

<http://www.reason.com>

<http://www.reason.com/news/show/133633.html>



Replacing Justice Souter

Legal experts discuss Obama's forthcoming Supreme Court nomination

May 21, 2009

With Supreme Court Justice David Souter set to retire next month at the end of the Court's current term, President Barack Obama faces one of the most important decisions of his tenure. Reason.com asked a panel of leading legal scholars and commentators for their views on what sort of justice Obama should—and will—nominate to take Souter's place.

Our panelists are Radley Balko, Alan Gura, Wendy Kaminer, Manuel Klausner, Judge Andrew Napolitano, Walter Olson, Roger Pilon, Glenn Reynolds, Damon W. Root, Ilya Shapiro, Harvey Silverglate, Ilya Somin, and Jacob Sullum. Their answers are below.

Radley Balko

Who should Barack Obama nominate for the Supreme Court and why?

Sen. Russell Feingold (D-Wis.). If we can't get a libertarian, let's at least hope for a civil libertarian. Campaign finance reform is obviously Feingold's blindspot (and it's a big one, even for a leftist), but he's one of the few members of Congress from either party who has stood up for privacy and personal freedom since September 11.

Who will Obama nominate and why?

I hope I'm wrong, but my bet is with Solicitor General Elana Kagan. Kagan won over Republicans at her hearing earlier this year with her consistent support for broad executive power to fight the war on terror. Kagan gives Obama the best chance of avoiding an extended confirmation fight while still getting someone on the Court who shares his broader worldview.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

On criminal justice and civil liberties matters, that sentiment would seem to make one inclined to adopt a presumption of liberty over government power, so in that context I have no problem with it, and don't think it would conflict with a justice's primary duty to uphold the Constitution (which, of course, delegates a limited set of government powers, leaving all other rights and power with the people). But it seems likely that Obama's referring more to policies like wealth redistribution and the adjudication of private lawsuits, here, which of course is much more problematic.

What issue(s) will dominate the court over the next three years and why?

We'll likely see more cases testing the limits and extent of executive power with respect to the war on terror. There's some speculation that Chief Justice Roberts wants to eliminate or severely limit the scope of the exclusionary rule in Fourth Amendment cases. I'd also expect the Court to start taking on cases looking at what rights and privileges we should afford to illegal immigrants as challenges to various crackdown policies across the country make their way through the appeals courts.

Radley Balko is a senior editor at Reason magazine.

Alan Gura

Who should Barack Obama nominate for the Supreme Court and why?

It's silly to expect an unabashed liberal like Obama to nominate a Justice in the mold of Antonin Scalia or Clarence Thomas. The president should be true to his conscience and give the electorate what they bargained for, by nominating a liberally-minded jurist with some meaningful practical experience in the law. Yet in doing so, Obama should seek a *liberal* liberal, one whose liberalism is reflected in a healthy skepticism of authority and respect for the dignity of the individual rather than in obedience to the regulatory state.

Who will Obama nominate and why?

As a former professor of constitutional law, Obama doubtless takes his Supreme Court selection as seriously as any of his predecessors, and has unusually precise ideas of what he wants in a justice. Look for a nominee whose background and beliefs closely match Obama's: an academic, or at least a judge or practitioner, who is identified with an Obama-style jurisprudence. Judge Sotomayor or Dean Erwin Chemerinsky might be logical Obama picks; a pure politician is less likely.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

Conservative attacks on Obama's desire for "empathetic" judges miss the mark. Although empathy is a more important requirement of lower court judges more frequently called upon to make discretionary calls, it is still an important trait in Supreme Court justices whose opinions define the contours of our individual rights. But Obama's version of empathy appears inappropriately geared toward avoiding hard-luck outcomes for favored people, as opposed to empathy for the legitimate interests of individuals without regard to personal circumstances or popular politics.

What issue(s) will dominate the court over the next three years and why?

The explosion in the regulatory state, initiated during the late Bush regime and continued by the current administration and Congress, will test the limits of constitutional government. It is fair now to ask whether there exist any inherent limits to federal power, or whether the government can do absolutely anything it wishes in the economic realm. I fear that whatever else they might get right, Obama's nominees might get these questions wrong.

