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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Letter	[Letter from Alberto Gonzales] [8 PAGES RELEASED IN WHOLE ON PRA RE-REVIEW 09/16/2025 JLS] - To: Senator Charles Schumer - From: Alberto Gonzales	8	05/06/2003	
002	Chart	[Chart]	1	N.D.	b6; b7c; b7e; b7f;

COLLECTION TITLE:

Counsel's Office, White House

SERIES:

Kavanaugh, Brett - Subject Files

FOLDER TITLE:

Hearings - Scope of Questions/Answers [1]

FRC ID:

9799

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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- B. Closed by statute or by the agency which originated the document.
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Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Records Not Subject to FOIA

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SUPERSEDED

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conscious integrity tells me none is required. On a former debate, I have said, and I now repeat, that I never exchanged a word of conversation with the President on the subject of publishing these instructions, nor did I know if he wished their publication, and I now add, that, until his message was delivered here this morning, I was uninformed of his purpose to send it. I do not understand the gentleman from Georgia to question the accuracy of that statement, or I should hold myself compelled to repel it indignantly.

[Mr. BERRIEN said, the gentleman was perfectly right. He had too much respect for himself, and for every member of the Senate, to call in question the veracity of any statement made on that floor.]

Mr. CHAMBERS resumed. The motion was to print the papers without commentary; the people were not so ignorant as to require a guide in this matter; and if an instructor was necessary, he could not think it altogether fit to employ on this duty a Committee prejudiced by a long course of avowed hostility to the measure, and inflamed by reports, speeches, and declamation, to present it in its worst form.

Before he concluded, he must ask indulgence to reply to one singular proposition asserted by the Senator from Georgia, (Mr. BERRIEN,) and repeated by the Senator from South Carolina, (Mr. HAYNE.) It is, that a refusal to print is not to arrest the papers, nor evincive of a disposition to keep them from the House of Representatives and the nation. What are the facts? An important paper is sent to the two Houses of Congress but a few hours before their adjournment. Instead of sending the original to the House, after making us acquainted with its contents, the course is to refuse to let the paper be read, to send the original to a Committee for the avowed purpose of examining whether they think it proper to be made public, and to refuse the usual motion to print, upon the ground that dangerous disclosures may be made thereby. And with all these facts before us, and knowing as we do that the House will adjourn in two or three hours, and perhaps sooner, we are told it is not intended to arrest these papers, and prohibit their seeing them. Why, sir, this appears to be adding mockery to positive injury; to take from the House its property, in the first place, and to laugh in its face, in the second. We all know it is physically impossible for the Committee to examine and report upon this message before the present House of Representatives, to whom it is as much addressed as to us, shall have adjourned—and adjourned never to meet again. Its constitutional term will expire, and another House will not meet till the largest part of a year has passed by, and that not the House to which the paper is addressed. In every view of the subject, then, it was proper the Senate should not interpose to withhold them—that they should go, and go now, to the House of Representatives and to the nation.

Mr. FOOT said that some of the remarks of the gentleman from South Carolina probably referred to the message of Mr. Monroe, rather than to any communications of

Mr. Adams. Gentlemen ask, what is the object of the President in publishing the documents? The question can be answered in the President's own words. I stated his object in his message. Mr. F. called for reading of the message.

The message having been read—

Mr. BENTON rose, he said, to make a single remark. The message and documents had been referred to an appropriate Committee, from which we should have a report concerning them; but if, in the mean time, the President should be eager to publish them, he can do so by virtue of the same authority by which he publishes the secret instructions given to Mr. Cook, the agent of the United States in Cuba.

The question being taken, the motion to print the message and documents was lost, by the following vote:

YEAS—Messrs. Barton, Boulogny, Burnet, Chase, Foot, Hendricks, Holmes, Johnston, of Louisiana, Knight, Marks, Noble, Robbins, Sanford, Seymour, Webster, Willey—18.

NAYS—Messrs. Barnard, Benton, Berrien, Chandler, Dickerson, Dudley, Eaton, Hayne, Johnson, of Kentucky, Kane, King, McKinley, P. Ridgely, Rowan, Smith of Maryland, Smith of Carolina, Tazewell, Tyler, White, Williams, Wood—24.

Mr. TAZEWELL asked whether a motion to transfer the message and documents from the Legislative to the Executive Journal would be in order.

The VICE PRESIDENT said, he presumed it would be in order. There were no instances of transfers from the Legislative to the Executive Journal; but transfers from the Executive to the Legislative Journal were not infrequent. The motion was made, and carried in the affirmative, by a vote of 25 to 16.

ADJOURNMENT.

During the above discussion, a message was received from the House of Representatives, stating that the House had passed a resolution for the appointment of a Joint Committee to wait on the President of the United States to inform him that unless he had any further business to communicate, the two Houses were ready to adjourn, and asking the concurrence of the Senate.

The Senate concurred, and appointed a committee on the part; and Mr. SMITH, of Maryland, from the committee, reported that they had discharged the duty trusted to them, and that the President informed them he had nothing further to communicate; that he paid his best respects to both Houses of Congress, and wished them a safe return to their families and homes.

Another message was received from the House of Representatives, stating that they had completed the legislative business, and were ready to adjourn.

On motion of Mr. SMITH, of Md. it was ordered that the Senate meet to-morrow at 11 o'clock A. M.

The VICE PRESIDENT then adjourned the Senate.

EXECUTIVE PROCEEDINGS.

NOMINATION OF Mr. CRITTENDEN.

The injunction of secrecy having been removed, we are enabled to give the proceedings which took place in the Senate upon the nomination of Mr. CRITTENDEN, by Mr. ADAMS, (the late President) to be an Associate Justice of the Supreme Court of the United States.

The nomination was sent to the Senate by message from the President, on the 18th of December, 1828, and was on that day referred to the Committee on the Judiciary.

No report was made by that Committee until the day of January following, when the Journal of the Senate records the following proceedings:

MONDAY, JANUARY 26, 1829.

Mr. BERRIEN, from the Committee on the Judiciary, to whom was referred the nomination of John J. Crittenden, contained in the message of the 18th of December, reported the following resolutions, which were read:

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"Resolved, That it is not expedient to act upon the nomination of John J. Crittenden, as a Justice of the Supreme Court of the United States, during the present session of Congress."

"Resolved, That it is not expedient to act upon the nomination of John J. Crittenden, as a Justice of the Supreme Court of the United States, until the Senate shall have finally acted on the report of the Judiciary Committee, relative to the amendment of the Judicial system of the United States."

On Thursday, the 29th of January, the Senate took up these resolutions for consideration; when

Mr. CHAMBERS moved to strike out all of the first resolution, after "Resolved," and to insert the following:

"As the sense of the Senate, that the constitution of the United States, by directing that the President shall take care that the laws be faithfully executed, and by vesting in him the authority to nominate, and, by and with the consent of the Senate, to appoint, all officers created by act of Congress, for whose appointment provision is not otherwise made, and the authority during the recess, to appoint all such officers, to hold their commissions until the end of the next session, intended to guard against the evils arising from vacancies in office: that such offices, having been created by act of Congress, must be deemed necessary for the public interest: that the power of the President to nominate and appoint, as intended to be exercised by him during the whole period for which he should be elected, for all such vacancies as should occur during that period; and that a neglect to exercise the power would be an omission of duty, on the part of the President: That the duty of the Senate to affirm or reject the nomination of the President, is as imperative as his duty to nominate: That the practice of the Executive, and of the Senate, heretofore, has accorded to the views above expressed, and that it is not now expedient or proper to alter the settled practice: And that, therefore, the Senate will, at the present session, upon, and reject or confirm, all nominations which have been, or may be, received from the President, for offices established by acts of Congress, and which have become vacant by the death, resignation, or removal, of late incumbents, or by the expiration of the term for which they were appointed, or which shall so become vacant on or before the third day of March next."

On Friday, the 30th of January, the subject having been resumed,

Mr. BELL moved to amend the amendment, by striking out all after the words "United States," and in lieu of inserting, "has directed that the President shall take care that the laws be faithfully executed, and that he shall nominate, and, by and with the advice and consent of the Senate, shall appoint, all officers created by act of Congress, for whose appointment provision is not otherwise made; and that the constitution requires that the President shall exercise this power during the term for which he should be elected, for all such vacancies as should occur during that term; and that a neglect to exercise the power would be an omission of duty on the part of the President: That the duty of the Senate to affirm or reject the nomination of the President, is as imperative as his duty to nominate; that such has heretofore been the settled practice of the Government; and that it is not now expedient or proper to alter it."

The question being put, this amendment was rejected; it then recurred on the amendment moved by Mr. CHAMBERS. Mr. BERRIEN called for a division of the question. On the motion of Mr. WEBSTER, it was agreed, that the question be taken, it be by yeas and nays. The debate on the amendment moved by Mr. CHAMBERS

occupied the Senate on the 2d, 3d, 4th, 5th, 9th, and 12th days of February.

On the 12th the question was finally disposed of, as will be seen by the following extract from the Journal:

THURSDAY, FEBRUARY 12, 1829.

The Senate resumed the consideration of the resolutions reported by the Committee on the Judiciary, relative to the nomination of John J. Crittenden, together with the amendment proposed thereto.

A division of the question having been called for, it was taken on striking out the first resolution, and determined in the negative—yeas 17, nays 24.

The yeas and nays being desired by one-fifth of the Senators present, those who voted in the affirmative, are,

Messrs. Bell, Boulogny, Burnet, Chambers, Chase, Foot, Holmes, Johnston, of Louisiana, Knight, Marks, Noble, Robbins, Ruggles, Seymour, Silsbee, Webster, Willey.

Those who voted in the negative, are,

Messrs. Barnard, Benton, Berrien, Chandler, Dickerson, Dudley, Eaton, Hayne, Iredell, Johnson, of Kentucky, Kane, McKinley, McLane, Prince, Ridgely, Rowan, Sanford, Smith, of South Carolina, Tazewell, Thomas, White, Williams, Woodbury.

On the question to agree to the first resolution reported, it was determined in the affirmative—yeas 23 nays 17.

On motion of Mr. CHAMBERS, the yeas and nays being desired by one-fifth of the Senators present, those who voted in the affirmative, are,

Messrs. Barnard, Berrien, Benton, Branch, Chandler, Dickerson, Dudley, Eaton, Hayne, Iredell, Kane, McKinley, McLane, Prince, Ridgely, Rowan, Sanford, Smith, of South Carolina, Tazewell, Thomas, White, Williams, Woodbury.

Those who voted in the negative, are,

Messrs. Bell, Boulogny, Burnet, Chambers, Chase, Foot, Holmes, Johnston, of Louisiana, Knight, Marks, Noble, Robbins, Ruggles, Seymour, Silsbee, Webster, Willey.

So it was

Resolved, That it is not expedient to act upon the nomination of John J. Crittenden, as a Justice of the Supreme Court of the United States, during the present session of Congress.

On motion of Mr. BERRIEN, the second resolution was ordered to lie on the table.

FEBRUARY 2, 1829.

The two resolutions above stated to have been reported by Mr. BERRIEN being under consideration, together with the amendment proposed by Mr. CHAMBERS, Mr. C. addressed the Senate to the following effect:

The question now before the Senate presents to my mind the most alarming prospect which has ever been exhibited by any one of the departments of this Government. In any view which I have been able to give the subject, it resolves itself into the question, whether this body can control the constitutional powers and duties of the other branches of the Government, and defeat the avowed objects of its laws. When the suggestion was first made some days past, by the Chairman of one of the Committees to whom nominations had been referred, that a distinction was made by the Committee, growing out of the particular period at which the office became vacant, my first impression was, that it might be a contest between rival claimants to the power of nomination, and a matter more to be determined by a spirit of courtesy, to usage and precedent, and a fair, generous, and magnanimous deportment on the part of a successful political party, than by reference to the principles of constitutional law, or the line

terest or safety of our institutions. But a little reflection on the subject has persuaded me of the error of these impressions, and feeling as I do the magnitude of the principles at stake on the decision of the Senate, I have thought it proper to present in the shape of an amendment to the resolution offered by the Committee, a proposition which seems to cover more fully the ground now assumed in discussion.

The course of remarks yesterday, on either side, did not more affect the individual case upon which the Judiciary Committee have reported, than any other nomination made, or to be made, during the present session.

The resolutions submitted by the committee do not declare any general principle of action, assign any motive or cause for that inexpediency which they oppose to the confirmation of this appointment, nor disclose the reasons which conduct the committee to their conclusion: nor will a perusal of our journal, when published, make known to the American people the reasons. We have learned them in the progress of the debate. We find them to involve, what some of us deem the most solemn and fearful considerations, and we have a fair claim to have them so presented, that, when the nation shall have access to the history of our proceedings in this secret session, it shall be able to understand by what rules we have been governed, and whether their adoption be dangerous to its interest. These reasons have induced me to submit the amendment offered. The Chairman of the Judiciary Committee has informed us, that a majority of that committee has taken two views of this subject. The first is, "that the present attitude of the Executive has but one parallel in our national history: in all other cases, the President has retired voluntarily at the expiration of eight years, and not by a transfer, invito, of the Executive power to other hands, by the people; and that this state of things imposes upon the Senate the necessity of scrutinizing most narrowly the executive acts of the present incumbent, to avoid the undue exercise, on his part, of powers proper to be reserved to his successor." The second view is, "that, if the notion of a majority governing be any thing but a theme for holiday declamation, it is proper that this body take care the popular will be gratified;" and he assumes that there has been a most decisive and unparalleled expression of public will that confidence is withdrawn from the present incumbent and reposed in others.

The honorable Senator from South Carolina, also a member of the Judiciary Committee, and of another committee before whom a number of nominations are now pending, has told us he considers this "a question of delicacy, rot of power; that the power is admitted; that the present Executive certainly has the power to appoint, but the Senate as clearly has the power to pause, inquire, hesitate, and delay; that the popular will is decisively expressed against the present Chief Magistrate, and ought to be obeyed; and that the rule he advocates is, that no vacancy which has occurred since this declaration of popular will, is to be filled until after the 3d of March, unless the regular action of the Government will be destroyed by it." Both the Senators say that "Mr. Jefferson's accession to the Government is the only case parallel to the present," and they rely on the precedent of that period. So far, Mr. President, as my researches have enabled me to judge, these gentlemen are as unsound in their doctrines as they are mistaken in their facts. Is it true, that considerations of public will, or nice questions of delicacy, are those by which we must be influenced? Can the existence of popular will, however decisively announced, divert the Senate from the performance of one of its most important and most necessary duties? No sir, far otherwise. The charter by which we must direct our course is the constitution. Whenever its voice is heard, the only popular will we can recognize is that which it announces—what-

ever obligation it imposes upon us we must discharge, regardless alike of the notions of delicacy to the few, or the expressed feelings of the many. According to my judgment, the constitutional injunction is clear in reference to this matter. Its language and its spirit cannot permit any one to doubt that it intended the offices created by Congress should be filled: that they should be permanently filled by the nomination of the President, and confirmation of the Senate; but, as it might often occur that a vacancy would happen in the recess, when, from the nature of the office, and the importance of its immediate operations, it would be injurious to the public interest to wait for a session of the Senate, or suspend the appointment, it gave to the President alone the power of filling such vacancy, taking care that such appointment should confer power only until the Senate could be called to act upon it. It never intended that the Executive should take from the Senate, by indirect means, or by any act of commission or omission, its concurrent voice in the appointment of officers; nor did it contemplate that the Senate, by any act, should take from the Executive his concurrent voice. It is equally plain, I think, that it did not contemplate that either of these branches should add to the power of the other, or diminish ought from its own. These constitutional principles, in the abstract, will not, I presume, be controverted; and if they do not in their application govern the matter now debated, I am utterly mistaken. Let us assume the case of an officer established by law, say a collector for the port of Baltimore. A vacancy occurs in the recess, for instance in July, and the President commissions A. B. Now clearly, the constitution never intended that the President should, by his sole act, and without the participation of the Senate, continue A. B.'s official existence beyond some period in the next session, not later than the last day of the session. If the President, by omitting to nominate A. B. at the next session, can suffer him to remain in office to the close of the last day of the session, under his Executive appointment, then he can rightfully, on the day following, when his time shall have expired, renew his Executive appointment, and the same process may be annually carried on, and the office be kept in the hands of an individual for the term of the President who first appointed him, and his successor may then go through the same process, and so from one to another, until the agency of the Senate in the creation of the officer is a mere mockery.

Sir, the constitution neither expects or justifies such a proceeding. It has provided and demands a different one. The Senator from South Carolina says he admits the power of the President to nominate. It is not the power I contend for—it is the duty. The President has no discretion to exercise; the authority was not vested in him to be exercised or not, as he pleased; but it was given him because it *must* be exercised, when the exigency occurs, and so exercised as to allow to a co-ordinate branch of the Government its regular action upon the officer. A failure to nominate would be a violation of the duty and obligation of the President, who, by the constitution, is directed to submit the appointment to the Senate, for their advice and consent. Let us for a moment inquire whether the same reasons do not demonstrate an equal obligation upon the Senate. The proposition does appear to my mind singularly strange, that the constitution should require an act to be done which can only be done by the advice of the Senate, on application by the President; that it should imperatively enjoin upon the President the duty to ask that advice, and yet the Senate be at large to withhold its advice. The only clause in the constitution conveying to the Senate this power of confirmation is found in the article defining the Executive power, and directing that the President shall nominate, "and, by and with the advice and consent of the Senate, appoint." No other language is any where introduced, to denote more

FEB. 2, 1829.]

Executive Proceedings.

[SENATE.]

clearly the obligation of the Senate to act upon nominations. The President being bound to have the laws executed, officers being necessary to the execution of the laws, and it not being in his power to create officers, without the agency of the Senate, it results, of necessity, that the Senate must contribute such agency. Our duties are correlative. The necessity imposed to demand our advice, denotes the corresponding duty to gratify the demand; and, by the very same argument, the necessity imposed upon the President now to demand, denotes as distinctly the corresponding duty now to gratify it. I have attempted to show, that, by failing to make the nomination at the proper period, the Executive can accumulate a power not conferred upon him, and deprive the Senate of their just participation in the creation of officers.

It is no difficult matter to perceive that, by a failure on the part of the Senate to act when the nomination is presented, the very same results are produced. Should the Senate refuse to act upon the nomination of an officer, created in the recess, so soon as the session terminates, the President must recommit an officer. The Senate, at one session, has no higher or other authority, in this respect, than at another; and if the omission to act on a nomination, at one session, can be justified, the same omission can be justified at another, and for an indefinite period; and thus the Senate will be able to defeat the whole scheme and policy of the constitution in relation to this branch of its duties, to invest the Executive with a power in terms denied to him in the constitution, and which all the branches of the legislative department cannot confer; and, at the same time, take away and destroy one of the most important and necessary items in the constitutional character of its own body: for, sir, if the Senate can be stripped by any means, whether by its own suicidal hand, or by any other power, of its claim to exercise its constitutional functions, the same, or similar reasons, will equally justify the next and every other Senate, seeing that the next Senate will have precisely the same authority we have, and certainly no more, nor no less.

