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A LITMUS TEST FOR JUDICIOUS SENATORS

Thomas L. Jipping

The Senate Judiciary Committee's vote on Justice Priscilla Owen's appeals court nomination will reveal the health of the judicial confirmation process.

Qualifications really mattered once. On June 24, 1986, Judiciary Committee member Joseph Biden explained that he would vote for judicial nominees with "the earmarks of excellence, intellectual capability, high achievement and demonstrated excellence in the law and the requisite judicial temperament." A member of the Texas Supreme Court since 1994, Justice Owen received a unanimous "Well-Qualified" rating from the American Bar Association, once praised by Democrats as the "gold standard."

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Democrats once opposed partisanship. On March 19, 1997, Judiciary Committee member Edward Kennedy said it is "time to end the excessive partisanship over judicial nominations." On June 16, 1997, Judiciary Committee Chairman Patrick Leahy said that "if there is one area where partisan politics should not be allowed, it is in the area of the federal judiciary."

Democrats once opposed litmus tests. On April 14, 1994, then-Chairman Biden condemned as "inappropriate" the fact that some critics of a female appeals court nominee "object to some of her decisions and therefore her confirmation on ideological grounds." On March 19, 1997, he said if judicial nominees "will be [persons] of their word and follow [precedent], it does not matter to me what their ideology is." On July 10, 1997, Mr. Leahy said he hoped "that no senator is imposing an ideological litmus test on judicial nominations." On March 17, 1998, he warned the Senate not to head "down a road toward an ideological litmus test."

Democrats once said that judicial nominees deserve a vote by the full Senate. On March 19, 1997, Mr. Biden said that "everyone who is nominated is entitled to . . . have a hearing and to have . . . a vote on the [Senate] floor. We in the Judiciary Committee have the right to give advice to the Senate, but it is the Senate that gives its advice and consent on judicial nominations." On Sept. 28, 1998, Judiciary Committee member Richard Durbin said that 150 days was too long for a nominee to wait without a full Senate vote (Justice Owen was nominated 476 days ago). In fact, in the past 60 years, the Senate Judiciary Committee has voted to prevent a judicial nominee from reaching the full Senate just five times.

That was then, this is now. Despite Justice Owen's qualifications, community service, and widespread support in Texas, far-left political interest groups have ordered Democrat senators to oppose her on purely ideological grounds. Abortion extremists, for example, say Justice Owen has a "strong personal bias against the right to choose" based on a few votes in parental notification cases. Yet Justice Owen was in the majority in nine of those 12 cases, dissenting only three times to uphold the decision of two lower courts requiring notification. The liberal Washington Post said on July 24 that these three votes were not "beyond the range of reasonable judicial disagreement." Will senators once opposed to litmus tests vote against a qualified nominee because of three votes that even a liberal editorial page says are reasonable?

Mr. Biden has outlined the better course. On April 19, 1994, he said he would support nominees who have "the capacity, competence, and temperament," who are "of good character" and "free of conflict of interest" and who will "faithfully apply the Constitution and the precedents of the Supreme

Court." According to the ABA, its "Well-Qualified" rating means that Justice Owen is "at the top of the legal profession" and has "outstanding legal ability, breadth of experience," and "the highest reputation for integrity."

As if he were speaking today about the Owen nomination, Mr. Biden said on June 24, 1986, that a judicial confirmation "is not about right to life, it is not about conservative or liberal, it is not about Democrat or Republican. It is about intellectual and professional competence to serve as a member of the third coequal branch of the government." And so it should be today.

Will senators capitulate to the far-left groups that want them to ignore qualifications and impose ideological litmus tests? Will they vote against Justice Owen because they disagree about the outcome of some cases? Or will they instead use the standard Mr. Biden outlined on Sept. 17, 1986: "[T]he fact that I may disagree with the nominee about the outcome of one or another matter within the legitimate parameters of debate is not enough" to oppose a nominee?

The Judiciary Committee's vote will speak volumes.

¶ Thomas L. Jipping is senior fellow in legal studies at Concerned Women for America, the nation's largest public-policy women's organization.