Alan Gura successfully argued District of Columbia v. Heller before the United States Supreme Court. He is a partner at Gura & Possessky.

Wendy Kaminer

Who should Barack Obama nominate for the Supreme Court and why?

Much as I disdain identify politics, I would urge him to nominate a very smart, scholarly, unabashedly liberal, young enough woman, like Kathleen Sullivan. I want a justice who will can stand up to Scalia, Alito, and Roberts, and I want Justice Ginsburg to have some company.

Who will Obama nominate and why?

My guess is (and I can only guess) a centrist female—I have no idea which one.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

Yes, and I find it hard to imagine an intelligent, good faith objection to choosing judges who remain cognizant that laws have actual consequences for actual human beings. You can see the injustices and idiocies of empathy's absence in the Court's crabbed and inhumane approach to claims of cruel and unusual punishment, which in the Court's view does not include life sentences for petty, non-violent offenses, like shoplifting, under three strikes laws, (see the 2003 cases of *Ewing v. California* and *Lockyer v. Andrade*) or a 200-year prison sentence imposed on a first time offender who privately downloaded images of child porn (see *Berger v. Arizona*, 2007).

What issue(s) will dominate the court over the next three years and why?

I don't know what will dominate, but I expect courts will continue to grapple with national security cases and post 9/11 abuses (how can they not?); and I expect that new technologies will continue inspiring efforts to impose new restrictions on speech.

Wendy Kaminer is a lawyer and former board member of the American Civil Liberties Union. She currently serves on the advisory boards of the Foundation for Individual Rights in Education and the Secular Coalition for America. Her latest book is Worst Instincts: Cowardice, Conformity and the ACLU.

Manuel Klausner

Who should Barack Obama nominate for the Supreme Court and why?

Solicitor General Elena Kagan, because she's bright, young (49 years old), and generally highly regarded, as evidenced by the support she received from some conservative lawyers when she was confirmed for solicitor general. Her positions aren't viewed as consistently left wing as many of the other leading contenders, so she'd draw less fire in the confirmation process. Since Obama's likely to have at least one additional opportunity to make a nomination to the Supreme Court, he could wait to nominate an Hispanic to score points with Hispanic voter—and thereby avoid a distracting confirmation controversy that a more doctrinaire and less highly regarded nominee would tend to provoke at this stage.

Who will Obama nominate and why?

My crystal ball's rather cloudy, but the name Janet Napolitano seems to be almost legible. She reportedly has Obama's confidence from her work in his Cabinet and has Earl Warren-like experience as a former governor.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

No. The notion of empathy as a criteria conflicts with the concept that justice should be blind, and thereby undermines the rule of law. Judges should rule on the merits of the case, without regard to the identity of the parties.

What issue(s) will dominate the court over the next three years and why?

The bulk of the cases won't involve highly-charged issues such as racial preferences, campaign finance regulation, and national security issues, although such cases are likely to be before the Court. Instead, given the Obama administration's political agenda, the Court's docket will likely be dominated by bankruptcy, antitrust, securities regulation, and environmental regulation cases--as well as the normal volume of criminal law, civil procedure, and administrative law cases. Still, many challenges to Obama's aggressive regulatory policies may not reach the Court within the next three years, given the time it normally takes to get a ruling from the intermediate appellate courts.

Manuel Klausner serves as general counsel to the Individual Rights Foundation (the legal arm of the David Horowitz Freedom Center) and was chairman of the Federalist Society's Practice Group on Free Speech & Election Law from 1996-2005. He has filed amicus briefs for the Individual Rights Foundation in significant Supreme Court cases, as well as for Reason Foundation, Ward Connerly, and the Libertarian Law Council.

Judge Andrew P. Napolitano

Who should Barack Obama nominate for the Supreme Court and why?