The constitution has not contemplated one Senate or one Congress as having more or less authority than another; nor, permit me to say, does it contemplate giving to one President more power or authority than to another. To him who comes into office by the lowest electoral vote which the House of Representatives can adopt, and to him who comes in by the united acclamation of all the various interests which distinguish the Union, it speaks the same language, confers the same powers, presents the same restraints, and demands the performance of the same duties. It looks not to the individual man, nor trusts to his dispositions, nor reposes in his personal inclinations for his fidelity. It looks to his official character, and presents its own will as the rule of his conduct. It contemplates no change of personal character. Like a corporate being, he has a continuing existence, not terminated by the change of the individual incumbent, but is the same yesterday, to-day, and so long as the constitution itself shall survive.

As of the Senate, so may it be said of him, that his constitutional powers and duties are the same on the third day of March in one year, as they are on the same, or any other day in any other year. It is not in the power of all the branches of the Government, and certainly not of the Senate alone, to restrict the exercise of those powers which the constitution confers, either as to the manner or the time in which he shall perform them, or to say that, in a contingency, whether that of a declaration of public will, or the expectation of a more popular successor, or any other, his constitutional functions shall be suspended, either directly, by arresting his agency, or indirectly, by withholding ours. For the period, and the full period for which he was elected, he is in the possession of all the authority which will belong to the most popular incumbent,

at the first, or any subsequent moment of his term. Nor is this assertion in the smallest degree impeached by the suggestion of the honorable Senator from Virginia, that "time is an ingredient in every political proposition;" with which remark he thinks the position should be qualified.

Sir, the distinction attempted by that honorable Senator appears to me to have no proper place here. He admits that every President has *potentially* the same power, but not *practically*, and he proves this by showing that the first President, having filled all the offices of the then newly organized Government, had the appointment of a greater number of officers than any other, and, therefore, practically, had more power. To this I remark, in the first place, that, let the term be what it may, by which you designate the power, it is not constitutionally the privilege of this body, by a neglect of its duty, to extend or limit either the practical or the potential powers of the President. Neither the Senate or any other branch of the Government, gave to the first, or any other President, a power, potential or practical, greater than the Executive has since possessed. That a greater number of officers were then nominated may be the fact, but it has no relation to the question now before us. We wish to adjust the question of the *quantum* of power, its extent and duration. Power may exist when no occasion justifies its exercise. As much constitutional power is evinced by the nomination and appointment of one officer of a given grade, as by the nomination and appointment of a score of them, in the same way that the same extent of physical power is evinced by a given exertion of it in one or two instances, as well as in a dozen. The celebrated Francisco did not cease to possess gigantic physical power in all the interval, because, from the period of the Revolution, his peaceful character kept him from scenes which required its exertion, until a troublesome assailant compelled him to throw, first the rider, and then the horse, over a fence. If, however, it be insisted that time is a necessary ingredient in every political proposition, we gratify this necessity when we contend that the Executive has now, in the last year, and last month of his term, the same constitutional power which he had in the first year, and first month, and the same duties, and that each are to be exercised now as then, when the occasion occurs which the constitution has declared shall require their exercise, and that, in relation to the powers and duties of the Senate, the same doctrine applies.

The remark of my friend from Louisiana applies here with infinite force, when he asks how can Senators who have been superseded by others actually appointed, claim to exercise equal authority and power with those who have again received a manifestation of continuing confidence, and, at the same moment, deny to a President the full powers of his station, solely because he is superseded by the election of another? It is not to Senators only this remark applies; most of the offices which are held for a period of years, subject the persons holding them to the same predicament. The honorable Senator from Virginia has frequently repeated the epithet, "repudiated," as applied to the President, with a decided commendation of its peculiar fitness. Is the appellation less descriptive of a Senator, or member of the other House, who, by a change of public opinion, has been pretermitted and superseded by the appointment of another? Is it not, still more descriptive of another, whose abandonment of all the peculiar political tenets which caused his election, has withdrawn from him the confidence of the very persons and party who elected him? And yet, because to such, you might appropriately apply the term of "repudiated Senators," or "repudiated members of the House of Representatives," would you therefore restrain them from the exercise of any power or duty which belongs to their official station, or, when exercised, would you fail to give

to their acts all the effect which could be claimed for them under different circumstances? Is a law less obligatory, because such members assisted in its enactment, or will its violation be less criminal? Such a doctrine, pushed to its fair and necessary results, would prove destructive to the Government.

I have thus far, sir, argued this question on constitutional grounds, with the concession of the fact assumed by the Senators, who have asserted that the public will has been decisively and emphatically expressed in relation to the subject before us. But I now call upon these Senators for the proof of this declaration. That the people of this nation have, by an immense majority, expressed their will to have another Executive officer for the next four years, is as certainly true as to me it is strange. This has clearly demonstrated their preference for the individual elected over the rival candidate. But it does appear to be a most unwise and mischievous, as it is certainly a most uncharitable inference, that therefore all confidence is lost in the present incumbent. This would be to assert, that one candidate cannot be successful in a political contest, without subjecting his rival not only to the loss of the office contended for, but to the infinitely aggravated loss of character and public confidence. In the selection of an individual for the Executive office, the freemen of the nation exercise their prejudices and partialities, influenced by whatever considerations they choose to obey, and irresponsible but to their conscience and their God, precisely as they do in the election of other political officers. With some a candidate is obnoxious for the very opinions or principles which make others his enthusiastic friends; and with a thousand men, you may find a thousand motives, each unlike the other, but bringing all to unite in elevating the same favorite. But this does not prove that each of them has lost confidence in the individual against whom his interest is exerted, much less does it prove, that they all wish to arrest the further execution of the appropriate powers and duties of the adversary candidate, being then in office, before the legal expiration of his term of office. Let us inquire what are the lessons of experience; whether the facts in relation to former persons and times have justified the theory which we are now asked to adopt. Who was the first unsuccessful candidate for this high and distinguished office? Was his defeat the result of a total want of confidence in his ability, his fidelity, and his integrity? Epithets more gross, crimes more numerous, or of more turpitude, personal slanders more vile, never were uttered against any man than were spoken, written, and published against that great and good man during his canvass; and yet, Mr. Jefferson, at the expiration of four years, was again a candidate, and was successful by a decided majority, and lived to see not only the fears and apprehensions of his adversaries relieved, but to witness the vast influence of his political virtues, in making proselytes of his deadliest foes. His memory and reputation are now cherished by all, and his example commended as a model for imitation, by those who certainly did not at the moment very much admire the original.

The elder Mr. Adams was ejected by a decided expression of public will, and left the Government loaded, not with his own political errors only, but with a heavier weight of political sins, which belonged properly to some, who, in the character of political friends and associates, were the most violent enemies to his reputation. But the nation did not fail in the justice which was due to him. He lived to see himself respected and esteemed for his many and excellent virtues, and a seemingly special Providence caused the period and circumstances of his death to indicate the direct agency of omnipotence, in having his name forever connected with the existence and prosperity of this Government. At one moment one was a "repudiated" President, and at the

next the other; and yet, when called to their eternal reward at the same instant, and that instant the anniversary of the most brilliant act of their lives and the nativity of rational liberty—when joined in death, as they had been, while living, joined in the arduous and dangerous labor of framing a constitution and government—a nation's tears bespoke the fond and universal remembrance of their many services; and their names will go down to the latest posterity, as the most distinguished of all our political patriarchs. Since then, many individuals have entered the arena on which this grand prize has been the object of a mighty contest. Some have scarcely entered when the disclosure of their want of popular support has induced them to withdraw. But it ought not to be supposed, I think, that they are destitute of public confidence in the ratio of this weakness. We have now an illustrious instance to the contrary; in which an acknowledged unwillingness existing to gratify the wishes of the friends of one candidate, induced them no longer to urge his claims; and yet an almost unanimous vote called him to the second office in the government, to which certainly no man could attain, in whom public confidence was destroyed.

The question of public confidence in this particular has not been tested. When another individual was selected to succeed the present Chief Magistrate, it was known he would continue to act until the 4th of March, and complaint has no where been uttered against it; much less has public opinion been decisively expressed. The people are satisfied with the appointments, so far as any indication can justify an opinion; and I do not believe that any Executive has ever existed, which has given more general satisfaction, by the distribution of offices created by law. They have not been confined to any party, and have been the reward of useful merit, not of partisan service. It has been said, however, by the Senator from Tennessee, (Mr. EATON) by the Chairman of the Judiciary Committee, (Mr. BERRIEN) and the Senator from South Carolina, (Mr. HAYNE) that the history of 1801 is the parallel period to the present, and furnishes ample precedent for the principles now asserted. It did not at all surprise me that the Senator from Virginia differed with these gentlemen: for, of all the authority extant, the most conclusive against them was that referred to. At the close of the administration of Mr. Adams, the Senate was of the same political party with himself; a vast number of offices had been created, for all of which nominations had been sent to the Senate, and the Senate confirmed every one of them.

When Mr. Jefferson was about to be installed, his friends did not ask to leave him unembarrassed by such a process as is now suggested; his power and patronage were not erected upon the restraints to be imposed on his predecessor, or on the Senate. He came in as the representative of a great and dominant political party, to none of whom had offices been given, and he found the individuals of the party in the minority in the possession of all the offices. So far from using the remedy now suggested—the withholding the exercise of the confirming power of the Senate—Mr. Jefferson did what every President ought to do. He assumed, in the face of the American people, the responsibility of doing, openly and boldly, what, according to his opinions of the constitution and the law, he had a right to do. Where commissions were made out and delivered, he removed the incumbent and appointed another; where the commissions were not made out, he refused to issue them; and in some cases in which commissions were made out, but not delivered, he refused to deliver them.

According to the decision of the Supreme Court, in *Marbury and Madison*, reported in 1 Cranch, the commissions which were refused to the Justices of the Peace, there mentioned, were not necessary to constitute them

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Executive Proceedings.

[SENATE.]

individuals judicial officers; they were made so by their appointment and confirmation, and they were beyond the control of the President, holding their offices for five years, during which time he had no authority to remove them. He, no doubt, supposed he did possess the authority which he exercised. Sir, my first political opinions were received at that period—received from the political friends of Mr. Jefferson, who were devoted to him. I was nurtured in that school, and amongst that class of political men, and have ever been in full membership, or, at least, have not, with my knowledge, abandoned it; although, of late, I find politicians, who were not formerly enrolled under that banner, nor supposed to be very ardent friends of Mr. Jefferson, or his administration, taking a very decided lead in sounding his praises and extolling his administration, and presenting especially the most violent of his measures as the only fit pattern for imitation. Mr. Jefferson's conduct was open, and exposed to the nation. When arraigned for it, as he was, by a memorial from New Haven, he avowed the motives which influenced him. He declared that it was unequal and unjust that the minority should retain all the offices under the government; that there ought to be a distribution in the fair proportion of parties; that it was his object to effect such a distribution; and when that was done, then the only inquiries ought to be, "is he honest?" "is he capable?" "is he faithful?" Beyond this, Mr. Jefferson did not go. It cannot be asserted that, in reference to any division of parties, the offices under the Government are now held by any one political party; and, therefore, if precedent would make law, this precedent would not avail. But, as the honorable Senator from Virginia (Mr. TAZEWELL) has said, the precedent of 1801 is the strongest precedent to sustain the doctrine maintained by us. All other periods of the Government furnish testimony of the same character. General Washington made nominations to the Senate, to the last day of his official existence, and the Senate confirmed them. Mr. Adams, who succeeded him, as has been proved, did the same thing, and the Senate confirmed his nominations. Mr. Jefferson, in like manner, made nominations to the full end of his term, and the Senate acted upon them. So with Mr. Madison, and Mr. Monroe, and the Senate of those times, respectively. I cannot exhaust myself, or fatigue the Senate, by reading from the Journal. The long list sent in by Mr. Jefferson, in his message in March, 1801, in which these words were used, "nominated, but not appointed," and which has entirely misled the gentleman, has been examined, and not one solitary case is found not acted upon by the previous Senate; and it is perfectly certain that the language was used as descriptive of persons either not commissioned, or to whom commissions, although made out, were not delivered. All that could be demanded, has been done—cases referred to as exceptions have been examined, and they are found not to exist, or to be capable of ready explanation. It is not intended to say that no one case has occurred in which the Senate delayed their action upon the subject beyond the session. In the very nature of things this must occur, and without censure. Where information was required to enable either the President or the Senate to act, and could not possibly be had in due time to act before the end of the session, it would justify delay. Whatever the constitution might enjoin, it did not mean to exact impossibilities; and if, therefore, it required an act to be done, and, from a necessary cause, a preliminary fact was to be ascertained, which could not be ascertained within the time prescribed, it afforded justification for leaving it undone. If delay is asked for necessary information, no one is less disposed than I am to oppose it; but that is a consideration altogether different from delay asked for the avowed purpose of defeating a co-ordinate branch of the Government in the exercise of its power and its duties.

The Senator from Virginia, after protesting that no want of delicacy towards me is to be inferred from his remark, impeaches the correctness of the assertion contained in the amendment, "that such is the settled practice," on the authority of several instances which he refers to. All the cases alluded to by that Senator are appointments made in virtue of the power derived under the constitution, and not offices created by "act of Congress;" to which the resolution is confined. The Senator from Virginia does not perceive the distinction which is made; yet it appears perfectly obvious. The constitution has said the President and Senate may constitute ambassadors and other public ministers, but has it any where directed that the particular offices to whom the Senator has alluded shall be appointed? Certainly not. It has given a discretion to the President and Senate as to the time when, and the foreign Power to whom, they are to be appointed. The Senate, in such cases, has constitutionally a controlling power over the President, and have always exercised it, and he has a power, without which they cannot act. Both must agree, or the public minister will not only not be appointed to-day, or to-morrow, but not at all. It is, therefore, entirely proper that the Senate, in the exercise of their constitutional duty, shall postpone, from day to day, from session to session, or from year to year, appointments like these; and the technical phraseology of the Senate, when opposed to the creation of a particular mission proposed by the President, is, that they "deem it inexpedient to appoint a minister to the nation or court proposed." Such was the case when Mr. Madison proposed the present Chief Magistrate as minister to Russia. The Senate, not from an objection to the person proposed, as the Senator would seem to suggest, but because they did not agree to the propriety of having a minister to represent this Government at that court, resolved, as the Senator has informed us from the journal, that it was "inexpedient." And if the gentleman would have investigated the subject, he would have found, in a few pages more, that the same President Madison re-nominated the same individual when satisfactory reasons were adduced to justify the mission, and that the Senate, of nearly the same individuals, approved the nomination unanimously, with the exception of Mr. Alexander Contee Hanson, of Baltimore, who alone voted against him. The cases brought by the Senator from Virginia, then, have no influence upon the fact. They are none of them such cases as the amendment speaks of.

But the gentleman asks if a Judge of the Supreme Court is not an officer created by the constitution? I answer yes, to some extent he is; but he is, nevertheless, within the language of the amendment, because his appointment is especially directed by act of Congress. The constitution provides that there shall be a "Supreme Court," but it does not designate the number of judges. The act of Congress was necessary to the organization of the court, and to ascertain the number of Judges; after which, the President and Senate have no discretion as to their appointment or non-appointment. The Senate cannot, when the President nominates, say, in this case it is inexpedient to have a seventh judge on the supreme bench. The case is altogether unlike that of public ministers, and differs in nothing, as to the present question, from other officers appointed by other acts of Congress.

Again the Senator from Virginia has taken exception to what he terms a misquotation of the constitution, which he finds in the amendment, that, in enumerating the Executive power of appointment, it omits to pursue the constitution, in naming "ambassadors and other public ministers," as well as "all other officers." There is no attempt or profession of attempt on the face of the amendment, to pursue the words of the constitution. It states the truth, that the President is vested, thereby, with the power and the duty to nominate to all offices created by act of

Congress, for which other provision is not made, but it does not affirm or deny any other power or duty in reference to other persons or things, except as to the subject matter of the amendment; and I do not perceive that it is just cause of complaint that the amendment has not made reference to parts of the constitution not having relation to the subjects of which it treats.

I am as little sensible of the proper application of another remark of the Senator from Virginia, which imputes to the advocates of this amendment the doctrine which he is pleased to say was once urged on this floor on the memorable occasion of Mr. Jefferson's recommendation of an embargo—that it is constituting the Senate the “recording officers of Presidential edicts.” If he supposes this amendment looks to such a doctrine for aid, he has greatly misconceived its character. The argument is, that the Senate are bound to act—reject or confirm the nomination; so is the assertion of the amendment. Does this deprive the Senate of their free exercise of judgment? Assuredly not. Let gentlemen record their names on the Journal in opposition to the individual named, and they have no account to render for so doing, but to their consciences and their constituents. It will then be the duty of the Executive to present another and another, until one is found who, in the opinion of the majority, is qualified.

The honorable Senator from Virginia has said, with much emphasis, that the doctrine of this amendment compels us to censure the conduct of the President in delaying the appointment from the period of Judge Trimble's death, until the nomination. I am not quite so well prepared to make an uncharitable deduction from the facts of this case, as to say there is any cause of censure. What were his motives for delay I know not; but, in as far as they have been stated by the Senator from Louisiana, they have been those of delicacy towards the Senate. All I feel myself called upon to say on this part of the subject is, that unless the President had satisfactory cause for delay, he ought, in my opinion, to have made the appointment as soon as the vacancy occurred.

I come now to the last, and perhaps the most alarming part of the doctrine urged on the other side. Gentlemen propose a rule which is to be enforced or relaxed by what they consider the necessities or exigencies of the public interest. If the exigencies of the public shall require the officer, he shall be created; if not, his creation shall be delayed till the next President comes into power. And who, I pray you, sir, is to judge of this exigency? The Senate is a party from whom a duty is asked; it shall be performed if necessary, but the Senate do not wish to perform it if not necessary. Are we to look to some third and independent power to pass a cool and impartial judgment on the subject, by which the action of this unwilling party is to be elicited or restrained? No, sir, no such proposition is before us. The Senate itself, the unwilling party, is to be the judge of the exigency, and the judge without appeal.

The three branches of the legislative department of the Government, at a moment when no influence operated but the desire to promote the public weal, have said that these offices are necessary to the public interest. Not to become necessary at certain periods or on certain contingencies, but at all times; they are to be permanent, continuing offices, for whose regular appointment, whenever a vacancy shall occur, ample provision is made. The constitution has delegated to this tribunal, and to none other, the authority to decide upon, and to provide for, such necessities, and they have pronounced an opinion, and made such provisions. To this body it has denied the power so to decide, even in its coolest moments, and when least influenced by political or any other excitement. And yet this body now, at the moment of action, and at a period of much excitement, is to disregard the judg-

ment of the competent tribunal, and give loose to its discretion!

