OUR BROKEN JUDICIAL CONFIRMATION PROCESS AND THE NEED FOR FILIBUSTER REFORM

JOHN CORNYN*

To vote without debating is perilous, but to debate and never vote is imbecile.

—Senator Henry Cabot Lodge[1]

Filibustering originally referred to mercenary warfare intended to destabilize a government.

—Catherine Fisk & Erwin Chemerinsky[2]

The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible.

The remedy? There is but one remedy. The only remedy is that the rules of the Senate shall be so altered that it can act.

—President Woodrow Wilson[3]

Now is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose.

—The New York Times[4]

---

* U.S. Senator (R-TX) and Chairman, Subcommittee on the Constitution, Civil Rights and Property Rights, Committee on the Judiciary, United States Senate; Attorney General, State of Texas, 1999-2002; Justice, Supreme Court of Texas, 1991-1997. I would like to express my gratitude to James C. Ho, Joshua Sandler, Jason Binford, Grant Wood, and Robert Kincaid, for their assistance.

1. Henry Cabot Lodge, *Obstruction in the Senate*, 157 N. AM. REV. 523, 527 (1893).

2. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 187 n.26 (1997).

3. *Id.* at 197 (quoting President Woodrow Wilson's statement published in N.Y. TIMES, Mar. 5, 1917).

4. *Time to Retire the Filibuster*, N.Y. TIMES, Jan. 1, 1995, § 4, at 8.

INTRODUCTION

On May 9, 2001, President George W. Bush nominated distinguished Washington attorney Miguel Estrada, Justice Priscilla Owen of the Texas Supreme Court, and nine other talented jurists to serve on the prestigious federal courts of appeals.[5] Senator Patrick Leahy, then and now the ranking Democrat on the Senate Judiciary Committee, attended the President's East Room ceremony announcing these nominees, and said afterward: "Had I not been encouraged, I would not have been here today. . . . I know them well enough that I would assume they'll go through all right."[6] Senator Leahy announced that "[w]e will submit [the nominees] to the [American Bar Association], so there could be peer review,"[7] and the ABA responded by giving both Estrada and Owen its highest possible rating: unanimous well-qualified.[8]

Yet today, well over two years later, Estrada and Owen have not—to use Senator Leahy's words—"go[ne] through all right."[9] Quite the contrary: Although both Estrada and Owen enjoy the support of an enthusiastic bipartisan majority of Senators who have long been ready to schedule a vote to confirm them, to date neither has received an up-or-down vote on the floor of the United States Senate. Instead, a partisan minority of Senators has launched unprecedented filibusters to block their confirmation by preventing the Senate from even calling an up-or-down vote on their nominations. Those same tactics are now being used against Alabama Attorney General Bill Pryor, Mississippi federal judge Charles Pickering, California Supreme Court Justice Janice Rogers Brown, and California Superior Court Judge Carolyn Kuhl, and it is feared that others will meet the same fate when their nominations arrive on the Senate floor.[10] An historic

---

5. President George W. Bush, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), *at* www.whitehouse.gov/news/releases/2001/05/20010509-3.html; Joseph Curl, *Bush Sends Nominees in 'Good Faith'; Leahy Foresees Few Foes to 'Encouraging' Judicial Batch*, WASH. TIMES, May 10, 2001, at A1.

6. Curl, *supra* note 5, at A1.

7. *Id.* (second alteration in original).

8. *See* Jonathan Ringel, *American Bar Association Approves More Bush Nominees*, TEX. LAW., July 23, 2001; *see also ABA Standing Committee on Federal Judiciary*, *at* www.abanet.org/scfedjud (last visited Nov. 30, 2003).

9. Curl, *supra* note 5, at A1.

10. One of the more remarkable tactics of some defenders of the current filibusters of judicial nominations is to contrast the number of filibusters (*e.g.*, six) with the relatively high number of confirmations (*e.g.*, 168) to date. In my view, one act of unprecedented obstruction—and one act of political destruction and smearing of a nominee's reputation and name—is one too many. In short: Who cares about the denominator? It is the

and tragic step was taken when Estrada declared that enough is enough and asked President Bush to withdraw his nomination—the first judicial nominee in the history of our nation to be denied confirmation despite enjoying the support of a majority of the Senate.[11]

The judicial confirmation process is badly broken. I am certainly not alone in that view. Earlier this year, all ten freshman Senators declared, in a letter to Senate leadership, that "the judicial confirmation process is broken and needs to be fixed," and that "the United States Senate needs a fresh start."[12] And veteran senators from

---

numerator that is the problem. As I wrote in a *Los Angeles Times* op-ed:

> Where I come from, it is wrong to treat people like statistics. Where I come from, you don't mistreat some people and then justify that conduct by how well you've treated others. It is wrong to disrespect even one nominee.
>
> The attacks on nominees aren't politics as usual, they are politics at its worst. The judicial confirmation process is now plagued by a cruel combination of obstruction and destruction.
>
> First, the obstruction: The current filibusters are unprecedented in the history of our nation and of the Senate. Even the chairman of the Democratic Senatorial Campaign Committee acknowledged—indeed, he boasted—that the current blockade of judicial nominees is an "unprecedented" effort. 168-4? Try 0-4.
>
> No judicial nominee who has enjoyed the support of a majority of senators has ever been denied an up-or-down vote—until now. I cannot understand how anyone can be proud of this record.
>
> Consider another shameful filibuster record in our nation's history—the blockading of civil rights legislation. During the presidency of Franklin Delano Roosevelt, civil rights were denied four times. In that time, Congress enacted, by my count, 4,473 other pieces of legislation. Is "4473-4" a record to be proud of—one in which "only" four civil rights bills were filibustered?
>
> During Lyndon Johnson's White House tenure, nearly 2,000 bills were enacted. 'Only' three civil rights bills were subjected to filibuster (although two were eventually overcome). Is '1,931-3' something to be celebrated? Clearly not?

John Cornyn, *Obstruction and Destruction Plague Judicial Nominees,* L.A. TIMES, Nov. 12, 2003, at B11. Similarly, during the Truman Administration, 3414 bills were enacted—compared to three civil rights bills filibustered. I gave a speech on this very issue at the beginning of the recent historic 40-hour round-the-clock Senate debate on judicial nominations. *See* 149 CONG. REC. 14541-42 (Nov. 12, 2003) (statement of Sen. Cornyn). It is also worth noting that, were it up to some opponents of the Bush Administration, there would be far more filibusters. For example, Kate Michelman, president of NARAL Pro-Choice America, an abortion rights group, said, "It's sad that not all these nominees can be filibustered." Nick Anderson, *Battle Over Judiciary Enters New Phase as Democrats Prepare to Fight Choice, Other Nominees Move Towards Approval,* L.A. TIMES, Apr. 26, 2003, at A16.

11. *See* President George W. Bush, President's Statement on Miguel Estrada (Sept. 4, 2003), *at* www.whitehouse.gov/news/releases/2003/09/20030904-2.html. Mr. Estrada's letter requesting the President to withdraw his nomination can be found at www.vermontgop.org/estrada_yields.html (last visited Nov. 12, 2003).

12. Letter from Senators John Cornyn, Mark Pryor, Lisa Murkowski, Lindsey Graham, Elizabeth Dole, Saxby Chambliss, Norm Coleman, James Talent, Lamar Alexander, and John E. Sununu, to Senators Bill Frist and Tom Daschle (Apr. 30, 2003), *infra* APPENDIX; *see also* Press Release, Office of Senator John Cornyn, Judicial Nomination Process Needs "A Fresh Start" (Apr. 30, 2003), *at* http://www.cornyn.senate.gov/

both parties have expressed similar sentiments. Senator Chuck Schumer of New York has written, for example, that "the judicial nomination and confirmation process [i]s broken and . . . we have a duty to repair it."[13] Senator Dianne Feinstein of California has likewise concluded that the judicial selection process "is going in the wrong direction. The debate between the Senate and the Executive Branch over judicial candidates has become polarized and increasingly bitter."[14]

Outside observers of the Senate judicial confirmation crisis have come to the same conclusion. ABA President Alfred P. Carlton Jr. has concluded that, as the result of the Senate's broken confirmation process, "[t]here is a crisis in our federal judiciary, constituting a clear and present danger to the uniquely American foundation of our tripartite democracy—an independent judiciary."[15] Senior Clinton Justice Department official Walter Dellinger concluded this year that the confirmation process is "badly broken."[16] *The Washington Post* has described the process as "steadily degrading."[17] Even *The New York Times* editorial page—one of the nation's most hostile opponents of President Bush's judicial nominees—has recognized that "the judicial selection process is broken."[18]

If one were to ask ordinary American citizens how they think the judicial confirmation process should work, I am confident most would say something along these lines:

- Find the nation's top legal minds, hardest workers, and committed public servants. They can be found in every community, representing every race, religion, and sex.
- Make sure they are committed to the principle that judges interpret the law, not make the law. They should know the difference between behaving judicially and behaving politically.

043003judicialfreshstart.html.

13. Letter from Senator Charles E. Schumer, to President George W. Bush (Apr. 30, 2003), *at* http://www.schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR01655.html (last visited Nov. 12, 2003).

14. Letter from Senator Dianne Feinstein, to President George W. Bush (May 6, 2003), *quoted in* Press Release, Senator Dianne Feinstein, Senator Dianne Feinstein Urges President Bush to Consider Proposal to Break the Impasse Over Judicial Nominations (May 6, 2003), *at* http://www.feinstein.senate.gov/03Releases/r-lettertobushonjudicialimpasse.htm (last visited Nov. 12, 2003).

15. Alfred P. Carlton, Jr., *More and Faster—Now: The Crisis in the Federal Judiciary*, A.B.A. J., Apr. 2003, at 8.

16. Walter Dellinger, *Broaden the Slate*, WASH. POST, Feb. 25, 2003, at A23.

17. *Victory for a Smear*, WASH. POST, Sept. 5, 2003, at A20.

18. *The Brawl Over Judges*, N.Y. TIMES, May 5, 2003, at A22.

- Give the Senate the time they need to review their records and vote on their confirmations. That may take perhaps a few months at most, longer in extraordinary cases. But in any event, once a majority of the Senate is finally ready to vote up or down on a judicial nomination, it should be allowed to do so.
- If the Senate approves a nomination, the President should commission the nominee quickly.
- If the Senate rejects a nomination, the President should either submit another nomination as soon as possible, or explain to the American people why the Senate was wrong to reject the nomination, and why they should elect a new Senate to confirm his judicial nominees.[19]

---

19. In recent months, some Senators have put forth the rather remarkable contention that once the Senate (or even a mere committee of the Senate) has rejected a nominee, that should be the end of the story, because the Senate has already made its decision, and that decision should not be revisited—as if decisions of the Senate Judiciary Committee somehow warrant *stare decisis* effect. *See, e.g.*, 149 Cong. Rec. S6614-04 (daily ed. May 19, 2003) (statement of Sen. Leahy) ("With respect to the renomination of Judge Owen, I have said that unprecedented renomination of a judicial nominee rejected after a hearing and a fair debate and vote before the Judiciary Committee was ill advised. It remains so."); Senator Patrick Leahy, Statement of Senator Patrick Leahy On the Nomination of Charles Pickering, Executive Business Meeting of the Senate Judiciary Committee (Oct. 2, 2003), *available at* http://www.leahy.senate.gov/press/200310/100203.html ("Never in the history of this Republic has a President renominated to the same post a judicial nominee voted down by this Committee—never until this Administration chose to renominate Judge Pickering and Justice Owen this year.").

This contention fundamentally misunderstands, of course, the nature of our democratic system of government, which provides for periodic elections for the precise purpose of allowing voters to reject decisions made by the political branches. Just as Congress has the constitutional authority to reconsider legislation rejected by a prior Congress, the President has the constitutional authority to renominate individuals not confirmed by a prior Senate. (And of course, even courts provide a period of time for litigants to seek reconsideration of judicial decisions. *See, e.g.*, FED. R. CIV. P. 60(b) (providing for relief from judgment or order).)

The contention that it is improper for a President to renominate an individual rejected by a prior Senate thus does not deserve to be taken seriously—and, given their prior assertions to the contrary, I do not believe that the Senators themselves regard this contention as real argument. *See, e.g.*, Press Release, Senator Patrick Leahy, Comment on Rep. Gephardt's Letter to President Bush Urging Renomination of Judge Ronnie White (Feb. 2, 2001), *at* http://www.leahy.senate.gov/press/200102/010202b.html (arguing that a "decision to renominate Judge [Ronnie] White . . . would be a just result after the Senate's earlier mistreatment").

Indeed, among those occasions when the Senate has seen fit to reject a nominee, Presidents frequently have renominated those individuals. In 1835, a majority of the Senate voted to postpone indefinitely the nomination of Roger Taney to be Associate Justice. President Andrew Jackson renominated Taney to be Chief Justice during the next Congress, and the Senate confirmed him. In 1844, the Senate rejected John C. Spencer's nomination to the Supreme Court, but President Tyler nevertheless renominated him. That same year, the Senate tabled the nominations of Reuben Walworth and Edward King to the Supreme Court in 1844, but President Tyler also renominated them both. In 1881, the Senate Judiciary Committee approved a motion to postpone consideration of President Hayes's nomination of Stanley Matthews to the Supreme Court and then refused to take any further action on the nomination. Yet in the following Congress, President Garfield

- But regardless of whether individual Senators support or reject a particular nominee, once a majority of the Senate is ready to act, it should be allowed to do so.