Judge Janice Rogers Brown is a minority and a female (which will please many of the president's constituents), has experience on the California Supreme Court and the U.S. Court of Appeals for the D.C. Circuit, and she understands federalism and the Constitution. Judge Alex Kozinski has over 20 years experience on the U.S. Court of Appeals for the Ninth Circuit, (he speaks with a foreign accent which will please many of the president's folks) and is an intellectual giant who is utterly faithful to, and fully understands, the natural law and the Constitution. He also understands tyranny, since he escaped from it in Eastern Europe as a child.

Who will Obama nominate and why?

My guess is that Obama understands the Court better than any president since Richard Nixon, and takes a long, rather than a political view. I'd expect a person whose personality and intellect he thinks are the functional equivalent of Antonin Scalia, (though I do not know that such a person exists). I also expect that he wants someone he is personally comfortable with. Thus, my guess is he will nominate his former University of Chicago Law School colleague Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit, or his long-time mentor, Professor Charles Ogletree of Harvard Law School.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

I wish his nominee would have empathy for the most beaten, bruised, dumped upon, disregarded, overlooked, avoided, evaded, crushed, ignored, discriminated against, and debased entity in American history: *The*

*Constitution.**What issue(s) will dominate the court over the next three years and why?*

The issues are the same: Can Congress continue to regulate any human behavior it wants under the Commerce Clause? Can the president do anything he wants to whomever he wishes to do it, in the name of national security? Will the Court continue to ignore our natural rights? Does the federal government recognize any limitations on its powers other than whatever it can get away with? Here is an old one coming the Court's way: Can the states nullify federal legislation that on its face impairs fundamental liberties or interferes with states' rights?

Judge Andrew P. Napolitano, the youngest life-tenured Superior Court judge in the history of the State of New Jersey, is senior judicial analyst for the Fox News Channel. His most recent book is Dred Scott's Revenge.

Walter Olson*Who should Barack Obama nominate for the Supreme Court and why?*

Walter Dellinger III is a Duke law professor and former Clinton Justice official whose expertise in separation of powers, civil liberties, and business law would seem to match those of any likely liberal Democrat. By praising him, I'm afraid, I've utterly doomed any chances he may have had. Sorry, Prof. Dellinger.

Who will Obama nominate and why?

Obama is grounded in today's legal academia, so the candidates he's most comfortable with would fit recognizably in the academic milieu. Like all presidents, though, he'll consult the political winds and constituency demands. Elana Kagan would breeze to confirmation.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

The "empathy" theme is politically golden for him, since on one level almost anyone agrees that judges benefit from having empathy, dealing constantly as they do with the stuff of human nature. Others, of course, will discern a signal that he wants judges who will rule for the little guy. I suppose we'll find out later which he meant.

What issue(s) will dominate the court over the next three years and why?

Replacing David Souter by a (marginally more liberal?) newcomer isn't the main game here. Every few years some new type of legal case arrives with the potential to shake up the old Court line-up. With the federal government rapidly grabbing quasi-executive authority over industries like finance and auto production, will—and should—the Court's conservatives uphold as an ideal the importance of deferring to the elected branches?

Walter Olson is a contributing editor at Reason magazine and a senior fellow at the Manhattan Institute. His most recent book is The Rule of Lawyers. He blogs at Overlawyered.com.

Roger Pilon

Who should Barack Obama nominate for the Supreme Court and why?

To fill a Supreme Court vacancy, President Obama *should* nominate a person with proven experience and integrity who has also demonstrated a deep understanding of the Constitution as a document designed to secure liberty through limited government. Unfortunately, that understanding has been out of fashion for some time, especially in the legal academy, and the president is nothing if not in step with the times.

Who will Obama nominate and why?

One can only speculate about who the president *will* nominate, but based on his record of legal appointments to date he may nominate someone from or with a strong connection to the academic world. One senses that he conceives of law as an instrument of policy, a vehicle through which to accomplish grand social ends, quite apart from any restraints the Constitution may place on such social engineering. If so, he would like to have a Court that facilitates rather than frustrates such endeavors.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

There is a place for empathy in the law and in adjudication insofar as it connotes a capacity to see things through the eyes of others and an appreciation for the full richness of the human experience, in contrast to an understanding that may be narrower, wooden, or otherwise lacking in what the ancients called "wisdom." But insofar as the term implies prejudice for one side or the other in a legal dispute it amounts to putting a thumb on the scale of justice and is thus inconsistent with the rule of law and impartial adjudication.