Sir, what is the value of your boasted Government, if it be not that it secures your people against the tyranny of discretion in rulers? If it is not in having written law, known and obligatory, as well upon your every department—upon this Senate amongst the rest—as upon the meanest man in society? Once let discretion be adopted as the rule of conduct for those in power, and no man can prescribe limits to the mischief which must ensue. I implore gentlemen seriously to reflect upon the consequences of our conduct. We have successfully passed through many and great political convulsions. Our predecessors have adhered to the plain terms of their charter by which we hold our seats. The storm has raged without; party animosities have been indulged elsewhere, but within this hall a steady, even-handed course has been pursued, regardless of every consideration but that of duty; and the storm has passed away, and left us the bright heritage we now enjoy. Let us not be less faithful to those who are to succeed us; and with a stern regard to the solemn obligations we owe to the constitution and the country, let us still recognize no other guide but the one, and no other object but the interests of the other.

Mr. HOLMES remarked, that when Coriolanus, believing that his countrymen were ungrateful, had determined to abjure them, and to claim the protection of Tullus Aufidius, his mortal enemy, he entered the city of Antium at midnight—all was silent and still as death. Ruminating on the extraordinary step he had taken, and upon its probable results, he expresses his thoughts in this soliloquy: “O, world! thy slippery turns: friends now fast sworn, whose double bosoms seem to wear one heart; whose bed, and hours, and meal, and exercise, are still together; who twine as ’twere in love inseparable, shall within this hour, on a dissension of a doit, break out to bitterest enmity. Thus fellest foes, whose passions and whose plots have broke their rest to take the one the other, from some chance, some cause, not worth an egg, shall grow dear friends, and interjoin their issues.” Why this quotation has been omitted in some editions of Shakspeare I know not—suffice it to say, that it is the history, in brief, of the politicians of the civilized world. It is “the abstract and brief chronicle of the times.” The reason is this: There is much less disinterested patriotism in the world than is imagined—coalitions have been, and still are, formed and broken up, according to the interests of the coalescing parties. The friends of Mr. Crawford had been circumvented and subdued, yet they could unite with the victor to subdue others.

We hear much of the public will, and all reverence it, when that will accords with their own. The popular voice is always right in the sight of a politician who happens to be in the majority; but always wrong when that majority is against him. I well remember that, at the last election of President, a distinguished citizen, whose name I would never repeat but with the profoundest respect, came in to the House of Representatives the lowest of the three. He was the least popular, but he was the favorite of the honorable Senator from Delaware and myself. “We took sweet counsel together,” and, instead of yielding to the popular will, it was thought our duty “to nail our colors to the mast;” and he could and he did act up to this determination, notwithstanding the “popular will.” Now should this apparent attempt at proscription, or any other cause, place this majority in a minority, many others would probably become very devoted to the public will, while some of this triumphant majority would perhaps “nail their colors to the mast.”

The resolutions on which we are to act, and which are the subject of the present discussion, are,
1st. That it is not necessary to act on John J. Critten-

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den's nomination for an Associate Judge of the Supreme Court, during the present session of Congress.

2nd. That it is not expedient to fill the vacancy until after the Senate shall have acted on some proposed judiciary system.

The rule prescribed, but which has not been put on the journals, is substantially this: After the public will has been expressed against the chief executive incumbent, no vacancies shall be filled, where it is not indispensable, until that will can act in the person of his successor. This is as I understood it from the hon. Senators from Georgia and South Carolina, (Messrs. BERRIEN and HAYNE,) but it seemed to be modified by the honorable Senator from Virginia, (Mr. TAZEWELL) so far as it regards time, magnitude, and exigency. I confess I was somewhat relieved from my surprise by these salutary modifications; and indeed, if I should happen to have misconceived this unwritten rule, I know I shall be pardoned, as they do not agree as to what it is, and especially if I should not differ from them more than they differ from themselves.

The application of the rule is this: The vacancy of a Justice of the Supreme Court happened during the Presidential canvass, and it was not filled in the recess of the Senate, nor until it was known that the President had failed in the election—now it ought not to be filled but by his successor. It is somewhat singular that, if this rule, as was stated by the Hon. Senator from Virginia, should govern the Senate, in all future time, the Committee have not put it on paper. If it is to govern we know not whom, why not leave a record of something that posterity may be instructed by it? This rule is, however, to be the *lex non scripta*, and not only this, but the *lex non scripta et non scriptura* of the Senate. But let your unwritten rule be what it may—any thing which its advocates please to make it—all that is intended to appear on the Journal, is, that John J. Crittenden was, on the 17th of December, nominated by the President to fill a vacancy on the bench of the Supreme Court; and on the——day of February the Senate decided that it is inexpedient to act on the nomination during the present session of Congress. This is all which is to govern and instruct in future time. And what a lesson! A case without a parallel! An office of the highest trust, prescribed by the constitution and defined by law; and yet, after seven weeks' delay, and having four weeks more before us, we gravely determine that it is unnecessary to act on this nomination. I wonder not that no written rule could be invented as an apology for such a case. But it has by more than one honorable Senator been attempted to justify this delay, on the ground that the President, too, has been slow in making this nomination. The vacancy occurred in August, and no appointment was made in the recess.

Now it seems to me, too, that, as terms of the court were to have been held in that circuit after the vacancy, and before the nomination to the Senate, the appointment should have been made in the recess. But, although I do not stand here to justify or apologize for the President, I can still imagine that he might have just motives for the delay. I admit that some men might be found who would accept such a temporary appointment, though they could have no reasonable assurance that they would hold it a month; but such men would confer little honor on the supreme bench of justice. A high-minded honorable man, and one who would reflect dignity and splendor upon the court, would scarcely subject himself to such a casualty. It might be, and probably was the case; and the indications here already justify the supposition, that there was good reason to suspect that any such appointment would not be confirmed by this Senate; whoever was worthy of such a trust, would incur the hazard and mortification of a rejection, even while he was administering justice within twenty feet of the tribunal that might reject him. And, indeed, I cannot readily perceive what

the President, if his motives were selfish, would have to gain by delay. The vacancy occurred during the canvass. If the patronage of an office comes in aid of an election, (and if it does not there would probably be no objection to Mr. Crittenden) this appointment, in the recess, would have helped Mr. Adams. Surely the nomination, after the election was determined, would neither help or harm him. In fine, if the motives may be honest or sinister, it is but charitable to assign to it honesty; especially as the President implicated is not here to explain.

But the nomination was made to the Senate as early as the 17th December; about seven weeks ago. If the President delayed unreasonably, should we? If, by his neglect, the public service has suffered, are we to delay that it may suffer more? It would be the strangest reason in the world. I should, with great deference, suppose that, if the President had been tardy or remiss, it would be a strong reason why the Senate should act with all possible promptitude. It would to me, sir, be a lame and miserable apology, that as the President had done wrong, we, by his example, may do so too. No precedent or authority, however respectable, can justify the neglect of a duty required by the constitution and the laws. But had the appointment been made in the recess, then it would probably have been *usurpation* that the President should fill such an office when he had every reason to expect that his power was about to expire. Had the nomination been made at the very commencement of the session, the complaint would have been that time was not given to consult the Western members; and now, as the nomination was made on the 17th December, it was *too late*, and not so late, notwithstanding, but that we may postpone it during a whole session, without detriment to the public interest! Sir, the measure and the reasons for it are equally unparalleled.

But the honorable Senator from Delaware has intimated that it has not been insisted that the public interest has suffered by our delay. Sir, was this necessary? Is not the fact within our own knowledge? Need it be farther urged? Within twenty feet from us, and almost within the hearing of my voice, the Supreme Court, who were ordered to hold their session here on the second Monday in January, have been obliged to adjourn from day to day, for want of a quorum; and we know that they have very lately determined that no case which involves a constitutional question is to be decided, as there is no prospect of more than a mere majority of the judges. And with these facts meeting us in the teeth, was it necessary to say that the public interests had suffered by our delay? Sir, the term of that court has been prolonged, and important trials have been continued to the next year, by this delay, and we know it. Had the Senate acted upon this nomination within a reasonable time after it was made, a judge might have been appointed for that circuit; have received the notice and taken his seat here at the commencement of the session; making all allowance for casualties. Surely, then, it was unnecessary to urge what is matter of public notoriety. But this is a necessity created by law.

The constitution has provided that the judicial power shall be vested in a Supreme Court, and such other courts as Congress may, from time to time, ordain and establish. Congress have provided by law that this court shall consist of seven judges. Here is a vacancy, and we are not allowed the "discretion" whether it ought to be filled. I am not permitted to violate the constitution and my oath to support it, by any question of political expediency. We have, to be sure, the *physical power* to refuse, but we have no such *right*. We could refuse to perform any executive or legislative duties, and thereby stop the wheels of Government entirely. But for this our constituents would hold us to a strict and rigorous account. And although by the tenure of office we may imagine that we are out of their reach for a time, still, an expression of

disapprobation, by their constitutional organs, would make us not a little *uneasy*. But here was a special palpable necessity, which no one can mistake. The public service has suffered, and is still suffering, by our delay. A co-ordinate department of the Government is deficient in its organization, and we refuse to organize it; not that we need time for deliberation, but that we will not deliberate at all—deliberating whether we shall deliberate—claiming a discretion which we utterly refuse to exercise; passing by the merits and qualifications of the candidate nominated, and referring the whole affair to a future administration. We have had seven weeks to deliberate and to act—we have done neither; and having four more before us, we would now determine that we will do nothing during the remaining time. Sir, let the advocates of this resolution say what they will, and enforce their determination by what arguments they can, and the public will and must believe that this Mr. Crittenden is postponed and virtually rejected for no other earthly reason than that he was not in favor of General Jackson for President. I consequently deny the doctrine advanced, that we may deliberate as long as we please. The constitution forbids us the *abuse* of a discretion given us only to be *used*. This discretion has not been *used* in this case; we have not inquired at all into the merits and qualifications of the candidate nominated; the Committee have passed him by; we are to do so to; and then the case will stand a naked case, beyond all precedent—a rejection of a man whose qualifications are not disputed, because, forsooth, he was against the successful candidate. I say beyond all precedent, for I hazard the presumption to repeat, that *there has been no instance, since the first organization of the Government, that a nomination to an important office, created by law, has been postponed but from absolute necessity*. Appointments should be made with all *convenient speed*. Of the expediency, we have no discretion; that has been determined by the law creating the office, and that must be obeyed. We have no right, no constitutional power, to resist its execution. Sir, I challenge a single case that can sustain this resolution. The Hon. Senator from Virginia appeared to rely with considerable stress on the precedents which he cited from the Journal of 1817. I have examined the Journal of that period and find them all; and more like them. The President, on the 24th of February, sent a message to the Senate, nominating *Claude Crozet* as professor of engineering at West Point Academy, and some others for civil offices. By another message of the same day he nominated a long list *for promotions in the navy*. And, by another message of the 27th of February, he nominated a consul to some place which I do not now recollect, and a district attorney for North Carolina. The first message was acted upon with the exception of Crozet; and his case, with all in the other messages, was postponed from the 3d to the 4th of March. If these cases were precedents at all, it is presumed the honorable Senator would not take them in their whole extent. Mr. Madison's term expired on the 3d, and Mr. Monroe's commenced on the 4th of March; yet these nominations, made by Mr. Madison, were, in Mr. Monroe's term, taken up by the Senate, and, without re-nomination, were, with one exception, confirmed. If these cases were at all in point, it would be enough to say that the whole proceeding was unconstitutional. We would scarcely admit that the nomination under discussion might be taken up and acted on after the 4th of March. But not one of the whole list of cases has any bearing on this, or has the remotest analogy? The office of professor of engineering is not established by law, and we have an unlimited discretion whether we will create it or not. In the whole list of promotions in the navy we have the same discretion. No law defines, or indeed can define, the number or time of such promotions; and it is, consequently, at the entire discretion

of the appointing power. The same may be said of the consul nominated. If we need such an officer, we appoint; but if, in our judgment, he is unnecessary, we reject or postpone him. We have, then, disposed of all these cases but one, the district attorney, and this it is admitted, is an office created by law. But you see, by the Journal, that he was postponed because there were objections to the man: for he was afterwards rejected by the Senate. No one doubts the right of the Senate to take that time which is indispensable to decide upon the character and qualifications of the candidate; but beyond this they have no right to go. Now, in this long list, so triumphantly cited, and so confidently relied on by the honorable Senator from Virginia, there is not a solitary case which in the least sustains him.

And, sir, the same may be said of the case of Amos Binney. He was nominated by Mr. Monroe for re-appointment, as navy agent at Boston, and there were objections to his official conduct. At the close of Mr. Monroe's administration, the Senate, for want of time to understand fully the merits of his case, postponed him to the 4th of March, and Mr. Adams nominated him again. His case was again discussed, and had a vote been taken directly, he would unquestionably have been rejected. But, at the request of the Senators from Massachusetts, he was postponed to the first Monday in December, equivalent to a rejection, and we expected to hear no more of Mr. Binney. But the next session the President nominated him again—his case was fully examined and discussed—the honorable Senator himself made a very able argument against him; and, finally, from the facts in the case, but chiefly from those stated in Mr. Binney's own book, which he had published in his defence, he was on the 17th April rejected by a vote of thirty-five to two. The honorable Senator from Virginia had egregiously mistaken the facts in the case. The Senate never assumed the right to say that the office need not be filled, or that they had the right to transfer this appointment to a new administration; and, in another particular, it is not, as he supposes, that the technical mistake of Mr. Adams in dating the nomination on the third, when he was not President until the fourth, would have had any weight with the Senate. They would have considered the nomination as made when it was sent, without regard to its date; and if not, the error could have been corrected in half an hour. No, sir, the first determination in that case was for want of time to decide correctly, and the two others were rejections, and intended as such.

The case of Vandeventer, cited by the same hon. Senator. He was the chief clerk in the War Department, and was nominated by Mr. Monroe as navy agent at New York. He was opposed on the ground that, while in that Department, he negotiated a contract with one Mix for stone, to be delivered at the Rip Raps, in which he was himself a co-partner, and this fraud appearing against him he was rejected. This produced a wonderful excitement—the doors of the Senate were literally blockaded by his friends from the War Department, and there was an immense pressure to have him restored. But his friends, finding that there was no hope of sustaining him, their only resource was to let him down easy; they prevailed on a majority of the Senate to postpone him indefinitely, instead of directly rejecting him.

Honorable Senators have, if possible, been less fortunate in finding an analogy in the cases of ambassadors and other public ministers. It has been matter of grave discussion in this Senate, at what time or by what event those offices become "vacant," when the office is created, and what creates it. I am very sure that the hon. Senators from Virginia and Delaware cannot sustain the position, that an appropriation for a salary and outfit is by law establishing the office, and that, after this is done, to fill it is as imperative as in the case under considera-

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tion. As all our foreign relations reside primarily, if not exclusively, with the President and Senate, it is impossible that an appropriation can either compel or control negotiations or the appointments, nor is it believed that such appropriations are ever so intended. Events might occur, immediately after such appropriation, which would require a mission much beyond the means provided, or which might render it inexpedient to be represented at all. The necessity of these appropriations is generally indicated by the estimate which emanates from the President; and, when otherwise, Congress only intended to say to the treaty-making power, "if you choose to establish the office, we anticipate you by providing the means." It has been a subject of considerable discussion in the Senate, when, how, and at what time, the office of foreign minister is created, and when it could be properly said to become vacant. Mr. Adams had, in his message, recommending a mission to the Congress at Panama, indicated an opinion that he could have made the appointment in the recess, although he preferred to submit the subject to the advice and consent of the Senate. The hon. Senator from North Carolina, (Mr. BRANCH) submitted a resolution denying the power of the President, in such a case, to appoint ambassadors and other public ministers, without the consent of the Senate, he being authorized by the constitution to fill vacancies only which happen in the recess; and this controversy involved of course the character and origin of such an office. And I submit to the Senators who supported that resolution, if the analogy of a minister to the case before us, upon which they now insist, does not conflict with the doctrines then advanced. Mr. Adams had in this case the power to fill the office in the recess; and the complaint is, that he did not. If the case of a minister is analogous, and the precedents there cited were not unconstitutional acts, you not only yield to him that point, but you give to every President the right to establish, in the recess, diplomatic relations, whenever, in his discretion, he may deem it expedient. I say the precedents there cited. President Washington had sent Mr. Jones as minister to Algiers, Mr. Jefferson had sent Mr. Short to Russia, and Mr. Madison had appointed Messrs. Adams and other envoys extraordinary to negotiate a treaty of peace with England, under the mediation of the Emperor of Russia. All these appointments were made in the recess—they were all "original appointments"—we never having had such missions to either of those Powers before; and it was readily perceived that, if a Congress of nations was a diplomatic body, recognized by the laws of nations, Mr. Adams was right, or Messrs. Washington, Jefferson, and Madison, were wrong. It appeared, to be sure, in the case of Algiers, that the Senate had recommended to the President to institute such a mission, but no person was nominated to them, and surely the Senate could not give the President a carte blanche, or confirm a nomination in advance. The last case was attempted to be justified on the ground that the President, in war, he being commander-in-chief, had appointing powers which he did not possess in peace. Against this claim of power I protested, and it was the reason why I voted to lay that resolution on the table: for if the President does, by war, acquire a right to fill vacancies to offices which do not "happen" in the recess, I would not give the snap of my finger for your liberties. If, then, the President, in the recess, or the President and Senate, in session, can, at discretion, constitute these offices and fill them as vacancies, (and there is no other way in which we can reconcile these precedents with the provisions of the constitution) what analogy can there be between these casual offices, which are filled the instant they spring into existence, and this permanent office, established by the constitution, and defined by a law which requires peremptorily that it shall always consist of seven judges? In all nations foreign agencies are,

and, from the nature of them, must be, casual; and it would be preposterous to suppose that the office of ambassador to Turkey, or any where else, had been vacant from the organization of this Government. Diplomatic missions must depend on the exigency, and be at the exclusive discretion of the appointing, which is also the treaty-making, power. The same applies with equal force to consuls and all foreign agencies. The case cited this morning by the honorable Senator from Delaware seems to me to have no bearing whatever on the question. President Washington, at the close of his first term, nominated Mr. Patterson a Justice of the Supreme Court; but recollecting that this gentleman was a member of that Congress which had created the office, and that, therefore, his appointment would be unconstitutional, he withdrew him, and, immediately on the commencement of the second term of his administration, he nominated him again, and the officer was appointed. The delay was four days—the necessity was a constitutional disqualification; and, so soon as this objection was removed, the President and Senate proceeded to the appointment. Is this the case here? Nothing like it. No mortal can perceive the analogy.

