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SPEECH

ADDRESS TO THE SEVENTH CIRCUIT BAR ASSOCIATION AND THE SEVENTH CIRCUIT JUDICIAL CONFERENCE ANNUAL JOINT MEETING MAY 6, 2013*

SENATOR RICHARD G. LUGAR**

I thank the Seventh Circuit Bar Association and the Seventh Circuit Judicial Conference for this opportunity to address your annual joint meeting. It is a great pleasure to be with so many friends who have served our country and our state. As a Hoosier, I have always been proud of the Seventh Circuit's contributions to American jurisprudence and to the well being of Indiana.

Since leaving office, I have been fortunate to become affiliated with several universities and organizations that give me a chance to continue my public service in a more scholarly and analytical format. Among these are the University of Indianapolis, Indiana University, Georgetown University, the German Marshall Fund, and the Center for Strategic and International Studies. Additionally, three weeks ago we announced the formation of The Lugar Center in Washington, D.C. This is a new non-profit organization through which I hope to continue my work in several specific policy areas, especially containing the spread of weapons of mass destruction, advancing global food security, and achieving more effective foreign assistance practices. The Center also will be dedicated to promoting a more bipartisan process within our government.

It is this element that I wish to address today, especially in relation to the construction of our court system and the confirmation of Federal judges by the Senate.

During my 36 years in the Senate, I witnessed a great number of changes in our government, but few were as profound as the change in attitudes toward the process of confirming Federal judges.

For most of our nation's history, judicial confirmations in the Senate rarely resulted in even a dozen negative votes against a nominee. Prior to 1955, Supreme Court nominees almost never testified before the Senate as part of their

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** United States Senator from Indiana serving between the years of 1977 and 2013.

confirmations. This was true of Indiana's own Sherman Minton, who was confirmed without controversy despite declining to appear before the Judiciary Committee following his nomination by President Truman.

When I began my Senate service in 1977, judicial confirmation hearings had become standard practice, but the vast majority of them were not the tense affairs we witness today. I recall that one of the Federal judges that I championed in the 1980s was asked just two questions at his Judiciary Committee hearing, the second of which was: "Dick Lugar said you will be a good judge—are you going to be a good judge?" The nominee quickly answered yes and the hearing was gaveled to a close.

Expectations changed significantly as a result of the battle over the Supreme Court nomination of Robert Bork. The unprecedented involvement of outside interest groups in the nomination process and the degree to which opponents attempted to portray the nominee's judicial opinions as character flaws signaled a new era in judicial confirmations. After the failure of the Bork nomination, Presidents were on notice that a no-holds-barred fight against any judicial nominee was a possibility. The Bork experience also guaranteed that all subsequent Supreme Court nominations would feature adversarial questioning during confirmation hearings.

But although the Bork nomination clearly was a watershed event, the norms against overt politicization of judicial nominations remained powerful. Few Senators sought to derail Federal judicial appointments without an extraordinary reason, and most Senators still began the confirmation process with the presumption that they would support a nominee unless information arose to convince them otherwise.

Over the last quarter century, however, this norm gradually has degenerated. I attribute this primarily to the ability of outside political forces on both sides to monetize partisanship through the use of cable news, the internet, and social media. Information technology has enabled many more commentators to successfully market at very low cost a strident viewpoint to vast numbers of adherents. Such operations find judicial nominations to be especially useful targets, because it is easier to personalize attacks against human beings than abstract policies. In addition, judicial nominees who already have served on the bench usually have records rich in controversial detail that can be manipulated or exploited.

For prospective Federal judges, this evolution to a highly partisan norm has meant far more contentious confirmations, longer waiting periods between their nomination and confirmation, and much closer Senate confirmation votes than in the past.

The new norms against politicizing judicial nominations can be observed in the Senate votes on the four most recent Supreme Court Justices to be confirmed. Chief Justice Roberts received 22 negative votes in the Senate; Justice Alito received 42, Justice Sotomayor received 31, and Justice Kagan 37.

All four of these Supreme Court Justices possessed strong qualifications and high moral character. Each of them demonstrated skill and a judicial temperament in their confirmation hearings. My own sense is that had they been nominated in the atmosphere of the 1990s, the negative votes against these

Justices would have been in the single digits. Had they been nominated in the pre-Bork era, their confirmations would have been unanimous or close to it. Yet between 2005 and 2010, roughly one half to four-fifths of the opposing party in the Senate voted against the nominations of all four justices.

What these numbers tell us is that most Senators no longer apply a non-political standard to their vote on nominees to the Supreme Court. The straightforward reason for this is that it is no longer good politics to do so. If you polled Senators today, you would find agreement that casting a vote for a Supreme Court Justice nominated by a President of the opposing party carries extreme political risks and almost no political benefits.