What issue(s) will dominate the court over the next three years and why?

Here again one can only speculate about the Court's docket over the next three years, but the sheer political activism of the Obama administration, especially in the marketplace, will surely bring economic liberty cases to the fore, including preemption cases as federal law seeks to supplant state law in various domains. Then too the Court in the past few years has waded into War on Terror questions of a kind that used to be left mainly to the political branches, crafting anything but a clear body of rules in the process, the very prescription for future litigation. Finally, unless one of the conservative seats is vacated, the Court will likely remain the Roberts Court for some time, which portends a continuing interest in narrower, technical cases rather than the flashier kinds of cases earlier Courts often looked for.

Roger Pilon is vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.

Glenn Reynolds

Who should Barack Obama nominate for the Supreme Court and why?

Professor Randy Barnett of Georgetown Law. An eminent constitutional scholar, a former Chicago prosecutor, and a voice for individual freedom on the Supreme Court. It's an easy choice.

Who will Obama nominate and why?

Based on experience, a political hack with tax problems.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

Poul Anderson once wrote that "compassionate government" is a code phrase meaning that there will be absolutely no compassion shown to the taxpayer. I think that's what Obama means when he talks about empathy. I don't see why this is a desirable trait in a judge.

What issue(s) will dominate the court over the next three years and why?

These are always iffy predictions, but I think we'll see cases on incorporating the Second Amendment under *Heller*, more on detainee policy—where, ironically, Obama appointees will wind up defending Bush policies—and (here I'm being hopeful) some cases on limits to Congressional power under the Commerce Clause.

Glenn Reynolds is a professor of law at the University of Tennessee. He blogs at Instapundit.com.

Damon W. Root

Who should Barack Obama nominate for the Supreme Court and why?

In a perfect world, Obama would appoint someone who respects the *entire* Constitution, which means a justice who will protect both civil liberties and economic liberties from government abuse. Richard Epstein, Obama's old colleague from the University of Chicago, fits the bill nicely.

Who will Obama nominate and why?

The usual suspects come to mind: Elena Kagan, Sonia Sotomayor, Janet Napolitano.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

I'm afraid Obama has a very selective definition of empathy. Explaining his senate vote against confirming John Roberts to the Supreme Court, Obama singled out several issues where "what is in the judge's heart" really matters, including "whether the Commerce Clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce." But it's precisely that interpretation of the Commerce Clause that allowed the Supreme Court to strike down California's medical marijuana law in *Gonzales v. Raich*. So where's Obama's "empathy" for the state's suffering medical marijuana users?

What issue(s) will dominate the court over the next three years and why?

Given the recent split among the federal circuit, it shouldn't be too long before the Supreme Court decides whether the Second Amendment applies against state and local governments. And with Obama's continuation of George W. Bush's foreign adventures, we're likely to see plenty more cases dealing with anti-terrorism policy.

Damon W. Root is an associate editor at Reason magazine.

Ilya Shapiro

Who should Barack Obama nominate for the Supreme Court and why?

Richard Epstein, Randy Barnett, Roger Pilon, Clint Bolick, Chip Mellor, Douglas Ginsburg, Janice Rogers Brown, Andrew Kleinfeld, Diarmuid O'Scannlain, Eugene Volokh, Eric Posner, Jack Goldsmith, Miguel Estrada... Realistically, he should pick Diane Wood—and not just because I had two classes with her in law school! Of all the candidates on the (long) shortlist, she has the biggest brain and most judicious temperament, would be no worse than the others—and quite possibly better—on constitutional issues, and would be least likely to damage the economy.

Who will Obama nominate and why?