But it is insisted that an expiring administration should leave open important offices, from courtesy to its successor, and respect to the majority who have elected him. And the honorable Senator from Virginia has cited the example of Mr. Jefferson, in 1809. And what offices does he tell us were left open by him, to be filled by Mr. Madison? Why, to be sure, Mr. Madison nominated Robert Smith, Secretary of State, and William Eustis, Secretary of War, and John Quincy Adams, Minister to Russia, and, I think, he mentioned some other cases. The first office was made vacant by Mr. Madison's elevation to the Presidency. Every new President has the right to select his own cabinet; and as to the minister to Russia, Mr. Jefferson surely did not leave that office vacant: for, just before, he had attempted to fill it by Mr. Short, whom the Senate had rejected, because it was inexpedient to send any minister, and the succeeding Senate, for the same reason, rejected Mr. Madison's nomination of Mr. Adams. A President of the United States is elected for four years, and, during the whole of the time, it is his right and his duty to act. He has no right to delay from motives of courtesy or delicacy, and no President has ever so practised. On the 17th of February, 1797, Washington nominated a judge, attorney, and marshal, for Tennessee, naval officer for New York, and consuls at Gottenburg, Genoa, and Brest; and on the 20th they were confirmed. On the 27th, four days only before his term expired, he sent to the Senate William Van Murray, for minister to the Netherlands, and on the 2d of March he was confirmed. On the same day, Joel Barlow was nominated as consul-general to Algiers. Three other consuls, and an attorney for Georgia, were contained in the same message, and on the third they were all confirmed—not a single instance of postponement, from courtesy or any other motive.

We recur next to the close of Mr. Adams's administration in 1801; and, although the honorable Senator from South Carolina seemed willing to rest his case on the precedents of that period, we find nothing to justify the adoption of this resolution, and consequently we have a right to expect that the honorable Senator will himself abandon it. Mr. Bayard's nomination as minister to France was dated on the 13th of February, sent on the 18th, and confirmed on the 19th. Mr. Bayard declined the appointment, for reasons which, it appears by the President's message, equally apply to any other person, and he declined making another nomination. What Mr. Bayard's reasons were does not appear from the Journal, and why his case has been referred to at all is not readily perceived. Was it to prove the practice

of an expiring administration to postpone? It proves the very reverse. The honorable Senator from Virginia gives us a supplementary narrative to the affair, which does not appear on the Journal: that Mr. Bayard would not accept the mission from Mr. Adams without an assurance that he should be retained by his successor; that, in a conversation with Mr. Jefferson, he learnt that he would not be retained, and thereupon so informed the Senators, indicating a wish to be confirmed, stating that he should decline, and the reasons; he was appointed, and did decline. As this narrative is, to say the least, a singular one, and not much to the honor of Mr. Bayard—as nothing appears on the Journal from which it can be inferred—as it is a transaction near thirty years old, cited from memory—as the honorable Senator has so much mistaken the facts in the very recent case of Amos Binney—he will pardon me if I do not entirely rely on his recollection. My conjecture would ascribe to Mr. Bayard a much higher motive. He needed not the confirmation of the Senate to save his character or his feelings. But he had performed a part in the then recent election of President which rendered his situation extremely critical. A distinguished member of the Federal party, he had voted with his friends in more than thirty successive ballotings; but he held the vote of Delaware in his hands—he saw that Mr. Burr could not be made President, and he was determined that a President should be elected. Mr. Jefferson, we know, was elected President by Mr. Bayard's influence. However pure his motives, he well knew, that, to hold an office under a President whose election he had contributed so essentially to effect, would subject him to suspicions which a high-minded, honorable man, like him, could not endure. He therefore declined the office, and has thereby established the character of a patriot, who, in an important crisis, abandoned his party to save his country.* But be this as it may, how the appointment and declining of Mr. Bayard can be cited as a precedent to postpone from one administration to another, is to me utterly inexplicable. All Mr. Adams's nominations, (*midnight*, as some of them were called) were confirmed, with scarcely an exception.

At the close of Mr. Jefferson's administration, to which I have already referred in reply to the honorable Senator from Virginia, I have not been able to find a single case of postponement to throw the appointment into the hands of his successor. The postponements at the close of Mr. Madison's term are accounted for on the ground of the hurry and pressure at the close of the war, and that they were for appointments to offices which might be filled or not, at the discretion of the appointing power. And at the close of Mr. Monroe's term, nominations to important offices were made and acted on, even down to its last hour, and not one postponed but for objections which went to the character and qualifications. Give us a case of a vacancy in a permanent office established by law, and a nomination in December to fill it, postponed on the 4th of February to the 4th of March, passing by entirely the merits of the candidate, for the purpose of giving the appointment to the succeeding administration, and you furnish a precedent—you establish an analogy. But all your attempts have miserably, fatally failed.

Now, if it is expedient to take from this administration and give to the next, why not meet the question at once, and reject? Why not say that John J. Crittenden ought not to be a Justice of the Supreme Court, because he was opposed to the election of General Jackson? If that is the reason, avow it, and the people will judge whether it is a sound one. And if you will give me probable grounds

*Note by Mr. H.—After these remarks in reply to Mr. Tazewell, Mr. McLane, of Delaware, confirmed the fact that the motive which Mr. Holmes had ascribed to Mr. Bayard was the true one, and stated that he had seen his letter to that effect.

to believe that he is a political partisan, who would carry his feelings with him, and indulge them upon the bench; that he would, in the disguise of charges to grand juries, or in any other way, pervert the office of judge into that of political apostle, no matter for whom or what, I will cheerfully give him my decided and emphatic *no*. Yes, sir, I have witnessed too often the pure ermine of justice soiled and polluted by the political partisan.

But we are approaching a political millennium, and we must anticipate it, in order to give it its effect, and to enjoy it in full fruition. Now, what is this grand political and moral revolution, of which there is so much boast? What is this great change of principle, which promises such an effectual regeneration? If it is only that the same thing is to be done with other hands, then the exclusive benefit is for the hands that are to be employed, and the people have "their labor for their pains." If it is nothing but a scramble for office, a contest between the seekers and the incumbents—the *outs* and the *ins*—in a national view, it is, after all, no great affair. We have not yet been told, and we ask, what is it?

Are the names of *Federalist* and *Republican* to be revived, and the lines distinctly marked, as they were before, during, and at the close of the war? It is believed that many, even of those who now hear me, would scarcely subscribe to such a policy. And, besides, on this point, General Jackson is pledged. In his letter to Mr. Monroe, at the commencement of his administration, and at the close of the war, when these lines were deep and distinct, he says:

"Upon every selection, party and party feelings should be avoided. Now is the time to exterminate that monster party spirit. By selecting characters most conspicuous for their probity, virtue, capacity, and firmness, without regard to party, you will go far to eradicate those feelings which, on former occasions, threw so many obstacles in the way of Government, and perhaps have the pleasure and honor of uniting a people heretofore politically divided. The Chief Magistrate of a great and powerful nation should never indulge in party feelings. His conduct should be liberal and disinterested, always bearing in mind that he acts for the whole, and not a part, of the community. By this course, you will exalt the national character, and acquire for yourself a name as imperishable as monumental marble. Consult no party in your choice—pursue the dictates of that unerring judgment which has so long and so often benefitted our country, and rendered illustrious its rulers."

With all my doubts whether General Jackson was competent for President of the United States, and believing, as I still do, that his predecessor ought to have been preferred, yet I believe him an honorable man—a man of his word; and, having once said that these names were 'mere bubbles,' he is too much of a practical man to be playing with bubbles. Is it to be *restrictive* or *latitudinarian*, in the construction of the constitution? Or, in plain language, is it to be for or against internal improvements; roads and canals? If for them, then, I suppose, Virginia, North and South Carolina, and Georgia, will cordially support it. If against them, Pennsylvania, Ohio, and Kentucky, will support it with equal cordiality. Is it to be tariff or anti-tariff? If the former, the first mentioned States, we may suppose, will still adhere; and if the latter, then New York, Pennsylvania, and the whole West, will defend it with all their might. Is it to be the patron of commerce, so long neglected, passed by, embarrassed, and encumbered, to build up other interests? Sir, I should rejoice at this, but I fear. Your President's habits, predilections, and experience, would scarcely lead him that way. Is it to be military? Very little change would be necessary for this. Ever since the war, the military spirit has predominated. We have been even magnanimous; have built fortifications in foreign countries, have erected and

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armed forts which we can never man, to no other effect but to accommodate an enemy. In no event can it be expected that any administration can do more in these respects than has been done. Is it to be economical? Any thing that would correct the extravagancies and prodigality which infest all governments, and which, with all your vigilance, are making rapid strides in this, would be a relief to the people. Let this be the case, and "the radicals" of 1824 would lift their heads, and I should rejoice with joy unspeakable at the re-election of the honorable Senator from New Jersey. We would then pounce like an eagle at Dauphin Island speculations, and rip up the "Rip Raps" by the roots. But, Sir, if the changes are to be made which this resolution indicates, your new officers will strike against reform, inasmuch as the public patronage, as it is, will fall far short of satisfying expectation. We shall talk about reform, and spend much time and money in the discussion, and—do nothing. It will at last come to this, and nothing more: Other men will fill the same offices, with the same emoluments, be as importunate, and commit the same peculations; and this will be the sum and substance of your great "moral and political revolution."

We speak of our "discretion," while we refuse to exercise it; of our "right of deliberation," while we refuse to deliberate; and when the deliberate purpose seems to be that the patronage of the office now vacant shall be transferred to the next administration. Very well; take these offices, and all others that you can, and we shall expect of you a rigid fulfilment of your promises. If an administration which, you say, was conceived in sin, and brought forth in iniquity—whose very origin was "bargain and corruption"—has preserved external and internal tranquillity, been attended with happiness, prosperity, and all the fruits of freedom, and has moreover extinguished twelve millions of the interest and principal of your national debt in a year, it will surely be expected that its successor, coming in by the pure and unadulterated "public will," shall at least do as much.

But this is the "repudiated" administration, and no appointment by it can be popular. Sir, I repeat, the public have expressed no such opinion. Is it true, that, when an officer of this government is succeeded by another, that his functions are to be suspended? Is the public confidence withdrawn from a Senator because another is elected to succeed him on the 4th of March next? I deny the inference. It is not warranted by the constitution, that, because General Jackson is elected your next President, public confidence is withdrawn from Mr. Adams. No, Sir, think, exult as you may; but, mark me, this administration, with all its faults, presented as they now are in bold relief, will constitute the brightest page in your political history. What! "repudiated," "disgraced," because not re-elected? Was it so with William H. Crawford? When pale disease and excruciating pain had stretched him on his restless couch for many a sleepless night; when his eye became dim, his limbs tottered, his tongue faltered, and the whole man was prostrate; it was then that the vilest conspiracy was formed to ruin him. Some of his friends became cool, and, like the Priest and the Levite, passed by on the one side and on the other, wagging their heads with indifference; and it was the Adams man who acted the good Samaritan; came to him, saw his condition, took care of him, and restored him; yet he failed—but he was not repudiated nor disgraced. I like the parallel of the honorable Senator from Virginia, of the natural and political death, but not so well the accompanying remarks. He speaks, exultingly, that this administration is "expiring in agony." Sir, when man, even if he has been an inveterate sinner, approaches the last verge of life; when he is about to shut his eyes on all sublunary things, and to go that way "whence no traveller returns;" when the curtain of futurity is drawn

aside, and the soul explores the gulf she has to pass, and is shaking her wings to be gone; is it then the time to upbraid and reproach him—to tell him he is about to rush "unanoointed and unannealed" into the presence of an angry God, consigned to the regions of everlasting despair, "cast upon the burning lake, wrapt in chains, to converse with everlasting groans, unpitied, unrespected, unreprieved, for ages of hopeless end?" No, Sir, humanity, Christian charity, would forbid it. Pursuing the honorable Senator's parallel, does it then comport with that gentleman's usual magnanimity to upbraid and reproach the President, whose political life is so soon to expire? Mr. Adams, it may be said, dies a premature death "in his full strength, his breasts full of milk, and his bones moistened with marrow;" but he dies not the "death of the wicked." He goes out of office an honest man—uncorrupted and incorruptible.

It has been intimated that one object of the course proposed is to preserve the purity of the Judiciary. But it would seem to me that a judge appointed by an "expiring administration," whether in "agony" or not, would be quite as likely to be independent of the power that was expiring, and that which succeeded, as if he owed his elevation to a new and popular administration. If the intent is to make this appointment for the purpose of sustaining the next administration, I should deprecate it as the worst of evils. If an administration cannot sustain itself, without summoning to its aid this department, no matter how soon it sinks.

The honorable Senator from Delaware seems to have arraigned certain States for the changes they have made in this Senate, and to intimate that this is proscription. He would, I presume, except the State of New Jersey; and the others have only managed their own affairs in their own way, and taken the same liberty that the people of the Union have in refusing to re-elect their President. Whether the State to which he has referred acted from political motives, or from a belief that rotation in this office was most republican, I know not; but when it becomes a maxim here, that a State should yield to the executive or popular will, this Senate will be worse than useless: for its design was to preserve the federative power against both.

Sir, I have done. To postpone a nomination for an important office, to give the patronage to a future Administration, is without precedent; against principle and constitutional duty, and a dangerous example to our successors.

On the motion to refer the nomination of Mr. Crittenden (to be an Associate Judge of the United States) to the Committee on the Judiciary,

Mr. JOHNSTON said, this motion is a deviation from the usage of the Senate. It had been usual to lay the nominations for some days on the table, and when called up for consideration, the members of the State interested in the appointment gave the Senate the information which they might possess with regard to the character and qualifications of the person in nomination; other members sometimes gave their opinions, and upon these statements the Senate relied. If the person was unknown to the Senate, the nomination was referred, as the most convenient mode of obtaining information. If charges were preferred, it was referred that the Committee might examine. In cases of re-nomination, where persons had the disbursement of public money, it was referred, in order to ascertain how the accounts stood. In cases of ministers, reference has been sometimes made to the Committee of Foreign Relations, to inquire into the expediency of the mission. But no reference of a judicial appointment was collected. He thought the innovation would introduce a very inconvenient practice.

On the report of the Committee, that it was inexpedient to act on the nomination of J. J. Crittenden,

Mr. JOHNSTON rose in reply to Mr. BERRIEN.

He said: This is certainly a new and very interesting proposition. A committee of the Senate, for the first time in the history of this body, declare it inexpedient to fill a high judicial office, required by the constitution, and created by law. It is a naked resolution, unaccompanied by any report, or any reasons for its adoption; and I am, said he, left to learn the principles on which the recommendation is founded, from what has just fallen from the Chairman of the Committee. It is declared to be inexpedient to act upon the nomination of a Judge of the Supreme Court, because the President of the United States has been superseded in the late election, and that his office will expire on the 3d March. That the will of the people has been expressed, and that the Senate ought to obey that will; that there will be a want of that mutual confidence which ought to exist between the President and the officers charged to execute the laws; that the President has neglected to make this nomination in vacation, &c. The effect of the rule, or the principle, or the practice, or whatever it may be called, is to destroy the Executive power under the constitution, to the extent to which the rule goes, and as far as the principle of it extends, and as far as the practice under it may warrant any party to go in any future time.

The constitution has divided the powers of Government into three equal and independent bodies; and has prescribed the powers and duties of each, both as to extent and duration; and duration is as much a part of the power conferred, as the extent of the authority. The President is elected for a specified and limited period of four years; during which he is to approve the laws, and see them executed; to make treaties and nominate to all offices, and he is to perform those duties under his oath, and under the penalty of impeachment, during the whole period of his office. The Senate have their appropriate duties for the whole period of their office. Among these is the duty of giving their advice to the nominations when made, and of seeing, so far as depends on them, the laws carried into effect. The Senate is not impeachable; but they are bound by the highest sanctions, and the most solemn obligations of duty, to do what the constitution has enjoined. The law requires Judges of the Supreme Court. The laws cannot be executed without them. Nay, they are an essential branch of the Government. The concurrence of the President and Senate is necessary to create them. The President has nominated, and the Senate, with a full knowledge of the peculiar situation of that court, have held this nomination for more than six weeks under advisement, and then declare it is inexpedient to act on it. The necessity of the officer is created by a law, which the Senate have no right to control or defeat, even if they deemed the office unnecessary or inexpedient, until the law is repealed in the regular mode; much less can they, for political purposes, with a view to wield the patronage of the Government, to transfer power from one to another, and subserve the interests of parties, take upon themselves to refuse, upon any pretence, to perform the duty prescribed by the constitution. The duty of the Senate is confined to an inquiry into the character and qualifications of the person, and to a decisive action upon the nomination, in a reasonable time. The time must be limited to what is necessary to make the inquiry, and to satisfy the Senate. But six weeks are already spent; there is no objection to the man. He is of high character, and acknowledged ability. The duty of the Senate is plain: the practice in it has been uniform. This rule is a deviation from both.

But let us inquire into the reasons of this innovation on the constitution. Before the expiration of the Presidential term, the Senate refuse to act upon a nomination, upon an exception to the exercise of the power by the President, arising from his having been superseded by the election of another, to take effect upon the termination of

his office. If this is a correct principle, it gives a different tenure of office from that prescribed by the constitution. If it is correct as to nominations, it must be so equally as to all his other duties. If it is a known rule, it is one on which the President ought to cease to act. If he has no right to make nominations, can he perform the higher duty of signing the laws and making treaties? If this principle is applicable to the President, is it not equally binding on the Senators who have been superseded? And will it not present a curious anomaly to see Senators sitting here to declare the powers of the President to have ceased, in a case and for a reason as strong in reference to themselves?

Was it ever contemplated by the framers of the constitution, that the President should, in any event not provided in the instrument itself, cease to act? Or can he cease to act, in any case, when the Vice President has not authority to take his place? And if the Senate can, because they have the power, declare a disqualification in this case, why may they not declare it in all other cases, and that the Vice President is authorized to act for him? The moment you depart from the constitution, and begin an attack upon the other departments of the Government, you commence a conflict of authority where there is no arbiter, which will end in perpetual collision, or in the destruction of the Government. But, sir, it has been strongly urged here, that the will of the people must regulate the conduct of the Senate. What, sir, is the will of the people disclosed in the late election? A mere preference of one man to another. It involved no principle or policy. So far as it is yet known, the competitors accord in opinion, and are in accordance with public opinion, upon all great public questions. If the successful candidate entertains opinions different from his competitor, they have never been disclosed; and if they had, he could not have been elected. Have the people expressed their will in favor of this deprivation of the rights of the President? Have they declared that the Senate shall not fill an important office, created by the law? Have they said there shall be a political test established here? and have they said you may infract the constitution, and disregard your duty, in order to set the example of intolerance and proscription? If they were mad enough for this, and they could justify the means to attain an end in which they, as a body, have little interest, however individuals may profit, yet the constitution was made to regulate the will of the people, and control its irregular action. The constitution is a solemn compact, among the States and among the people, as well as between the people and the States. It is a great rule of conduct above the will of the people, and above the control of the States, and which neither can transcend. The people have no right to alter or modify it, but by the instrument itself, and in the mode agreed on by the parties to it. To enlarge or diminish the powers conferred by it, as the opinions of the people may change, is so far to destroy the settled principles of the Government, and to substitute the wildest theory of democracy for a written compact, which they, for the wisest purposes, have sworn not to violate. The moment you depart from that known and written law, the Government must become what a majority may at any time declare it to be. What security have the people in the stability of our institutions? What protection have the small States? If the will of the people is to be obeyed, rather than the constitution, why is so much said about the construction of it; about the alien and sedition laws; the tariff, and other acts; all of which have, at different times, emanated from the Representatives of the people? The will of the people is great and commanding, and to which we must all bow with respect and reverence; but that will, to be rightful, must be within its proper sphere, and never in derogation of that higher will they have exerted in forming the principles of this Confederation. The

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Proceedings at Extra Session.

