www.aauw.org/takeaction. You can find additional resources on our website at www.aauw.org.

Conclusion

Over the past decade, control of the White House and the Senate has switched among the political parties, and, unfortunately, both parties have slowed down the judicial nominations process. AAUW will continue to monitor the judicial nominations process and advocate for nominees who are committed to the protection of fundamental civil rights and liberties for which our members have fought for over a century.

For more information, call 202/785-7793 or e-mail VoterEd@aauw.org.

AAUW Public Policy and Government Relations Department
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¹ American Association of University Women. (June 2009). *2009-11 AAUW Public Policy Program*. Retrieved July 9, 2009, from http://www.aauw.org/advocacy/issue_advocacy/principles_priorities.cfm.

² Ibid.

³ *Stare decisis* is Latin for "to stand by that which is decided."

⁴ U.S. Supreme Court. *2008 Term Opinions of the Court*. Retrieved April 12, 2010, from <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=08>.

⁵ U.S. Census 2000 (2006). *U.S. Supreme Court – Cases Filed and Disposition*. Retrieved January 6, 2009, from http://www.allcountries.org/uscensus/356_u_s_supreme_court_cases_filed.html.

⁶ Administrative Office of the U.S. Courts. *Judicial Business of the United States Courts 2009*. Retrieved April 12, 2010, from <http://www.uscourts.gov/judbus2009/JudicialBusinesspdfversion.pdf>.

⁷ U.S. Senate Committee on the Judiciary. (2008). *Judicial Nominations and Confirmations*. Retrieved January 6, 2009, from <http://judiciary.senate.gov/nominations/judicial.cfm>.

⁸ Democratic Policy Committee. (July 22, 2004). *Bush Judicial Nominees Confirmed at Rate Better Than or Equal to Recent Presidents*. Retrieved January 6, 2009, from http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=fs-108-2-197.

⁹ Ten of the original members of the Gang of 14 remain in the Senate. Of the six senators from the Gang of 14 who were up for re-election in 2006 (three from each party), Republicans Mike DeWine and Lincoln Chafee lost their races. Democrat Joseph Lieberman lost his primary, but won reelection after becoming an Independent for the general election. Each of the four senators from the Gang of 14 who were up for re-election in 2008 (two from each party) won their respective races. Republican John Warner did not seek reelection, and Democrat Ken Salazar now serves as Secretary of the Interior.

¹⁰ A blue slip is the traditional method of allowing the home state senators of a judicial nominee to express their approval or disapproval. Blue slips are generally given substantial weight by the Senate Judiciary Committee in its consideration of a judicial nominee. The process dates back several decades and is grounded in the tradition of "senatorial courtesy," which traces its roots back to the presidency of George Washington.

¹¹ U.S. Senate (August 6, 2009). *On the Nomination (Confirmation Sonia Sotomayor, of New York, to be an Associate Justice of the Supreme Court)*. Retrieved Jan. 6, 2010, from http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00262.

¹² The White House (May 26, 2009). *Background on Judge Sonia Sotomayor*. Retrieved Jan. 6, 2010, from http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor.

¹³ U. S. Senate Committee on the Judiciary (2009). *Associate Justice of the U.S. Supreme Court – Sonia Sotomayor*. Retrieved Jan. 6, 2009, from <http://judiciary.senate.gov/nominations/SupremeCourt/SotomayorIndex.cfm>.

¹⁴ United States Senate Committee on the Judiciary (April 2010). *Judicial Nominations and Confirmations: 111th Congress*. Retrieved April 23, 2010, from <http://judiciary.senate.gov/nominations/111thCongress.cfm>.

¹⁵ Al Kamen, The Washington Post (April 7, 2010). *Obama Continues to Lag When it Comes to Judges*. Retrieved April 14, 2010, from <http://www.washingtonpost.com/wp-dyn/content/story/2010/04/06/ST2010040605037.html>.

¹⁶ Alliance for Justice (April 2, 2010). *Judicial Selection Snapshot*. Retrieved April 23, 2010, from <http://www.afj.org/check-the-facts/nominees/judicial-selection-snapshot.html>