Elena Kagan. She was only recently vetted and confirmed as the first female solicitor general—with the support of many conservative professors and former government officials—but, with a fine academic resume that lacks experience as an advocate, is actually better suited to a judicial role. The president will calculate that he won't have to use much political capital on Kagan, saving the fight over a more controversial nominee who could help with an important demographic (such as Sonia Sotomayor) for closer to his re-election campaign.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

No, while empathy might be among the qualities to look for in a legislator, or even a family court judge, the things that make a good justice are quite different. The role of any judge is to apply the law to the facts, respecting the integrity of the judicial process and the limits of judicial power; for example, when Judge Learned Hand bade Justice Oliver Wendell Holmes to "do justice," Holmes replied that alas he could only administer the law. Obama should thus focus on legal skills and judicial temperament, and leave the talk of empathy or "the daily realities of people's lives" to talk show hosts.

What issue(s) will dominate the court over the next three years and why?

The first is the fallout from the economic crisis: will contracts be rewritten—by courts or the administration—and will there be any checks on what the federal government can do? The second (although this might not be so noticeable in just three years) is cases resulting from technological advancements; intellectual property to be sure, but also biotechnology, social networking/privacy issues, and a host of other legal claims only the most creative lawyers can imagine. The third, and the most dangerous to my mind long-term, is in the escalation of the battle between classical liberal and transnational progressive legal theory: purveyors of customary international "law"—rule by self-anointed legal elites—undermine national sovereignty, democratic legitimacy, republican forms of government, and, thereby, the liberty guaranteed by our Constitution.

Ilya Shapiro is a senior fellow at the Cato Institute's Center for Constitutional Studies and the editor in chief of the Cato Supreme Court Review.

Harvey Silverglate

Who should Barack Obama nominate for the Supreme Court and why?

Kathleen Sullivan. Sullivan started out her career doing cutting-edge civil rights and criminal defense litigation, trial and appellate, for a small Boston law firm that I co-founded, and she proved herself brilliant at it. She went on to a professorship at Harvard Law, then the deanship at Stanford Law, where her students still rave over her inspired and inspiring teaching of constitutional law. She is now back in private practice, where

she has taken on at least one case I'm familiar with (because I've worked on it) involving an innocent Muslim being pursued by the "national security" apparatus—what more can one wish in a Supreme Court justice besides skill, integrity, devotion to the Constitution, and guts?

Who will Obama nominate and why?

Elena Kagan. Kagan proved her mettle in taming the famously fractious faculty of the Harvard Law School after years of the high-profile dysfunctionality of that body, which indicates she could well be a future leader of a revived liberal wing of the court that is sensible rather than post-modernist or otherwise loony. Having gone through the confirmation process for solicitor general, she has a head start toward a reasonably non-confrontational and successful confirmation process. It probably matters to Obama that she is a woman who happens to be more than tough enough to weather decades on the high court bench.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

If Obama means by "empathy" an understanding of how life is actually lived by different segments of society, then I would agree with him, since one of my gripes in arguing before appellate courts is the lack of real-life experience and knowledge that characterize so many of them, especially on the federal appellate bench. But if Obama means an affinity for any particular group within society, then I think this would be a dangerous undertaking, since it would derogate against the notion of "equality under the law"—the "Golden Rule" underpinning of the 14th Amendment and of the whole common law tradition that applies the same rule of law to all citizens who find themselves in a similar fact situation (law students call it *stare decisis*, or the rule of precedent). The law would, overall, be far more sensible if what applies to me also applies to thee.

What issue(s) will dominate the court over the next three years and why?

White collar prosecution issues will be front-and-center because the trend within the Criminal Division of the Justice Department in the last quarter century has been the increasingly unfair application of vague criminal statutes to innocent members of a wide range of occupational groups for conduct not intuitively criminal. This prosecutorial trend will become exacerbated with the flood of indictments just around the corner, seeking scapegoats for an economic collapse for which the federal government is not going to want to take its fair (and rather large) share of the credit (or blame, as the case may be). If the court has even a single member who has actually represented criminal defendants, especially in unfair circumstances, it would be very useful, which gets us back to Question One.

Harvey Silverglate is a Boston-based criminal defense and civil liberties litigator and writer.