[SENATE.]

people have a permanent interest in the stability of the Government; but if every fluctuation of opinion, and every change of rulers, and every popular election, can change its principles, it will become what all wise men have dreaded—too weak for the strong, too strong for the weak.

It is urged, in the argument, that there will not be "that mutual confidence which ought to exist between the President and the officer." Mr. J. said that he could not perceive how a difference of opinion in the late election could destroy confidence in the integrity, ability, or learning of a judge. He saw nothing in this which was not applicable to all the other judges. But, he said, the Judiciary is a co-ordinate branch of the Government, equal, in its proper sphere, to the Executive, and, in the theory of the constitution, intended to be independent. They do not act together—no confidence is expected. Indeed, if any fears have been entertained, or any jealousy expressed of the Judiciary, it is from the apprehension that they may sympathize too strongly with the powers that be. Here the connexion with the present rulers is about to cease; and they will stand independent and free from any influence of the Executive.

The course recommended by the Committee has been justified by charging the President with neglect, and imputing unworthy motives in not making the appointment in vacation. Mr. Trimble died in Kentucky in August; the first recommendations are dated 28th August, and the last, from Frankfort, on the 18th September; these arrived at Washington from the 15th to the last of September. With a proper respect for the States, and the persons having claims to the office, he could not have proceeded before the first of October to decide on the claims of the parties, and it would have been the middle of October before the appointment could have been received. There would then have been sixty days between the appointment, and about forty-five days between the receipt of the commission and the session of the Senate. It is a very high and permanent office, requiring great ability, in which three large States are particularly concerned, and the whole Union interested. Under such circumstances, it would be indelicate to make an appointment and leave the Senate under the necessity of confirming it, or the painful and ungracious task of rejecting a judge already on the bench, and in the exercise of his office.

The President has deemed it more respectful to the Senate to leave them free to act upon the nomination.

The propriety and the delicacy of naming a judge to this high office, on the sole will of the President, only sixty days before the meeting of Congress, may well be questioned. The discretion vested in him has been wisely exerted, and with the most elevated purpose. His conduct, for the benefit of the example, should have been justly appreciated and commended. If he had made the nomination, then we should have heard of the corruption of Executive patronage. Then the confirmation would have been withheld, because he had, in the heat of the political contest, thrown in his official influence. He stood aloof from the struggle; but he could not by any course have avoided the unworthy motives ascribed to him.

But can the Senate, an independent body, acting on its own responsibility, justify a violation of its express duty, under the plea that the President has neglected to perform his? If he has too long delayed it, it becomes an additional motive to act promptly on it.

But to what condition have we reduced the country, and for what consequences are we not responsible? This nomination was made the 17th December, and in time to enable the Judge to attend the session of the Supreme Court. The Committee have held it for six weeks under advisement. For what purpose? In the mean time, the Supreme Court have been obliged to adjourn from day to day, and when a bare quorum is formed, they are unable to decide on any cause involving any great principles. The Senate have assumed an undue responsibility, for which they cannot acquit themselves before the country. They are deviating from the meaning and spirit of the constitution; they are refusing to carry the laws into effect; they are accumulating all the patronage of the Government to augment the power and influence of the Executive, to subvert the views and interests of a dominant party. But this is not all: they are setting an example, which, in worse times, will lead to dangerous abuses of power and more fatal innovations on the constitution.

Note by the publishers.—There were doubtless speeches made by gentlemen on the other side of the question; but it is well known that speeches made in secret session must be furnished by the speakers themselves, or they cannot be published. Not having been furnished with any other than the foregoing, the publishers can of course give none other.

PROCEEDINGS AT EXTRA SESSION.

THURSDAY, MARCH 5, 1829.

DOCUMENTS—PANAMA MISSION.

The following message from the President of the United States, received and considered the third instant, in legislative session, was, at that time, on motion of Mr. TAZEWELL, ordered to be transferred, with the accompanying documents, to the Executive Journal:

To the Senate and House of Representatives of the United States of America.

WASHINGTON, 3d MARCH, 1829.

I transmit herewith to Congress a copy of the instructions prepared by the Secretary of State, and furnished to the ministers of the United States appointed to attend to the assembly of American plenipotentiaries, first held at Panama, and thence transferred to Tacubaya. The occasion for which they were given has passed away, and there is no present probability of the renewal of those negotiations; but the purposes for which they were intended are still of the deepest interest to our country and to the

world, and may hereafter call again for the active energies of the Government of the United States. The motive for withholding them from general publication having ceased, justice to the Government from which they emanated, and to the people for whose benefit it was instituted, require that they should be made known. With this view, and from the consideration that the subjects embraced by those instructions must probably engage hereafter the consideration of our successors, I deem it proper to make this communication to both Houses of Congress. One copy only of the instructions being prepared, I send it to the Senate, requesting that it may be transmitted also to the House of Representatives.

JOHN QUINCY ADAMS.

TUESDAY, MARCH 10, 1829.

Mr. BENTON submitted the following motion: *Ordered*, That the message of the President of the United States, transmitting to the Senate the instructions to the ministers of the United States to the Congress at Panama,

Source: Legal > Secondary Legal > Law Reviews & Journals > Law Reviews, Combined ⓘ

Terms: "that when nominations shall be made in writing by the president of the united states to the senate, a future day shall be assigned, unless the senate unanimously direct otherwise, for taking them into consideration." (Edit Search)

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ARTICLE: The Senate is Supposed to Advise and Consent, Not Obstruct and Delay

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SUMMARY:

... Over a year after President Bush nominated his first group of circuit court judges, only two have been confirmed. ... Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the *confirmation* phase of the appointment process. ... Despite the original understanding of the Senate's limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criterion for judicial qualification, the Senate today appears bent on using its limited confirmation power to impose ideological litmus on presidential nominees and even to force the President to nominate judges preferred by individual senators, thus arrogating to itself the nomination as well as the confirmation power. ... Today, senators inquire into a nominee's ideology for precisely the opposite reason: to ensure that the nominee will *not* abide by the Constitution--to ensure that he will stretch and bend the Constitution in the directions that the senator prefers. ... What that essentially means is that the current attempt to use the Senate's confirmation power to regulate the ideology of judges is part of an overall trend which is turning the *judiciary* into a second *legislative* branch. ...

TEXT:

[*11] Over a year after President Bush nominated his first group of circuit court judges, only two have been confirmed. Most have not even received a hearing, yet the number of vacancies on the federal bench has grown to crisis proportion. Chief Justice William Rehnquist recently complained of an "alarming number of judicial vacancies," creating a real strain on the courts. ¹ Even Senator Patrick Leahy, who, as Chairman of the Senate's judiciary

committee is largely responsible for the current logjam, previously referred to a judicial vacancy "crisis" when the number of vacancies on the bench was about half what it is today, contending that those who delay or prevent the filling of vacancies were "derelict in [their] duty," and delaying or preventing the administration of justice. ²

More fundamentally, the judicial vacancy crisis is threatening to hamper the ability of the courts to perform their primary role as an important check on the elected branches of government, protecting individual rights against tyrannical majorities, and insuring that the legislative and executive branches do not exceed the scope of authority delegated to them by the Constitution. As James Madison noted two years before the Constitutional Convention, the "Judiciary Department merits every care" because it "maintains private Right against all the corruptions of the two other departments...." ³

Of course, Sen. Leahy and his Democrat colleagues in the Senate claim that they are simply fulfilling their own constitutional obligation to give "advice and consent" to the President in the nomination process and to insure that those nominees who are "hostile" to their view of what the law ought to be are not confirmed to lifelong seats on the bench. The resulting standoff reveals important differences of opinion over the role of the Senate in the appointment process. But that disagreement in turn masks a profound division over the proper role of government in general, and even the very notion of the rule of law. As is often the case, it is well to begin with a review of the founders' understanding of the process in assessing this disagreement.

I. The Framers of the Constitution Assigned to the President the Pre-Eminent Role in Appointing Judges

The President alone has the power to *nominate*

[*12] Article II of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court [and such inferior courts as the Congress may from time to time ordain and establish]." ⁴ As the text of the provision makes explicitly clear, the power to choose nominees--to "nominate"--is vested solely in the President, ⁵ and the President also has the primary role to "appoint," albeit with the advice and consent of the Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one that is currently being claimed.

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison's notes, an initial proposal on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, "even that branch [was] too numerous, and too little personally responsible, to ensure a good choice." ⁶ Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Gouverneur Morris of Pennsylvania, two of the Convention's leading figures, agreed with Ghorum and moved that judges be appointed by the President.

In contrast, Luther Martin of Maryland and Roger Sherman of Connecticut argued in favor of the initial proposal, contending that the Senate should have the power because, "being taken from all the States it [would] be best informed of the characters & most capable of making a fit choice." ⁷ And Virginia's George Mason argued that the President should not have the power to appoint judges because (among other reasons) the President "would insensibly form local & personal attachments...that would deprive equal merit elsewhere, of an equal chance of promotion." ⁸

Ghorum replied to Mason's objection by noting that the senators were at least equally likely to "form their attachments." ⁹ Giving the power to the President would at least mean that he

"will be responsible in point of character at least" for his choices, and would therefore "be careful to look through all the States for proper characters." For him, the problem with placing the appointment power in the Senate was that "Public bodies feel no personal responsibility, and give full play to intrigue & cabal," ¹⁰ while if the appointment power were given to the President alone, "the Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone." ¹¹

Seeking a compromise, James Madison suggested that the power of appointment be given to the President with the Senate able to veto that choice by a 2/3 vote. ¹² Another compromise was suggested by Edmund Randolph, who "thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal." ¹³ These compromises were defeated, however, and the vote on Ghorum's motion--that the President nominate and with the advice and consent of the Senate, should appoint--resulted in a 4-4 tie. ¹⁴ The discussion was then postponed.

When the appointment power was taken up again on July 21, the delegates returned to their previous arguments. One side argued that the President should be solely responsible for the appointments, because he would be less likely to be swayed by "partisanship"--what Madison's generation called "faction" ¹⁵ --than the Senate. The other side opposed vesting the appointment power in the President for a similar reason: he would not know as many qualified candidates as the Senate would, and might still be swayed by personal considerations or nepotism.

The convention delegates were primarily concerned about improper influence in the appointments process, and most of the debate centered on whether assigning the appointment power to the President or to [*13] the Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent such political bargaining. As Edmund Randolph noted, "appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications." ¹⁶ But those who opposed this idea, and instead wanted the Senate to have the power of appointment, did *not* argue that the Senate should have the power in order to control the development of case law or regulate judicial philosophy. Instead, they feared that the President would be "more susceptible to caresses & intrigues than the Senate," as Oliver Ellsworth of Connecticut contended. ¹⁷

In the end, the Convention agreed that the President would make the nominations, and the Senate would have a limited power to withhold confirmation as a check against political patronage or nepotism. Gouverneur Morris put the decision succinctly: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." ¹⁸ As the Supreme Court subsequently recognized, "the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body." ¹⁹ No one argued that the Senate's participation in the process should include second-guessing the judicial philosophy of the President's nominees or attempting to mold that philosophy itself. Indeed, such a suggestion was routinely rejected as presenting a dangerous violation of the separation of powers, by allowing the Senate to control the President's choices and, ultimately, intrude upon the judiciary.

Madison, for instance, arguing in defense of his suggested compromise--that a 2/3 vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand--noted that

The Executive Magistrate wd be considered as a national officer, acting for and equally sympathizing with every part of the U. States. If the 2d branch alone should have this power, the Judges might be appointed by a minority of the

people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States....²⁰

In short, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role; such would undermine the President's responsibility, and far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared.

This understanding of the appointment power was reaffirmed during the ratification debates. In *Federalist* 76, for example, Alexander Hamilton explained at length that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment."²¹ Noting that a President would "have fewer personal attachments to gratify, than a body of men who may each be supposed to have an equal number,"²² --or as we would say today, that the President will be swayed by fewer political pressure groups than the Senate-- Hamilton concluded:

In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would [*14] exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.²³

Note the very limited role that the Senate serves in Hamilton's view--which, of course, echoes the views expressed at the Constitutional Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders' view, the Senate acts as a brake on the President's ability to fill offices with his own friends and family members rather than qualified nominations, but beyond that, the element of choice--the essence of the power to fill the office--belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in *picking* the nominees--either through direct choice or through logrolling and deal-making.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate--as he writes, legislatures are very often prone to "bargain[s]" by which one party says to another, "'Give us the man we wish for this office, and you shall have the one you wish for that.'"²⁴ But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates, because under the Constitutional scheme, all would understand that the power of appointment belonged in the President alone. That understanding, as we shall see, has been eroded in recent years.

Commenting on the prevailing understanding, Joseph Story later described the President's power to nominate as almost absolute. "The president is to nominate," Story noted, "and thereby has *the sole power* to select for office."²⁵ Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because "if he should...surrender the public patronage into the hands of

profligate men, or low adventurers, it [would] be impossible for him long to retain public favour.... At all events, he would be less likely to disregard [public disapprobation] than a large body of men, who would share the responsibility and encourage each other in the division of the patronage of the government." ²⁶

The Framers envisioned a narrow role for the Senate in the confirmation process

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the *confirmation* phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell--later a Justice of the Supreme Court himself--noted during the North Carolina Ratification Convention, "as to offices, the Senate has no other influence but a restraint on improper appointments.... This, in effect, is but a restriction on the President." ²⁷

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the president." To Adams, the President should be *solely* responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate...?" ²⁸ The appointment power is, Adams wrote, an "executive matter[]," which should be left entirely to "the management of the executive." ²⁹ James Wilson echoed this view: "The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune, [*15] should be responsible. He should be alike unfettered and unsheltered by counsellors." ³⁰

In discussing the analogous situation of executive appointments--such as ambassadors or cabinet members--James Madison asked, "Why...was the senate joined with the president in appointing to office...? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here, the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government." ³¹

The Senate's confirmation power therefore acts only as a relatively minor check on the President's authority--it exists only to prevent the President from selecting a nominee who "does not possess due qualifications for office." ³² Essentially, it exists to prevent the President from being swayed by nepotism or mere political opportunism. ³³ Assessing a candidate's "qualifications for office" did not give the Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.

Ideology was not considered a proper reason for refusing confirmation, as long as it did not prevent the nominee from fulfilling the judicial oath

In the founders' view, then, the Senate's power in the confirmation of judicial appointees was extremely limited. It existed solely to prevent the President from exercising his power in an improper manner. Ideology--at least ideology of the kind that is unrelated to a candidate's ability to fulfill his oath of office--simply had no place in the Senate's decision. As Hamilton wrote, "It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*--they can only ratify or reject the choice he may have made." ³⁴ It was not that the founders believed the political views of judges were irrelevant;

they were not that naive. But in their view, the President was alone responsible for his appointments, and, in turn, the ideology of those he appointed. ³⁵

There is, of course, an early case that suggests the Senate believed that it was appropriate to reject nominees because of their political ideology. In 1795, John Rutledge of South Carolina, former delegate to the Constitutional Convention, was nominated by President Washington to be Chief Justice of the United States. Although Rutledge took his seat and presided over two cases, he was never confirmed.

Rutledge was a vocal opponent of the controversial Jay Treaty, negotiated by President Washington's envoy to England--and first Chief Justice of the United States--John Jay. ³⁶ Shortly after his nomination, Rutledge delivered an emphatic and somewhat imprudent attack on the Treaty, which was supported by the Federalist majority in Congress. Rutledge's appointment was rejected shortly thereafter on December 15, 1795, almost immediately after Congress resumed its work after a recess. ³⁷ Although the Senate's refusal to confirm Rutledge might in part be due to questions about his mental stability, ³⁸ his opposition to the Jay Treaty undoubtedly played an important role in the vote. Thomas Jefferson complained privately that "the rejection of Mr. Rutledge by the Senate is a bold thing; because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but tories hereafter into any department of the government." ³⁹

Jefferson's supporters in Congress responded in kind after Jefferson was elected President. Attempting to expand Jefferson's own control over the courts beyond what was **[*16]** permitted in the normal course of filling vacancies, the Jeffersonian Republicans brought articles of impeachment against Supreme Court Justice Samuel Chase, a Federalist opponent of the administration. ⁴⁰ Jefferson's supporters in Congress had been successful in impeaching New Hampshire District Judge John Pickering for bad behavior--Pickering was insane ⁴¹ --but success in impeaching him emboldened members of Jefferson's party to impeach Justice Chase, who had been appointed in 1796 by John Adams, and had attempted to enforce the notorious Sedition Act. ⁴² Articles of impeachment against Chase were drawn up by Virginia Congressman John Randolph of Roanoke, ⁴³ who was immediately challenged on the floor of the House. "The streams of justice should be preserved pure and unsullied," said one Congressman:

The Judicial department ought to attach to itself a degree of independence. I am of opinion that this House possesses no censorial power over the Judicial department generally, or over any judge in particular. They have alone the power of impeaching them; and when a judge shall be charged with flagrant misconduct...I shall be at all times prepared to carry the provisions of the Constitution into effect, in virtue of which great transgressors are punishable for their crimes.... If the resolution pass in its present form, it appears to me that we shall thereby pass a vote of censure on this judge, which neither the Constitution nor laws authorize. ⁴⁴

Popular outcry against Chase's impeachment was swift. "The simple truth is," one newspaper said, that "Mr. Jefferson has been determined from the first to have a judiciary, as well as a legislature, that would second the views of the executive." ⁴⁵ "I am afraid," said another Congressman, "that unless great care be taken the doctrine of judicial independence will be carried so far as to become dangerous to the liberties of the country." ⁴⁶ Randolph insisted that he was not seeking impeachment for ideological reasons but based on Chase's bad behavior. In a charge to a grand jury in a Sedition Act case in Baltimore, Chase had let fly with a political screed against the Jefferson Administration, and supporters of impeachment argued that this demonstrated Judge Chase's own ideological bias. ⁴⁷ Yet few were

persuaded. To the Federalists, the Chase impeachment was motivated purely by the political ideology of the Jeffersonians. As John Quincy Adams wrote in his diary, "this was a party prosecution." ⁴⁸

The Senate ultimately voted *not* to convict Justice Chase, and the Congress backed away from the ideological litmus test that threatened the independence of the judiciary. As one commentator has noted, "at that early stage of the republic, a successful impeachment of a Supreme Court Justice innocent of criminal activity probably would have left the judicial branch of the federal government forever dependent on the legislative." ⁴⁹ As a result, the use of impeachment to enforce political orthodoxy on the Supreme Court was abandoned. In 1970, when then-Congressman Gerald Ford denounced Justice William O. Douglas on the floor of the House and called for his impeachment, the suggestion was doomed from the start. ⁵⁰

II. The Current State of the Confirmation Power

Why Ideology Matters to The Left

Despite the original understanding of the Senate's limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criterion for judicial qualification, the Senate today appears bent on using its limited confirmation power to impose ideological litmus on presidential nominees and even to force the President to nominate judges preferred by individual senators, thus arrogating to itself [*17] the nomination as well as the confirmation power.

