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More than 8,500 Utahns are in legal occupations, and Utah's diverse and vibrant legal community includes nearly 400 members of the Federal Bar Association. The quality and depth of the Utah legal community is a great benefit when it comes to filling judicial vacancies in Utah. I have participated in the appointment of more than 70 percent of the judges who have ever served on the U.S. District Court in Utah and nearly 60 percent of the judges on the Tenth Circuit.

I have served in the Senate minority and the majority under presidents of both parties. In working with my fellow Utah senators to recommend candidates for nomination, however, I have kept the same three basic criteria in mind. I strive to find men and women who are broadly experienced, widely respected, and who can be solidly confirmed.

I think we have succeeded. Over the last decade, for example, Presidents George W. Bush and [Barack] Obama have appointed two Utahns to the Tenth Circuit and four to the U.S. District Court. Together, these men and women had more than a century of private legal practice when they were appointed. A grand total of two votes were cast against any of them, and even those votes were not about the merits of the nominee. With these criteria in mind, Sen. [Mike] Lee and I are working on a recommendation for the last vacancy on the U.S. District Court.

I know that the Federal Bar Association is vigilant about this issue of judicial appointments. I have served on the Judiciary Committee since February of 1977, longer than all but one senator in American history, and chaired the committee for eight years. From that experience and perspective, I would like to offer a few observations about the substance and the process of judicial appointments.

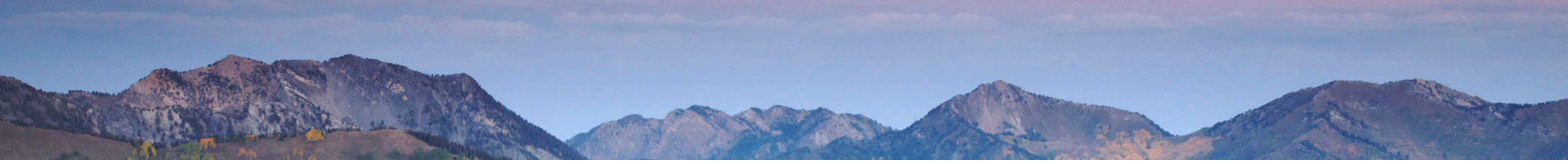
The debate about judicial appointments is really a debate about judicial power. How much power should unelected judges have in our system of government? Many today would say that federal judges should have as much power as they need to get the job done. In this view, the political ends justify the judicial means, and judicial independence means freedom from any restraints. It echoes the words of former Chief Justice Charles Evans Hughes when he was governor of New York: "We are under a Constitution, but the Constitution is what the judges say it is."

This view turns the design of America's founders on its head. They believed that liberty requires limits on government, including on the judiciary. Those limits include a republican form of government in which all power resides in the people and a written Constitution separating the three branches of government. I have written and spoken many times over the years about how these principles provide a kind of job description for federal judges.

In his farewell address, George Washington said that the very basis of our system of government "is the right of the people to make and to alter their constitutions of government." Until the people amend the Constitution, he said, it is "sacredly obligatory upon all." Alexander Hamilton wrote in *The Federalist No. 78* that in this system of government, the judiciary cannot actively resolve political issues because it has "neither force nor will, but merely judgment." This is what makes the judiciary, in his words, the weakest and least dangerous branch.

Those basic principles help identify the proper place of judges in our system of government. One of my predecessors as senator from Utah, George Sutherland, served on the Supreme Court from 1922 to 1938. He wrote this in 1937: "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation." Ignoring this difference, he wrote, converts "inescapable and enduring mandates into mere moral reflections."

The conflict over judicial appointments is a conflict between these opposing views of judicial power. Political power, including



control over the Constitution, cannot remain with the people if judges are able to amend our written Constitution under the guise of interpretation.

It is neither partisan nor political to observe that President Obama has clearly taken a side in this conflict. When he served in the Senate, when he ran for president, and throughout his presidency, he has promoted and acted on the view that judges may find the Constitution's meaning and decide cases based on their own perceptions of how the world should work, on their deepest values and concerns, on their personal empathy, and on what is in their hearts. Those are his words, not mine.

There is a lot at stake here. If we believe that liberty depends on these principles, then we need federal judges of the kind consistent with these principles. So there should be no surprise that as federal judges have become more powerful, their appointment should become more contentious.

