

AFJ NOMINEE REPORT

STEPHANOS

BIBAS



U.S. Court of Appeals for the Third Circuit

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INTRODUCTION

On June 19, 2017, President Trump nominated Stephanos Bibas to the United States Court of Appeals for the Third Circuit.¹ He is nominated to fill the seat of Marjorie Rendell, who assumed senior status on July 1, 2015.²

Bibas currently serves as a professor at the University of Pennsylvania Law School. Having worked in academia for more than 20 years, he has amassed a body of scholarly work that is extensive. His articles focus on criminal law and sentencing, such as the effects of plea bargaining on the criminal justice system³ and fact-finding at sentencing.⁴ Much of his work is thoughtful. For example, Bibas has been outspoken about injustices in the criminal justice system involving the prevalence of plea bargains, noting that the system is “capacious, onerous machinery that sweeps everyone in.”⁵ He has highlighted the need for prison reform, including increased education for offenders.

This report, however, does not attempt to summarize the entirety of his career or his scholarship. Rather, it seeks to highlight areas where we believe careful scrutiny by the Senate is particularly necessary.

One particularly troubling aspect of Bibas’s record came prior to his academic career, during his brief stint as a federal prosecutor. Although he only served as a prosecutor for

¹ *Current Judicial Vacancies*, UNITED STATES COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited Sept. 19, 2017).

² *Id.*

³ See, e.g., Stephanos Bibas, *Using Plea Procedures to Combat Denial and Minimization*, in *JUDGING IN A THERAPEUTIC KEY* (Bruce J. Winick & David B. Wexler eds., 2003); Stephanos Bibas, *Pleas’ Progress*, 102 MICH. L. REV. 1022 (2004).

⁴ See, e.g., Stephanos Bibas, *Apprendi and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311 (2001); Stephanos Bibas, *Apprendi in the States: The Virtues of Federalism as a Structural Limit on Errors*, 93 J. OF CRIM. L. & CRIMINOLOGY 1 (2003–04); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001).

⁵ See Emily Yoffe, *Innocence is Irrelevant*, THE ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/53417/>.

two years, in that time he used federal prosecutorial, law enforcement, and court resources to bring charges against a cashier at a veterans’ hospital cafeteria for allegedly stealing *seven dollars*. This deployment of resources to prosecute such a minor offense has been roundly criticized, and Bibas lost the case when the cashier was acquitted.

To make matters worse, the case against the cashier unraveled when, on the morning of the trial, long after discovery should have occurred, Bibas turned over a key piece of evidence that corroborated the defense. It isn’t clear when Bibas had become aware of the evidence, but the transcript of the court hearing suggests that Bibas may have withheld the evidence for a period of time.

This case warrants attention because it suggests such an egregious abuse of authority at the one time in his career when Bibas had an opportunity to wield it. A prosecutor, like a judge—and unlike a law professor—makes decisions that impact the rights and liberties of other individuals. We find it disturbing that when Bibas was in a position to exercise such authority, he exercised it in a manner that raises serious questions about his judgment and ethics.

In more recent years, in his academic writings, Bibas also has taken troubling positions on mass incarceration, people addicted to drugs, and certain core constitutional protections. For example, Bibas has minimized racial disparities in the criminal justice system and stated that drug addiction was not a disease but rather something that people could choose to

overcome. Moreover, Bibas has questioned the propriety of the *Miranda* doctrine and argued against robust habeas corpus protections.

Bibas has taken few public positions on civil issues, including critical constitutional rights for women and LGBTQ Americans; civil rights laws; protections for workers, consumers and the environment; and countless other issues that the Third Circuit will deal with outside the criminal context. Indeed, it is troubling that in one of his few public statements outside the criminal context, he displayed a misunderstanding of Title IX. The Senate should probe his views on critical non-criminal issues.