Yet for too long the Senate acted too slowly to vote on judicial nominations. Real solutions to the broken confirmation process are sorely needed. On July 4, 1997, the American Bar Association issued a report of its Commission on Separation of Powers and Judicial Independence. That report, entitled *An Independent Judiciary*, recommended that "judicial vacancies be filled without delay."[20] According to the ABA's official stated policy, "[t]he ABA urges the President to nominate candidates for vacanct federal judicial positions promptly and *urges the Senate to hear and vote on those nominations in an expeditious manner.*"[21] More recently, ABA President Carlton has recommended "expeditious nomination and confirmation." He explained:

> As this page is being written, the spectacle of the Miguel Estrada 'filibuster' grinds on—a living testament to the inability of both sides to cooperatively fulfill the grave constitutional duty entrusted to them. . . . This is to say nothing of the secondary effect current intramural disputes will have on a legion of other nominees—all awaiting hearings or confirmation, many for months or even years at a time, having all put professional careers and private lives on

---

nominated Matthews, and the Senate confirmed him by a one-vote margin. In 1893, President Cleveland nominated William Hornblower to the Supreme Court. The committee refused to report his vote out of committee, yet Hornblower was renominated during the next session of the same Congress. More recently, in 1997, the Senate Judiciary Committee refused to report the Justice Department nomination of Bill Lann Lee to the entire Senate. Yet President Clinton not only renominated Lee in subsequent sessions of the Senate, he even gave Lee a recess appointment in 2000—evading the Senate's advice and consent prerogative altogether—without triggering substantial opposition in the Senate. Thanks to the Congressional Research Service for providing my staff with the information necessary to compile this list.

Many Americans believe that the renomination of Justice Priscilla Owen and Judge Charles Pickering was also, to borrow one prominent Senate Democrat's words, a "just result" in light of "the Senate's earlier mistreatment." Press Release, Senator Patrick Leahy, Comment on Rep. Gephardt's Letter to President Bush Urging Renomination of Judge Ronnie White (Feb. 2, 2001), *supra*. The selection of nominees is, of course, well within each President's discretion. Unlike the current President, who nominated two of President Clinton's stalled nominees—Roger Gregory, whom President Clinton recess appointed to the Fourth Circuit, and Legrome Davis of Pennsylvania—President Clinton did not nominate any of the individuals whose nominations were still pending at the end of the first Bush Administration.

20. AM. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 52 (1997), *available at* http://www.abanet.org/govaffairs/judiciary/report.html.

21. American Bar Association, *2002 Legislative and Governmental Priorities: Independence of the Judiciary: Judicial Vacancies*, http://www.abanet.org/poladv/priorities/judvac.html (last visited Nov. 25, 2003) (emphasis added).

hold.[22]

He concluded that federal judicial nominees "need to be nominated and confirmed faster."[23]

Similarly, Chief Justice William Rehnquist has repeatedly reiterated the need for speedier consideration of judicial nominees by the United States Senate. In his *1997 Year-End Report on the Federal Judiciary*, the Chief Justice urged that

> the President should nominate candidates with reasonable promptness, and the Senate should act within a reasonable time to confirm or reject them. . . . The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.[24]

He repeated this same message in his 2001[25] and 2002[26] year-end reports. Yet a partisan minority of the Senate today stands directly opposed to the common sense, good government principles articulated by the ABA and the Chief Justice of the United States.

To be sure, some delay in the Senate's judicial confirmation process may be necessary from time to time. If, for whatever reason, a majority of Senators needs more time to determine whether a particular nominee deserves confirmation, a short delay may be appropriate. But delay is neither necessary nor appropriate once a majority of the Senate finally decides that it has conducted a sufficient investigation and is ready to vote on the nomination. From time to time, a minority of Senators might also have good cause for delay. But such delays should not be used to prevent a majority of Senators from ever voting to confirm a nominee.[27]

---

22. Carlton, Jr., *supra* note 15, at 8.

23. *Id.*

24. Chief Justice William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary*, 30(1) THE THIRD BRANCH (Jan. 1998), *available at* http://www.uscourts.gov/ttb/jan98ttb/january.htm.

25. Chief Justice William H. Rehnquist, *2001 Year-End Report on the Federal Judiciary*, 34(1) THE THIRD BRANCH (Jan. 2002), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html.

26. Chief Justice William H. Rehnquist, *2002 Year-End Report on the Federal Judiciary*, 35(1) THE THIRD BRANCH (Jan. 2003), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html.

27. I am not alone in the view that delay by the majority is more tolerable than delay by the minority. That view has been endorsed, for example, by the Presidential Appointee Initiative—a blue ribbon bipartisan commission of former prominent Democrat and Republican government officials, established by the Brookings Institution. Recommendation 8 of the Initiative's April 2001 report recommends a new Senate rule that requires votes on nominations within 45 days. THE PRESIDENTIAL APPOINTEE

That is why the filibusters of judicial nominations have never been a part of Senate tradition before, and why its current usage is such an abomination: Simply put, filibusters are the most virulent form of unnecessary delay one can imagine in the Senate's exercise of the judicial confirmation power. Senator Feinstein is thus quite right when she says that the judicial selection process "is going in the wrong direction."[28]

Today, a bipartisan majority of the Senate has determined that it has in fact conducted an ample inquiry into the qualifications of judicial nominees like Estrada, Owen, Pryor, Pickering, Brown, and Kuhl and determined to its satisfaction the nominees' commitment to the principle that judges interpret the law and do not make the law. That bipartisan majority has long been ready to act, and ready to confirm. Yet a minority of Senators has hijacked the process and will not allow the majority to conduct the nation's business and to vote to fill judicial vacancies. I firmly believe that, once a majority of Senators has determined that it has conducted an adequately thorough investigation into a nominee's qualifications and fitness for judicial service, that majority should possess the power and authority to act and to confirm judicial nominees it finds acceptable, without further delay.[29]

INITIATIVE, THE BROOKINGS INSTITUTION, TO FORM A GOVERNMENT: A BIPARTISAN PLAN TO IMPROVE THE PRESIDENTIAL APPOINTMENTS PROCESS 13-14 (2001), www.appointee.brookings.org/events/reformag.pdf. Yet the recommendation specifically mentions that "[a] majority of the Senate" should be able to "postpone the confirmation vote until a subsequent date." *Id.* at 14.

28. Letter from Senator Dianne Feinstein, to President George W. Bush (May 6, 2003), *quoted in* Press Release, Senator Diane Feinstein, Senator Feinstein Urges President Bush to Consider Proposal to Break the Impasse Over Judicial Nominations (May 6, 2003), *at* feinstein.senate.gov/03Releases/r-lettertobushonjudicialimpasse.htm (last visited Nov. 12, 2003).

29. Of course, Senate investigation of judicial nominees is a discretionary function, not a constitutional obligation. Yet even this view is apparently not without its opponents. On February 14, 2003, just before the President's Day recess—and well over a year and a half after Estrada was first nominated—Senator Dick Durbin suggested that there *still* had not been sufficient investigation of Estrada's credentials for the federal bench. He asserted that the Senate had a "constitutional obligation" to continue that investigation. *See* 149 CONG. REC. S2510 (daily ed. Feb. 14, 2003) (statement of Sen. Durbin) ("[Article II] tells those who are watching that what is at stake here is not just a discretionary decision by the Senate as to whether or not we will investigate a judicial nominee. We have a constitutional obligation.").

I responded to that argument on February 24 (the very next session day of the United States Senate), when I explained that the Founders contemplated a narrower role for the United States Senate in the confirmation of federal judges. *See* 149 CONG. REC. S2561-63 (daily ed. Feb. 24, 2003) (statement of Sen. Cornyn). As I explained:

> The constitutional structure demonstrates that the Senate's role is satisfied when the record makes clear that whatever a nominee's personal views, that they will play no role in how the nominee will judge specific cases and controversies.

After all, to do otherwise would mean that it would take practically all of the Senate's time to confirm Presidential nominees, leaving no room for legislation, treaties, and other matters to which the Constitution gives even more responsibility to Congress than in the confirmation process.

The Constitution nowhere requires a majority of the Senate to undertake a full-blown trial of a judicial nominee. Yet that seems to be what the Democratic leadership is asking for. Quite to the contrary, the Framers of the Constitution well understood that the Senate's role in the process is really quite limited—something it does us well to reflect on, with the confirmation process today so skewed and so poisoned, and so toxic, toxic not only to the nominees but also to this body.

As Alexander Hamilton explained in the Federalist Papers, the Constitution gives the Senate a confirmation role to ensure that the President has not injected cronyism into his appointment process. Alexander Hamilton does not say that the Senate is supposed to second-guess the President's judgment or to conduct a deep and searching inquiry into the legal views of the nominee—the sorts of things that are being asked for here. Instead, Alexander Hamilton writes, in Federalist No. 76:

> To what purpose then require the cooperation of the Senate? . . . It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Indeed, far from indicating that substantial hearings and investigation would be required, Hamilton noted that the Senate's confirmation role would be, "in general, a silent operation."

Hamilton's understanding of the confirmation process—that it would largely be what he called "a silent operation"—is reflected in the text of the Constitution. By contrast, the impeachment provisions of the Constitution require the Senate to undertake an actual trial before an official can be punished, including removal from office.

So it is clear that the text, the structure, the original understanding, and, indeed, the tradition of confirmation proceedings handed down these last 200 years all refute the theory of Senate advice and consent suggested by those who would obstruct this vote, including the views expressed by the senior Senator from Illinois and those who would espouse a new standard, one made of whole cloth, again changing the rules and applying a double standard to Miguel Estrada.

Once the Senate has determined that an otherwise qualified judicial nominee respects the law and understands that judges interpret the law and do not make the law, that nominee may be confirmed to the Federal bench. It is absurd to think that the Constitution would require anything else.

Moreover—and this is significant, to show how far afield we have come from the confirmation process as practiced by the Founding Fathers and those in the last 200 years—for much of our Nation's history, the Senate did not even conduct confirmation hearings, not even for nominees to the U.S. Supreme Court. Instead, the Senate either deferred to the President's determination that the nominee would abide by constitutionally required distinctions between judging and law making, or would reject nominees without resort to intrusive hearings.

Indeed, the Senate Committee on the Judiciary did not even exist during the first half century of this country's existence—nearly 30 years after the ratification of the Constitution. It did not even exist until 1816. And even when such hearings were later held in our Nation's history, by custom, the nominee would not even appear.

The first extensive hearings on a Supreme Court nominee were not held until the nomination of Louis Brandeis in 1916. Yet despite those hearings, Mr. Brandeis never even appeared in person before the Senate or a committee.

On September 5, 1922, the day after Justice John Hessin Clarke resigned,

This article contains four parts. Part I surveys the relevant events of the past year with regard to the current filibuster crisis and the Senate's judicial confirmation process. Part II analyzes the serious constitutional objections to the current filibusters. Part III catalogues the traditional Senatorial objections to the use of filibusters against judicial nominees. Part III also advocates filibuster reform, both to restore our Constitution and our traditions, and to ensure that a President and a majority of the Senate continue to enjoy the power to select judges. Finally, Part IV rebuts various myths and false precedents that some have cited in an attempt to justify the current filibusters.

I.

I have long been a passionate believer in the fundamental importance of an independent judiciary as the foundation of government. Indeed, the current struggle to build a free Iraq reminds us that no society can be just or prosperous without the rule of law. That requires an independent judiciary.[30]

President Harding nominated George Sutherland to the Supreme Court, and the Senate confirmed him that very day. It was not until Harlan Fiske Stone, in 1925, that the first nominee for the U.S. Supreme Court would actually appear in person before the Judiciary Committee, and even that was a novel episode, after which nominees would revert back to the tradition of not appearing personally before the Judiciary Committee. That tradition continued for over a decade, until Felix Frankfurter testified before the Senate Judiciary Committee in 1939. Even then, Justice Frankfurter read a prepared statement in which he said he would not express his personal views on controversial issues before the court, the same answer that Mr. Estrada has given in response to the questions asked him during these proceedings.

As late as 1949, Sherman Minton refused to appear before the Senate Judiciary Committee and was still confirmed. And it was not until 1955, when John Marshall Harlan started the modern tradition of judicial nominees appearing and testifying before the Senate. And even then, confirmation hearings have typically been brief, even in cases of Supreme Court nominations. Justice Byron White's confirmation, for example, in 1962, lasted less than 2 hours.

Can it really be the position of the senior Senator from Illinois or our colleagues across the aisle who are blocking a vote on this nomination that the countless Federal judges and Supreme Court Justices who were confirmed following a less extensive investigation than that already inflicted on Mr. Estrada all served pursuant to illegal confirmations? Did so many of our predecessors in the Senate violate the constitutional oath they took on each and every one of those occasions? Of course not.

Id. at S2562-63.

30. Because of my interest in these issues, Senator Lincoln Chafee (R-RI) and I co-chaired a joint hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights, and the Senate Foreign Relations Subcommittee on Near Eastern and South Asian Affairs. The hearing was held on June 25, 2003 and entitled "Constitutionalism, Human Rights, and the Rule of Law in Iraq." The official GPO transcript of the hearing will not be available to the public until 2004, but written

Thus, when I had the honor of serving as a member of the Texas Supreme Court, I joined Justice Owen and others to advocate reform of our judicial selection process in the state of Texas. It has long been my view that partisan elections, because they excessively politicize the selection process, are not the proper method for selecting judges.[31]

But I must say that, whatever the problems the various states may have in their judicial selection systems, nothing compares to how badly broken the system of judicial confirmation is here in Washington, D.C. In Texas, we have debate and discussion, and that is always followed by a vote. Whatever else you might say about the process, we always finish it. We always hold a vote.[32] And of course, voting is precisely what we in the U.S. Senate were elected to do. Vote up or down, but, as the *Washington Post* admonished in a February editorial, "Just Vote."[33]

Because I believe that the current filibusters of judicial nominations pose a serious threat to our independent judiciary, earlier this year I decided to work with my fellow Senators to take action to fix the broken judicial confirmation process, restore our constitutional design, and protect our independent judiciary. On April 30, 2003, I sent a letter to the Senate leadership of both parties, signed by the bipartisan freshman class of the Senate of the 108th Congress, arguing that the confirmation process is badly in need of reform.[34] On May 6, 2003, I chaired a hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights to examine the constitutional issues presented by the filibustering of judicial nominees.[35] A few days later, I joined with Senate Majority Leader Bill Frist, Democrat Senator Zell Miller, and nine other Senators to introduce Senate Resolution 138, to reform the filibuster within the context of nominations.[36] And on June 5, 2003, I testified before the

---

testimony is available now at http://judiciary.senate.gov/hearing.cfm?id=826 (last visited Nov. 12, 2003).