Though ours was the first and is one of the shortest written constitutions in the world, our fellow citizens know little about it. Polls have found, for example, that 17 percent of Americans believe that the First Amendment protects the right to drive a car and 21 percent believe it protects the right to own a pet.

Three times as many Americans can name two of Snow White's seven dwarves as can name two of the nine Supreme Court justices. According to a new poll released this week by the American Council of Trustees and Alumni, 10 percent of college graduates believe that Judge Judy serves on the Supreme Court. Since federal judges have no term limits and serve for an average of 20 to 25 years, you would think people would have time to learn a few names.

But seriously, this ignorance of even basic constitutional principles is a real threat to our liberty. James Madison was right when he said in his 1810 State of the Union address that a well-instructed people alone can be permanently a free people. Ignorance allows political priorities to overwhelm constitutional principles.

The judicial appointment process today takes place against the backdrop of this dramatic change in the perception of how much power judges should have in our system of government. I'd much rather debate that issue when we have a controversial nominee on the Senate floor than what club they belonged to in high school or whether they consistently used spell-check while writing memos.

Let me turn to the confirmation process itself. The same separation of powers that helps define the limited role of judges also informs the Senate's role in the appointment process. The Constitution gives the appointment power to the president and a check on that power to the Senate. I have long believed, therefore, that there should be a rebuttable presumption in favor of confirmation. When it comes to judicial nominations, the Senate owes some deference to the president if his nominees are qualified on the basis of legal experience and judicial philosophy. I have tried to apply that principle consistently, case by case, and have supported nearly 90 percent of President Obama's judicial nominees.

If ever a process differed in practice from what the textbooks describe, it is the judicial appointment process. And that process has changed in many ways during my Senate service. As you may know, for example, the Senate can confirm nominees with or without a formal roll call vote. Roll call votes take time; voice votes and unanimous consent do not.

I have served in the Senate under six presidents, three Republicans and three Democrats. Under Presidents [Jimmy] Carter, [Ronald] Reagan, and the first [George] Bush, the Senate confirmed only 2 percent of federal judges by a roll call vote, and only a small percent of those roll call votes were unanimous. In other words, roll call votes were used primarily for controversial nominees. Under Presidents Clinton, the second Bush, and Obama, 45 percent of nominees were confirmed by roll call vote, and 68 percent of those were unanimous. It had become common to use roll call votes for noncontroversial nominees, prolonging the process for confirming any individual nominee.

The second example is the filibuster. A filibuster occurs when an attempt to end debate fails. Since ending debate requires 60 votes, a minority of senators could use a filibuster to prevent the majority of senators from confirming a nominee. The Senate took its first cloture vote on a judicial or executive branch nominee in 1968 and for the next 35 saw only 17 cloture votes failed and three filibustered nominees were unconfirmed. The filibuster was not used to defeat majority-supported judicial nominees until 2003. During the 108th Congress, when I chaired the Judiciary Committee, Democrats conducted 20 filibusters that prevented confirmation of 10 nominees to the U.S. Court of Appeals.

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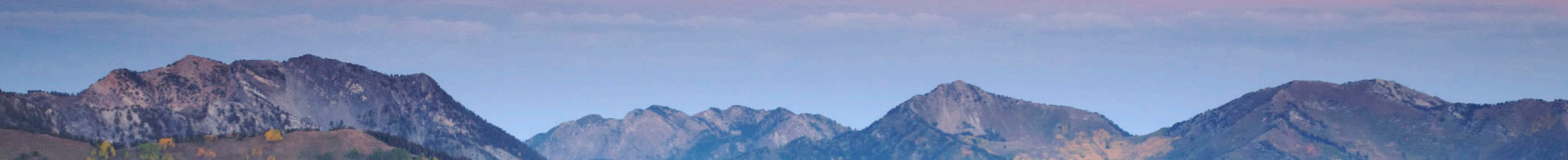
As you know, the majority used a parliamentary tactic in 2013 to abolish the filibuster for all nominations except to the Supreme Court. There had been only 14 nomination filibusters and only five filibustered nominees were unconfirmed in the previous five years. These procedural matters seem like inside-baseball to many, and the media like to use words such as arcane to describe them, but they do affect the how the judicial appointment process operates day to day.