Finally, it is worth noting that President Trump nominated Bibas after Senator Pat Toomey did not return his blue slip for Rebecca Ross Haywood, whom President Obama had nominated to the Third Circuit on March 15, 2016. If she had been confirmed, Haywood would have been the first African-American woman on the Third Circuit.⁶ Nevertheless, the Senate Judiciary Committee, respecting the blue slip tradition, did not consider Haywood's nomination.⁷

While Senator Toomey exercised his right not to return his blue slip on Haywood, it took just *one* day after Bibas submitted his nearly 8,000-page record for Republicans to accuse Senator Bob Casey of "obstructing" and "blocking" Bibas when he did not immediately return his blue slip.⁸ The speed of the political attack on Casey was brazen, given the seat's history. Ultimately, Casey did return his blue slip on Bibas after taking just over two months to carefully review Bibas's record and to meet with the nominee.

⁶ *Rebecca Haywood*, ALLIANCE FOR JUSTICE (June 15, 2016), <https://www.afj.org/our-work/nominees/rebecca-ross-haywood>.

⁷ See Matthew Stiegler, *A look at Third Circuit nominee Rebecca Haywood's qualifications*, CA3Blog (Mar. 16, 2016), <http://ca3blog.com/judges/a-look-at-haywoods-qualifications/>.

⁸ Matthew Stiegler, *Casey reportedly blocking Bibas nomination [update: but apparently he isn't]*, CA3BLOG, (July 11, 2017), <http://ca3blog.com/judges/casey-reportedly-blocking-bibas-nomination/>.

BIOGRAPHY

Stephanos Bibas received his B.A. from Columbia University and, in 1991, earned a B.A and an M.A. in jurisprudence from Oxford University.⁹ Bibas received his J.D. from Yale Law School.¹⁰ After law school, he clerked for Judge Patrick E. Higginbotham on the Fifth Circuit and, after a two-year stint at Covington & Burling, clerked for Justice Anthony Kennedy on the United States Supreme Court.¹¹ Upon completing his clerkship, Bibas was an Assistant United States Attorney in the Southern District of New York for two years.¹² He then was a research fellow at Yale Law School for a year, taught at the University of Iowa College of law for five years, and has been a professor at the University of Pennsylvania Law School since 2006.¹³

Bibas currently is the Director of the University of Pennsylvania Law School's Supreme Court Clinic and, in that capacity, has argued six Supreme Court cases: [*Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 \(2016\)](#); [*Bank of America v. Caulkett*, 135 S. Ct. 1995 \(2015\)](#); [*Petrella v. MGM*, 134 S. Ct. 1962 \(2014\)](#); [*Vartelas v. Holder*, 566 U.S. 257 \(2012\)](#); [*Turner v. Rogers*, 564 U.S. 431 \(2011\)](#); [*Padilla v. Kentucky*, 559 U.S. 356 \(2010\)](#).

⁹ Sen. Comm. on the Judiciary, 115th Cong., Stephanos Bibas: Questionnaire for Judicial Nominees 1.

¹⁰ *Id.*

¹¹ *Id.* at 2–3.

¹² *Id.* at 2.

¹³ *Id.*

ISSUES OF CONCERN

I. PROSECUTORIAL JUDGEMENT

From 1998 to 2000, Bibas worked as a federal prosecutor in the Southern District of New York.

One of Bibas's cases, *United States v. Williams*, was not listed on his questionnaire, even though it received a full write-up in *The New York Times*.¹⁴ At the time, the case was described as "a legal legend in the making."¹⁵

The defendant, Linda Williams, worked as a cashier at the Veterans Affairs Medical Center in the Bronx. A federal officer accused Williams of stealing seven dollars.¹⁶ The officer alleged that Williams had put a \$5 bill and two \$1 bills in her pocket when a customer purchased breakfast.¹⁷

Williams maintained her innocence and refused to plead guilty. The customer whose money she was accused of pocketing also said the accusations were false: he remembered paying her with seven crinkled one dollar bills that she spent time straightening out.¹⁸ In spite of perhaps more pressing issues in the Southern District of New York, including violent crimes, Bibas exercised his discretion to bring a federal case against Williams.¹⁹ After she was charged, Williams lost her job.²⁰

The testimony, which bordered "on the surreal," undermined Bibas's case.²¹ The chief of police at the hospital "acknowledged that no one had actually seen the entire transaction through the surveillance camera."²² And a detective testified that he had "found seven crumpled single dollar bills in Ms. Williams' cash register,"²³ thereby corroborating the accounts of both Williams and the customer who was present during the alleged theft.