31. *See, e.g.*, *Voters Guide General Election '96 League of Women Voters*, FT. WORTH STAR-TELEGRAM, Oct. 20, 1996, at 1.

32. I made this very point on the floor of the Senate earlier this year. *See* 149 CONG. REC. S3435-36 (daily ed. Mar. 11, 2003) (statement of Sen. Cornyn).

33. *Just Vote*, WASH. POST, Feb. 18, 2003, at A24.

34. *See* Letter of Senator John Cornyn et al., *supra* note 12, *infra* APPENDIX.

35. The hearing was entitled "Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent." The official GPO transcript of the hearing will not be available to the public until 2004, but written testimony is available now at http://www.judiciary.senate.gov/hearing.cfm?id=744 (last visited Nov. 12, 2003).

36. S. Res. 138, 108th Cong. (2003). The resolution has 12 original sponsors: Senators Bill Frist, George Allen, Saxby Chambliss, Orrin Hatch, Kay Bailey Hutchison, Jon Kyl, Trent Lott, Mitch McConnell, Zell Miller, Rick Santorum, and Ted Stevens, as well as myself.

Senate Rules and Administration Committee to express my support for that proposal.[37]

The American people need the courts to be fully staffed. Our judicial selection process should focus simply on identifying and confirming well-qualified jurists committed to interpreting and applying the law, not their own personal will or agenda.

For far too long, however, this process has been caught in a downward spiral of politics and delay. As President Bush recognized in a speech in the Rose Garden on May 9, 2003, "[d]uring the administration of former Presidents Bush and Clinton, . . . too many appeals court nominees never received votes."[38] So the problem we face today is not new. It has faced Presidents of both parties; and it has existed in the Senate under the control of both parties.[39]

Yet the problem remains and has grown even worse today. This problem threatens to destroy the integrity of our constitutional system of advice and consent and of an independent judiciary.

For the last several months—and as a direct result of the November 2002 elections, when voters across the country decided to place control of the United States Senate back in the hands of the President's political party—a bipartisan Senate majority has finally come together to try and stop the politics of delay and has attempted to hold up-or-down votes on a number of judicial nominees. However, a partisan minority of Senators is blocking the Senate from holding those votes. As one leader of the current filibusters has said, "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees.[40] Indeed, the filibustering

37. The official GPO transcript of this "Hearing on Senate Rule XXII and proposals to amend this rule" will not be available to the public until 2004, but written testimony is available now at http://www.rules.senate.gov.hearings.2003.060503_hearing.htm (last visited Nov. 12, 2003).

38. Bush, *supra* note 5.

39. For example, by my count, there were 54 nominees pending in the Senate as of December 31, 1992—near the close of the first Bush Administration. Similarly, there were 41 nominees pending in the Senate as of December 31, 2000—near the close of President Clinton's second and final term in office. So it is beyond cavil that nominations have been blocked by delay during the previous Administrations of both parties. Indeed, many of the current President's judicial nominees were originally nominated by President George H.W. Bush but never received a floor vote. Unlike the current President, who nominated two of President Clinton's stalled nominees—Roger Gregory, whom President Clinton recess appointed to the Fourth Circuit, and Legrome Davis of Pennsylvania—President Clinton did not nominate any of the individuals whose nominations were still pending at the end of the first Bush Administration.

40. 149 CONG. REC. S4949 (daily ed. Apr. 8, 2003) (statement of Sen. Reid). Consider this rather remarkable exchange on the Senate floor between Senators Robert Bennett and Harry Reid, on April 8, 2003, respecting the nomination of Justice Owen:

Senators refused to allow up-or-down votes on certain judicial nominees even after the conclusion of the Senate's recent and historic 40-hour round-the-clock session, held from November 12 through November 14, specifically to debate the qualifications of those nominees.

Unlike House rules, the standing rules of the Senate do not impose strict time limits on debate. That is not, however, because the drafters of the Senate rules actually wanted endless debate and delay, and eternal paralysis and inaction in the Senate. Quite the contrary: Renowned former Senate parliamentarian Floyd Riddick once said that Senators are expected to "restrain themselves" and "not abuse the privilege" of debate.[41] The current rules provide that debate on a judicial nomination ends when Senators agree that they are ready to

---

> Mr. BENNETT. Mr. President, as in executive session, I ask unanimous consent that there be an additional 6 hours for debate on the Owen nomination, provided further that the time be equally divided between the chairman and ranking member of the Judiciary Committee, or their designees, and that following the conclusion of that time, the Senate proceed to a vote on the confirmation of the nomination, with no intervening action or debate.
>
> The PRESIDING OFFICER. The Senator from Nevada.
>
> Mr. REID. Reserving the right to object, we on this side are perplexed. We have indicated to the majority leader that there are at least three circuit judges who, with just a little bit of work, could be approved this week. The average during the Clinton 8 years was eight circuit judges a year. If the three were approved, that would be five already by Easter.
>
> One of those is Edward C. Prado of the Fifth Circuit. They could go to that tomorrow-tonight. So we believe there is more here than meets the eye. There are three circuit judges who are available with just a little bit of work. This has all been discussed with the majority leader.
>
> So for these and many other reasons, I object.
>
> The PRESIDING OFFICER. Objection is heard.
>
> Mr. BENNETT. Mr. President, I modify the request to 10 additional hours.
>
> The PRESIDING OFFICER. Is there objection?
>
> Mr. REID. Yes. Mr. President, reserving the right to object, we have approved, during the time President Bush has been President, 116 judges. Two have been turned down-116 to 2. One of those who was turned down is back. Owen is back. This would be the first time in the history of this country that a judge who has been turned down is back and would be approved.
>
> The hours that have been suggested by my friend from Utah I appreciate very much, but there are productive things that could be done during those 10 hours, including the approval of more judges. There could be at the end of this week 120 judges instead of 116.
>
> I object.
>
> The PRESIDING OFFICER. Objection is heard.
>
> Mr. BENNETT. Mr. President, I ask if any number of hours would be sufficient for the Senator from Nevada.
>
> Mr. REID. Speaking for the Senator from Nevada, there is not a number in the universe that would be sufficient.

Id.

41. Ward Sinclair, *Senate Filibuster: Some Call It Tyranny, Others Freedom*, WASH POST, June 15, 1978, at A3.

vote, or when 60 Senators agree to set time limits on debate by voting to invoke cloture under Rule XXII of the standing rules of the Senate. But the rules nowhere state, of course, that debate should be unlimited, or that they should be exploited and abused so that nominations actually require more than the support of a simple majority of Senators to secure confirmation.

The current use of the standing rules of the Senate, not to ensure adequate debate, but to change the voting rule on judicial nominations from a simple majority to 60 votes in order to block a Senate majority from confirming judges, is unprecedented and wrong. Indeed, law professor and former Clinton adviser Michael Gerhardt—the Democrats' own legal expert on the judicial confirmation process—has condemned supermajority requirements for confirming nominees, saying they "would be more likely to frustrate rather than facilitate the making of meritorious appointments."[42]

The indefinite, needless, and wasteful delay caused by filibusters of judicial nominations distracts the Senate from other important business. And it hurts Americans. It leaves not only would-be judges in limbo, but also thousands of litigants. Over 250 editorials from 113 separate newspapers from 37 states and the District of Columbia condemn the current filibusters of judicial nominees.[43] President Bush has rightly called the situation "a disgrace."[44]

II.

The current filibusters of judicial nominations are not only unprecedented and wrong, they are also offensive to our nation's constitutional design.[45] At a May 6 hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights, legal scholars of both parties informed Senators that filibusters of judicial nominations are uniquely offensive to our nation's constitutional design.[46]

---

42. MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 297 (2000).

43. For data collected by the Senate Republican Policy Committee, see http://www.rpc.senate.gov/releases/2003/Working%20Editorial%20Chart.htm (last visited November 25, 2003).

44. Bush, *supra* note 5.

45. *See* John Cornyn, *The Constitution and the Judiciary: Where's the Check on Senate Filibusters?*, WSJ.COM OPINION J., May 6, 2003, *at* http://www.opinionjournal.com/extra/?id=110003456.

46. See, for example, the testimonies of Prof. Steven G. Calabresi of Northwestern University Law School, Dr. John Eastman of Chapman University School of Law, Mr. Bruce Fein of Fein & Fein, and Dean Douglas W. Kmiec of Columbus School of Law,

The essence of our democratic system of government is simple: Majorities must be permitted to govern. And the constitutional case against filibusters of judicial nominations is rather straightforward as a result. The text of Article II states that "[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges."[47] It has long been understood that, as a matter of general parliamentary law, the Constitution should be construed to provide for simple majority rule except where it expressly states otherwise. As a unanimous U.S. Supreme Court explained in *United States v. Ballin*:[48]

> [T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the federal constitution, and therefore the

---

Catholic University of America, http://www.judiciary.senate.gov/hearing.cfm?id=744; *see also* Stephen G. Calabresi, *Pirates We Be*, WALL ST. J., May 14, 2003, at A14; Bruce Fein, *Confirmation Treachery*, WASH. TIMES, March 23, 2003, at B3; Douglas W. Kmiec, *Tedious—and Unconstitutional*, WALL ST. J., Mar. 6, 2003, at A12; Douglas W. Kmiec, *A Catch in Senate Clogs Judicial Pipeline*, L.A. TIMES, May 19, 2003, at B11; Letter from Prof. Lawrence B. Solum, University of San Diego, to Senator John Cornyn (May 13, 2003) (letter on file with the author, and included in the subcommittee record to be published by GPO in 2004).

47. U.S. CONST. art. II, § 2. The text expressly gives the President the sole power to nominate judges; only the power of appointment is shared with the Senate. In other words, unlike in the case of treaties, the Senate has no constitutional role whatsoever in the selection of judicial nominees. Nevertheless, this provision of Article II was the source of substantial controversy when, in anticipation of a possible Supreme Court vacancy in 2003, a number of Senators debated whether the President had a constitutional duty to consult with certain Senators prior to announcing a Supreme Court nominee, in a series of letters sent to the President last June. *Compare* Letter from Senator John Cornyn, to President George W. Bush (June 17, 2003), *at* http://www.cornyn.senate.gov/061703senateconsultation.html ("It has long been recognized and understood that the Senate's "Advice and Consent" role is limited to the appointment, and not the nomination, of judges . . . ."), *with* Letter from Senator Charles E. Schumer, to President George W. Bush (June 10, 2003), *at* http://www.schumer.senate.gov/schumerWebsite/pressroom/press_releases/PR0172.html ("The Constitution dictates that federal judges be nominated by the President with the advice and consent of the Senate."), Letter from Senator Patrick Leahy, to President George W. Bush (June 11, 2003), *at* http://www.leahy.senate.gov/press/200306/061603.html ("I write to urge you to engage[] in meaningful consultation with Members of the Senate, including those in the other party, before deciding on nominees."), *and* Letter from Senator Edward M. Kennedy, to President George W. Bush (June 25, 2003) *at* http://www.kennedy.senate.gov ("I'm writing to express my hope that in considering potential nominees . . . you will consider the example of earlier Presidents who . . . fully respected the role the Framers gave the Senate to share with the President."). *See also* John Cornyn, *Advice and Consent—After the Fact*, WASH. POST, July 1, 2003, at A12 (pointing out that "[t]he constitutional provision that discusses nominations . . . begins with the phrase '[the president] shall nominate'" and "[o]nly then does it say, 'and by and with the advice and consent of the Senate, shall appoint.'").

48. 144 U.S. 1 (1892).

general law of such bodies obtains."[49]

The *Ballin* approach to textual silence is reinforced by Thomas Jefferson's *Manual of Parliamentary Procedure*—which still governs the House of Representatives to this day, and which Jefferson used to govern the Senate when he was Vice President. Section 41 of the *Manual* states that "[t]he voice of the majority decides. For the lex majoris partis is the law of all councils, elections, &c. where not otherwise expressly provided."[50]

By contrast, the Constitution expressly establishes supermajority voting requirements in a variety of contexts:

- "[T]he Concurrence of two thirds" of either the House or the Senate is required to expel a Member of Congress under Article I, Section 5.
- "[N]o Person shall be convicted" by the Senate in an impeachment trial "without the Concurrence of two thirds of the Members present," according to Article I, Section 3.
- Legislation can be enacted over presidential veto if "two thirds" of each House approves, pursuant to Article I, Section 7.
- The President is authorized to ratify treaties only if "two thirds of the Senators present concur," under Article II, Section 2.
- Congress may propose amendments to the Constitution "whenever two thirds of both Houses shall deem it necessary," according to Article V.
- Under the Fourteenth Amendment, Congress is authorized, "by a vote of two-thirds of each House," to remove the disability from federal service of rebels who, having previously sworn allegiance to the

49. *Id.* at 6. Some supporters of the current filibusters cite the U.S. Supreme Court's more recent decision in *Gordon v. Lance*, 403 U.S. 1 (1971), as support for the constitutionality of filibusters of judicial nominations. *See, e.g.*, People for the American Way, GOP Leaders Try to Create Constitutional Cover for Illegitimate Power Play, *at* http://www.pfaw.org/pfaw/general/default.aspx?oid=10511 (last visited Dec. 2, 2003). Such reliance on *Gordon* is wholly misplaced, however. In *Gordon*, the Court upheld a West Virginia supermajority voting requirement against a challenge under the Equal Protection Clause. The constitutional objections raised in this article, by contrast, are not based on the Equal Protection Clause at all, but rather on the structural provisions of the Constitution that uniquely govern the operations of the federal government. *See also* Brett W. King, *Deconstructing* Gordon *and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNTABLE 133, 193 (1999) ("the Supreme Court's decision in *Gordon v. Lance* has little to offer efforts at constructing a theory of supermajoritarianism").

50. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES (2d ed. 1812), *reprinted in* JEFFERSON'S PARLIAMENTARY WRITINGS: "PARLIAMENTARY POCKET-BOOK" AND A MANUAL OF PARLIAMENTARY PRACTICE, at 407 (Wilbur Samuel Howell ed., 1988).