With those observations in mind, I want to look at the judicial appointment process today. I think it is hazardous to describe the entire situation with a single statistic or label. In 1906, Mark Twain wrote: "Figures often beguile me, particularly when I have the arranging of them myself; in which case the remark attributed to Disraeli would often apply with justice and force.—There are three kinds of lies: lies, damn lies, and statistics."

So far this year, the Senate has confirmed five judges to the U.S. District Court and one to the U.S. Court of Appeals. This is below



both the overall average annual pace and the pace in the first year after partisan control of the Senate has switched. That said, a single number is just that, a number. Without some frame of reference or context, a single number alone cannot support a conclusion or judgment about how the process is working today.

Two other numbers come to mind that can provide some of that context. The first is the number of judicial vacancies, which has averaged 56 so far this year. That figure has been lower in only six of the last 25 years. So at least in historical terms, vacancies this year have been relatively low. It is also important to remember that the impact of judicial vacancies varies among jurisdictions—a single vacancy can be a greater burden in one district than several can be in another.

The other number that helps provide context is the number of pending nominees. It sounds obvious, but the Senate cannot confirm nominees who do not exist. President Obama has provided the Senate with nominees for even a majority of current vacancies in only 22 percent of the months since he took office. This compares to 69 percent for the second President Bush, 49 percent for President Clinton, and 40 percent for the first President Bush. This is a good example of why it is important to look at the entire judicial appointment process, including both nomination and confirmation, to get a better sense of the current situation.

The same is true for labels. The desire for more confirmations does not make the current situation a crisis. In general, the Senate majority has a very different view than the President about the kind of judges our system of government requires. This is a profoundly important issue, with liberty itself at stake, so there will inevitably be—in fact, there should be—active engagement between the sides in this conflict. While that conflict is more evident in the context of Supreme Court nominations, it trickles down to the appeals and district court levels because the same basic principles apply.

Judicial nominations are not the only important legal issue currently before the Judiciary Committee and the Senate. Criminal justice reform is an issue that's been in the news a lot lately and that will likely be coming before the Senate Judiciary Committee in the very near future.

Much of the discussion in the news, and in Congress, has focused on sentencing reform. Various proposals have been introduced to cut prison sentences, augment judges' ability to sentence below statutory minimums, or allow prisoners to earn early release for good behavior. I know a number of you in the audience are judges, prosecutors, or criminal defense attorneys, and I'm sure you've been following these developments with interest.

But sentencing reform is only one part of the picture. Yes, improvements can likely be made to how we determine sentences and how much discretion we give judges. But sentencing does not occur in a vacuum. It's the final stage in a long process that begins, not with trial, or even with arrest, but way back in Washington, D.C., when Congress decides what conduct to criminalize.

For a number of years now, there's been agreement on both sides of the aisle that Congress has criminalized too much conduct. For too long, Congress has had the attitude that whenever something bad happens, the right response is to create a new crime to ensure that the bad thing never happens again. A bank fails. We must criminalize whatever caused the failure. A river becomes polluted. We must criminalize the actions that caused the pollution.

But not every bad act needs to be criminalized. In many cases, civil penalties suffice. Moreover, the fact that something bad happens does not necessarily mean there's a hole somewhere in the criminal code that must be plugged. In most cases, existing law provides all the tools prosecutors need to bring bad actors to justice.

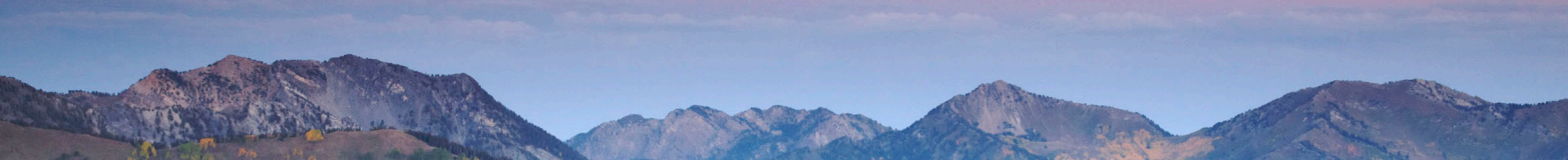
Decades of overcriminalization by Congress have resulted in the creation of thousands of federal crimes. Some of these are familiar prohibitions on murder, assault, and other inherently wrongful conduct. But many are incredibly esoteric. For example, it's a federal crime, punishable by up to six months in prison, to use the 4-H club logo without authorization. It's also a federal crime, again punishable by up to six months in prison, to walk a dog in a federal park area on a leash that's longer than 6 feet. No person can reasonably be expected to know the details of all these laws, or even that they exist.