Troublingly, this key piece of evidence – the crumpled dollar bills – was only turned over to the defense on the morning of trial, immediately before the detective testified. Williams's attorney raised a concern with the judge that Bibas had failed to disclose the evidence in violation of the *Brady* doctrine:

[I]f seven one-dollar bills were found in that drawer, I think that's Brady material. I made a discovery request in this case. That was not produced to me. Secondly, we went through an exercise concerning the reliability of [the customer's] testimony in which the government took the position that this suggestion that it was seven one-dollar bills was not trustworthy. It did not disclose that it had this information. Mr. Bibas has advised me that he did not learn about it until this morning for the very first time.²⁴

Bibas responded, "I believe it was this morning. It could have been yesterday, but

¹⁴ See Benjamin Weiser, *A Federal Case of Small Change; U.S. Prosecutes a Hospital Cashier Over \$7 and Loses*, N.Y. TIMES (Oct. 6 1999), <http://www.nytimes.com/1999/10/06/nyregion/a-federal-case-of-small-change-us-prosecutes-a-hospital-cashier-over-7-and-loses.html?mcubz=0>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Transcript of Trial at 165, *United States v. Williams*, 99 Cr. 407 (DFE) (S.D.N.Y. 1999).

²⁴ *Id.* at 166.

I think it was this morning.”²⁵

Tellingly, however, Bibas’s excuse was undermined by his own witness. The detective who had found the crumpled bills indicated that he had turned over that evidence to Bibas before the morning of the trial:

Q: When did you first tell Mr. Bibas here about the seven crumpled one-dollar bills that you found in Ms. Williams’ cash register drawer?

A: I don’t recall.

Q: Wasn’t it this morning? Wasn’t this morning the very first time that you told him?

A: I don’t believe so.²⁶

Before Williams’s defense attorney made his closing argument, the judge interrupted him, saying there was no need for the defense to make a final presentation, and acquitted Williams.²⁷

Bibas left the United States Attorney’s Office several months after *United States v. Williams*. He did not complete his three year commitment in the office.

II. TITLE IX

In 2015, Bibas signed an open letter criticizing the University of Pennsylvania’s adoption of new procedures for investigating and resolving sexual assault complaints on campus.²⁸

The letter argues that the University’s new procedures, adopted in response to the Department of Education’s guidelines on Title IX and sexual assault, “subordinat[e] so many

protections long deemed necessary to protect from injustice those accused of serious offenses.”²⁹ The letter urges the University to adopt an adjudicative system that closely mirrors the criminal justice system.³⁰

The letter is striking for three reasons. First, advocating for full criminal procedures in the context of a university disciplinary procedure fundamentally misunderstands the purpose of civil rights law. Unlike criminal law, which is designed to punish and incapacitate, the purpose of Title IX, as the Supreme Court itself has made clear, is to ensure that all students have access to equal education.³¹ The Supreme Court has discouraged schools from adopting criminal procedures in their disciplinary hearings; such requirements would hinder their ability to ensure safe and equitable learning environments for students.³²

Second, the letter distorts the Department of Education’s policy guidelines, which it concluded mandated the University’s policy. Many of the aspects of the University’s new policy that Bibas objected to were not mandated by the Department’s 2011 policy guidance, which required that universities provide equal rights to both parties, including opportunities to present witnesses and evidence.³³

²⁵ *Id.*

²⁶ *Id.* at 165.

²⁷ Weiser, *supra* note 14.

²⁸ Open Letter from Members of the Penn Law School Faculty, Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf>.

²⁹ *Id.* at 1.

³⁰ *Id.* at 4–5.