The Senate's expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary--and of government in general--in the lives of Americans today, the Senate's part in the nomination process has become a powerful political tool, and, like all powerful political tools, it is the subject of a strenuous competition among interest groups every time the President seeks to fill a judicial vacancy. Moreover, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate's ideological use of the confirmation power threatens the separation of powers by undermining the responsibility for appointments given to the President, by demanding of judicial nominees a commitment to a role not appropriate to the courts, and, perhaps most importantly, by threatening the independence of the judiciary.

The reason that some senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a "living document," modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called "progressive" policies that could never emerge from the legislative process. Of course, the Constitution is based on a profoundly different notion of law than is modern liberalism, and it is no wonder, therefore, that President Franklin D. Roosevelt, the godfather of the Welfare State that lies at the center of modern liberalism, found it necessary to resort to the highly questionable "Court-packing plan" of 1936 in order to enforce his "vision" of a new political order. The Constitution simply was not designed to accommodate such things as the massive redistributions of wealth that Roosevelt was proposing--in fact, it was designed precisely to prevent such things. ⁵¹ As Rexford Tugwell, one of the principal architects of the New Deal, admitted, "To the extent that [the New Deal policies] developed, they were tortured interpretations of a document intended to prevent them." ⁵² So the Constitution was essentially re-written by interpretation, culminating in the great "Switch in Time That Saved Nine," in which centuries of precedent were reversed and the Constitution stretched and torn out of shape to accommodate the New Deal programs. ⁵³

Judicial ideology is therefore critically important to modern-day liberals because an honest reading of the Constitution reveals that it is incompatible with their scheme of government.

Senator Charles Schumer of New York, for example, has been quite candid in acknowledging that his opposition to President Bush's judicial nominees is based on the fact that they respect and will enforce the Constitution's limitations on the power of Congress. "Elected officials," Sen. Schumer told the press on May 9, 2002,

should get the benefit of the doubt with respect to policy judgments and courts should not reach out to impose their will over that of elected legislatures.... Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve--these decisions affect, in a fundamental way, our ability to address major national issues like discrimination against the disabled and the aged, protecting the environment, and combating gun violence. ⁵⁴

This is not to say that ideology should never play a role in the confirmation process. Some ideologically-based views render it impossible for a nominee who holds them to fulfill his oath of office. Consider, for instance, Judge Harry Pregerson, who, when he was nominated to the Court of Appeals for the Ninth Circuit by President Carter, was asked whether he would follow his conscience or the law, if the two came into conflict. [*18] "I would follow my conscience," he replied. ⁵⁵ That statement, grounded in Pregerson's own ideology, should easily have been grounds for disqualification, yet Pregerson was not only confirmed to the bench, but roundly praised for this statement, despite the fact that it threatens to undermine the very essence of constitutionalism and the rule of law. ⁵⁶

Contrast this with Justice Antonin Scalia, who in a recent speech said that he was glad the Pope had not declared the Catholic Church's opposition to the death penalty a matter of infallible Church doctrine, because if the Pope had done so, Justice Scalia would, as a practicing and committed Catholic, feel compelled to resign, unable to abide by his oath to enforce the law. In his view,

the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own.... This dilemma, of course, need not be confronted by a proponent of the "living Constitution," who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the "living Constitution" has such attraction for us judges.) ⁵⁷

Ideology understood in this light is of course relevant in selecting a judicial nominee. Broadly understood, "ideology" would encompass a nominee's honor and character, which are necessary to fulfill the oath of office. ⁵⁸ A nominee who for ideological reasons cannot "support and defend the Constitution of the United States"--say, an agent working for the Taliban--would be unfit for office because he would lack the *qualifications* necessary for the position. In fact, although we tend to take the concept of an oath lightly today, James Madison wrote that under the Constitution, "*the concurrence of the Senate* chosen by the State Legislatures, in appointing the Judges, *and the oaths* and official tenures of these, with the surveillance of public Opinion, [would be] relied on as *guarantying their impartiality*...." ⁵⁹ This is very different than demanding of a nominee that he toe the line of leftist jurisprudence.

Today, senators inquire into a nominee's ideology for precisely the opposite reason: to ensure that the nominee will *not* abide by the Constitution--to ensure that he will stretch and bend the Constitution in the directions that the senator prefers.

On top of the danger that this presents to the fair resolution of controversies in Constitutional law, it presents a great danger to another vital principle of American government: separation of powers. In *Federalist* 78, Alexander Hamilton declared the judiciary the "least dangerous branch" of the new federal government. "The general liberty of the people can never be endangered" by the judiciary, he wrote, "so long as the judiciary remains truly distinct from both the legislature and the Executive.... Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments," and "all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation."⁶⁰ The enforcement of political orthodoxy on the bench is creating precisely this dependence, strengthened even more by judicial "deference" to Congressional acts that exceed the limited scope of the federal government's Constitutional powers.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution," wrote Hamilton. The courts alone could "declare all acts contrary to the manifest tenor of the Constitution [*19] void."⁶¹ But the current attempt to block judges who believe in limited government is not motivated by a desire to maintain inviolate the "exceptions to the legislative authority." It is motivated by a desire to ensure that the judiciary will interpret the Constitution in a way most suited to *extend* that legislative authority as far as possible.

What that essentially means is that the current attempt to use the Senate's confirmation power to regulate the ideology of judges is part of an overall trend which is turning the *judiciary* into a second *legislative* branch. The fundamental differences between the legislative and the judicial branch is that in the former, parties lobby, contend, vote, and decide on procedures that may infringe on the private rights of individuals. The courts are supposed to act as a "countermajoritarian" mechanism to ensure that the legislature does not engage in "the invasion of private rights...from acts in which the Government is the mere instrument of the major number of the constituents."⁶² The very existence of the judiciary is premised on the fact that the majority is not always right. Allowing the Senate--elected by the majority--too great a hand in regulating the federal bench risks eroding the judiciary's power to perform this most crucial task.

The dangerous techniques of today's judicial confirmation process

One of the most disturbing manifestations of the new process is the growing tendency of the Senate to *refuse even to hold hearings* for nominees. This practice suggests not that the nominees are too far outside the ideological mainstream to be confirmed, but rather that the senators fear to vote down the nominees on ideological grounds, precisely because they are *not* outside the ideological mainstream.

Even those who argue that the Senate should take a large role in molding the judiciary must acknowledge that blocking nominations by refusing to hold hearings is an inappropriate tactic. The Senate has the power to advise and consent to a President's nominees. The refusal to hold hearings at all is not advise or consent; it is political blackmail which perpetuates the critical number of vacancies on the federal bench. In fact, as one author has noted, Senatorial inaction is contrary to a resolution passed by the very first Senate in 1789, which declared that "**when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration...**and the Senators shall signify their assent or dissent by answering, *viva voce*, ay or no."⁶³

It is very important to note an interesting claim made by Senate Democrats in defense of their refusal to hold hearings on President Bush's nominees. Many of them--for instance, Sen. Leahy--argue that they have actually confirmed quite a lot of judges, and that Republicans are simply lying when they complain about the slow pace of Sen. Leahy's Judiciary Committee.⁶⁴ But in fact, most of the judges that have been confirmed are *district* court judges, a very important component of the judicial system, to be sure, but not the final word on the law, the way Circuit Judges are in the vast majority of cases. Of the eleven circuit court nominees President Bush made on May 9, 2001--more than a full year ago--only four have received hearings. Two of these, Judges Barrington Parker Jr. and Roger Gregory, were confirmed almost immediately⁶⁵ because they were *Clinton* nominees, whom President Bush re-nominated in a show of bipartisanship. The others, Judges Charles Pickering and Judge D. Brooks Smith, waited over a year for their hearings, and then were given hearings only after far-left interest groups thought they had dug up enough dirt to scuttle the nominations.

Even taking Democrats at their word that their refusal to confirm President Bush's nominees is an exercise of legitimate Congressional power to protect us from diabolical [*20] judges, one cannot justify the *refusal to hold hearings*. If these judges are so dangerous, Congress should hold the hearings and vote them down. But the fact is that these judges are in general unobjectionable characters and outstanding legal minds. Democrats refuse to hold hearings precisely because, if they did so, it would become clear that the Democrats have no legitimate objections to them. The delays are meant as a starvation campaign--or, worse, to bide time for liberal interest groups to discover (or invent) grounds for objecting to the nominees.

Another dangerous change that has occurred in the confirmation procedures involves the so-called "blue slip" policy--the practice whereby home state senators are essentially given a veto power of the President's nominees to positions in that state.⁶⁶ Although the policy has always been constitutionally suspect⁶⁷--the advice and consent power is given to the Senate as a body, not to individual senators--it at least had natural limits as it has been exercised historically. A senator who went to the blue slip well too often could easily find that the President simply nominated a judge from another State in the Circuit. Not so with the current, expended blue slip policy. Now, senators essentially have a veto power over any nominee from the *entire circuit* in which their states are located. Not surprisingly, without the check that was built in to the original policy, the blue slip has become a much more favored tool for advancing a senator's own views, further undermining the President's constitutional role in appointments.

Ironically, Senatorial inaction toward judicial nominations came under increasing fire during the Clinton Administration, when Democrats complained that the Republican-controlled Senate was refusing to confirm President Clinton's nominees.⁶⁸ Now that the tables have turned, however, Democrats are defending their inaction not only as a political game of tournabout-is-fair-play, but as a solemn duty to defend the Constitutional structure--the same structure, of course, that they have been vigorously undermining for at least seventy years.⁶⁹

But inaction and the blue slip process are not the only tactics being indulged toward President Bush's nominees. Recently, Judge D. Brooks Smith received a remarkable letter from Sen. Schumer, asking Smith

to imagine it is 1965 and you are a Supreme Court justice. The *Griswold* opinion⁷⁰ has not yet been written. Chief Justice Warren turns to you in conference and asks you for your opinion on whether there is a right to privacy in the Constitution and why. He further asks you to articulate how that right, if it exists, should be applied in *Griswold*. Please provide your answers to those inquiries.

Schumer was, in his own words, "interested in how you personally read and interpret the Constitution." ⁷¹

Sen. Schumer's questions quite obviously have nothing to do with preventing nepotism, or the appointment of incompetent political cronies, by the President. Nor could it. Judge Smith has served on the District Court of Pennsylvania for the Western District since 1988, when he was appointed by President Ronald Reagan. Before that, he was a state judge, and before that a district attorney for seven years. Judge Brooks is unquestionably competent, and not related to President Bush. Nor is he a political crony.

Instead, Sen. Schumer's questions serve merely to test Judge Smith's commitment to the standard of "evolving constitutionalism" advocated by Schumer and his colleagues. Sen. Schumer's question is designed precisely to elicit the nominee's political ideology in an attempt to enforce political orthodoxy on the bench. Yet Schumer is not "responsible" for the nomination in the sense that the founders envisioned. Citizens throughout most of the country who might be appalled by Sen. Schumer's questions [*21] cannot vote him out of office. While President Bush, in nominating Judge Brooks, must be, in Madison's words, "considered as a national officer, acting for and equally sympathising with every part of the U. States," Sen. Schumer is only required to serve his liberal constituency in New York, comprised of groups such as the National Organization for Women, which has targeted Judge Smith's nomination, claiming that he is "unfit" to be a Circuit Judge because he did not resign fast enough from a men's hunting club, and because, in its words, he has "ultraconservative buddies." ⁷²

Of course, Congress has the Constitutional power to create schemes for the redistribution of wealth or other interferences with individual rights--that is to say, it can propose Constitutional amendments that would authorize such action. It could propose to repeal the Constitutional protections for property rights found in the Fifth Amendment and elsewhere, by writing an amendment and submitting it to the states. But Congress knows that such an amendment would never succeed, so instead some members of Congress pursue this new method of enforcing their liberal orthodoxy from the bench.

This is essentially the difference between raw power and right. Having failed to accomplish their legal goals in the Constitutional fashion, the Senate is accomplishing them through techniques whereby judges are vetted by liberal interest groups to ensure that they will decide the "right" way on the cases that come before them. There is an interesting irony to this, however: in a sense, the Constitution already requires judges to decide the "right way"--that is, it requires judges to abide by an oath to "support and defend the Constitution." But it also requires senators to do the same thing. Some senators have abandoned that duty by supporting and defending a governmental scheme totally alien to that contemplated by the framers. Now those senators are seeking to weed out any judges who might force them to abide by that duty.

Conclusion

In June of 2001, President Clinton's White House Counsel, Lloyd Cutler, told the Senate Judiciary Committee that "it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts." ⁷³

Today the Senate is doing precisely what one delegate to the North Carolina ratification convention warned against: it is taking over the nomination power which the Constitution vested in the President alone. "The President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed: He will

be obliged finally to acquiesce in the appointment of those which the Senate shall nominate, or else no appointment will take place." ⁷⁴ The dangers posed by such a system are as real today as they were to the founding generation. It is time to rid ourselves of all ideological litmus tests save one: "Mr. Nominee, are you prepared to honor your oath to support the Constitution as written and not as you would like it to be, if we confirm you to this important office?" ⁷⁵ Any nominee who answers that question in the negative deserves to be rejected. Unfortunately, the Senate is today refusing a hearing to several nominees precisely because the current leadership knows that those nominees would honestly answer that question in the affirmative.

FOOTNOTES:

†n1 William H. Rehnquist, *2001 Year-End Report on The Federal Judiciary* (visited May 23, 2002) <www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html>.

†n2 *Reaction of Sen. Patrick Leahy, D-Vt., Ranking Member, Senate Judiciary Committee, To Chief Justice Rehnquist's Year-End Report On The Federal Judiciary*, Dec. 31, 1997 (visited June 2, 2002) <<http://leahy.senate.gov/press/199801/980101.html>>. See further 143 CONG. REC. S2518 (1997) (remarks of Mr. Leahy).

†n3 Letter to Caleb Wallace, (Aug. 23, 1785) in MADISON: WRITINGS 39, 42 (J. Rakove ed. 1999).

†n4 U.S. CONST. art. II § 2 cl. 2; art. III § 1.

†n5 See also *Weiss v. United States*, 510 U.S. 163, 185 n. 1 (1994) (Souter, J., concurring) ("the President was...rightly given the sole power to nominate").

†n6 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 41 (1911).

†n7 *Id.*

†n8 *Id.* at 42. Mason's objections were actually more complicated. He argued that the President should not appoint judges because the judges might try impeachments of the President. This problem was later avoided by having the Senate try impeachments with the Chief Justice of the Supreme Court merely presiding. See U.S. CONST. art. I § 3 cl. 6. Gouverneur Morris, in replying to Mason, argued that impeachments should not be "tried before the Judges." FARRAND, *supra* note 6 at 41-42. Mason also worried that "the Seat of Govt must be in some state," and the President would form personal attachments to people in that state, which might exclude citizens of other states from the federal bench--an understandable objection from an antifederalist like Mason. This problem was at least partly obviated by placing the capital in a federal district which would not be subject to the jurisdiction of any state. See U.S. CONST. art. I § 8 cl. 17.

†n9 FARRAND, *supra* note 6 at 42.

†n10 *Id.*

†n11 *Id.* at 43.

†n12 *Id.* at 42.

†n13 *Id.* at 43.

†n14 The Convention voted by state. Georgia abstained from this vote, and Rhode Island never sent a delegate. Other states' delegates were sometimes absent for various reasons--for instance, although the Convention had been under way for more than a month, New

Hampshire's delegates had still not arrived. In addition, this debate came during one of the lowest points of the Convention, when the differences between the delegates was at its severest. New York delegates, Robert Yates and John Lansing, had left the Convention on July 10, opposed to all its proceedings. New York's third delegate, Alexander Hamilton, had left ten days earlier. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 140 (Book of the Month Club, 1986) (1966). The day Lansing and Yates left the Convention, Washington wrote to Hamilton that he "almost despaired" of the Convention's success. *id.* at 185-186. (Hamilton returned to the Convention in September and was New York's only signer). Thus the vote on July 18 was Massachusetts, Pennsylvania, Maryland and Virginia in favor of Ghorum's motion, and Connecticut, Delaware, North Carolina and South Carolina against.

†n15 See THE FEDERALIST NO. 10 & 51 (C. Rossiter ed. 1961).

†n16 FARRAND, *supra* note 6 at 81.

†n17 *Id.*

†n18 *Id.* at 539.

†n19 *Edmond v. United States*, 520 U.S. 651, 659 (1997).

†n20 FARRAND, *supra* note 6 at 81.

†n21 THE FEDERALIST NO. 76 at 455 (C. Rossiter, ed. 1961).

†n22 *Id.* at 456 (emphasis in original).

†n23 *Id.* at 456-457.

†n24 *Id.* at 456.

†n25 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1525 at 351 (5th Ed., 1891) (1833) (emphasis added).

†n26 *Id.* § 1529 at 353.

†n27 James Iredell, *Debate in the North Carolina Ratification Convention*, July 28, 1788, reprinted in 4 THE FOUNDER'S CONSTITUTION 102 (P. Kurland & R. Lerner eds. 1987).

†n28 Letter to Roger Sherman (July 20, 1789) *in id.* at 106-107. John Adams was a lifelong champion of judicial independence. See John Adams, *The Independence of The Judiciary: A Controversy between William Brattle And John Adams* (1773) reprinted in 2 THE WORKS OF JOHN ADAMS 511 (Easton Press, 1992). He was the author of the Massachusetts state constitution, which Ghorum cited as his precedent for giving the President the power to appoint, and the Senate to advise and consent on, judicial nominees. See 1 PAGE SMITH, JOHN ADAMS 440 (1962) ("even with minor changes and deletions and one major change in the article dealing with religious freedom, the constitution [of Massachusetts] was Adams' handiwork"); DAVID MCCOLLOUGH, JOHN ADAMS 220-222 ("it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected...that Adams made one of his greatest contributions not only to Massachusetts, but to the country, as time would tell." *Id.* at 222).

†n29 Letter to Roger Sherman, *supra* note 28 at 107. See also James Madison, *Speech in Congress on the Removal Power*, June 16, 1789, reprinted in RAKOVE, *supra* note 3 at 453, 456 ("if any power whatsoever is in its nature executive it is the power of appointing,

overseeing, and controlling those who execute the laws.")

†n30 James Wilson, *Lectures on Law* (1791), 4 KURLAND & LERNER, *supra* note 27 at 110. See also *Americanus* (John Stevens Jr.), No. VII (Jan. 21, 1788) reprinted in 2 DEBATE ON THE CONSTITUTION 58, 59 (B. Bailyn ed. 1993) ("Instead of controlling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government solely to the President....").

†n31 James Madison, *Speech in Congress on the Removal Power*, May 19, 1789, reprinted in RAKOVE, *supra* note 3 at 434, 436.

†n32 STORY, *supra* note 25 § 1531 at 354.