Without adequate *mens rea* protections, individuals can be criminally convicted for doing things they thought were perfectly lawful. Even before we get to the point of sentencing, the fact that these individuals get swept up in the criminal system in the first place is troubling.

And this is a problem. We're a nation of laws. We're supposed to be guided by the rule of law. Our criminal law—indeed, the very idea that it's proper to brand some conduct, and some people, as criminal—is predicated on the notion that individuals know the law and are able to choose whether or not to follow it. A government that locks people up for conduct they didn't know was wrong, and that no reasonable person would know was wrong, is not a government of laws. It is a tyranny. It presumes power arbitrarily to choose which citizens to punish based on obscure rules known only to the state.

Now, I'm not saying we've reached that stage here in the United States. But it is true that we have thousands of crimes in our statutes, and especially in our regulations, that the average person has no idea about and that criminalize conduct the average person would not think was wrong.

The overcriminalization problem, however, lies not only in the sheer number of federal crimes, but also in their vague, duplicative, and even conflicting terms. Consider the case of John Yates, who was convicted of violating the so-called anti-shredding provision of the



Sarbanes-Oxley Act. This extraordinarily broad law, which Congress passed in the wake of the Enron scandal, prohibits the destruction of any "tangible object" with the intent to impede, obstruct, or influence a federal investigation.

Yates was not an Enron executive, or any sort of corporate executive. He was a fisherman. His crime? Discarding a small number of undersized fish from his boat after a state inspector found him carrying fish slightly below the minimum legal size. Yates appealed his conviction all the way to the Supreme Court on the ground that the statute did not apply to his conduct. By a 5-4 vote, the Court agreed.

In a remarkable move, the dissenting justices—who had voted to sustain Yates's conviction—heaped scorn on the anti-shredding statute. They called it a "bad law—too broad and undifferentiated, with too-high maximum penalties." Its vague terms and overly harsh penalties were "unfortunately not an outlier, [but rather] an emblem of a deeper pathology in the federal criminal code."

These words should be a wake-up call. For too long, Congress has criminalized too much conduct and enacted overbroad statutes that sweep far beyond the evils they're designed to avoid.

And there are other problems with the criminal code. Foremost among these is the failure of many statutes to specify the level of criminal intent, or *mens rea*, the government must prove to obtain a conviction. Historically, in order to convict, the government had to prove both that the defendant committed the criminal act and that the defendant acted with a guilty mind. This prevented government from locking people up for conduct they didn't know was wrong.

But many modern criminal statutes fail to specify a criminal intent requirement, leaving people vulnerable to prosecution for conduct they thought was lawful. Consider two examples.

First is Wade Martin, an Alaskan fisherman who sold 10 sea otters to a buyer he thought was a Native Alaskan but who turned out not to be. Authorities charged Wade with violating the Marine Mammal Protection Act, which criminalizes the sale of sea otters to non-Native Alaskans. The fact that he thought the buyer was a Native Alaskan was irrelevant. Prosecutors had to prove only that the buyer was not in fact a Native Alaskan. The absence of a criminal intent requirement meant Wade could be convicted regardless of whether he knew what he was doing was wrong. Wade pleaded guilty to a felony charge and was ordered to pay a $1,000 fine.

Second is Lawrence Lewis, a janitor at a retirement home who was charged with criminally violating the Clean Water Act when he diverted backed-up sewage at the retirement home to a storm drain. Lawrence thought the storm drain was connected to the city's sewage-treatment system, but it turned out it emptied into a creek that ultimately connected to the Potomac River, a protected waterway. The Clear Water Act required proof only that Lawrence diverted the sewage into the storm drain. It required no proof that he knew the drain connected to a creek that emptied into the Potomac or that he knew he was violating the law. Lawrence pleaded guilty and was sentenced to probation.