³¹ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972); see also Why Schools Handle Sexual Violence Reports, Know Your IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> (last visited Sept. 22, 2017).

³² See *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (“To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”); see also *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (holding that accused students’ rights in a disciplinary hearing “are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial”); *Brewer by Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (urging parties not to “confuse[] two quite distinct processes: school disciplinary actions and criminal sentencing proceedings”).

³³ See Office for Civil Rights, Dear Colleague Letter, Dep’t of Educ. 8–14 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

Finally, while the letter purports to “recognize serious concerns about the problem of sexual assaults on college campuses,” it makes troubling statements suggesting that victims are in part responsible for assaults.³⁴ For example, the letter states that clear rules are needed to define what amounts to consent, because “there are too often troubling ambiguities on questions such as what constitutes valid consent, and such ambiguities leave students vulnerable to sometimes unpredictable, after-the-fact assessments of their behavior.”³⁵

III. MASS INCARCERATION

In a 2015 *National Review* article, Bibas criticized the “liberal” “mass incarceration” “narrative.”³⁶ He wrote that President Barack Obama and Michelle Alexander (author of the book *The New Jim Crow*), “blame our prison boom on punitive, ever-longer sentences tainted by racism, particularly for drug crimes,” and believe mass incarceration is caused by “structural racism, as manifested in the War on Drugs.”³⁷ Bibas wrote, “President Obama’s and Alexander’s well-known narrative, however, doesn’t fit the facts.”³⁸

Rather than address the overwhelming data on racial disparities in the criminal justice system, Bibas, setting up a straw man, dismissed claims that the criminal justice system is being used as a “tool of white supremacy to oppress blacks.” He supported this by saying, unremarkably, that “law-abiding blacks” “want more and better law enforcement” too. And he asserted that a great many African-American leaders were involved

in promoting the tough-on-crime initiatives of the 1990s, arguing that “the War on Drugs was bipartisan and cross-racial,”³⁹ as if that somehow makes disparities in sentencing non-racial.

Bibas also blamed the “Left” for being “soft on crime.”⁴⁰ He wrote, “The Left has forgotten how to blame and punish,” and opined that the liberal view of criminal justice “wrongly absolves criminals of responsibility for their ‘poor choices.’”⁴¹ He claimed that “the Left . . . blame[s] crime on society rather than on wrongdoers who need to be held accountable, disciplined, and taught structure and self-control.”⁴²

The premise for this argument rests on old political demagoguery that liberals believe in exonerating criminals of moral blame while focusing wholly on societal ills, while conservatives see criminals as miscreants in need of punishment and accountability. It is disappointing to see this simplistic straw man argument from someone who wishes to be a federal judge, especially since it seems completely ignorant of the “smart on crime” approach that has received bipartisan support from President Obama, Senator Richard Durbin, and Republicans including Senate Judiciary Committee Chairman Chuck Grassley and Senator John Cornyn. “Smart on crime” reform efforts are premised on using federal resources more efficiently to target violent offenders, not being “soft on crime.”

³⁴ Open Letter, *supra* note 28, at 1.

³⁵ *Id.*

³⁶ Stephanos Bibas, *The Truth about Mass Incarceration*, NATIONAL REVIEW (Sept. 16, 2015), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

IV. DRUG OFFENDERS

At a time when there is bipartisan consensus that too many low-level, nonviolent drug offenders are in prison, it is disturbing that, in the same *National Review* article referenced above, Bibas argued that contrary to the emerging narrative regarding mass incarceration, “[p]rison growth has been driven mainly by violent and property crime, not drugs.”⁴³ In contrast, then-Deputy Attorney General Sally Yates, testifying in support of the bipartisan Sentencing Reform and Corrections Act of 2015 (legislation supported by, among others, Chairman Grassley, Senator Cornyn, Senator Durbin and Senator Sheldon Whitehouse), noted:

We have seen an explosion in the Federal prison population since the 1980’s. While the country’s population has only grown by about a third, our Federal prison population has grown by almost 800 percent, due in large part to the influx of drug defendants. Today, nearly half of all Federal inmates are in Federal prison for drug-related offenses. Under the current sentencing regime, our mandatory minimum laws do not calibrate a defendant’s sentence to match the threat that he or she poses to our safety.⁴⁴