United States as a federal or state office, subsequently supported the Confederacy during the Civil War.

- Under the Twenty-Fifth Amendment, Congress may determine "by two-thirds vote of both Houses" that "the President is unable to discharge the powers and duties of his office."

In addition, Article 9, Section 6 of the Articles of Confederation contains an express supermajority requirement for appointing commanders in chief—stating that "[t]he United States in Congress assembled shall never . . . appoint a commander-in-chief of the army or navy, unless nine States assent to the same"[51]—and expressly provides for supermajority voting rules in a variety of other contexts as well.[52] In light of these express supermajority voting requirements, it seems clear that the Founders did not intend to impose a supermajority voting rule for the confirmation of judges.

This canon of interpretation—that majorities rule unless otherwise stated explicitly in constitutional text—is also reinforced by the shared beliefs of our Founding Fathers. As Alexander Hamilton explained in Federalist No. 22, "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail."[53] Similarly, James Madison stated in Federalist No. 58 that "the fundamental principle of free government would be reversed" if supermajority voting requirements were the norm.[54] "It would be no longer the majority that would rule: the power would be transferred to the minority."[55]

If the Constitution provides that only a majority is necessary to confirm judges, any Senate rule that purports to prevent a majority of the Senate from exercising that confirmation function directly contradicts and offends our constitutional design. After all, no Senate rule can trump the Constitution. As the Supreme Court unanimously noted in *Ballin*, although "[t]he Constitution empowers each house to determine its rules of proceedings," neither House of Congress may "by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is

51. 1 Stat. 4, 8 (1778).
52. *Id.*
53. THE FEDERALIST NO. 22, at 104-05 (2d ed., Max Beloff, ed., 1987).
54. THE FEDERALIST NO. 58, at 301-02 (2d ed., Max Beloff, ed., 1987).
55. *Id.* at 302.

sought to be attained."[56]

I am not the first to have made this argument. Indeed, numerous Democrats have previously argued that, because Article I, Section 7 of the Constitution (like Article II) does not provide for supermajority voting requirements to enact legislation, filibusters of legislation are also unconstitutional (a far more aggressive argument than the one I have put forth here,[57] given the extensive historical practice of legislative filibusters):

- **Senator Daschle:** "The Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote. The Founders debated the idea of requiring more than a majority to approve legislation. They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. *Democracy means majority rule, not minority gridlock.*"[58]
- **Senator Joe Lieberman**: "For too long, we have accepted the premise that the filibuster rule is immune. Yet . . . there is no constitutional basis for it. . . . [I]t is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate. . . . [I]t seems to me to be inconsistent with the Constitution that this body, by its rules, has essentially amended the Constitution to require 60 votes to pass any issue on which Members choose to filibuster or threaten to filibuster."[59]
- **Senator Joe Lieberman**: "The Constitution states only five specific cases in which there is a requirement for more than a majority to work the will of this body: Ratification of a treaty, override of a Presidential veto, impeachment, adoption of a constitutional amendment, and expulsion of a Member of Congress. In fact, the Framers of the Constitution considered other cases in which a

56. *United States v. Ballin*, 144 U.S. 1, 4. *See also United States v. Smith*, 286 U.S. 6, 33 (1932) (same).

57. To be clear, I do not have any constitutional objections to filibusters of legislation, given the extensive historical practice supporting legislative filibusters, as well as the unique threat to presidential power and judicial independence presented by filibusters of judicial nominations, as described above.

58. 141 CONG. REC. 2832 (1995) (statement of Sen. Daschle) (emphasis added).

59. 141 CONG. REC. 38 (1995) (statement of Sen. Lieberman).

supermajority might have been required and rejected them. And we by our rules have effectively amended the Constitution—which I believe, respectfully, is not right—and added the opportunity of any Member or a minority of Members to require 60 votes . . . ."[60]

- **Senator Tom Harkin**: "I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment."[61]
- **Lloyd Cutler**:[62] "A strong argument can be made that [the] requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional."[63]
- **Lloyd Cutler**: "[T]he Senate rule requiring a super-majority vote to cut off debate is unconstitutional . . . ."[64]

To be sure, this Democratic claim that filibusters of legislation are unconstitutional runs into a significant obstacle, whatever its merits as an original matter: namely, the robust historical practice of such filibusters.[65] The extensive use of filibusters to defeat legislation throughout this body's history stands in stark contrast, however, to the historical absence of filibusters of judicial nominations.

Moreover, because the use of filibusters to defeat judicial nominations uniquely threatens both presidential power and judicial independence—a rare affront to members of all three branches of government—such filibusters are far more constitutionally dubious than filibusters of legislation, an area of pre-eminent congressional power. It is well established that Congress retains primary responsibility over legislation, while the President retains primary responsibility over the appointment power. Under Article I, Section 1, "[a]ll legislative Powers herein granted" are vested in Congress. The

60. 141 CONG. REC. 642 (1995) (statement of Sen. Lieberman).

61. 140 CONG. REC. 3459 (1994) (statement of Sen. Harkin).

62. Cutler served as Counsel to Presidents Jimmy Carter and Bill Clinton.

63. Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23.

64. Lloyd Cutler, *On Killing Senate Rule XXII (Cont'd)*, WASH. POST, May 3, 1993, at A19.

65. On the relevance of historical practice in analyzing constitutional issues, see, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915) (stating the "wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself,—even when the validity of the practice is the subject of investigation"); McPherson v. Blacker, 146 U.S. 1, 27 (1892) ("where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight").

power to appoint judges and executive officials, by contrast, is an executive power vested in the President pursuant to Article II, Section 2, one shared with the Senate (and, notably, not with both Houses of Congress) through the Advice and Consent Clause.[66] The Senate itself recognizes this dichotomy between legislative and executive powers by establishing two separate calendars of business: the legislative calendar and the executive calendar. Any Senate action on nominations is recorded in a separate Senate executive journal, conducted during executive session, and coordinated by an executive clerk. Executive session is governed by a set of rules distinct from those applicable to legislative session.[67]

Thus, the historical existence of filibusters against legislation cannot, without more, justify the use of filibusters to defeat

---

66. *Cf.* Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals, 10 Op. Off. Legal Counsel 12, 17 (1986) ("Nothing in the text of the Constitution or the deliberations of the Framers suggests that the Senate's advice and consent role in the treaty-making process was intended to alter the fundamental constitutional balance between legislative authority and executive authority."). Of course, the case is even stronger that the appointment power remains an executive power. At least the Treaty Clause involves lawmaking of some sort—namely, international lawmaking. The appointment power, by contrast, is not only historically an executive power, it is an executive power with no lawmaking component whatsoever. The Senate's advice and consent participation in appointments is thus merely an inter-branch check on executive power, not a legislative power.

67. RULES XXIX-XXXII, STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, at 38-41 (2000); *see Hearing on S. Res. 138, Before the Committee on Rules and Administration,* 108th Cong. (June 5, 2003) (statement of Dr. Bill Frist, Senate Majority Leader), *at* http://www.rules.senate.gov/hearings/2003/060503frist.htm (last visited Nov. 12, 2003).

> By rules and precedents, there are deeply rooted differences between the conduct of executive and legislative business.
>
> For example, ever since the first Congress, executive business has been considered separately from legislative business. When committees report treaties or nominations, these are placed on the Executive Calendar, not on the Calendar of Business for legislative measures.
>
> When a motion is made to proceed to executive session, it may specify the nomination or treaty to be considered, but when a motion is made to return to legislative session, it may not specify the business. This distinction, which stems from a 1980 precedent, effectively means that no filibuster can be conducted on a motion to proceed to a nomination or treaty, while the filibuster remains alive and well on a motion to proceed to a legislative measure. . . .
>
> . . . .
>
> In addition, the chair has interpreted the word "day" to mean only a calendar day in executive session but it can mean legislative day in legislative session, an interpretation that could affect implementation of the two speech rule under Rule XIX.
>
> So, if the Senate adopts a special cloture procedure for debate of nominations, it will add another dimension to the differences in the way in which legislative and executive business is conducted.

Id.

nominations as well. After all, the constitutional structure of our government dictates that the Senate's power with respect to nominations is necessarily narrower than its power with respect to legislation. Under traditional separation of powers analysis, congressional incursions into executive power—such as the appointment power—are construed narrowly, and are not permitted absent a clear expression in constitutional text. As Alexander Hamilton once noted, and the Supreme Court subsequently quoted, "[t]he general doctrine of our Constitution . . . is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument."[68]

Filibusters of judicial nominations arguably offend the constitutional structure and separation of powers because they effectively reorder the Constitution's allocation of executive power with respect to appointments. By increasing the number of Senators needed to confirm a judge, this abuse of the Senate rules effectively increases the power of each and every Senator, and of the Senate as a whole, at the expense of the President. Accordingly, separation of powers principles strongly suggest that the Senate may not—and especially not by mere Senate rule—enhance its own power in such a manner without offending the Constitution.

Legal scholars across the political spectrum have endorsed this conclusion.[69] For example, D.C. Circuit Chief Judge Harry Edwards, a respected Carter appointee, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. After all, otherwise, "[t]he Senate, acting unilaterally, could thereby increase its own power at the expense of the President" and "essentially take over the appointment process from the President."[70] Chief Judge Edwards thus concluded that "the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes."[71]

Georgetown Law Professor Susan Low Bloch has similarly condemned supermajority voting requirements for confirmation,

68. Myers v. United States, 272 U.S. 52, 138-39 (1926) (internal citations omitted).

69. *See supra* note 46.

70. Skaggs v. Carle, 110 F.3d 831, 838, 847 (D.C. Cir. 1997) (Edwards, C.J., dissenting).

71. *Id.* at 838. Chief Judge Edwards also discussed the constitutional issues arising out of the cloture rule within the context of legislation. *See id.* at 846.

arguing that they would allow the Senate to by itself

> upset the carefully crafted rules concerning appointment of both executive officials and judges and to unilaterally limit the power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to aggrandize its own role and would unconstitutionally[72] distort the balance of powers established by the Constitution.

Professor Michael Gerhardt—the Democrats' own legal expert on constitutional issues arising out of the filibusters of judicial nominees—has written:

> The final problem with the supermajority requirement is that it is hard to reconcile with the Founders' reasons for requiring such a vote for removals and treaty ratifications but not for confirmations. The Founders reserved a two-thirds supermajority voting requirement to shift the presumption against certain matters they expected not to arise routinely in order to ensure greater deliberation on them, decrease the chances for political or partisan reprisals on removals and treaty ratifications, and protect an unpopular minority from being abused in Senate votes on these questions. The Framers required a simple majority for confirmations to balance[73] the demands of relatively efficient staffing of the government.

Professor Gerhardt has also written that "requiring a two-thirds supermajority for Supreme Court confirmations is problematic because it creates a presumption against confirmation, shifts the balance of power to the Senate, and enhances the power of the special interests."[74] Georgetown Law Professor Mark Tushnet has likewise written that "[t]he Democrats' filibuster is . . . a repudiation of a settled pre-constitutional understanding."[75] And in a letter to the

---

72. Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENT. 1, 4 (1997).

73. GERHARDT, *supra* note 42, at 297.

74. Michael Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 398 (1994).

75. MARK TUSHNET, CONSTITUTIONAL HARDBALL 3 (Georgetown Public Law and Legal Theory Working Paper No. 45160 2003).

Supermajority requirements within the context of legislation, as opposed to the executive power of appointments, has triggered significant academic commentary as well. In 1995, the new Republican majority in the House adopted a House rule purporting to require a supermajority of three-fifths of the House to approve tax increases. *See* RULES OF THE HOUSE OF REPRESENTATIVES, Rule XXI(5)(c), H.R. Doc. No. 940-1, 104th Cong., 1st Sess. 21, 141 CONG. REC. H23-02 (1995) ("No bill . . . carrying a Federal income tax rate increase shall be considered as passed . . . unless so determined by a vote of not less than three-fifths of the Members voting.") ("House Rule").

The academic response was swift and vibrant. For arguments against the new rule, see Bruce Ackerman, *Gingrich vs. the Constitution*, N.Y. TIMES, Dec. 10, 1994, at A23

Senate Subcommittee on the Constitution, University of San Diego Law Professor Lawrence B. Solum wrote:

> I am not writing to support the President's nominees on the merits, nor am I a member of the President's party. My concern is with the Constitution and the downward spiral of politicization that has characterized the confirmation process in recent years. . . .
>
> . . . .
>
> . . . [B]ecause advice and consent is an executive function, it is distinguishable from the Senate's legislative function. When the Senate acts in its legislative capacity, it owes no constitutional duties to the President, but when the Senate acts as an executive body—the fundamental nature of its role is different. . . .
>
> . . . .
>
> . . . [A]llowing indefinite filibusters of Presidential nominees is inconsistent with the constitutional duty to provide advice and consent in a timely fashion.[76]

An even stronger constitutional argument could be made that a majority of Senators retains the constitutional right at least to adopt rules abolishing or regulating the use of the filibuster.[77] Under this

---

(arguing that a House rule requiring a three-fifths vote to enact laws that increase taxes is unconstitutional); Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995); Bloch, *supra* note 72, at 1; Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role*, 100 DICK. L. REV. 341 (1996); Benjamin Lieber and Patrick Brown, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347 (1995); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996); Christopher J. Soller, *"Newtonian Government:" Is the Contract with America Unconstitutional?*, 33 DUQ. L. REV. 959 (1995). For arguments in support of the new rule, see Robert S. Leach, *House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress*, 44 UCLA L. REV. 1253, 1256 (1997); John O. McGinnis and Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 483-85 (1995); John O. McGinnis and Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997).

As noted earlier, the constitutional objections to supermajority requirements are even stronger within the context of executive powers such as the appointment of judges.