These and other examples demonstrate the danger of missing or incomplete *mens rea* requirements. Without adequate *mens rea* protections, individuals can be criminally convicted for doing things they thought were perfectly lawful. Even before we get to the point of sentencing, the fact that these individuals get swept up in the criminal system in the first place is troubling. Any sentence they receive for their purported crimes is arguably unfair, because they shouldn't even have been charged criminally in the first place. Or at the very least, the government should have had to prove criminal intent in order to convict.

Another aspect of our current criminal code that undermines the rule of law is the proliferation of agency-defined crimes. When Congress passes a new criminal law, its actions are subject to democratic checks. If Congress goes too far or creates a bad law, angry constituents can respond with phone calls or letters or by voting incumbents out of office.

In recent years, however, Congress has increasingly passed the buck to unelected agency officials. Congress has enacted numerous far-reaching statutes that criminalize violations of agency regulations and then leave it to the agency to fill in the details. Decisions regarding whether and under what circumstances to brand people as criminals are no longer being made by the people's elected representatives, but rather by unaccountable, anonymous bureaucrats.

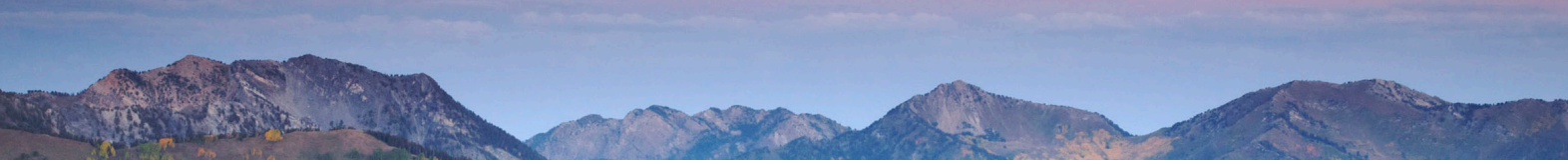
This is a dangerous trend. The rule of law requires accountability and restraint. If officials can criminalize vast swaths of conduct without check, they can essentially set the bounds of their own authority. They can dictate how people are to conduct their affairs without regard to the democratic processes our Constitution is supposed to protect. This trend also places the power to define the law in the same hands as the power to enforce it. The legislator and the prosecutor become one.

There are other problems with our criminal laws that I could mention, but the ones I have highlighted—the sheer number of criminal laws, the vague and overbroad language of many such laws, the lack of adequate *mens rea* requirements, and the proliferation of agency-defined crimes—have hopefully sufficed to persuade you that real criminal justice reform requires much more than merely changing sentencing laws.

Before we ask ourselves whether a particular sentence is too long, we should ask if the person should even be in jail in the first place, if what he did really warranted criminal charges, if civil penalties might be more appropriate. We should also ask whether the person acted with a guilty mind and consider whether the law at issue was enacted through valid, democratic processes. I'm by no means saying we should release masses of prisoners from our system. But I am saying that to the extent overcriminalization is a problem, it's a problem that extends far beyond the narrow question of sentencing. Overcriminalization strikes at the heart of democratic accountability and the rule of law. It's time we took full account of the problem.

Now, before I conclude my discussion of criminal justice reform, I would be remiss if I did not pay tribute to the bravery and heroism of our law enforcement officials. Today is Sept. 11th. Fourteen years ago, hundreds of New York's finest gave their lives protecting and rescuing victims of that horrific event. These heroes gave their all in the finest tradition of American law enforcement.

Today, in the United States, some 900,000 law enforcement officers put their lives on the line for the safety and protection of others. They serve with valor, distinction, and great success. Statistics show



that violent and property crime rates in the United States are at historic lows, thanks in large measure to the dedicated service of the men and women of law enforcement.

That protection comes at a price, however. Each year, there are approximately 60,000 assaults on law enforcement officers, resulting in nearly 16,000 injuries. Over the last decade, an average of 150 officers per year have been killed in the line of duty. Since the first recorded police death in the United States in 1791, more than 20,000 law enforcement officers have made the ultimate sacrifice.