And, again contrary to a consensus, Bibas stated that he does not believe drug addiction is a disease. He wrote that “the Left paints drug addiction as a disease requiring costly medical intervention, drug addicts can in fact choose to stop using drugs.”⁴⁵ Both the American Medical Association⁴⁶ and American Psychological

Association disagree.⁴⁷ Several Republican senators also disagree with Bibas. Senator Rob Portman, discussing the Comprehensive Addiction & Recovery Act of 2016, said of the opioid crisis, “[t]his is also the first time that we’ve treated addiction like the disease that it is, which will help put an end to the stigma that has surrounded addiction for too long.”⁴⁸ And Senator Marco Rubio has called opioid addiction a “medical condition” and said that “[i]t’s important to ensure that proper treatment services are there for those who are seeking help or who have fallen through the cracks.”⁴⁹

Bibas should explain why he believes he understands drug addiction better than addiction specialists, research psychologists, and medical doctors.

V. CONSTITUTIONAL PROTECTIONS

In a 2012 book, *The Machinery of Criminal Justice*, Bibas evaluated the criminal justice system, tracing its evolution from colonial times and exploring the forces that have shaped the system as it functions today. Much of the material in the book shows that the author has given thought to needed improvements in the system, including his focus on how efficiency and speed have come at the expense of justice, including the right of defendants to have their day in court. Bibas also encourages emphasis on work and reintegration of inmates, suggesting that

REGULATION (2010), https://www.ncsbn.org/Understanding_the_Disease_of_Addiction.pdf.

47 Addictions, AM. PSYCH. ASS’N., <http://www.apa.org/topics/addiction/> (last visited Sept. 19, 2017).

48 Amber Jamieson, *Congress passes opioids bill to address addiction and support recovery*, THE GUARDIAN (July 14, 2016), <https://www.theguardian.com/us-news/2016/jul/14/congress-passes-opioids-bill-anti-addiction-legislation>.

49 Jason M. Breslow, *How Would the Candidates Fix the Heroin Epidemic?*, PBS FRONTLINE (Feb. 23, 2016), <http://www.pbs.org/wqhb/frontline/article/how-would-the-candidates-fix-the-heroin-epidemic/>.

43 *Id.*

44 S.2123 *Sentencing Reform and Corrections Act of 2015: Hearing before the Comm. on the Judiciary*, 114th Cong. 3 (statement of Deputy Atty. Gen. Sally Quillian Yates), <https://www.judiciary.senate.gov/imo/media/doc/10-19-15%20Yates%20Testimony.pdf>.

45 *Supra* note 36.

46 Kathy & Daniel H. Angres, *Understanding the Disease of Addiction*, 1 JOURNAL OF NURSING

they receive education, job training and drug treatment.

With respect to the treatment of inmates, however, Bibas also makes some deeply troubling suggestions that are in stark contrast to his more thoughtful work.

For example, Bibas argues in his book that prisoners should be “compelled to join” the military:

They would come in at lower wages than ordinary enlistees. Garnishment and restitution would further reduce their take-home pay, and GI Bill benefits would not vest for some time. They would not enjoy the free handouts and taxpayer-supported idleness that they currently do. They could wear different uniforms and enjoy fewer privileges than ordinary soldiers and sailors, by for example being confined to base. They would have to endure the lowliest of jobs, even cleaning latrines, and suffer push-ups and other punishments for the smallest infractions.⁵⁰

Recognizing compulsory military service might not be feasible, Bibas then emphasized that “prisons must force all able-bodied prisoners to work” “visibly demanding jobs, which would satisfy the public that inmates were ensuring the hard treatment that they earned.”⁵¹