During my 2012 primary campaign, we operated a vigorous phone bank through which volunteers made well over a million calls to Hoosier Republican households. These volunteers were able to engage roughly a quarter million Hoosiers in conversation on the election and the issues of the day. As we tallied issues raised in these conversations, it was clear that among the votes that I cast, none were more controversial than my votes to confirm Justices Sotomayor and Kagan. Some Republican primary voters had been convinced that these Justices were unqualified or ethically unfit to sit on the bench. Many others opposed them on philosophical grounds or simply because they had been nominated by President Obama.

I made the case during the campaign that Republican-appointed judges would not likely receive a fair hearing in the future if nominees of Democratic presidents were routinely blocked in the present. I also argued that opposing well-qualified judicial nominees rarely resulted in a more moderate candidate being named, because the tendency during and after such an episode is for the President to dig in his heels. I encountered a good number of voters who agreed with these points in principle. But many of them perceived such enormous risk from President Obama's judicial appointees that any concern for the future treatment of Republican-appointed judges was trumped by their desire to oppose the President.

It is no mystery that in politics, short-term thinking predominates. It may also be that for some, preventing a judge with whom they disagree from taking the bench is more important than securing the appointment of a judge they like, though it was rarely expressed to me in that way.

My concern is that one party or the other will succumb to a fit of partisan passion and decide to filibuster a qualified Supreme Court nominee. We are very close to this. Periodically, the thought is raised that filibustering a prospective justice would not be such a bad thing. This usually happens in the early stages of vetting a nominee as the opposing forces are coming to grips with their options.

In 1968, the Senate held an unsuccessful cloture vote on the Supreme Court nomination of Abe Fortas, but there is disagreement as to whether this constituted a full-fledged filibuster. In any case, the Fortas nomination has never been much of a precedent because of its many peculiarities, including ethical problems that emerged late in the confirmation process and the fact that those voting against cloture were almost evenly split between Democrats and Republicans. Thus, this failed nomination was not the result of one party using a filibuster strategy to kill a nominee of the opposite party for partisan reasons.

If we cross this partisan barrier in a way that establishes a precedent, the last vestiges of fair and open-minded treatment of judicial nominees could disintegrate. Filibusters of judges could become common, with the votes of only a handful of centrists in either party coming into play.

In such a universe, the problems that have encumbered the Federal Judiciary, including lengthy judicial vacancies and heavy caseloads, would multiply. But the consequences could be much further reaching for our system of government.

Crossing over the line could change the character of American democracy. The Founders emphasized the difference between the “political branches”—the Executive and the Legislature—and the Judiciary. Their concern about the potential dangers of passionate, interest-driven political divisions, which Madison famously called the “mischiefs of faction,” influenced their design of our entire governmental structure. But they were especially concerned that such mischiefs not permeate those who would sit on the bench.

If nominating and confirming judges becomes a purely partisan affair, it will be far more likely that judges subjected to such proceedings will feel less inclined to uphold strict norms of impartiality and non-partisanship. Moreover, how the Senate treats judges is a leading indicator of the direction of our political culture and our expectations for our government. The judiciary was conceived as the element of our government that would be the least subject to partisanship. If the Senate routinely treats judicial nominees as objects to be exploited for political advantage, hopes for bipartisan unity and productivity throughout our democracy would be much dimmer.

I believe that despite recent trends, a foundation still exists on which to rebuild the vital concept of non-partisan confirmation of judges. Even if most Senators are resigned to what they see as a personal political necessity to vote against a Supreme Court nominee of the opposite party, few relish the process. Perhaps more importantly, although Supreme Court nominations produce political combat with few limitations, opposition to lower court nominees is more selective and more often takes the form of delay than outright opposition.

In 2005, I had the opportunity to introduce Chief Justice John Roberts at his Judiciary Committee confirmation hearing. This was one of the most memorable and proud occasions of my Senate tenure. On that day I told the Judiciary Committee that, “the timeless lesson that transcends any particular case and whatever controversy may swirl about it is how our courts resolve disputes, from the momentous to the mundane, in administering a fair, impartial system of justice that must stand outside the political passions and pressures of the day, and whose judges must put aside whatever personal views they may have on the issues presented.”

Through all of the deeply divisive issues and political combat that permeate our democracy in the present age, we must defend this principle. I hope that each of you will use the occasion of this Conference to rededicate yourself to fulfilling the trust that our Founders placed in our courts and the judicial branch. I thank each of you for your hard work, study, and expertise that daily benefits our country and our legal system.