EMBARGOED UNTIL DELIVERY
REMARKS BY JOHN MCCAIN ON JUDICIAL PHILOSOPHY

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Tuesday, May 6, 2008

ARLINGTON, VA -- U.S. Senator John McCain will deliver the following remarks as prepared for delivery at Wake Forest University, in Winston-Salem, NC, today at 10:00 a.m. EDT:

Thank you, Ted, and thank you all very much. Dr. Hatch, I'm grateful for your invitation to this great university. And Senator Richard Burr, thank you for that warm welcome to North Carolina and to Wait Chapel. I'm honored to be here, and I brought along a friend. I'm sure you'll recognize him -- my pal, Senator Fred Thompson of Tennessee.

We appreciate the hospitality of the students and faculty of Wake Forest University, and especially during exams. I know exam week involves some tough moments, like when you're up at 3:00 a.m. and have to choose between studying or watching one of Fred's old movies. Most of the students here look confident and ready, so you need no advice from me as final exams draw near. But for those of you who might be feeling a slight sense of panic coming on, all I can say is that a few bad grades don't have to be end of the road -- so just give it your best and move on. An undistinguished academic record can be overcome in life, or at least that is the hope that has long sustained me.

Your kind invitation brings me here as a candidate for president of the United States, and anyone in that pursuit has plenty of promises to make and to keep. When it's all over, however, the next president will be compelled to make just one promise, in the same words that 42 others have spoken when the moment arrived. The framers of our Constitution had a knack for coming right to the point, and it shows in the 35-word oath that ends with a pledge to preserve, protect, and defend the Constitution itself.

This is what we require and expect of every president, no matter what the agenda or loyalties of party. All the powers of the American presidency must serve the Constitution, and thereby protect the people and their liberties. For the chief executive or any other constitutional officer, the duties and boundaries of the Constitution are not just a set of helpful suggestions. They are not just guidelines, to be observed when it's convenient and loosely interpreted when it isn't. The clear powers defined by our Constitution, and the clear limits of power, lose nothing of their relevance with time, because the dangers they guard against are found in every time.

In America, the constitutional restraint on power is as fundamental as the exercise of power, and often more so. Yet the framers knew that these restraints would not always be observed. They were idealists, but they were worldly men as well, and they knew that abuses of power would

arise and need to be firmly checked. Their design for democracy was drawn from their experience with tyranny. A suspicion of power is ingrained in both the letter and spirit of the American Constitution.

In the end, of course, their grand solution was to allocate federal power three ways, reserving all other powers and rights to the states and to the people themselves. The executive, legislative, and judicial branches are often wary of one another's excesses, and they should be. They seek to keep each other within bounds, and they are supposed to. And though you wouldn't always know it from watching the day-to-day affairs of modern Washington, the framers knew exactly what they were doing, and the system of checks and balances rarely disappoints.

There is one great exception in our day, however, and that is the common and systematic abuse of our federal courts by the people we entrust with judicial power. For decades now, some federal judges have taken it upon themselves to pronounce and rule on matters that were never intended to be heard in courts or decided by judges. With a presumption that would have amazed the framers of our Constitution, and legal reasoning that would have mystified them, federal judges today issue rulings and opinions on policy questions that should be decided democratically. Assured of lifetime tenures, these judges show little regard for the authority of the president, the Congress, and the states. They display even less interest in the will of the people. And the only remedy available to any of us is to find, nominate, and confirm better judges.

Quite rightly, the proper role of the judiciary has become one of the defining issues of this presidential election. It will fall to the next president to nominate hundreds of qualified men and women to the federal courts, and the choices we make will reach far into the future. My two prospective opponents and I have very different ideas about the nature and proper exercise of judicial power. We would nominate judges of a different kind, a different caliber, a different understanding of judicial authority and its limits. And the people of America -- voters in both parties whose wishes and convictions are so often disregarded by unelected judges -- are entitled to know what those differences are.

Federal courts are charged with applying the Constitution and laws of our country to each case at hand. There is great honor in this responsibility, and honor is the first thing to go when courts abuse their power. The moral authority of our judiciary depends on judicial self-restraint, but this authority quickly vanishes when a court presumes to make law instead of apply it. A court is hardly competent to check the abuses of other branches of government when it cannot even control itself.

One Justice of the Court remarked in a recent opinion that he was basing a conclusion on "my own experience," even though that conclusion found no support in the Constitution, or in applicable statutes, or in the record of the case in front of him. Such candor from the bench is rare and even commendable. But it was not exactly news that the Court had taken to setting aside the facts and the Constitution in its review of cases, and especially in politically charged cases. Often, political causes are brought before the courts that could not succeed by democratic means, and some federal judges are eager to oblige. Politicians sometimes contribute to the problem as well, abdicating responsibility and letting the courts make the tough decisions for them. One abuse of judicial authority inspires more. One act of raw judicial power invites others. And the result, over many years, has been a series of judicial opinions and edicts w andering farther and farther from the clear meanings of the Constitution, and from the clear limits of judicial power that the Constitution defines.