He quickly added, however, “that does not mean chain gangs.” Disturbingly, his objections to chain gangs and corporal punishment seem driven less by an inherent objection to such practices, but because “the spectacle of a line of black men, shackled together and guarded

by white overseers, could sap minority communities’ fragile faith in equal justice,” and because “returning to chain gangs, corporal punishment, or similar hallmarks of slavery would deeply divide public opinion.”⁵²

Finally, Bibas highlights his belief that in the colonial era, criminal trials functioned as “morality plays” that served to spread and reinforce the community’s values, and he laments the lack of public participation today in the criminal justice system. In this context, however, he again ventures into problematic territory, when he writes approvingly that colonial-era punishments like public beatings and whippings were “public, shameful, and even painful, but...most often temporary” and that the punishment enabled the wrongdoers to “pay their material and moral debts to victims and society, wipe their slates clean, and return to the community as equals. It did not create a durable underclass of ex-cons, as our prisons do today.”⁵³

These “punishments were extremely visible,” something Bibas bemoans as lacking in the current system. For this reason, with respect to his suggestion that all prisoners should be required to work, he also suggests that working prisoners should be on display to the public:

The public might have controlled access and prison tours to watch prisoners at work, and could see non-dangerous inmates out on work-release programs cleaning highways, repaving roads, and the like. Jailers would avoid the shackles

⁵⁰ STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* E-BOOK 168 (Oxford Univ. Press 2012)

⁵¹ *Id.* at 168-170.

⁵² *Id.* at 68.

⁵³ *Id.* at 40.

and trappings of chain gangs, perhaps using electronic ankle bracelets instead of chains At the very least, the press and reality-television programs could broadcast images of prisoners toiling instead of watching soap operas. Just possibly, victims and the public might accept shorter terms of imprisonment if they were visibly more intense, as a tradeoff.⁵⁴

Bibas's focus on pain and public humiliation as beneficial aspects of now-outmoded criminal penalties is unsettling.

Elsewhere, Bibas's writings have raised questions concerning his commitment to constitutional protections. For example, Bibas has criticized the *Miranda* doctrine as a "social experiment on a grand scale" and "one of the Warren Court's great mistakes" that "articulat[ed] and impos[ed] top-down theories without enough regard for their real world import and impact."⁵⁵ Bibas also criticized the Court's decision in [*Dickerson v. United States*, 530 U.S. 428 \(2000\)](#), which held that *Miranda* was a constitutional requirement that could not be overturned by statute, writing that "*Dickerson* ensured that *Miranda*'s mistake will live on."⁵⁶

Bibas also supported limiting habeas corpus rights. He argued that habeas rights, before the Anti-Terrorism and Effective Death Penalty Act (AEDPA), bore no resemblance to the writ as the founders perceived it and allowed criminals to "rehash their entire cases, no matter how fair their trials and appeals had been."⁵⁷ He wrote:

[t]here is no reason to give criminals two

or more bites at the same apple, provided that a state court gave them a full and fair opportunity to be heard. And there is no reason to allow prisoners who make no claim that they are innocent to hog the justice system at the expense of law-abiding citizens. It is time to end the hyperbolic rhetoric about gutting the Constitution and to focus on the rights of victims.⁵⁸

All of these statements raise questions about whether Bibas will properly enforce critical constitutional protections for those who are accused of a crime and those who are incarcerated.

CONCLUSION

Stephanos Bibas, President Trump's nominee for the Third Circuit, has expressed troubling views on a range of constitutional and statutory protections aimed at protecting the rights of vulnerable Americans. Moreover, his startling lack of judgment in prosecuting a woman for allegedly stealing seven dollars, and possibly withholding exonerating evidence, raises questions about his nomination for a seat on one of the nation's most important courts. Alliance for Justice urges senators and the nominee to address these issues at his confirmation hearing.

⁵⁴ *Id.* at 168.

⁵⁵ Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078, 1079, 1086 (2006).

⁵⁶ *Id.* at 1089.

⁵⁷ Stephanos Bibas, *Letter to the Editor: Framers Never Intended Habeas Corpus as we know it*, N.Y. TIMES (Mar. 20, 1995).

⁵⁸ *Id.*