76. Letter from Prof. Lawrence B. Solum, University of San Diego, to Senator John Cornyn, *supra* note 46.

77. *See* Fisk & Chemerinsky, *supra* note 2, at 245-52; *see also* Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 526-36 (1999); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 404-05; Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 196-201 (1986); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505-06 (1997); John O. McGinnis & Michael

argument, the filibuster is permissible but only because the majority always retains the prerogative to dispense with it at its discretion. Senate rule proposals cannot be defeated by a minority of Senators willing to filibuster even a rules proposal. Just as one Congress cannot enact a law that a subsequent Congress could not amend by majority vote, one Senate cannot enact a rule that a subsequent Senate could not amend by majority vote. Such power, after all, would violate the general common law principle that one parliament cannot bind another. As William Blackstone once explained:

> Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind the present parliament.[78]

In addition, such power would arguably offend the U.S. Constitution because it would be tantamount to amending the Constitution by majority vote of Congress. Indeed, as the Father of the Constitution, James Madison, explained to the House of Representatives in 1790, just one year after the Constitution took effect: "Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made."[79] Thomas Jefferson took the same view, famously declaring in a letter to Madison that "the earth belongs always to the living generation."[80] Jefferson and Madison also worked together on the Virginia Statute for Religious Freedom, which specifically acknowledges that "this assembly elected by the people for ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in

---

B. Rappaport, *Symmetric Entrenchement: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003); McGinnis & Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, supra note 75, at 503-07; Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003). For a rare academic voice in support of Congress's ability to entrench itself, *see* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

78. 1 WILLIAM BLACKSTONE, COMMENTARIES *90. *See also* FRANCIS BACON, THE HISTORY OF THE REIGN OF KING HENRY THE SEVENTH 135 (Jerry Weingberger ed., Cornell Univ. Press 1996) (1622); JEREMY BENTHAM, THE BOOK OF FALLACIES 82-112 (Peregrine Bingham ed., London, John & H.L. Hunt 1824); THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 125-26 (Boston, Little, Brown , and Co. 1868).

79. 2 ANNALS OF CONG. 1666 (1790).

80. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 229 (Marvin Meyers ed., 1973) (quoting Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)).

law."[81]

The Supreme Court appears to have spoken on this issue as well. As it explained in its unanimous decision in *Ballin*, "[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house . . . ."[82] These arguments have also been made by numerous Senators throughout our history, and even became a part of Senate precedent during the 1975 struggle to amend Senate Rule XXII.[83]

Given these substantial legal arguments against filibusters of judicial nominations (and against filibusters of filibuster reform proposals), constitutional concerns about the current judicial confirmation crisis demand attention and respect. As Charles Lane of the *Washington Post* has concluded, the constitutional arguments against the filibusters of Estrada, Owen, Pryor, and others are a "serious matter" based on "good-faith arguments,"[84] and thus deserve

---

81. DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY: FROM SETTLEMENT THROUGH RECONSTRUCTION 83-85 (Melvin Urofsky ed., 1989).

82. United States v. Ballin, 144 U.S. 1, 5 (1892). *See also* United States v. Winstar Corp., 518 U.S. 839, 873 (1996) ("[A] general law . . . may be repealed, amended, or disregarded by the legislatures which enacted it," and "is not binding upon any subsequent legislature . . . ." (quoting Manigault v. Springs, 199 U.S. 473, 487 (1905))); Conn. Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 621 (1899) ("[E]ach subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify [an] act."); Newton v. Comm'rs, 100 U.S. 548, 559 (1879) ("Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality."); Fletcher v. Peck, 10 U.S. 87, 135 (1810) ("[O]ne legislature is competent to repeal any act which a former legislature was competent to pass; and . . . one legislature cannot abridge the powers of a succeeding legislature.").

83. *See* 121 CONG. REC. 5649 (1975) (statement of Sen. Mondale).

> For the first time in American history . . . the U.S. Senate may, at the beginning of a new Congress, establish its rules by majority vote, uninhibited by rules adopted by previous Congresses. . . . Even if we wanted to, we could not, under the U.S. Constitution, bind a future Congress or waive the right of a future majority.

Id. See also 121 CONG. REC. 3850 (1975) (statement of Sen. Kennedy).

> The notion that a filibuster can be used to defeat an attempt to change the filibuster rule cannot withstand analysis. It would impose an unconstitutional prior restraint on the parliamentary procedure in the Senate. It would turn rule XXII into a Catch XXII. It would give the two-thirds filibuster rule itself an undesirable and undeserved new lease on life.
>
> Mr. President, the immediate issue is whether a simple majority of the Senate is entitled to change the Senate rules. Although the procedural issues are complex, it is clear that this question should be settled by a majority.

Id.

84. *See Special Report with Brit Hume: Analysis with Chuck Lane* (Fox News television broadcast, May 12, 2003), *available at* 2003 WL 2370554.

> Very prominent Democrats in the past, Hubert Humphrey, Lloyd Cutler, who's a very distinguished lawyer here in Washington, have raised fundamental

to be treated accordingly regardless of how one might ultimately come down on the merits.[85]

III.

Until now, members of this distinguished body have long and consistently obeyed an unwritten rule not to block the confirmation of judicial nominees by filibuster, consistent with the requirements of the Constitution and the vision of our Founding Fathers. Now that a partisan minority of Senators in this Congress has broken that tradition, I support legislation to restore our constitutional balance of powers and the traditions of the Senate, which prohibit filibusters of judicial nominations.[86] The rules have been changed. We must now take action to preserve our Constitution, traditions, and precedents, and to protect our independent judiciary against the scourge of partisan filibusters.

A.

As noted earlier, Senators are expected to "restrain themselves" and "not abuse the privilege" of debate.[87] Out of respect for the independent judiciary, Senators have historically and consistently exercised such restraint within the context of judicial nominations.

Indeed, even as acrimony in the judicial confirmation process has increased and intensified under Presidents of both parties in recent decades, Senators on both sides of the aisle have (at least until now) maintained the tradition against using filibusters to prevent a majority of Senators from confirming judicial nominees. Here is just a sampling of statements by Democratic and Republican Senators alike opposing the filibustering of President Clinton's judicial nominations:

---

objections to the filibusters. So, I think it's best to deal with this on—as a serious matter. There have been good-faith arguments made against it from both sides.

Id.

85. To be clear, the question whether the current filibusters of judicial nominees offend the Constitution is separate from the question whether a court has the authority to resolve this debate. On May 15, 2003, Judicial Watch filed a lawsuit against the United States Senate and others seeking a declaration from the U.S. District Court for the District of Columbia that the current filibusters are unconstitutional. The Senate Legal Counsel, which represents the entire Senate, has taken no position on whether the current filibusters are unprecedented, unjustified, or unconstitutional. However, it does expect the lawsuit to be dismissed on procedural grounds.

86. *See* John Cornyn, *A Broken Tradition*, WASH. TIMES, June 5, 2003, at A21, *available at* www.washtimes.com/op-ed/20030604-104138-9833r.htm.

87. *See supra* note 41 and accompanying text.

- **Senator Biden:** "[E]veryone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor. . . . It is totally appropriate . . . to reject every single nominee if they want to. That is within their right. But it is not . . . appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote."[88]
- **Senator Boxer:** "According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor."[89]
- **Senator Daschle:** "As Chief Justice Rehnquist has recognized: 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' An up-or-down vote, that is all we ask . . . they deserve at least that much. . . . *I must say, I find it simply baffling that a Senator would vote against even voting on a judicial nomination.* Today's actions prove that we all understand that we have a constitutional outlet for antipathy against a judicial nominee—a vote against that nominee. . . . Thus, today, I implore, one more time, every Senator to follow Senator Leahy's advice, and treat every nominee 'with dignity and dispatch.' Lift your holds, and let the Senate vote on every nomination."[90]
- **Senator Durbin:** "If, after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down."[91]
- **Senator Feinstein:** "A nominee is entitled to a vote. Vote them up; vote them down. . . . What this does to a [nominee's] life is, it leaves them in limbo . . . It is our job to confirm these judges. If we don't like them, we can vote against them. That is the honest thing to do. If there are things in their background, in their abilities that don't pass muster, vote no."[92]
- **Senator Feinstein:** "Chief Justice Rehnquist recently said that '[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him

88. 143 CONG. REC. S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).
89. 143 CONG. REC. S4420-21 (daily ed. May 14, 1997) (statement of Sen. Boxer).
90. 145 CONG. REC. S11,919 (daily ed. Oct. 5, 1999) (statement of Sen. Daschle) (emphasis added).
91. 144 CONG. REC. S11031 (daily ed. Sept. 28, 1998) (statement of Sen. Durbin).
92. 145 CONG. REC. S11,014-15 (daily ed. Sep. 16, 1999) (statement of Sen. Feinstein).

up or vote him down.' . . . Our institutional integrity requires an up-or-down vote."[93]

- **Senator Hatch:** "I personally do not want to filibuster Federal judges. The President won the election. He ought to have the right to appoint the judges he wants to."[94]
- **Senator Hatch:** "I am also pleased, with regard to these judicial nominees, that no one on our side has threatened to ever filibuster any of these judges, to my knowledge. I think *it is a travesty if we ever start getting into a game of filibustering judges*. . . . I really thing *it is a travesty if we treat this third branch of Government with such disregard that we filibuster judges*. . . . We are dealing with a coequal branch of Government. We are dealing with some of the most important nominations a President, whoever that President may be, will make. And we are also dealing with good faith on both sides of the floor."[95]
- **Senator Hatch:** "I have always, and consistently, taken the position that *the Senate must address the qualifications of a judicial nominee by a majority vote*, and that the 41 votes necessary to defeat cloture are no substitute for the democratic and constitutional principles that underlie this body's majoritarian premise for confirmation to our federal judiciary."[96]
- **Senator Hatch:** "Simply put, there are certain areas that must be designated as off-limits from political activity. Statesmanship demands as much. The Senate's solemn role in confirming lifetime-appointed Article III judges—and the underlying principle that the Senate performs that role through the majority vote of its members—are such issues. Nothing less depends on the recognition of these principles than the continued, untarnished respect in which we hold our third branch of Government. On the basis of this principle, I have always tried to be fair, no matter the President of the United States or the nominees. Even when I have opposed a nominee of the current President, I have voted for cloture to stop a filibuster of that nominee. . . . *At bottom, it is a travesty if we establish a routine of filibustering judges.* We should not play politics with them."[97]

---

93. 145 CONG. REC. S11,875-76 (daily ed. Oct. 4, 1999) (statement of Sen. Feinstein).

94. 140 CONG. REC. 27,470 (1994) (statement of Sen. Hatch).

95. 144 CONG. REC. S641-42 (daily ed. Feb. 11, 1998) (statement of Sen. Hatch) (emphasis added).

96. 145 CONG. REC. S11,876 (daily ed. Oct. 4, 1999) (statement of Sen. Hatch) (emphasis added); *see also* 145 CONG. REC. S11,915 (daily ed. Oct. 5, 1999) (statement of Sen. Hatch).

97. 146 CONG. REC. S1297 (daily ed. Mar. 8, 2000) (statement of Sen. Hatch)

- **Senator Kassebaum:** "While I respect the right of any Senator to engage in extended debate on any issue, I have long believed that nominations should be dealt with in a direct fashion. *My practice has been to oppose filibusters on nominations . . . .*"[98]
- **Senator Kennedy:** "Nominees deserve a vote. If our . . . colleagues don't like them, vote against them. But don't just sit on them—that is obstruction of justice. Free and full debate over judicial nominations is healthy. The Constitution is clear that only individuals acceptable to both the President and the Senate should be confirmed. The President and the Senate do not always agree. But we should resolve these disagreements by voting on these nominees—yes or no. As Chief Justice Rehnquist said in his annual report, 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time it should vote' up or down."[99]
- **Senator Leahy:** "If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . If Senators are opposed to any judge, bring them up and vote against them. . . . I have had judicial nominations by both Democrat and Republican Presidents that I intended to oppose. But I fought like mad to make sure they at least got a chance to be on the floor for a vote. I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. If we don't like somebody the President nominates, vote him or her down. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators."[100]
- **Senator Leahy:** "I cannot recall a judicial nomination being successfully filibustered. I do recall earlier this year when the Republican Chairman of the Judiciary Committee and I noted *how improper it would be to filibuster a judicial nomination.* During this year's long-delayed debate on the confirmation of Margaret Morrow, Senator Hatch said: 'I think it is a travesty if we ever start getting into a game of filibustering judges.'"[101]

(emphasis added).

98. 141 CONG. REC. 16,687 (1995) (statement of Sen. Kassebaum) (emphasis added).

99. 144 CONG. REC. S86 (daily ed. Jan. 28, 1998) (statement of Sen. Kennedy).

100. 144 CONG. REC. S6521-22 (daily ed. June 18, 1998) (statement of Sen. Leahy).

101. 144 CONG. REC. S12,578 (daily ed. Oct. 14, 1998) (statement of Sen. Leahy) (emphasis added).

- **Senator Leahy:** "I, too, do not want to see the Senate go down a path where a minority of the Senate is determining a judge's fate on votes of 41. . . . [D]uring the Republican administrations I rarely ever voted against a nomination by either President Reagan or President Bush. There were a couple I did. *I also took the floor on occasion to oppose filibusters to hold them up and believe that we should have a vote up or down.* Actually, I was one of those who made sure, on a couple controversial Republican judges, that we did. That meant 100 Senators voted on them, 100. . . . [Nominees] ought to be allowed a vote up or down. If Senators want to vote against them, then vote against them. If they want to vote for them, vote for them."[102]
- **Senator Leahy:** "We are paid to vote either yes or no—not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting 'maybe' but we are doing a terrible disservice to the man or woman to whom we do this. They have to put their life on hold. They do not know what is going to happen: Are they going to be confirmed, or not? It is not like when any one of us runs for election; we know that on a certain day the election occurs. We either win or we lose. But we know that on that Tuesday, we are going to know our fate. We won or we lost. These people come here and they never know what may happen."[103]
- **Senator Levin:** "The President is entitled to his nominee, if a majority of the Senate consent."[104]
- **Senator Lott:** *"I think it would be a bad practice if we began to have filibusters on Federal judicial nominations, requiring only 41 votes to defeat a judicial nomination."*[105]
- **Senator Lott:** *"I do not believe that filibusters of judicial nominations are appropriate. . . ."*[106]
- **Senator Moseley-Braun:** *"[U]nder no circumstance is it appropriate or fair for us to filibuster, to erect extraordinary hurdles to a vote on confirmation, to use procedural tricks to avoid having to take up the question of whether or not the President's nominee is*

---

102. 145 CONG. REC. S11,014 (daily ed. Sept. 16, 1999) (statement of Sen. Leahy) (emphasis added).