†n33 It might seem ironic, then, that President Washington nominated his nephew, Bushrod Washington, to the Supreme Court in 1798. But Justice Washington was easily confirmed and served a long and successful term on the Supreme Court. His most famous opinion, *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), was an important early case interpreting the Privileges and Immunities Clause in Article V.

†n34 THE FEDERALIST NO. 66, at 405 (C. Rossiter ed. 1961) (emphasis in original).

†n35 This is not to say that the founding generation did not use the confirmation power as a political tool. It and subsequent generations have done so very frequently. See Jeffrey K. Tulis, *The Appointment Power: Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court*, 47 CASE W. RES. 1331 (Summer 1997). But in these confirmation battles, the Senate more often used its power to block nominees in opposition to the President's policies, not in order to enforce a particular vision of the Constitution. In the original understanding, judicial *philosophy* was a matter for the President's consideration. In those unusual cases in which the Senate *did* attempt to enforce an orthodoxy on the Court, the Senate was subjected to severe criticism.

†n36 For more on the Jay Treaty, see THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 75-82 (7th ed. 1964); JAMES MacGREGOR BURNS, THE VINEYARD OF LIBERTY 102-105 (Vintage Books, 1983) (1982).

†n37 Washington's nomination was made December 10, 1795. See SENATE EXECUTIVE J. at 194 (Dec. 10, 1795). The nomination was delayed and finally rejected on December 15. See *id.* at 195-196. No official record exists of floor debates on the nomination.

†n38 See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 998 (Fall, 2000) (noting that some contemporary observers claimed that "after the death of his Wife, his mind was frequently so much deranged, as to be in a great measure deprived of his senses"). As Garrow notes, "Professor Haw concludes that the nomination 'was defeated primarily for political reasons,' but even in the weeks immediately preceding the Senate's vote, Chief Justice Rutledge's mental health appears to have taken a very decided turn for the worse. In November, while riding circuit in North Carolina, Rutledge became seriously ill, and his illness exacerbated his depression to such an extent that on his way home to Charleston Rutledge apparently tried 'to drown himself at Camden' but without success" *Id.* at 1000. See also Letter of James Madison to Thomas Jefferson, (Feb. 7, 1796) in 2 THE REPUBLIC OF LETTERS 917, 919 (J. Smith ed. 1995) ("There is some reason to think that Jno. Rutledge is not in his mind"). But see Matthew D. Marcotte, NOTE: *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 519, 538-539 (2001/2002) (arguing that allegations of Rutledge's insanity were a tool in the partisan campaign against Rutledge).

†n39 Letter to William Branch Giles(Dec. 31, 1795) in 9 WRITINGS OF THOMAS JEFFERSON 318 (A. Bergh ed. 1907).

†n40 David Mayer argues that Jefferson "gave only lukewarm support" to the attempt to impeach Chase. DAVID MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 273 (1994). Dumas Malone shares this view. DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 1801-1805 at 468-469 (1970). For an interesting evaluation of the impeachment power as a mechanism for redressing the problem of faction, see Jonathan Turley, *Senate Trials And Factional Disputes: Impeachment As A Madisonian Device*, 49 DUKE L.J. 1 (Oct. 1999).

†n41 President Jefferson referred the question of Judge Pickering's impeachment to the Congress on February 4, 1803. See 13 ANNALS OF CONG. 460 (1803). The House reported articles of impeachment to the Senate on March 2. *Id.* at 642. The Senate took up the impeachment proceedings on October 26. 13 ANNALS OF CONG. 315. The actual trial began January 4, 1804. *Id.* at 317.

†n42 Act of July 14, 1798, 1 Stat. 596 (1798).

†n43 Randolph was a cousin of Jefferson's, but while he started out as a leading member of Jefferson's party, he ended up being Jefferson's chief antagonist in the House. See ALF MAPP, THOMAS JEFFERSON: PASSIONATE PILGRIM 41-42 (1991).

†n44 13 ANNALS OF CONGRESS 807 (1804) (statement of Mr. Elliott).

†n45 MALONE, *supra* note 40 at 469 (*quoting New York Evening Post*, Jan. 20, 1804).

†n46 13 ANNALS OF CONGRESS 808-809 (1804).

†n47 MAYER, *supra* note 40 at 268-276, discusses Jefferson's view of the proper role of ideology in the judiciary--a view too complex to address fully here. In brief, "Jefferson's constitutional theory...relied upon the independence of the judiciary as a guardian of individual rights against executive and legislative tyranny; [so] his quarrel with the judiciary was that under the control of the Federalists, it failed to fulfill this vital function and had become the destroyer rather than the protector of the Constitution and citizens' liberties." *Id.* at 268. As I argue *infra*, section II, today's attempt by Senate liberals to delve into the ideology of judicial nominees gets this Constitutional theory backwards: their quarrel with the judiciary is precisely that it threatens to place roadblocks in the way of the left's attempt to increase government control over citizens' lives. Where Jefferson believed the judiciary should not be independent "of the will of the people," modern liberals want the judiciary dependent on the will of *political interest groups*. Witness the liberal reaction to the recall of California Chief Justice Rose Bird--an expression of "the will of the people" which the left denounced as a corruption of the rule of law by thoughtless mob rule. See Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985 (Sept. 1988). Witness also the notion of a "living Constitution," by which unelected judges exercise the power to nullify duly enacted laws based on their own unaccountable consciences.

†n48 THE DIARY OF JOHN QUINCY ADAMS 1794-1845 at 35 (Allan Nevins ed., 1928). Adams, of course, would become much more familiar with such "party prosecutions" late in his career, when the House of Representatives attempted to expel him for his outspoken opposition to slavery. See WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY (1996).

†n49 MAPP, *supra* note 43 at 89.

†n50 See generally BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 75-79 (1979).

✦n51 See CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1935) ("The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities").

✦n52 Quoted in Roger Pilon, *The Purpose And Limits of Government* 31 (Cato Institute 1999).

✦n53 See generally THOMAS FLEMING, THE NEW DEALER'S WAR: FDR AND THE WAR WITHIN WORLD WAR II 59-62 (2001); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND (1994); Timothy Sandefur, *The Common Law Right to Earn A Living*, 7 INDEPENDENT REV. 69 (Summer 2002); BERNARD SEIGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980). See further *United States v. Carolene Products*, 304 U.S. 144, 152 (1936); *West Coast Hotel v. Parrish*, 300 U.S. 379, 398 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937).

✦n54 Statement at Courts Subcommittee hearing, May 9, 2002 (visited May 26, 2002) <http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR00978.html>.

✦n55 John Johnson, *Judge Harry Pregerson, Choosing between Law And His Conscience*, LOS ANGELES TIMES, May 3, 1992 at B5.

✦n56 In 1992, Judge Pregerson ordered a stay to the execution of the serial killer Robert Alton Harris, the *fourth* such stay that was issued on the night of Harris' scheduled execution. The result was an unprecedented decision from the Supreme Court of the United States, ordering that "no further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." *Vasquez v. Harris*, 503 U.S. 1000 (1992). See further Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 188-92.

✦n57 Antonin Scalia, *God's Justice And Ours*, FIRST THINGS, May 1, 2002 at 17.

✦n58 The oath of office is prescribed in U.S. CONST. art. VI § 3.

✦n59 Letter to Thomas Jefferson (June 27, 1798), in RAKOVE, *supra* note 3 at 801 (emphasis added).

✦n60 THE FEDERALIST NO. 78 at 466 (C. Rossiter ed. 1961).

✦n61 *Id.*

✦n62 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in RAKOVE, *supra* note 3 at 418, 421.

✦n63 SENATE EXECUTIVE J. at 19 (Aug. 21, 1789) cited in Lee Renzin, NOTE: *Advice, Consent, and Senate Inaction: Is Judicial Resolution Possible?* 73 N.Y.U. L. REV. 1739, 1755 (Nov. 1999).

✦n64 See Statement of Sen. Leahy (May 23, 2002) (visited May 29, 2002) <http://judicial.senate.gov/member_statement.cfm?id=268&wit_id=50>.

✦n65 Judge Parker was nominated on May 9, 2001 and confirmed on October 11, 2001. See further David G. Savage, *Bush's Judicial Nominees Go 28 for 80 in The Senate*, LOS ANGELES TIMES, Dec. 31, 2001 at A12. Judge Gregory was nominated on May 9, 2001 and confirmed on July 20, 2001. See further Jonathan Ringel, *Senate Confirms Three Bush Judicial Nominees*, THE LEGAL INTELLIGENCER, July 24, 2001 at 4.

✚n66 Brannon P. Denning, *The "Blue Slip": Enforcing The Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL OF RTS. J. 75 (Dec. 2001).

✚n67 According to its defenders, the blue slip procedure enforces the Constitutional scheme of advice and consent by serving as a "formal sanction for violation of the Senate norm of the courtesy from *presidents*, who are expected to seek advice from Senators prior to making judicial appointments." *Id.* at 97. But the President is not expected to seek advice from individual Senators, or at least not from the two Senators from a nominee's home state, whose views will be based primarily on the nominee's party loyalty and the Senator's political ambitions. The Constitution expects the President to seek advice from the Senate. In fact, as the history of the Advice and Consent Clause shows, the founders would have preferred a system which required the President to seek the advice from Senators of states *other* than the nominee's home state, because they would be less likely to be influenced by that nominee's home-grown political connections. In any case, the Constitution does not confer the confirmation power on the home-state Senators; it vests it in the Senate, and only to prevent unqualified or politically driven nominations.

✚n68 See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 233 (Jan. 1997) (proposing a lawsuit to force the Senate to hold hearings on nominees); Renzin, *supra* note 63 (arguing that blue slip procedure and Senatorial inaction are unconstitutional). Of course, in reality, the Congress did not refuse to confirm President Clinton's judicial nominees--it confirmed 377, almost as many as were confirmed during the Reagan Administration (382).

✚n69 See Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 NEXUS J. OP. 75 (2001).

✚n70 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

✚n71 Quoted in Byron York, *Schumer's Attack*, NATIONAL REVIEW ONLINE, May 14, 2002 (visited May 23, 2002) <<http://www.nationalreview.com/york/york051402.asp>>.

✚n72 NOW *Activists Protest Nomination of D. Brooks Smith Outside Federal Court Building*, May 20, 2002, (visited May 23, 2002) <<http://www.now.org/press/05-02/05-20.html>>.

✚n73 Statement to Administrative Oversight And The Courts Subcommittee (June 26, 2001) 2001 WL 21756493.

✚n74 Samuel Spencer, *Speech at the North Carolina Ratification Convention*, July 28, 1788, reprinted in 2 BAILYN, *supra* note 30 at 879.

✚n75 In this view, the qualifications of judges are similar to the qualifications of jurors as explained in *Wainwright v. Witt*, 469 U.S. 412 (1985). There the Court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

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SYMPOSIUM: FEDERAL JUDICIAL SELECTION IN THE NEW MILLENNIUM: The Limited Nature of the Senate's Advice and Consent Role

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SUMMARY:

... Oral Statement of Dr. John C. Eastman Before The House Judiciary Subcommittee on the Constitution Oversight Hearing on "A Judiciary Diminished is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary. ... The convention delegates were primarily concerned about improper influence in the appointment process, and most of the debate centered on whether assigning the appointment power to the President or to the Senate would serve as a better check on that influence. ... Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the confirmation phase of the appointment process. ... The Senate Judiciary Committee refused, by straight party-line vote, to report Judge Pickering and Justice Owen out of committee. ... Now, Senators essentially have a veto power over any nominee from the entire circuit in which their state is located. ... The blue-slip opposition by Michigan's other Senator to the blatant display of nepotism was precisely the kind of check on the appointment power envisioned by the framers. ... "The President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed: He will be obliged finally to acquiesce in the appointment of those which the Senate shall nominate, or else no appointment will take place. ...

TEXT:

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Oral Statement of Dr. John C. Eastman Before The House Judiciary Subcommittee on the Constitution

Oversight Hearing on "A Judiciary Diminished is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary."

Thursday, October 10, at 9:00 a.m., Rayburn House Office Building, Room 2237

Thank you, Chairman Chabot, for inviting me to participate in this hearing this morning. I first want to acknowledge what an extraordinary hearing this is, a subcommittee of the House of Representatives inquiring into a matter that is textually committed by the Constitution to the other body, the Senate of the United States. Of course, the House of Representatives does have an important role in the overall appointments process. It can propose legislation to confer the power of appointment for lower court judges in the President alone under Article II of the Constitution. ¹ Moreover, the judicial seats that have been vacant for this entire session of Congress have been not only authorized, but mandated by law. ² Yet that law is clearly not being followed. It is as if Senator Leahy thinks he has been vested with the line item veto power and has **[*635]** used his own red pen to single-handedly strike out fifteen percent of the Federal appellate court bench. ³

This hearing, however, is about much more than the vacancy created by the Senate's inaction. The unprecedented assertion of power by the Senate is threatening two of the most core principles of our constitutional system of government. First, it is intruding upon the President's power to nominate judges, in violation of the separation of powers. Second, it is threatening the independence of the judiciary and, as a result, the very rule of law itself.

Now, my fellow panelist Ralph Neas is going to tell you that the Senate is just being diligent in its advice and consent role, ⁴ but quite frankly, his view of that role is fundamentally mistaken. He claims in his prepared testimony that the Senate has a co-equal role in nominating judges. ⁵ That claim is inconsistent with the Constitution's text and the history of the advice and consent power.

As I describe in greater detail in my prepared testimony, the Framers of the Constitution assigned to the President the sole power to nominate and the primary power in appointing judges. ⁶ They did this because they wanted the accountability that came with placing the appointment power in a single individual. ⁷ They specifically refused to give the power of appointment to the Senate because they knew the tendency of public bodies to feel no personal responsibility and to give full play to intrigue and cabal. ⁸

Now, as with every aspect of the separation of powers, there are, of course, checks on that Presidential power: The requirement of advice and consent is given to the Senate for principal officers and is a default for inferior officers. ⁹ But when we view this mere check in the Senate as **[*636]** a co-equal share in the power of appointment itself, as Mr. Neas does, ¹⁰ we grant to the Senate a power that the Constitution does not confer, opening the door to the very threat of cabal and partisanship that the Founders feared. What is worse, the ideological litmus test some Senators would impose with their new-found power is one that would turn a blind eye to the limits on power that the Constitution itself imposes on those very same Senators. ¹¹

This threat to an independent judiciary and its ability to check a Congress bent on exercising power that is not authorized by the Constitution is every bit as great as the threat raised by the court-packing scheme advanced by President Roosevelt in the 1930s, ¹² and every bit as

dangerous to the very idea of limited constitutional government.

So what can this committee do? As I alluded to at the beginning, it can consider legislation that would give sole appointment power to the President alone whenever the Senate has failed to act within a reasonable time in confirming or rejecting his nominees. ¹³ That would ensure that the Senate's check on Presidential power does not itself become a blank [*637] check.

I thank this committee for the opportunity to help shed some light on this serious problem, and I hope that your hearing today will demonstrate to the country how critical is the constitutional crisis that has been perpetrated by the Senate's abject refusal to perform its advice and consent role for a significant number of the President's nominees to the Circuit Courts of Appeals.

Thank you, Mr. Chairman.

[A slightly modified version of Dr. Eastman's prepared testimony follows.]

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Prepared Testimony of Dr. John C. Eastman Before The House Judiciary Subcommittee on the Constitution
Oversight Hearing on "A Judiciary Diminished is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary."
Thursday, October 10, at 9:00 a.m., Rayburn House Office Building, Room 2237

Good morning, Chairman Chabot and other members of the House Judiciary Subcommittee on the Constitution. I am delighted to be here this morning to offer some historical and constitutional perspective on the current stalemate in the Senate Judiciary Committee over confirmations of circuit court judges, its impact on the federal judiciary and, perhaps more importantly, its threat to the separation of powers.

As of yesterday, ¹⁴ seventeen months have passed since President Bush nominated his first group of 11 circuit court judges; only three have been confirmed. ¹⁵ Several have not even received a hearing, yet the number of [*639] vacancies on the federal bench has grown to crisis proportions. Chief Justice William Rehnquist recently complained of an "alarming number of judicial vacancies," creating a real strain on the courts. ¹⁶ Even Senator Patrick Leahy, who, as Chairman of the Senate's judiciary committee is largely responsible for the current logjam, previously referred to a judicial vacancy "crisis" when the number of vacancies on the bench was about half what it is today. In 1997, he contended that those who delay or prevent the filling of vacancies were "derelict [in their] duty" and delaying or preventing the administration of justice. ¹⁷

More fundamentally, a large number of judicial vacancies threatens to hamper the ability of the courts to perform their primary role as an important check on the elected branches of government, protecting individual rights against tyrannical majorities, and insuring that the [*640] legislative and executive branches do not exceed the scope of authority delegated to them by the Constitution. As James Madison noted two years before the Constitutional Convention, the "Judiciary Department merits every care" because it "maintains private Right against all the corruptions of the two other departments... ." ¹⁸

Of course, Senator Leahy and his Democratic colleagues in the Senate claim that they are simply fulfilling their own constitutional obligation to give "advice and consent" to the President in the nomination process. Moreover, they claim that their inaction is meant to

insure that those nominees who are "hostile" to their view of what the law ought to be are not confirmed to lifelong seats on the bench. The resulting standoff reveals important differences of opinion over the role of the Senate in the appointment process. But that disagreement in turn masks a profound division over the proper role of government in general, and even the very notion of the rule of law. As is often the case, it is well to begin with a review of the founders' understanding of the process in assessing this disagreement.

I. The Framers of the Constitution Assigned to the President the Pre-Eminent Role in Appointing Judges

A. The President Alone Has the Power to Nominate

Article II of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the Supreme Court [and such inferior courts as the Congress may from time to time ordain and establish]." ¹⁹ As the text of the provision makes explicitly clear, the power to choose nominees - to "nominate" - is vested solely in the President. ²⁰ The President also has the primary role to "appoint," albeit with the advice and consent of the Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one than is currently claimed.

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison's notes, an initial proposal [***641**] on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, "even that branch [was] too numerous, and too little personally responsible, to ensure a good choice." Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Gouverneur Morris of Pennsylvania, two of the Convention's leading figures, agreed with Ghorum and moved that judges be appointed by the President. ²¹

In contrast, Luther Martin of Maryland and Roger Sherman of Connecticut argued in favor of the initial proposal, contending that the Senate should have the appointment power because, "being taken from all the States it [would] be best informed of the characters and most capable of making a fit choice." ²² And Virginia's George Mason argued that the President should not have the power to appoint judges because (among other reasons) the President "would insensibly form local & personal attachments ... that would deprive equal merit elsewhere, of an equal chance of promotion." ²³

Ghorum replied to Mason's objection by noting that the Senators were at least equally likely to "form their attachments." ²⁴ Giving the power to the President would at least mean that he "will be responsible in point of character at least" for his choices, and would therefore "be careful to look through all the States for proper characters." For Ghorum, the problem with placing the appointment power in the Senate was that "Public bodies feel no personal responsibility, and give full play to intrigue and cabal," ²⁵ while if the appointment power were given to the President alone, "the Executive would certainly be more answerable for [***642**] a good appointment, as the whole blame of a bad one would fall on him alone." ²⁶

Seeking a compromise, James Madison suggested that the power of appointment be given to the President with the Senate able to veto that choice by a 2/3 vote. ²⁷ Another compromise was suggested by Edmund Randolph, who "thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal." ²⁸ These compromises were defeated, however, and the vote on Ghorum's motion - that the President nominate and with the advice and consent of the Senate, should appoint - resulted in a 4-4 tie. ²⁹ The discussion was then postponed.

