

RESOLUTION ON JUDICIAL, EXECUTIVE BRANCH, AND INDEPENDENT AGENCY NOMINATIONS

*Union of American Hebrew Congregations Board
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BACKGROUND

Jewish tradition teaches the necessity of fair, just and impartial courts. In Exodus 18:21, for example, Moses' father-in-law, Jethro, advises him to choose capable, trustworthy, and law abiding members of society as judges. Elsewhere we are taught of the ethical obligation to oppose unjust persons and unfair judgments; judges should neither "favor the poor or show deference to the rich." (Leviticus 19:15)

These values are also a cornerstone of American democracy. The preservation of the rule of law rests on the independence and fairness of our courts. Judges at all levels must be committed to defending the Constitution, protecting civil rights and civil liberties, acting within the framework of the precedents set by higher courts, and enforcing Constitutional legislation enacted by Congress when cases come before them. Legitimate concern about judicial vacancies and the burdens they impose on an overworked judiciary should not lead us to retreat from insisting that individual nominees meet the highest standards.

In addition to the Supreme Court's well known and crucial role in our nation's governance, federal courts at all levels play an increasingly critical role in safeguarding our fundamental freedoms. As the country has grown, and as the number of issues under federal jurisdiction has multiplied, federal court caseloads have burgeoned. At the same time, the Supreme Court has significantly reduced the number of cases that it considers by granting writs of certiorari. This means that even novel precedents set by each of the Federal Courts of Appeals may never be reviewed by the Supreme Court or may not be reviewed for a considerable period of time even when there are conflicts between circuits or significant issues on which a Supreme Court ruling is needed. Those precedent-setting decisions and interpretations by the appellate courts govern all lower court cases in their respective circuits and are effectively final decisions until and unless overturned by the Supreme Court.

Since the landmark ruling in *Brown v. Board of Education*, advocacy groups on both the right and the left have increasingly come to understand the policy-making role of the courts. While in the past, the pattern was to appoint judges across a fairly wide political spectrum, some recent administrations have intensified efforts to shape the philosophical balance of the courts by appointing as judges individuals who subscribe to a particular view concerning the Constitution and controversial policy issues. As a result, the philosophical and ideological diversity of the bench has been diminished, and a singular perspective dominates in a majority of the thirteen Courts of Appeals. Moreover, the next Supreme Court appointment could tip the balance of an evenly divided court on issues of the most fundamental concern to the Reform Jewish Movement, American Jewry, and our nation.

Unlike other Presidential appointees, federal judges serve for life; their service often extends far beyond the term of the President who appoints them. Public input on judicial nominations is part of the democratic process envisioned by the founders. The Constitution makes judicial appointment subject to the Senate's "advice and

consent." Presidential appointments were never envisioned to be automatic. Appointment and confirmation are political decisions in which the voice of the people should be heard and weighed. As a democratic institution, the Senate needs to hear from the public before exercising its Constitutional power. This is implicit in the Senate's own rules, which provide for committee hearings on each nominee; it is expected and desirable that interest and advocacy groups make their views known. As Reform Jews, we believe there are cases where it is essential that our unique voice be heard in the debate over the future of our judiciary.

Executive Branch Nominations

Although a President is entitled to significantly greater discretion in selecting Executive Branch nominees who reflect the Administration's views and philosophy, some similar considerations apply with respect to confirmation of nominees to these positions. Such appointees serve at the will of the President, and her/his key roles are to provide advice to, and implement decisions of, the President. The President should have wide leeway in appointing people to carry out the President's policies and reflect the Administration's viewpoints. Nonetheless, many of these appointments also shape public policy we care deeply about, and may determine the approach of an entire agency of government. Expressing views on confirmation permits us a role in decisions that determine vital policy matters. In the past, the UAHC has, on rare occasions, spoken out against executive branch appointments, particularly where proposed appointees have been associated with extremist groups.

Independent Agency Nominations

Appointees to independent agencies are charged with carrying out policies enacted by Congress, often during different administrations, have terms in office that often extend beyond the term of the President who appoints them, and are usually removable from office only for cause. As a consequence, the views of Congress and of the public relating to how agency policies are to be carried out must also be considered. In the unusual case where a nominee has a demonstrated record of opposition to the policies that he or she would be responsible to administer, or of opposition to protection of fundamental rights that our Movement supports, it may be necessary for us to oppose confirmation of the nominee in order to protect our Movement's fundamental values and rights. While fewer instances may be expected in which the UAHC would express an opinion, the same process would be followed as in cases where expressing an opinion on a judicial nomination is recommended.

It is not the intention of this resolution that opposition to nominees or appointments becomes a regular occurrence. Opposition will be appropriate only where consideration of the factors listed in paragraph 2, below leads to the conclusion that core values and/or issues of concern to our Movement will be significantly jeopardized or adversely affected. Even then, appropriate restraint should be exercised so that opposition is limited to matters of significant import.

THEREFORE, the Union of American Hebrew Congregations resolves to:

1. Bring to the attention of the Senate of the United States, without opposing or supporting nominees, issues affecting moral policy concerns as articulated in UAHC resolutions on which the nominees' views or record need to be clarified before consent is given. (The process followed by the UAHC in such actions will be the same as that followed in determining the UAHC's position on legislative issues.)

2. Oppose a nominee if after consideration of what the nominee has said and written, and his or her record, it believes that a compelling case can be made that the appointment would threaten protection of the most fundamental rights which our Movement supports (including, but not limited to, the separation of church and state, protection of civil rights and civil liberties, women's reproductive freedom, Israel's security, and protection of the environment). Among the considerations that should be weighed in making this determination are whether:

- A. The nominee lacks the competence, professional qualifications, or ethical standards to serve in the position to which he or she is nominated;
- B. A nominee for a judicial position has demonstrated a pattern of disregard for generally accepted principles of jurisprudence or a nominee for an executive branch or independent agency appointment has a demonstrated record of opposition to the policies that he or she would be responsible to administer;
- C. The nominee has a record of bigoted, racist or anti-Semitic activity;
- D. The nominee has emerged as a major and influential ideologue on one or more issues of core concern to the Reform Movement and the appointment would likely contribute significantly to reshaping American jurisprudence or policy in a direction that would jeopardize those core values;
- E. The nomination has engendered a national debate on one or more issues of core concern to the Reform Movement so that the outcome of the confirmation or nomination is likely to be perceived as a referendum on that issue and will have significant implications beyond the individual nomination;
- F. The nominee's confirmation would shift the ideological or policy balance of a particular court or independent agency on matters of core concern to the Reform Movement;

3. Use the following process to decide whether to oppose confirmation of a Presidential nominee:

- A. If time permits, recommendations to oppose a nominee will be taken to the UAHC Board or its Executive Committee for decision.
- B. If time does not permit, recommendations to oppose a nominee will be submitted to a review committee, which will include, in accordance with the UAHC board resolution of June 1974, all members of the CSA Executive Committee who serve on the UAHC Board and such other members as the Chair of the UAHC may choose. The review committee is to make a recommendation to the Chair and President of the UAHC who will decide the matter.
- C. The above process refers to UAHC policy making. As always, the CCAR will follow its own procedures and the Commission will work with both bodies.
- D. Ask the UAHC Executive Committee to review how this process has worked in practice at its February 2004 meeting or thereafter.