Sometimes the expressed will of the voters is disregarded by federal judges, as in a 2005 case concerning an aggravated murder in the State of Missouri. As you might recall, the case inspired a Supreme Court opinion that left posterity with a lengthy discourse on international law, the constitutions of other nations, the meaning of life, and "evolving standards of decency." These meditations were in the tradition of "penumbras," "emanations," and other airy constructs the Court has employed over the years as poor substitutes for clear and rigorous constitutional reasoning. The effect of that ruling in the Missouri case was familiar too. When it finally came to the point, the result was to reduce the penalty, disregard our Constitution, and brush off the standards of the people themselves and their elected representatives.

The year 2005 also brought the case of Susette Kelo before the Supreme Court. Here was a woman whose home was taken from her because the local government and a few big corporations had designs of their own on the land, and she was getting in the way. There is hardly a clearer principle in all the Constitution than the right of private property. There is a very clear standard in the Constitution requiring not only just compensation in the use of eminent domain, but also that private property may be taken only for "public use." But apparently that standard has been "evolving" too. In the hands of a narrow majority of the court, even the basic right of property doesn't mean what we all thought it meant since the founding of America. A local government seized the private property of an American citizen. It gave that property away to a private developer. And this power play actually got the constitutional "thumbs-up" from five m embers of the Supreme Court.

Then there was the case of the man in California who filed a suit against the entire United States Congress, which I guess made me a defendant too. This man insisted that the words "Under God" in the Pledge of Allegiance violated his rights under the establishment clause of the First Amendment. The Ninth Circuit court agreed, as it usually does when litigious people seek to rid our country of any trace of religious devotion. With an air of finality, the court declared that any further references to the Almighty in our Pledge were -- and I quote -- "impermissible." And it was so ordered -- generations of pious, unoffending custom supposedly overturned by one decree out of a courtroom in San Francisco. And now it turns out the same litigant is back for more in the Ninth Circuit, this time demanding that the words "In God We Trust" be forever removed from our currency. I have a feeling this fellow will get wind of my remarks today -- and we're all in for trouble when he hears that we met in a chapel.

In the shorthand of constitutional discourse, these abuses by the courts fall under the heading of "judicial activism." But real activism in our country is democratic. Real activists seek to make their case democratically -- to win hearts, minds, and majorities to their cause. Such people throughout our history have often shown great idealism and done great good. By contrast, activist lawyers and activist judges follow a different method. They want to be spared the inconvenience of campaigns, elections, legislative votes, and all of that. They don't seek to win debates on the merits of their argument; they seek to shut down debates by order of the court. And even in courtrooms, they apply a double standard. Some federal judges operate by fiat, shrugging off generations of legal wisdom and precedent while expecting their own opinions to go unquestioned. Only their favorite precedents are to be considered "settled law," and everything else is fair game.

The sum effect of these capricious rulings has been to spread confusion instead of clarity in our vital national debates, to leave resentment instead of resolution, and to turn Senate confirmation hearings into a gauntlet of abuse. Over the years, we have all seen the dreary rituals that now pass for advice and consent in the confirmation of nominees to our Supreme Court. We've seen

and heard the shabby treatment accorded to nominees, the caricature and code words shouted or whispered, the twenty-minute questions and two-minute answers. We have seen disagreements redefined as disqualifications, and the least infraction of approved doctrine pounced upon by senators, their staffs, and their allies in the media. Always hanging in the air over these tense confirmation battles is the suspicion that maybe, just maybe, a nominee for the Court will dare to be faithful to the clear intentions of the framers and to the actual meaning of the Constitution. And then no tactic of abuse or delay is out of bounds, until the nominee is declared "in trouble" and the spouse is in tears.

Of course, in the daily routine of Senate obstructionism, presidential nominees to the lower courts are now lucky if they get a hearing at all. These courts were created long ago by the Congress itself, on what then seemed the safe assumption that future Senates would attend to their duty to fill them with qualified men and women nominated by the president. Yet at this moment there are 31 nominations pending, including several for the Fourth Circuit Court of Appeals that serves North Carolina. Because there are so many cases with no judges to hear them, a "judicial emergency" has been declared here by the Administrative Office of U.S. Courts. And a third of the entire Fourth Circuit Court of Appeals is vacant. But the alarm has yet to sound for the Senate majority leadership. Their idea of a judicial emergency is the possible confirmation of any judge who doesn't meet their own narrow tests of party and ideology. They want federal judges who will push the limits of constitutional law, and, to this end, they have pushed the limits of Senate rules and simple courtesy.

As my friend and colleague Senator Tom Coburn of Oklahoma points out, somehow these very same senators can always find time to process earmark spending projects. But months go by, years even, and they can't get around to voting on judicial nominations -- to meeting a basic Senate duty under our Constitution. If a lobbyist shows up wanting another bridge to nowhere, or maybe even a courthouse with a friend's name on it, that request will be handled by the Senate with all the speed and urgency of important state business. But when a judicial nominee arrives to the Senate -- a nominee to preside at a courthouse and administer justice -- then he or she had better settle in, because the Senate majority has other business and other priorities.