103. 146 CONG. REC. S9672-73 (daily ed. Oct. 3, 2000) (statement of Sen. Leahy).

104. 141 CONG. REC. 16,775 (1995) (statement of Sen. Levin).

105. 145 CONG. REC. S11,013 (daily ed. Sept. 16, 1999) (statement of Sen. Lott) (emphasis added).

106. 145 CONG. REC. S14,503 (daily ed. Nov. 10, 1999) (statement of Sen. Lott) (emphasis added).

qualified to serve in this office."[107]

B.

Despite these numerous statements, the Senate tradition and unwritten rule against filibusters of judicial nominations has been broken. The current judicial confirmation crisis demands a response. Senate Resolution 138 is that response. It guarantees full debate on nominees, while ensuring the ability of a Senate majority to hold up-or-down votes.

Senate Resolution 138 is a bipartisan proposal that would allow, over time, a simple majority of Senators to confirm any nominee. The first attempt to invoke cloture would still require 60 votes. Subsequent cloture petitions would require fewer and fewer votes: from 60 to 57 to 54 to 51 to a simple majority. Accordingly, this proposal strikes an appropriate balance between the right to debate and the need for a majority eventually to close debate and take action on a nominee.

The proposal has a strong Democratic pedigree. It originates with the filibuster reform proposal introduced by Senators Harkin and Lieberman in 1995, which would have applied to all filibusters,[108] and reintroduced by Senator Miller earlier this year.[109] Indeed, the Harkin-Lieberman proposal was endorsed by 19 Senate Democrats,[110] as well as the *New York Times*, which editorialized in 1995 that "[n]ow is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose."[111]

On May 6, Senator Miller testified before the Senate Constitution Subcommittee that, "at the very least, . . . I would hope we would consider applying my proposal to judicial nominations."[112] I could not

107. 141 CONG. REC. 16,703 (1995) (statement of Sen. Moseley-Braun) (emphasis added).

108. S. Res. 14, 104th Cong. amend. 1 (1995).

109. S. Res. 85, 108th Cong. (2003).

110. 141 CONG. REC. 647 (1995). A motion to table the Harkin amendment was passed by a vote of 76-19. The 19 nay votes were provided by Senators Bingaman, Boxer, Bryan, Bumpers, Feingold, Graham, Harkin, Kennedy, Kerrey, Kerry, Lautenberg, Lieberman, Moseley-Braun, Pell, Pryor, Robb, Sarbanes, Simon, and Wellstone.

111. *Time to Retire the Filibuster*, *supra* note 4. *See also* Tom Wicker, *In the Nation: U.S. Senate Versus Fortas*, N.Y. TIMES, Sept. 12, 1968, *reprinted in* 114 CONG. REC. 28,599-600 (1968) ("[T]he Fortas [nomination] ought not to be . . . filibustered to death by a minority. If the policies of the Warren Court are what is to be tried, then the whole Senate ought to stand up and be counted.").

112. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent. Hearing Before the United States Senate Committee on the Judiciary*, 108th Cong. (2003) (statement of Sen. Zell Miller), *at* http://

agree more, and I am so pleased that, following that hearing, we were able to introduce Senate Resolution 138 as a bipartisan effort. Congressional experts from think tanks as diverse as the American Enterprise Institute,[113] the Brookings Institution,[114] and the Cato Institute have endorsed similar proposals.[115] In short, the resolution is a reasonable, commonsense proposal with a lot of precedent to support it.

The Senate has previously considered at least thirty proposals to eliminate filibusters altogether. And there are literally dozens of laws on the books today, which prevent a minority of Senators from filibustering certain kinds of measures—from the Budget Act of 1974 to the War Powers Resolution. In fact, at least twenty-six laws on the books today limit debate or otherwise eliminate the minority's power to filibuster certain kinds of matters. The judicial confirmation process should surely be added to this list:

---

judiciary.senate.gov/testimony.cfm?id=744&wit_id=2058. *See also* Zell Miller, *Senate Math: 41 Is Greater Than 59!*, WALL ST. J., Mar. 10, 2003, at A18.

113. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, A SECOND REPORT OF THE RENEWING CONGRESS PROJECT 53 (1993). Mann and Ornstein write:

> As with current practice, the first cloture petition would require sixty votes to implement. But the second petition, taken at least one week after the first one, would need only fifty-five votes; the third petition, taken at least one week after the second, would require only a simple majority. . . . Thus minority rights would be preserved, but with additional ways to expedite action.

Id.

114. *See id.*; *see also* Sarah A. Binder & Thomas E. Mann, *Slaying the Dinosaur: The Case for Reforming the Senate Filibuster*, BROOKINGS REV., Summer 1995, at 45-46. Binder and Mann write:

> To limit the harm done by the filibuster, the Senate should consider three approaches to reform. The first would limit the ability of senators to filibuster presidential nominations for executive and judicial branch positions. . . . Such a move would protect the full Senate's power to advise and consent on nominations. . . . The third approach to reform . . . would ratchet down over several days the number of votes required to invoke cloture. . . . Ratcheting down the number of votes to invoke cloture would both preserve the minority's right to be heard while boosting Senate leaders' ability to move forward on favored legislation.

Id. Binder has also joined with Steven S. Smith:

> [W]e favor a proposal similar to Frist's that would change the 60-vote requirement for invoking cloture. Over a two-week period the number of votes required for cloture would fall from 60 to 57 to 54 and finally to 51. We would couple this change with an increase in the number of days that must pass between the filing of and voting on cloture motions.

Sarah A. Binder & Steven S. Smith, *Filibusters a Great American Tradition*, ATLANTA J.-CONST., May 25, 2003, http://www.ajc.com/opinion/content/opinion/0503/25filibuster.html. *See also supra* note 27.

115. *See* James L. Swanson, *Filibustering the Constitution*, WASH. TIMES, May 6, 2003, at A18.

Federal Budget[116]

- Congressional Budget and Impoundment Control Act of 1974[117]
- Balanced Budget and Emergency Deficit Control Act of 1985[118]

War, National Emergency, and National Security

- War Powers Resolution[119]
- National Emergencies Act[120]
- International Emergency Economic Powers Act[121]
- Defense Base Closure and Realignment Act of 1990[122]
- Cuban Liberty and Democratic Solidarity Act of 1996[123]

Arms Control and Foreign Assistance

- International Security Assistance and Arms Export Control Act of 1976[124]
- Arms Export Control Act[125]
- Atomic Energy Act of 1978[126]

International Trade

- Trade Act of 1974[127]
- Uruguay Round Agreements Act[128]
- Bipartisan Trade Promotion Authority Act of 2002[129]

Energy and Environment

- Department of Energy Act of 1978[130]

---

116. *See* 141 CONG. REC. 2832 (1995) (statement of Sen. Daschle) ("Even the Senate, with its veneration for the filibuster rule, limits its reach when it comes to the budget. The Senate has specifically protected the reconciliation process against manipulation by a minority. You cannot filibuster a reconciliation bill.").
117. 2 U.S.C. §§ 636, 641, 688 (2000).
118. 2 U.S.C. §§ 907a-d (2000).
119. 50 U.S.C. §§ 1544-1546 (2000).
120. 50 U.S.C. § 1601 (2000).
121. 50 U.S.C. §§ 1701, 1706 (2000).
122. 10 U.S.C. § 2687 (2000).
123. 22 U.S.C. § 6064 (2000).
124. Pub. L. No. 94-329, § 601, 90 Stat. 765 (1976).
125. 22 U.S.C. § 2753 (2000).
126. 42 U.S.C. §§ 2153-2159 (2000).
127. 19 U.S.C. § 2191 (2000).
128. 19 U.S.C. § 3535 (2000).
129. 19 U.S.C. §§ 3803-3804 (2000).
130. 22 U.S.C. § 3224a (2000).

- Energy Policy and Conservation Act[131]
- Power Plant and Industrial Fuel Use Act of 1978[132]
- Nuclear Waste Policy Act of 1982[133]
- Public Utility Regulatory Policies Act of 1958[134]
- Outer Continental Shelf Lands Act[135]
- Alaska Natural Gas Transportation Act of 1976[136]
- Alaska Nat'l Interest Lands Conservation Act[137]

Employment Retirement Security

- Employee Retirement Income Security Act of 1974[138]
- Pension Reform Act of 1976[139]

General Government

- Congressional Review Act[140]
- Executive Reorganization Act[141]
- District of Columbia Home Rule Act (Section 604)[142]

Thus, if Senate Resolution 138 were adopted by the Senate—as it should be—it would hardly be the first law to abrogate the filibuster. To the contrary, it would be at least the twenty-seventh such law.

Moreover, Resolution 138 is not the first Senate proposal to attempt to prohibit filibusters in the judicial nominations context. In 1991, Senators Bob Graham and Connie Mack introduced the Judicial Nomination and Confirmation Reform Act of 1991.[143] That legislation would have required a Senate floor vote on a judicial nomination within thirty days of committee action, and imposed deadlines for

131. 42 U.S.C. § 6421 (2000).
132. 42 U.S.C. § 8374 (2000).
133. 42 U.S.C. §§ 10131-10135 (2000).
134. 43 U.S.C. § 2008 (2000).
135. 43 U.S.C. § 1337 (2000).
136. 15 U.S.C. § 719f (2000).
137. 16 U.S.C. §§ 3232-3233 (2000).
138. 29 U.S.C. § 1322a (2000).
139. 29 U.S.C. § 1306 (2000).
140. 5 U.S.C. § 802 (2000).
141. 5 U.S.C. § 912 (2000).
142. District of Columbia Home Rule Act, Pub. L. No. 93-198, § 604, 87 Stat. 816 (1973). Thanks to the Congressional Research Service for assisting my office with the compilation of this list. *See also* SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 189 tbl.6-2 (1997).
143. S. 910, 102d Cong. (1991); H.R. 2371, 102d Cong. (1991).

presidential nomination and committee votes as well—effectively eliminating the filibuster for nominations purposes, as well as redressing other sources of delay in the confirmation process.

Several years later, Senator Leahy introduced the Judicial Emergency Responsibility Act of 1998,[144] which prohibited the Senate from recessing for more than nine days whenever a nomination for a judicial vacancy, designated an emergency under federal law,[145] has been pending in the Senate for sixty days or longer. Although not a direct abrogation of the filibuster, the Leahy proposal certainly provided a strong stick to prod Senators into providing up-or-down votes on judicial nominees selected to fill vacancies designated judicial emergencies under federal law.

Later that same year, Senator Dick Durbin offered a series of amendments to the Federal Vacancies Reform Act of 1998 to impose a 150-day deadline on both committee consideration of, and a floor vote on, all nominations.[146] As Senator Durbin himself explained, his proposal would "create[] an end point after which we can no longer hold up a nominee. I am not suggesting that we would give our consent to all of these nominees. I am basically saying that this process should come to a close. The Senate should vote. It should make its decision."[147]

Senator Arlen Specter has recently suggested similar legislation to impose strict time limits on Senate consideration of nominees.[148] And on October 1, nine Republican U.S. Representatives from the state of Michigan proposed a constitutional amendment under which all nominees would be presumptively confirmed unless a majority of the Senate acted to disapprove the nominations within 120 Senate session days of receiving the nomination from the President.[149] The amendment was proposed out of obvious frustration with the blockade of all of the President's Michigan judicial nominees to the federal district court and the Sixth Circuit, a blockade launched at the behest of the two U.S. Senators representing that state.[150]

---

144. S. 1906, 105th Cong. (1998).

145. *See* 28 U.S.C. § 46(b) (2000).

146. *See* 144 CONG. REC. S10,997 (daily ed. Sept. 25, 1998) (Amendments No. 3658 and 3659 to S. 2176).

147. 144 CONG. REC. S11,029 (daily ed. Sept. 28, 1998) (statement of Sen. Durbin).

148. *See* Arlen Specter, *To Break the Judicial Nominations Gridlock, The Senate Needs to Vote on Schedule*, LEGAL TIMES, July 8, 2002, at 38.

149. H.R.J. Res. 71, 108th Cong. (2003).

150. *See* Press Release, Office of U.S. Representative Thaddeus G. McCotter, McCotter Proposes Constitutional Amendment to Correct Confirmation Process (Sep. 18, 2003), *at*

Similarly, during the 2000 Presidential campaign, then-Governor Bush proposed "A New Approach" in a speech in Knoxville, Tennessee. In that June 8 speech, Bush announced that,

> [s]tarting next January, I will make the prompt submission of my presidential nominees a top priority. And I will ask the Senate to act on each nominee I submit within 60 days. I would ask Republicans and Democrats in the Senate to follow this standard regardless of who may be elected next November.[151]

Senator Leahy embraced the Bush sixty-day proposal immediately.[152]

As President, Bush has taken steps to expand and formalize his proposal to set time limits on the judicial selection process. On October 30, 2002, he announced a new protocol with the following components: (1) federal judges would be asked to announce their intention to retire at least one year in advance, whenever possible; (2) Presidents would endeavor to submit their nomination to the Senate within 180 days; (3) the Senate Judiciary Committee would hold a hearing on the nomination within ninety days; and (4) the full Senate would commit to an up or down vote no later than 180 days after the submission of the nomination to the Senate by the President.[153] Under this protocol, as one judge prepared to step down, another would be ready to take his place. The Judicial Conference of the United States acted on the first prong earlier this year.[154] The second prong of this

---

http://www.house.gov/apps/list/press/mi11_mccotter/constitutional_amendment.html.

151. Governor George W. Bush, Presidential Campaign Speech in Knoxville, Tenn. (June 8, 2000), http://www.uni.edu/palczews/bushnewapproach.htm.