Ilya Somin

Who should Barack Obama nominate for the Supreme Court and why?

If it were up to me, I would pick my Volokh Conspiracy co-blogger and Georgetown law professor Randy Barnett. Randy is perhaps the leading scholar of the original meaning of the Constitution and a strong advocate for individual rights and limited government. He is also a former prosecutor and would bring a badly needed perspective to the issues addressed by the Court's extensive criminal law docket, matters that most of the other justices have little experience with.

Who will Obama nominate and why?

It will likely be one of three consensus front-runners: Elena Kagan, Sonia Sotomayor, and Diane Wood. If I had to guess, I would predict Kagan; she is younger than Wood, much more capable than Sotomayor, and would avoid any significant confirmation fight. Kagan would also be a reliable liberal vote, and (based on her record as Dean of Harvard Law School) a skillful coalition-builder on the Court.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

No, the job of a Supreme Court justice is to apply the text and original meaning of the law irrespective of whether he "identifies" with the litigants or not. Even if judges should take policy consequences into account, "empathy" with individual litigants can easily blind them to the broader, systemic effects of their rulings. For example, upholding laws that violate constitutional property rights may help individual "downtrodden" litigants, but often actually hurts the poor overall by curtailing the availability of low-cost housing.

What issue(s) will dominate the court over the next three years and why?

It's very hard to predict, because much depends on which cases happen to make their way through the lower courts. However, it's safe to say that the Court will continue to have extensive business law, regulatory, and criminal law dockets. In terms of major constitutional issues, it's likely that the Obama administration's revisions of Bush's War on Terror policies will lead to various legal challenges, some of which will probably get to the Supremes.

Ilya Somin is an assistant professor at George Mason University School of Law.

Jacob Sullum

Who should Barack Obama nominate for the Supreme Court and why?

It would be nice to see a nominee with some classically liberal inclinations, combining a respect for property rights with a commitment to freedom of speech, for example, or taking seriously both the right to arms and the guarantee against unreasonable searches and seizures. Unfortunately, the judges who meet that description (the 9th Circuit's Alex Kozinski, for example) tend to be viewed as conservatives and therefore would be anathema to Obama. Beyond that, there is something to be said for picking a trial judge, a scholar, a practicing lawyer, or even a politician just for the sake of diversifying the outlook of a Supreme Court that now consists entirely of former appellate judges.

Who will Obama nominate and why?

I have no special insight into his political calculations, although I gather it will be a woman.

Obama says that his ideal Supreme Court justice would have the "empathy" to identify with society's downtrodden. Do you agree with his criteria?

Obama's remarks on this subject can be interpreted in a way that is unobjectionable. But I fear that when he elevates "empathy" above "some abstract legal theory," he means judges should to some extent be guided by their feelings, as opposed to a careful, dispassionate, and intellectually honest reading of the law. We don't want justices who dress up their personal policy preferences as constitutional interpretation, or who side with a particular party just because they feel bad for him. As it says in Leviticus, "You shall do no injustice in judgment; you shall not be partial to the poor nor defer to the great, but you are to judge your neighbor fairly."

What issue(s) will dominate the court over the next three years and why?

Many of the issues that came up in connection with the Bush administration's anti-terrorism policies have not been fully resolved and probably will come to the Court in some form, including the due process rights of detainees, the extent of executive power in the area of national security, and the application of the Fourth Amendment to surveillance aimed at preventing terrorist attacks. It seems certain that the Court will hear a First Amendment challenge to the Federal Communications Commission's restrictions on the content of over-the-air programming, which will give it an opportunity to renounce the misbegotten and increasingly quaint constitutional distinction between broadcasting and other media. Now that the Court has said the Second Amendment guarantees an individual right to arms, it will have to explain what that means when applied to forms of gun control that fall short of a complete ban on keeping firearms in the home for self-defense.

Jacob Sullum is a senior editor at Reason magazine.

[Discuss this article online.](#)

Try Reason's award-winning print edition [today!](#) Your first issue is FREE if you are not completely satisfied.