Things almost got even worse a few years ago, when there were threats of a filibuster to require 60 votes for judicial confirmations, and threats in reply of a change in Senate rules to prevent a filibuster. A group of senators, nicknamed the "Gang of 14," got together and agreed we would not filibuster unless there were "extraordinary circumstances." This parliamentary truce was brief, but it lasted long enough to allow the confirmation of Justices Roberts, Alito, and many other judges. And it showed that serious differences can be handled in a serious way, without allowing Senate business to unravel in a chaos of partisan anger.

Here, too, Senators Obama and Clinton have very different ideas from my own. They are both lawyers themselves, and don't seem to mind at all when fundamental questions of social policy are preemptively decided by judges instead of by the people and their elected representatives. Nor have they raised objections to the unfair treatment of judicial nominees.

For both Senator Obama and Senator Clinton, it turned out that not even John Roberts was quite good enough for them. Senator Obama in particular likes to talk up his background as a lecturer on law, and also as someone who can work across the aisle to get things done. But when Judge Roberts was nominated, it seemed to bring out more the lecturer in Senator Obama than it did the guy who can get things done. He went right along with the partisan crowd, and was among the 22 senators to vote against this highly qualified nominee. And just where did John Roberts fall short,

by the Senator's measure? Well, a justice of the court, as Senator Obama explained it -- and I quote -- should share "one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy."

These vague words attempt to justify judicial activism -- come to think of it, they sound like an activist judge wrote them. And whatever they mean exactly, somehow Senator Obama's standards proved too lofty a standard for a nominee who was brilliant, fair-minded, and learned in the law, a nominee of clear rectitude who had proved more than the equal of any lawyer on the Judiciary Committee, and who today is respected by all as the Chief Justice of the United States. Somehow, by Senator Obama's standard, even Judge Roberts didn't measure up. And neither did Justice Samuel Alito. Apparently, nobody quite fits the bill except for an elite group of activist judges, lawyers, and law professors who think they know wisdom when they see it -- and they see it only in each other.

I have my own standards of judicial ability, experience, philosophy, and temperament. And Chief Justice Roberts and Justice Samuel Alito meet those standards in every respect. They would serve as the model for my own nominees if that responsibility falls to me. And yet when President Bill Clinton nominated Stephen Breyer and Ruth Bader Ginsberg to serve on the high court, I voted for their confirmation, as did all but a few of my fellow Republicans. Why? For the simple reason that the nominees were qualified, and it would have been petty, and partisan, and disingenuous to insist otherwise. Those nominees represented the considered judgment of the president of the United States. And under our Constitution, it is the president's call to make.

In the Senate back then, we didn't pretend that the nominees' disagreements with us were a disqualification from office even though the disagreements were serious and obvious. It is part of the discipline of democracy to respect the roles and responsibilities of each branch of government, and, above all, to respect the verdicts of elections and judgment of the people. Had we forgotten this in the Senate, we would have been guilty of the very thing that many federal judges do when they overreach, and usurp power, and betray their trust.

The surest way to restore fairness to the confirmation process is to restore humility to the federal courts. In federal and state courts, and in the practice of law across our nation, there are still men and women who understand the proper role of our judiciary. And I intend to find them, and promote them, if I am elected president.

Harry Truman said that he gave "more thought, more care, and more deliberation" to the selection of judges than nearly any other duty of the office. I will bring that same level of care and caution to my judicial nominations, expecting in return that the Senate will do its own part, and confine itself to the duty of confirming qualified men and women for the courts. The decisions of our Supreme Court in particular can be as close to permanent as anything government does. And in the presidential selection of those who will write those decisions, a hunch, a hope, and a good first impression are not enough. I will not seek the confidence of the American people in my nominees until my own confidence is complete -- until I am certain of my nominee's ability, wisdom, and demonstrated fidelity to the Constitution.

I will look for accomplished men and women with a proven record of excellence in the law, and a proven commitment to judicial restraint. I will look for people in the cast of John Roberts, Samuel Alito, and my friend the late William Rehnquist -- jurists of the highest caliber who know their own minds, and know the law, and know the difference. My nominees will understand that there are clear limits to the scope of judicial power, and clear limits to the scope of federal power. They will

be men and women of experience and wisdom, and the humility that comes with both. They will do their work with impartiality, honor, and humanity, with an alert conscience, immune to flattery and fashionable theory, and faithful in all things to the Constitution of the United States.

There was a day when all could enter the federal courthouses of our country feeling something distinctive about them -- the hush of serious business, the quiet presence of the majesty of the law. Quite often, you can still find it there. And in all the institutions of government there is nothing to match the sight of a court of law at its best. My commitment to you and to all the American people is to help restore the standards and spirit that give the judicial branch its place of honor in our government. Every federal court should command respect, instead of just obedience. Every federal court should be a refuge from abuses of power, and not the source. In every federal court in America, we must have confidence again that no rule applies except the rule of law, and that no interest is served except the interest of justice. Thank you very much.