152. *See* 146 CONG. REC. S7437 (daily ed. July 21, 2000) (statement of Sen. Leahy); 146 CONG. REC. S7532 (daily ed. July 25, 2000) (statement of Sen. Leahy); 146 CONG. REC. S8935 (daily ed. Sept. 21, 2000) (statement of Sen. Leahy); 146 CONG. REC. S9672 (daily ed. Oct. 3, 2000) (statement of Sen. Leahy).

153. *See* President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021030-6.html; *see also* Press Release, White House, President Announces Plan for Timely Consideration of Judicial Nominees (Oct. 30, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021030-4.html; *see also* President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002), *at* www.whitehouse.gov/news/releases/2002/10/20021030-6.html.

154. *See* Press Release, Administrative Office of the U.S. Courts, Judicial Conference Asks Congress to Create 57 New Judgeships, *available at* http://www.uscourts.gov/Press_Releases/303judconf.pdf.

> Acting on a presidential recommendation, the Conference also voted to strongly urge all judges to notify the President and the Administrative Office of the U.S. Courts as far in advance as possible of a change in their status, preferably a year before the contemplated change in status. This action clarifies and strengthens similar Conference policies adopted in March 1988 and September 1995.
>
> Last October the White House proposed a series of reforms to the judicial nomination and confirmation process. One recommendation called for judges to announce their plans to leave active status at least a year in advance.

protocol—Presidential submission of nominations within 180 days—was codified in an executive order issued on May 9, 2003.[155] The Senate has yet to act, however.

Finally, the Presidential Appointee Initiative—a blue ribbon bipartisan commission of former prominent Democrat and Republican government officials established by the Brookings Institution—has issued a similar proposal that is worth examining. According to recommendation 8 of the Initiative's April 2001 report:

> The Senate should adopt a rule that mandates a confirmation vote on every nominee no later than the 45th day after the receipt of a nomination. The rule should permit any Senator, at the end of 45 days, to make a point of order calling for a vote on a nomination. A majority of the Senate may postpone the confirmation vote until a subsequent date.[156]

In light of these alternative proposals that have previously been considered, it is simply disingenuous for anyone to characterize Senate Resolution 138 as either reckless or unprecedented. If anything, Senate Resolution 138 is a moderate reform compared to the more dramatic proposals authored by Senators Graham, Leahy, Durbin, and others in the past. While the other proposals endeavor to eliminate delay altogether—a worthy goal, to be sure—Senate Resolution 138 is much simpler and narrower. Recognizing that there may be occasions when a majority will not be able to act within a specified time limit, Senate Resolution 138 would not purport to limit the majority's authority to schedule votes on nominations. It would simply ensure that a majority that is ready to act on a nomination will eventually be permitted to do so.[157]

To protect the independence of our judiciary and to restore the Constitution and the unwritten rules long respected by the Senate until now, we should immunize the Senate's process of confirming judges against filibusters and approve Senate Resolution 138. As two Congressional scholars from the Brookings Institution have argued: "Just as senators have been willing to impose statutory limits on debate on trade, budget, and other issues, they should also consider expedited procedures for consideration of nominations. Such a move would protect the full Senate's power to advise and consent on

---

Id.

155. Exec. Order No. 13,300, 68 Fed. Reg. 25,807 (May 13, 2003).

156. THE PRESIDENTIAL APPOINTEE INITIATIVE, *supra* note 27, at 13-14.

157. *See supra* note 27.

nominations."[158]

IV.

At times, it has been argued that the current filibusters of judicial nominations can be justified on the basis of precedent.[159] Yet Senate Democrats have already admitted—at least amongst themselves—that their current obstruction is unprecedented. In a November 3, 2003, fundraising e-mail to potential donors, my colleague Jon Corzine, the chairman of the Democratic Senatorial Campaign Committee, acknowledged—actually, he boasted—that the current blockade of judicial nominees is "unprecedented."[160] It is dishonest for Senate Democrats to tell their donors one thing and the American people something else. My colleague from New Jersey is right in reporting that the current filibusters are unprecedented.

A.

In 1968, President Lyndon Johnson nominated Justice Abe Fortas to the position of Chief Justice. Fortas was never confirmed, however. In fact, some have argued that Abe Fortas was the first judicial nominee ever to be defeated by filibuster. As I have written elsewhere, I strongly disagree with that reading of history.[161] Fortas was not defeated due to a filibuster, but rather because he could not get the support of fifty-one Senators and because his nomination was subsequently withdrawn by President Johnson.[162]

The debate over the Fortas nomination was heated, to be sure. The margins in the Senate were sufficiently close that Fortas supporters feared that the nomination could eventually enjoy the support of a

158. Binder & Mann, *supra* note 114, at 45-46.

159. I rebutted these arguments in a recent National Review Online essay. *See* John Cornyn, *Falsities on the Senate Floor*, NATIONAL REVIEW ONLINE (Nov. 13 2003), *at* http://www.nationalreview.com/comment/cornyn200311131044.asp.

160. E-mail from Senator Jon Corzine, Chairman, Democratic Senatorial Campaign Committee, to potential Democratic Senatorial Campaign Committee donors (Nov. 3, 2003) (on file with author) ("Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration's most radical nominees, Senate Democrats have led the effort to save our courts.").

161. *See* John Cornyn, *The Constitution and the Judiciary: Where's the Check on Senate Filibusters?*, WSJ.COM OPINION J., May 6, 2003, *at* http://www.opinionjournal.com/extra/?id=110003456; Press Release, Senator John Cornyn, Fortas Was Not Filibustered (Nov. 13, 2003), *at* http://cornyn.senate.gov/111303quotes.html.

162. *See, e.g.*, C. Boyden Gray, *A Filibuster Without Precedent*, WALL ST. J., June 10, 2003, at A18.

majority of Senators yet still be defeated if opponents were willing to launch an unprecedented filibuster against a judicial nominee. A number of organizations—such as the Leadership Conference on Civil Rights and the National Council of Jewish Women—preemptively argued that Fortas should not be defeated by filibuster.[163]

The record also contains a remarkable letter from the Lawyers' Committee on Supreme Court nominations, signed by "seven past presidents of the American Bar Association, many past and present officers of state bar associations and twenty-two law school deans."[164] That letter states:

> No one would deny the need for careful consideration by the Senate of the qualification of nominees to the highest court in the land. Nor is there any doubt that some period of debate and deliberation for that purpose is appropriate. But just as surely, the Senate has a duty not only to explore the issues but also to render a decision either granting or withholding its consent to the nominations.
>
> If the pending nominations do not win the support of a majority of the Senate, they will fall. If they do win such support, they deserve the Senate's consent. Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote.
>
> Senators have never before employed a filibuster against a

---

163. *See* 114 CONG. REC. 28,927 (1968) (Letter of Roy Wilkins, Chairman, Leadership Conference on Civil Rights (Sep. 25, 1968)) ("Our long opposition to the filibuster . . . leads us, now, to protest its impending use against the nomination of Justice Abe Fortas as Chief Justice of the United States. . . . [T]here are issues, here, that threaten the independence of the Judiciary. . . ."); *id.* at 28,928 (Sep. 24, 1968) (Statement by the Leadership Conference on Civil Rights on the Abe Fortas Nomination).

> Since the organization of the Conference, nearly 20 years ago, we . . . have sought to change Rule XXII in order to enable a majority of the Senate to work its will. Use of the filibuster against Mr. Fortas would only add the most ignoble chapter of all to the history of this parliamentary device.

Id. See also id. (Letter of Mrs. Leonard H. Weiner, National President, National Council of Jewish Women, to Senator Philip A. Hart (Sep. 27, 1968)).

> The National Council of Jewish Women has for a number of years opposed the use of unlimited debate for the purpose of preventing Senate action on pending measures. . . . The full membership of the Senate is entitled to consider the nomination on its merits and render its decision. This will not occur unless you vote for limitation of debate. We hope you will do so.

Id.

164. *Id.* at 28,926. The Federalist Society has helpfully posted an electronic version of the letter on its webpage. *See* www.fed-soc.org/Publications/White%20Papers/fortasltr.pdf (last visited Nov. 12, 2003).

> Supreme Court nomination. Indeed, prior Supreme Court appointments have seldom been debated more than 8 days. Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government.
>
> Senators concerned about whether the courts have correctly applied the Constitution ought not to ignore their own constitutional duties. We therefore urge that after a reasonable time for debate the nominations be voted up or down on their merits.[165]

As it turns out, Fortas's nomination could not garner the support of fifty-one Senators, let alone the support of the supermajority of Senators needed to invoke cloture. Moreover, even Senators opposed to the nomination specifically noted that they were not filibustering—they simply wanted time to adequately debate the nomination on the floor of the Senate.

After just a few days of debate, supporters of Fortas's nomination to be Chief Justice filed for cloture to end debate.[166] When the cloture vote was taken up two Senate session days later, the vote failed by a margin of 45-43. In other words, the Fortas nomination failed to obtain the support of fifty-one Senators—let alone the supermajority required to invoke cloture—due to allegations of ethical improprieties and the bipartisan opposition of twenty-four Republicans and nineteen Democrats.[167] Moreover, had there been an actual confirmation vote, Fortas might have been defeated by a vote of 46-49, based on various indications in the *Congressional Record*. The day after the failed vote on the Fortas nomination, Senator Robert P. Griffin summarized recent events as follows:

> An examination of the *Congressional Record* of October 1 . . . clearly reveals that the will of the majority was not frustrated.
>
> It will be noted that the votes of 12 Senators were not recorded. It appears in the *Congressional Record* that seven of that number sent word and indicated how they would have voted had they been present.
>
> The Senator from Oregon [*Mr. Morse*] and the Senator from Idaho [*Mr. Church*] would have voted "yea," raising the total of those in favor of invoking cloture from 45 to 47.

---

165. 114 CONG. REC. 28,926-27 (1968) (Statement of Lawyers' Committee on Supreme Court Nominations (Sept. 29, 1968)).

166. *See id.* at 28,571.

167. *See id.* at 28,933.

> The *Record* reflects that the Senator from Vermont [*Mr. Aiken*], the Senator from Nevada [*Mr. Bible*], the Senator from Louisiana [*Mr. Ellender*], the Senator from Alaska [*Mr. Gruening*], and the Senator from Maine [*Mrs. Smith*] would have voted "nay," raising the total of those opposed to cloture from 43 to 48.
>
> Accordingly, if every Senator who made his position known in the *Record* had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture.
>
> There is no indication in the *Record* how the other five absent Senators would have voted.
>
> It should not be overlooked that the distinguished Senator from Kentucky [*Mr. Cooper*] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice.
>
> On the basis of the *Record*, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated.[168]

An independent review of the *Congressional Record* confirms the accuracy of Senator Griffin's recapitulation: Senators Morse and Church did not vote on the cloture petition but did express support for the Fortas nomination,[169] while Senators Aiken, Bible, Ellender, Gruening, and Smith also did not vote on the cloture petition but did express opposition to the nomination.[170] Senator Cooper voted for cloture even though he said he would vote against the nomination itself.[171] And I too was unable to find any expression in the *Record* from any of the other Senators who failed to vote on the cloture petition.

---

168. *Id.* at 29,150 (statement of Sen. Griffin). I am grateful to Senator Griffin for contacting my office to share this information. *See* Letter from Robert P. Griffin, former U.S. Senator, to Senator John Cornyn, Chairman, Senate Subcommittee on the Constitution (June 2, 2003) (on file with the author, and included in the Rules Committee record to be published by GPO in 2004).

169. *See id.* at 28,933 (statement of Sen. Gruening) ("On this vote I have a pair with the senior Senator from Oregon [Mr. Morse] and the senior Senator from Idaho [Mr. Church]. If they were present and voting, they would vote 'yea.'").

170. *See id.* (statement of Sen. Gruening) ("If I were permitted to vote, I would vote 'nay.'"); *id.* (statement of Sen. Byrd) ("[I]f present and voting, the Senator from Louisiana [Mr. Ellender] and the Senator from Nevada [Mr. Bible] would each vote 'nay.'"); *id.* (statement of Sen. Kuchel) ("If present and voting, the Senator from Vermont [Mr. Aiken] and the Senator from Maine [Mrs. Smith] would each vote 'nay.'").

171. *Id.* at 28,929 (statement of Sen. Cooper) ("I shall vote, if the matter comes to a vote, against the nomination of Justice Fortas. Nevertheless, because it has been my position always that such an important matter should come to a vote by the Senate and an opportunity given to the entire Senate to make its decision, I shall vote for cloture.").

The Fortas nomination was thus doomed to failure because it apparently would not have been approved by a majority of Senators. Not surprisingly, then, President Johnson withdrew the nomination, rather than subject Fortas to further debate and thereby further embarrass the Johnson Administration. (And indeed, Fortas later resigned under threat of impeachment.)