Unfortunately, as a result of anti-police rhetoric being pushed by the media and misguided community leaders, many law enforcement officers today are feeling increasingly isolated from the communities they serve. In many places, standing up to the police has become a badge of honor. It's as though the police, not criminals, are the bad guys. This profoundly unhealthy dynamic risks creating an adversarial relationship between citizens and police and undermines law enforcement's ability to protect the rule of law.

It saddens me to report that, as of Sept. 9th, there had been 85 law enforcement officer fatalities in 2015. The police officer who was recently shot and killed north of Chicago was the eighth officer to be shot and killed in the last month. When a person attacks a law enforcement officer, they are attacking our society and attacking the rule of law. We must all—each of us—work together to ensure that the honorable men and women who police our communities have our unified support. I look to you here in attendance today to carry this message home to your communities and to remind your friends and neighbors of the great good that law enforcement does across our nation.

I've spoken thus far about current issues, about debates currently before Congress and specifically before the Senate Judiciary Committee. In my remaining time with you, I'd like to take a step back and talk a bit more generally about the Constitution and our system of government.

Next week we celebrate the 228th anniversary of the signing of the Constitution. Two hundred twenty-eight years ago, 39 brave men and women set their names to the document that has guided our government and our politics ever since.

The Constitution contains a number of principles that have been crucial to its continued success. Among these are the separation of powers, federalism, checks and balances, an independent judiciary, a bicameral legislature, and a unified executive. Each branch of government has to share power with the others, just as states and the federal government have to share power as well. By preventing any one branch, or any one level of government, from being able to act unilaterally in its affairs, the Constitution ensures that no one individual or group is be able to run roughshod over any other. And just as important, the Constitution ensures that no major policy change can occur without substantial support from large numbers of Americans at all levels of government and society.

Unfortunately, there are some today who view the Constitution as an obstacle to overcome, a barrier to supposed progress. These individuals find fault with the fact that the Constitution makes change difficult and requires broad, long-lasting consensus in order to enact major reform. Surely the exigencies of the day, they argue, warrant bypassing or even ignoring the separation of powers, federalism, and other critical elements of our constitutional structure. Although some of these individuals may be well intentioned, they are fundamentally misguided.

The fact is that the Constitution is not an obstacle—it is a guide. A guide for how we should approach our contemporary problems, for how we should think about our roles as citizens, judges, and legislators, for how we should conduct ourselves as we debate the problems of the day.

The Constitution limits government in order to preserve freedom. It makes each branch the equal of the others and the states the equals of Washington, D.C. It provides a check on all government action. It divides power among multiple sources because no one individual or office can be trusted with all authority. And it requires cooperation at all levels and all stages to ensure that changes in law are thoroughly vetted rather than rammed through by temporary majorities. These are the principles that should guide us as we seek solutions to our nation's challenges.

These principles apply in any number of situations. A law that coerces states into creating or expanding programs against their will by threatening to cut off all funding makes states the subordinates, not equals, of the federal government. Executive action that effectively suspends immigration laws does not honor Congress as a co-equal branch. Nor do statements threatening that if Congress does not act, the president will.

More generally, all laws that expand government risk ignoring the Constitution's lessons. When we vote to expand government, we set ourselves against the very purpose of the Constitution—to restrain the powers of the federal government. True, the Constitution created a more robust government to remedy the defects in the Articles of Confederation, but in creating a more robust government it placed check upon check upon check upon check on that government. Whenever we carve out new space for the federal government, we must be exceedingly careful not to upset the Constitution's careful balance.

Perhaps most fundamentally, the Constitution teaches the virtue of prudence. Prudence is a habit of mind that should come naturally to lawyers and judges, who have been trained to think carefully and critically before making decisions. Prudence restrains us from seeking immediate and complete vindication of a single, abstract principle. Rather, it counsels us to work within our existing circumstances to vindicate the enduring principles upon which liberty depends. Prudent lawmakers—and prudent citizens—make experience, not theory, their guide, and recognize that success requires harmonizing competing values.

I would hope that all of us here today would agree that we can learn much from the Constitution and from the carefully calibrated system of government the Founders created. As we work to improve our nation, we should remember that the institutions and traditions we inherited are the product of centuries of wisdom and work. There are always things that can be made better, but there is also much that, if lost, would make our nation much worse.

Thank you for the invitation to be here today. ⊙