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From: Robert McConnell <RMcConnell@hyi-usa.com> (Robert McConnell <RMcConnell@hyi-usa.com> [UNKNOWN])
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : The machine is at work and it will only get worse.
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CREATOR:Robert McConnell <RMcConnell@hyi-usa.com> (Robert McConnell <RMcConnell@hyi-usa.com> [UNKNOWN])
CREATION DATE/TIME:12-MAR-2003 06:38:49.00
SUBJECT:: The machine is at work and it will only get worse.
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
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The liberal attack machine is at work against all Bush nominees to the Federal bench and it is only going to get worse.

townhall.com

Thomas Sowell (back to
<<http://www.townhall.com/columnists/thomassowell/ts20030312.shtml>> story)

March 12, 2003

The other filibuster

While Senate Democrats are filibustering against the nomination of Miguel Estrada to the federal appeals court, liberals in the media are filibustering against conservative judges in general. The hallmark of these liberal media filibusters is that they can find little or nothing specific to criticize about how the judges have interpreted the laws, so the critics resort to rhetoric, confusion and guilt by association.

A classic of this genre was an article in the New York Times magazine section on March 9th, attacking the conservative judges on the Fourth Circuit Court of Appeals. This voluminous article contained not one example of a written law that Fourth Circuit judges interpreted to mean something other than what it said. Instead, there were a lot of words (and a couple of photographs) about Senators Jesse Helms and J. Strom Thurmond, and their role in the judicial nomination process that put two judges on the Fourth Circuit bench.

When all is said and done, however, Senators Helms and Thurmond have had just two votes out of a hundred in the Senate. If they are not being put front and center for purposes of guilt by association, what is the point? Moreover, the two nominees they sponsored are by no means a majority on the Fourth Circuit bench.

Tangential issues dominate the New York Times' hatchet job. A plaintiff who lost on appeal is quoted in a sweeping denunciation of the judges --

without a word even claiming to show how the decision varied from the statutory law or the Constitution, which are after all what judges are put on the appellate courts to uphold.

Characterizations abound. This is said to be "a judicially active conservative court" serving "a conservative political agenda." If true, these would be grounds for impeachment. If not true, they tell us more about the liberals who make such charges than about the judges on the receiving end.

The ease of creating verbal parallels has led to much moral equivalence, whether between Communist countries and the United States or between liberal and conservative judges. But do these parallels stand up under scrutiny?

"Judicial activism" is one of those confused terms that have come to mean all things to all people. Its initial meaning was quite clear: Judges who make rulings based on their own personal assumptions, beliefs, and preferences, rather than on the written statutes or the Constitution, are judicial activists. They are a threat to the very concept of law or of a self-governing democracy.

The fact that it was liberals who did this most often in the era that began during the New Deal and reached its peak in the Warren court years led to the phrase "liberal judicial activism." Now, those who promote moral equivalence have countered with charges of "conservative judicial activism."

Examples of liberal judicial activism are easy to find. When Justice William Brennan decided the 1979 Weber case by "interpreting" the Civil Rights Act of 1964 to mean the direct opposite of what its words plainly said, that was substituting what Brennan wanted for what Congress had voted to enact into law.

No such cases are brought forward by those who proclaim that "conservative judicial activism" is a threat. Instead, most do what the New York Times article does -- cite cases whose outcomes they wish had been different, such as a ruling upholding laws on parental notification before a child can get an abortion.

Whether that law is good, bad, or indifferent is a political issue, for which we have political institutions, such as legislatures and executive branches of government. Appellate judges are supposed to determine whether laws violate the Constitution, not whether they personally agree with them or not.

There is a more sinister side to media attempts to manufacture a "conservative judicial activism" threat. Liberal columnist Albert Hunt has argued that, when President Bush makes nominations based on ideology, the Senate has a right to make their ideology an issue when voting on these nominees.

Interpreting the law as written is not an ideology. It is what all judges swear to do when they go on the bench. Are those who do so now to be considered "activists" or even "extremists," so that only those who lied when they took the oath are acceptable?

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Bob

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