In other words, Fortas was denied confirmation not due to a filibuster, but because he lacked the support of fifty-one Senators. Indeed, several Senators from both parties who opposed Fortas specifically and repeatedly noted that they were not filibustering, or otherwise trying to prevent a majority from confirming him. They were simply seeking time to debate and expose the serious problems with the nomination in hopes of persuading a majority of Senators to reject the nomination:

- "[A]n adequate and full discussion on this great and important issue *should not be termed a filibuster*."[172]
- "I am certain that, in due time, we will come along, in the extended debate process, to a vote of some kind of some point. The main thing is that this great deliberative body . . . *ought to discuss this question*."[173]
- "[I]t takes some time to develop these facts. . . . [T]he proponents are just waiting in the aisle, almost, to file a cloture petition at some early time . . . . *[G]ive us just a little time*, Mr. Leader."[174]
- "[I]t is right and proper that the U.S. Senate carefully deliberate this nomination . . . . *Debate is not a dilatory tactic*. . . . I am not willing now to say those of us who oppose Justice Fortas are a minority."[175]
- "[T]here are a good many more than one—there may be half of the Senate; *there may be more than half of the Senate—that share our concern*."[176]
- "[W]e in the Senate of the Untied States stand ready here and now, today, to discharge fully and completely, not with the *undue haste* that seems to be counseled by some, but rather with the *deliberation that the significance of the occasion requires*."[177]
- "*I do not rise to defend a filibuster*, because I firmly believe that as

172. *Id.* at 28,115 (statement of Sen. Griffin) (emphasis added).
173. *Id.* at 28,155 (statement of Sen. Hollings) (emphasis added).
174. *Id.* at 28,251-52 (statement of Sen. Stennis) (emphasis added).
175. *Id.* at 28,253 (statement of Sen. Baker) (emphasis added).
176. *Id.* at 28,253 (statement of Sen. Holland) (emphasis added).
177. *Id.* at 28,254 (statement of Sen. Hansen) (emphasis added).

long as Senators are seeking the floor to speak on the issue before the Senate—and are addressing themselves to that issue without resort to dilatory tactics, then we do not have a filibuster. . . . [W]e do not have to defend a filibuster for *we do not have a filibuster.*"[178]

- "[T]his debate has given some the idea that someone is doing a wrongful thing here by debating it a little, even before the motion to take up has prevailed. This is one place where it can be discussed, and for that I make no apologies, if it takes us *a little time.*"[179]
- "[T]hus far, there have been only 4 days of Senate debate on this very important, historic issue. . . . *[A] filibuster, by any ordinary definition, is not now in progress.*"[180]
- "I would not like to see the Senate gag itself . . . there are other things here that need exploration. *That requires time.*"[181]
- "An examination of the *Congressional Record* . . . clearly reveals that *the will of the majority was not frustrated. . . . On the basis of the* Record, *then, it is ridiculous to say that the will of a majority in the Senate has been frustrated.*"[182]

However one characterizes the Fortas situation, it is certainly a far cry from what we are facing today. Fortas was debated for *just a few days*. He was opposed on *ethical grounds*, and by a *bipartisan group of Senators*. And most importantly, *he did not have the support of fifty-one or more Senators*. The current filibusters of Miguel Estrada, Justice Owen, and others bear no resemblance to the situation Fortas faced.[183]

---

178. *Id.* at 28,585 (statement of Sen. Griffin) (emphasis added).

179. *Id.* at 28,748 (statement of Sen. Stennis) (emphasis added).

180. *Id.* at 28,930 (statement of Sen. Griffin) (emphasis added).

181. *Id.* at 28,933 (statement of Sen. Dirksen) (emphasis added).

182. *Id.* at 29,150 (statement of Sen. Griffin) (emphasis added).

183. Similarly, a number of 19th Century Supreme Court nominees were denied confirmation not due to filibuster, but due to the lack of support of a majority of Senators. In 1828, President John Quincy Adams nominated former Kentucky Senator John J. Crittenden to the Supreme Court, but in February, 1829, the Democrat majority voted 23-17 to postpone the nomination. *See* HENRY J. ABRAHAM, JUSTICES & PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 93-94 (3d ed. 1992). President Tyler's nominations of John C. Spencer, Ruben Walworth, Edward King, and John Meredith Read to the Supreme Court all failed to secure the support of a Senate majority. *See id.* at 106-7. There is likewise no indication that Edward A. Bradford, George E. Badger, or William C. Micou, President Millard Fillmore's nominees to the Supreme Court, were supported by a majority of the Senate. *See id.* at 111-12. Rather than confirm President Andrew Johnson's Supreme Court nominee, Henry Stanberry, the Senate instead approved legislation abolishing the vacant seat altogether. *See id.* at 124-25. Finally, in January, 1881, President Rutherford Hayes nominated Stanley Matthews to the Supreme Court. The nomination died in the Senate Judiciary Committee. *See id.* at 136.

B.

Some say the current filibusters are justified because of the previous treatment of Stephen Breyer, Rosemary Barkett, H. Lee Sarokin, Richard Paez, and Marsha Berzon—current and former federal court of appeals judges whose confirmation proceedings involved a cloture vote.

This argument is even more baseless than the Fortas claim. The reason is simple: Breyer, Barkett, Sarokin, Paez, and Berzon were all confirmed by the U.S. Senate. Breyer served as a judge on the First Circuit until he was elevated to the Supreme Court. Barkett now sits on the Eleventh Circuit. Paez and Berzon are now judges on the Ninth Circuit. Sarokin served as a judge on the Third Circuit until he retired.

Those of us who support this President's judicial nominees are simply asking for the same treatment for Estrada, Owen, Pryor, Pickering, Brown, and Kuhl. If the Democrats' argument is taken seriously, then all of these nominees must also be confirmed.

Indeed, the Paez precedent in particular reinforces my contention that Senate tradition condemns filibusters of judicial nominations. For Paez was not only confirmed, he was confirmed *only* because his Senate opponents restrained themselves and voted to end debate.

Indeed, on *every* occasion in history, prior to this Congress, when a judicial nominee has enjoyed the support of a majority of Senators, but fewer than the supermajority vote necessary under the Senate's cloture rule, the Senate nevertheless acted to confirm the judicial nominee. This Senate tradition and practice has been observed at every level of the federal judiciary:

When President Garfield took office later that year, he renominated Matthews, and the Senate confirmed him by a vote of 24-23. *See id.* at 136-37. Thanks to Jason Binford for his 19th Century historical research.

JUDGES CONFIRMED WITH FEWER THAN 60 VOTES
(97TH-106TH CONGRESSES)

Judge	*Court*	*Vote*	*Date of Vote*
J. Harvie Wilkinson III	4th Cir.	58-39	Aug. 9, 1984[184]
Alex Kozinski	9th Cir.	54-43	Nov. 7, 1985[185]
Sidney A. Fitzwater	N.D. Tex.	52-42	Mar. 18, 1986[186]
Daniel A. Manion	7th Cir.	48-46	June 26, 1986[187]
Clarence Thomas	S. Ct.	52-48	Oct. 15, 1991[188]
Susan O. Mollway	D. Haw.	56-34	June 22, 1998[189]
William A. Fletcher	9th Cir.	57-41	Oct. 8, 1998[190]
Richard A. Paez	9th Cir.	59-39	Mar. 9, 2000[191]
Dennis W. Shedd	4th Cir.	55-44	Nov. 19, 2002[192]
Timothy M. Tymkovich	10th Cir.	58-41	April 1, 2003[193]
Jeffrey Sutton	6th Cir.	52-41	April 29, 2003[194]
Victor J. Wolski	Fed. Cl.	54-43	July 9, 2003[195]

This record is also interesting in light of claims by some Senators that the President should nominate only "consensus nominees" who can achieve a supermajority vote of the United States Senate.[196] Such

184. 130 CONG. REC. 23,284 (1984).
185. 131 CONG. REC. 31,069 (1985).
186. 132 CONG. REC. 5153 (1986).
187. 132 CONG. REC. 15,809 (1986).
188. 137 CONG. REC. 26,354 (1991).
189. 144 CONG. REC. S6761 (daily ed. June 22, 1998).
190. *Id.* at S11,884 (daily ed. Oct. 8, 1998).
191. 146 CONG. REC. S1368 (daily ed. Mar. 9, 2000).
192. 148 CONG. REC. S11,522 (daily ed. Nov. 19,2002).
193. 149 CONG. REC. S4613-14 (daily ed. Apr. 1, 2003).
194. *Id.* at S5,457-58 (daily ed. Apr. 29, 2003).
195. *Id.* at S9,083 (daily ed. Jul. 9, 2003).
196. *See, e.g.,* 149 CONG. REC. S10,200 (daily ed. July 30,2003) (statement of Sen. Leahy) ("These rules help ensure that lifetime appointees have wide, rather than narrow, support because consensus nominees are more likely to be fair than extremely divisive ones."). Senator Leahy also noted:

> Consensus, mainstream, qualified nominees will get the support of not just a bare majority of Senators voting but the overwhelming majority of Senators. . . . I respectfully suggest that the better way to proceed would be for the White House to work more closely with Democrats and Republicans in the Senate to identify consensus nominees who will not generate a close vote and do not need special rules in order to be considered.

Id. at S6617 (2003) (statement of Sen. Leahy).

arguments contradict not only the wisdom of the Founders, who specifically rejected the idea of supermajority voting requirements for judicial confirmations, but also Democrats' own behavior in prior Congresses and under prior Administrations—for example, when they voted to confirm Susan O. Mollway, William A. Fletcher, and Richard A. Paez, even though *none* of those Clinton nominees were able to achieve "consensus," and all failed to garner the support of the sixty Senators needed to invoke cloture. They were all confirmed only because Senators on both sides of the aisle respected and complied with the Senate's longstanding tradition and unwritten rule against filibusters of judicial nominations, a tradition that has, unfortunately and unjustifiably, been abandoned by a partisan minority of Senators during this Congress.

C.

Finally, some argue that the current filibusters are justified because Republicans during the Clinton Administration blocked some nominees in committee.

This argument cannot withstand scrutiny. Only filibusters offend the constitutional doctrine of majority rule. Committee inaction, by contrast, can always be cured, if a majority of the Senate is inclined to do so, through the use of a discharge petition.[197] Thus, Georgetown Law Professor Mark Tushnet has written:

> There's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.[198]

Similarly, a blue ribbon bipartisan commission of former

197. *See* Senate Rule XVII(4)(a) ("All reports of committees and motions to discharge a committee from the consideration of a subject, and all subjects from which a committee shall be discharged, shall lie over one day for consideration, unless by unanimous consent the Senate shall otherwise direct."). *See also* Intrasession Recess Appointments, 13 Op. Off. Legal Counsel 271, 275 (1989) ("The Senate has the inherent power to discharge from a committee any matter it wishes including nominations . . . .").

198. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. On the Constitution, Civil Rights, and Property Rights of the Senate Comm. On the Judiciary*, 108th Cong. (May 6, 2003) (testimony of Dr. John Eastman, Professor of Law, Chapman University School of Law) (quoting an e-mail from Professor Tushnet).

prominent Democrat and Republican government officials established by the Brookings Institution, the Presidential Appointee Initiative, has pointed out that only delays in our confirmation process at the behest of a majority of Senators should be tolerated.[199]

CONCLUSION

I'd like to conclude by repeating the old saw, mentioned by Majority Leader Frist during the Senate Rules Committee hearing on Senate Resolution 138, that, unfortunately in Washington, often what matters most is not whether you win or lose, but where you place the blame.[200]

That is precisely the problem with the judicial confirmation process. Instead of fixing the problem, we nurse old grudges, debate mind-numbing statistics, and argue about who hurt whom first, the most, and when.

It is time to end the blame game, fix the problem, and move on. Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House and no matter which party is the majority party in the Senate. Unnecessary delay has for too long plagued the Senate's judicial confirmation process. And filibusters are by far the most virulent form of delay imaginable. Two years is too long to debate a judicial nomination. For the good of our justice system and the American people, the problem should be fixed, and the independence of the judiciary restored. As all ten freshman Senators stated earlier this year: "None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future. Each of us firmly believes the United States Senate needs a fresh start."[201]

---

199. THE PRESIDENTIAL APPOINTEE INITIATIVE, *supra* note 27, at 13-14.

200. *See Hearing on S. Res 138, Before the Committee on Rules and Administration,* 108th Cong. (June 5, 2003) (statement of Dr. Bill Frist, Senate Majority Leader), *at* http://www.rules.senate.gov/hearings/2003/060305frist.htm (last visited Nov. 12, 2003).

201. Letter of Senator John Cornyn et al., *supra* note 12, *infra* APPENDIX. President Bush quoted and endorsed this same passage in a May 9, 2003 Rose Garden speech on judicial reform:

> I'm very pleased that 10 freshmen senators of both parties have come together to demand the return of dignity and civility to the process. As newcomers, they see the futility of endless bickering that blocks good judges from the bench.
>
> Under the leadership of John Cornyn and Democrat Mark Pryor, these senators sent a letter to the Senate leadership last week. And this is what it said: None of us were parties to any of the reported past offenses, whether real or

perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future. Each of us firmly believes the United States Senate needs a fresh start.

I completely agree, and so do the American people. (Applause.)

Bush, *supra* note 5.

APPENDIX

United States Senate
WASHINGTON, DC 20510
April 30, 2003

Dear Senators Frist and Daschle,

As the ten newest members of the United States Senate, we write to express our concerns about the state of the federal judicial nomination and confirmation process. The apparent breakdown in this process reflects poorly on the ability of the Senate and the Administration to work together in the best interests of our country. The breakdown also disserves the qualified nominees to the federal bench whose confirmations have been delayed or blocked, and the American people who rely on our federal courts for justice.

We, the ten freshmen of the United States Senate for the 108th Congress, are a diverse group. Among our ranks are former federal executive branch officials, members of the U.S. House of Representatives, and state attorneys general. We include state and local officials, and a former trial and appellate judge. We have different viewpoints on a variety of important issues currently facing our country. But we are united in our commitment to maintaining and preserving a fair and effective justice system for all Americans. And we are united in our concern that the judicial confirmation process is broken and needs to be fixed.

In some instances, when a well qualified nominee for the federal bench is denied a vote, the obstruction is justified on the ground of how prior nominees – typically, the nominees of a previous President – were treated. All of these recriminations, made by members on both sides of the aisle, relate to circumstances which occurred before any of us arrived in the United States Senate. None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future.

Each of us firmly believes that the United States Senate needs a fresh start. And each of us believes strongly that we were elected to this body in order to do a job for the citizens of our respective states – to enact legislation to stimulate our economy, protect national security, and promote the national welfare, and to provide advice and consent, and to vote on the President's nominations to important positions in the executive branch and on our nation's courts.

Accordingly, the ten freshmen of the United States Senate for the 108th Congress urge you to work toward improving the Senate's use of the current process or establishing a better process for the Senate's consideration of judicial nominations. We acknowledge that the White House should be included in repairing this process.

All of us were elected to do a job. Unfortunately, the current state of our judicial confirmation process prevents us from doing an important part of that job. We seek a bipartisan solution that will protect the integrity and independence of our nation's courts, ensure fairness for judicial nominees, and leave the bitterness of the past behind us.

Yours truly,