When the debate over the appointment power was renewed on July 21, the delegates repeated their previous arguments. One side argued that the President should be solely responsible for the appointments because he would be less likely to be swayed by "partisanship" - what Madison's generation called "faction" ³⁰ - than the Senate. The other side opposed vesting the appointment power in the President for a similar reason: he would not know as many qualified candidates as the Senate would, and might still be swayed by personal considerations or nepotism.

The convention delegates were primarily concerned about improper influence in the appointment process, and most of the debate centered on whether assigning the appointment power to the President or to the [*643] Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent the political bargaining that would inevitably result from giving the power to a legislative body. As Edmund Randolph noted, "appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications." ³¹ But those who opposed assigning the appointment power to the President, and instead wanted the Senate to have the power of appointment, did not argue that the Senate should have the power in order to control the development of case law or regulate judicial philosophy. Instead, they feared that the President would be "more susceptible to caresses and intrigues than the Senate," as Oliver Ellsworth of Connecticut contended. ³²

In the end, the Convention agreed that the President would make the nominations, and the Senate would have a limited power to withhold confirmation as a check against the President making appointments based on political patronage or nepotism. Governor Morris put the decision succinctly: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." ³³ As the Supreme Court subsequently recognized, "the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body." ³⁴ No one argued that the Senate's participation in the process should include second guessing the judicial philosophy of the President's nominees or attempting to mold that philosophy itself. Indeed, such a suggestion was rejected as presenting a dangerous violation of the separation of powers, by allowing the Senate to control the President's choices and, ultimately, intrude upon the judiciary itself. Madison, for instance, arguing in defense of his suggested compromise - that a 2/3 vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand - noted that:

The Executive Magistrate wd be considered as a national officer, acting for and equally sympathizing with every part of the U. States. If the 2d. branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the [*644] States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States... ³⁵

Furthermore, as noted above, Ghorum thought giving too great a role to the Senate would result in "intrigue and cabal." ³⁶ In short, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role. The delegates believed that providing the Senate with such a role would undermine the President's responsibility and, far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared.

This understanding of the appointment power was reaffirmed during the ratification debates. In Federalist 76, for example, Alexander Hamilton explained at length that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to

particular offices, than a body of men of equal or perhaps even of superior discernment." ³⁷ Noting that a President would "have fewer personal attachments to gratify, than a body of men who may each be supposed to have an equal number," ³⁸ - or as we would say today, that the President will be swayed by fewer political pressure groups than the Senate - Hamilton concluded:

In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice. ³⁹

Note the very limited role that the Senate serves in Hamilton's view - which, of course, echoes the views expressed at the Constitutional [*645] Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders' view, the Senate acts as a check on the President's ability to fill offices with his own friends and family members rather than qualified nominees. Beyond that, the element of choice - the essence of the power to fill the office - belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in picking the nominees - either through direct choice or through logrolling and deal-making.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate. Legislatures, he noted, are very often prone to "bargains" by which one party says to another, "'Give us the man we wish for this office, and you shall have the one you wish for that.'" ⁴⁰ But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates because, under the Constitutional scheme, all would understand that the power of appointment belonged to the President alone.

Commenting on the prevailing understanding, Joseph Story later described the President's power to nominate as almost absolute. "The president is to nominate," Story noted, "and thereby has the sole power to select for office." ⁴¹ Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because

if he should ... surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour At all events, he would be less likely to disregard [public disapprobation], than a large body of men, who would share the responsibility, and encourage each other in the division of the patronage of the government. ⁴²

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B. The Framers Envisioned a Narrow Role for the Senate in the Confirmation Process

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the confirmation phase of the appointment

process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell, later a Justice of the Supreme Court, noted during the North Carolina Ratification Convention: "as to offices, the Senate has no other influence but a restraint on improper appointments This, in effect, is but a restriction on the President." ⁴³

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the president." ⁴⁴ To Adams, the President should be solely responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate...?" ⁴⁵ The appointment power is, Adams wrote, an "executive matter[]," which should be left entirely to "the management of the executive." ⁴⁶ James Wilson echoed this view: "The [*647] person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible. He should be alike unfettered and unsheltered by counselors." ⁴⁷

In discussing the analogous situation of executive appointments - such as ambassadors or cabinet members - James Madison asked,

Why ... was the senate joined with the president in appointing to office ... ? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government." ⁴⁸

The Senate's confirmation power therefore acts as a relatively minor check on the President's authority. It exists only to prevent the President from selecting a nominee who "does not possess due qualifications for office." ⁴⁹ Essentially, the Senate's confirmation power exists to prevent the President from being swayed by nepotism or mere political opportunism. ⁵⁰ Assessing a candidate's "qualifications for office" did not give the Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office.

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C. Ideology Was Not Considered a Proper Reason for Refusing Confirmation, as Long as It Did Not Prevent the Nominee From Fulfilling the Judicial Oath

In the founders' view, then, the Senate's power in the confirmation of judicial appointees was extremely limited. It existed primarily, if not solely, to prevent the President from exercising his power in an improper manner. Ideology - at least ideology of the kind that is unrelated to a candidate's ability to fulfill his oath of office - simply had no place in the Senate's decision. As Hamilton wrote:

It will be the office of the President to nominate, and, with the advice and consent of the Senate, to appoint. There will, of course, be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves choose - they can only ratify or reject the choice of the president. ⁵¹

It was not that the founders believed the political views of judges were irrelevant; they were not that naive. But in their view, the President was alone responsible for his appointments, and, in turn, the ideology of those he appointed.⁵²

There is, of course, an early case that suggests the Senate believed that it was appropriate to reject nominees because of their political ideology. In 1795, John Rutledge of South Carolina, former delegate to the Constitutional Convention, was nominated by President Washington to be Chief Justice of the United States. Although Rutledge took his seat and presided over two cases, he was never confirmed.

Rutledge was a vocal opponent of the controversial Jay Treaty, negotiated by President Washington's envoy to England - and first Chief Justice of the United States - John Jay.⁵³ Shortly after his nomination, Rutledge delivered an emphatic and somewhat imprudent [*649] attack on the Treaty, which was supported by the Federalist majority in Congress. Rutledge's appointment was rejected shortly thereafter on December 15, 1795, almost immediately after Congress resumed its work after a recess.⁵⁴ Although the Senate's refusal to confirm Rutledge might in part be due to questions about his mental stability,⁵⁵ his opposition to the Jay Treaty undoubtedly played an important role in the vote. Thomas Jefferson complained privately that "the rejection of Mr. Rutledge by the Senate is a bold thing; because they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but tories hereafter into any department of the government."⁵⁶

Jefferson's supporters in Congress responded in kind after Jefferson was elected President. Attempting to expand Jefferson's own control over the courts beyond what was permitted in the normal course of filling vacancies, the Jeffersonian Republicans brought articles of impeachment against Supreme Court Justice Samuel Chase, a Federalist opponent of the administration.⁵⁷ Jefferson's supporters in Congress had [*650] been successful in impeaching New Hampshire District Judge John Pickering for bad behavior - Pickering was insane⁵⁸ - but success in impeaching him emboldened members of Jefferson's party to impeach Justice Chase, who had been appointed in 1796 by John Adams, and who had attempted to enforce the notorious Sedition Act.⁵⁹ Articles of impeachment against Chase were drawn up by Virginia Congressman John Randolph of Roanoke,⁶⁰ who was immediately challenged on the floor of the House. "The streams of justice should be preserved pure and unsullied," said one Congressman:

The Judicial department ought to attach to itself a degree of independence. I am of opinion that this House possesses no censorial power over the Judicial department generally, or over any judge in particular. They have alone the power of impeaching them; and when a judge shall be charged with flagrant misconduct ... I shall be at all times prepared to carry the provisions of the Constitution into effect, in virtue of which great transgressors are punishable for their crimes If the resolution pass in its present form, it appears to me that we shall thereby pass a vote of censure on this judge, which neither the Constitution nor laws authorize.⁶¹

Popular outcry against Chase's impeachment was swift. "The simple truth is," one newspaper said, that "Mr. Jefferson has been determined from the first to have a judiciary, as well as a legislature, that would second the views of the executive."⁶² "I am afraid," said another Congressman, "that unless great care be taken the doctrine of judicial independence will be carried so far as to become dangerous to the liberties of the country."⁶³ Randolph insisted that he was seeking impeachment based on Chase's behavior, not for any ideological reasons. In a charge to a grand jury in a Sedition Act case in Baltimore, Chase had let fly with a political screed against the Jefferson Administration, and [*651] supporters of impeachment argued that this demonstrated Judge Chase's own ideological bias.⁶⁴ Yet few

were persuaded. To the Federalists, the Chase impeachment was motivated purely by the political ideology of the Jeffersonians. As John Quincy Adams wrote in his diary, "this was a party prosecution."⁶⁵

The Senate ultimately voted not to convict Justice Chase, and Congress backed away from the ideological litmus test that threatened the independence of the judiciary. As one commentator has noted, "at that early stage of the republic, a successful impeachment of a Supreme Court Justice innocent of criminal activity probably would have left the judicial branch of the federal government forever dependent on the legislative."⁶⁶ As a result, the use of impeachment to enforce political orthodoxy on the Supreme Court was abandoned. In 1970, when then-Congressman Gerald Ford denounced Justice William O. Douglas on the floor of the House and called for his impeachment, the suggestion was doomed from the start.⁶⁷

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II. The Current State of the Confirmation Power

A. Why Ideology Matters to the Left

Despite the original understanding of the Senate's limited role in the confirmation process, and despite the lessons learned from these early historical flirtations with the use of political ideology as a criteria for judicial confirmation, the Senate today appears bent on using its limited confirmation power to impose ideological litmus tests on presidential nominees. In this way, the Senate seems to be arrogating to itself the nomination as well as the confirmation power.

The Senate's expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary, the Senate's part in the nomination process has become a powerful political tool. And, like any powerful political tool, it is the subject of a strenuous competition among interest groups every time the President seeks to fill a judicial vacancy. Nevertheless, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate's ideological use of the confirmation power threatens the separation of powers in three ways. First, it undermines the responsibility for appointments given to the President. Second, it demands of judicial nominees a commitment to a role not appropriate to the courts. Third, and, perhaps most importantly, the Senate's ideological use of the confirmation power threatens the separation of powers by threatening the independence of the judiciary itself.

The reason that some Senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a "living document," modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called "progressive" policies that could never emerge from the legislative process. Of course, the Constitution is based on a profoundly different notion of law than is modern liberalism. It is no wonder, therefore, that President Franklin D. Roosevelt, the godfather of the Welfare State that lies at the center of modern liberalism, found it necessary to resort to the highly questionable Court-Packing Plan of 1936 in order to uphold his vision of a new political order.⁶⁸ The Constitution simply was not designed to accommodate such things as the massive [*653] redistributions of wealth or bureaucratic restrictions on individual liberty that Roosevelt was proposing. On the contrary, the Constitution was designed precisely to prevent such things.⁶⁹ As Rexford Tugwell, one of the principal architects of the New Deal, admitted, "To the extent that these [New Deal policies] developed, they were tortured interpretations of a document ... intended to prevent them."⁷⁰ So the Constitution was essentially re-written by interpretation, culminating in the great "Switch in Time That Saved Nine," in which a century and a half of precedent was reversed

and the Constitution stretched and torn out of shape to accommodate the New Deal programs. ⁷¹

Judicial ideology is, therefore, critically important to modern-day liberals because any honest reading of the Constitution reveals that it is incompatible with their scheme of government. Senator Schumer, for example, has been quite candid in acknowledging that his opposition to President Bush's judicial nominees is based on the fact that they respect and will enforce the Constitution's limitations on the power of Congress. "Elected officials," Senator Schumer told the press on May 9, 2002,

should get the benefit of the doubt with respect to policy judgments and courts should not reach out to impose their will over that of elected legislatures Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve - these decisions affect, in a fundamental way, our ability to address major national issues like discrimination against the disabled and the aged, protecting the environment, and combating gun violence. ⁷²

[*654] This is not to say that ideology should never play a role in the confirmation process. Some ideologically-based views render it impossible for a nominee who holds them to fulfill his oath of office. Consider, for instance, Judge Harry Pregerson, who, when nominated to the Court of Appeals for the Ninth Circuit by President Carter, was asked whether he would follow his conscience or the law, if the two came into conflict. "I would follow my conscience," he replied. ⁷³ That statement, grounded in Pregerson's own ideology, should easily have been grounds for disqualification. Yet Pregerson was not only confirmed to the bench, but roundly praised for this statement, despite the fact that it embodied a belief that threatens to undermine the very essence of constitutionalism and the rule of law. ⁷⁴

Contrast this with Justice Antonin Scalia, who in a recent speech said that he was glad the Pope had not declared the Catholic Church's opposition to the death penalty a matter of infallible Church doctrine. Justice Scalia explained that had the Pope done so, Justice Scalia would, as a practicing and committed Catholic, feel compelled to resign, unable to abide by his oath to enforce the law. In his view,

the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own This dilemma, of course, need not be confronted by a proponent of the "living Constitution," who believes that it means what it ought to mean. If the death penalty is (in his view) immoral, then it is (hey, presto!) automatically unconstitutional, and he can continue to sit while nullifying a sanction that has been imposed, with no suggestion of its unconstitutionality, since the beginning of the Republic. (You can see why the "living Constitution" has such attraction for us judges.) ⁷⁵

[*655] Ideology understood in this light is, of course, relevant in selecting a judicial nominee. Broadly understood, such "ideology" would encompass a nominee's honor and character, which are necessary to fulfill the oath of office. ⁷⁶ A nominee who for ideological reasons cannot "support and defend the Constitution of the United States" would be unfit for office because he would lack the qualifications necessary for the position. In fact, although we tend to take the concept of an oath lightly today, James Madison wrote that under the Constitution, "the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public Opinion, [would be] relied on as guarantying their impartiality" ⁷⁷ This is very different

than demanding that a nominee toe the line of leftist jurisprudence.

Today, Senators inquire into a nominee's ideology for precisely the opposite reason: to ensure that the nominee will not abide by the Constitution or his oath to support it.⁷⁸ In addition to the danger that this presents to the fair resolution of controversies in constitutional law, it presents a great danger to another vital principle of American government: separation of powers. In Federalist 78, Alexander Hamilton described the judiciary as the "least dangerous branch" of the new federal government:

The general liberty of the people can never be endangered [by the judiciary] ... so long as the judiciary remains truly distinct from both the legislature and the Executive Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments ... All the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent [*656] separation.⁷⁹

The enforcement of political orthodoxy on the bench is creating precisely this dependence, strengthened by demands for judicial "deference" to Congressional acts that exceed the limited scope of the federal government's Constitutional powers.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution," wrote Hamilton. The courts alone could "declare all acts contrary to the manifest tenor of the Constitution void."⁸⁰ But the current attempt to block judges who believe in limited government is not motivated by a desire to maintain inviolate the "exceptions to the legislative authority."⁸¹ It is motivated by a desire to ensure that the judiciary will interpret the Constitution in a way most suited to extend that legislative authority as far as possible.

In other words, the current attempt to use the Senate's confirmation power to regulate the ideology of judges is part of an overall trend which is turning the judiciary into a second legislative branch. The fundamental differences between the legislative and the judicial branch is that in the former, parties lobby, contend, vote, and decide on procedures that may infringe on the private rights of individuals. The courts are supposed to act as a "countermajoritarian" mechanism to ensure that the legislature does not engage in "the invasion of private rights ... from acts in which the Government is the mere instrument of the major number of the constituents."⁸² The very existence of an independent judiciary is premised on the fact that the majority is not always right, and that a body independent of the legislative majority is necessary to secure individual rights.⁸³ Allowing the Senate - elected by the majority - too great a hand in regulating the federal bench risks eroding the judiciary's power to provide this most crucial check against the possibility of majority tyranny.

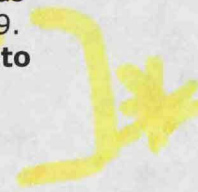
[*657]

B. The Dangerous Tactics of Today's Judicial Confirmation Process

One of the most disturbing manifestations of the new process is the growing tendency of the Senate to refuse even to hold hearings for nominees. This practice suggests not that the nominees are too far outside the ideological mainstream to be confirmed, but rather that the Senators fear to vote down the nominees on ideological grounds, precisely because they are not outside the ideological mainstream.⁸⁴

Even those who argue that the Senate should take a large role in molding the judiciary must acknowledge that blocking nominations by refusing to hold hearings is an inappropriate

tactic. The Senate has the power to advise and consent to a President's nominees. The refusal to hold hearings at all is not advice or consent; it is political blackmail which perpetuates the critical number of vacancies on the federal bench. In fact, as one author has noted, senatorial inaction is contrary to a resolution passed by the very first Senate in 1789. **"When nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration ... and the Senators shall signify their assent or dissent by answering, viva voce, ay or no."**⁸⁵



Moreover, the current strategy of delay that appears to be the mainstay of the present Senate Judiciary Committee threatens to intrude upon the Executive's powers, in violation of core separation of powers principles. Improper attempts to impose ideological litmus tests by voting down the President's nominees could be countered by re-nomination of like-minded individuals, but the outright refusal to hold hearings, or to refer nominees to the floor of the Senate for a vote, deprives the President of even this remedial power. Such a tactic eventually forces the President to accede to demands to nominate individuals more to the liking of individual Senators. The delay tactics **[*658]** appear designed, then, to transfer the nomination power from the President to the Senate, a result that the founders greatly feared.⁸⁶

It is important to note an interesting claim made by some Senate Democrats in defense of their refusal to hold hearings on President Bush's nominees. Senator Leahy, for example, has argued that they have actually confirmed quite a lot of judges, and that Republicans are simply lying when they complain about the slow pace of Senator Leahy's Judiciary Committee.⁸⁷ But, in fact, most of the judges that have been confirmed are district court judges, a very important component of the judicial system, to be sure, but not the final word on the law, the way circuit judges are in many cases. Of the eleven circuit court nominations President Bush made on May 9, 2001, only six had received hearings by October 9, 2002 - seventeen months after the nominations were made. Two of these, Judges Barrington Parker, Jr. and Roger Gregory, were confirmed relatively quickly⁸⁸ because they were Clinton nominees, whom President Bush re-nominated in an apparent show of bipartisanship.⁸⁹ The others, Judge Charles Pickering, Justice Priscilla **[*659]** Owen, Professor Michael McConnell, and former deputy Solicitor General Miguel Estrada, waited over a year for their hearings, and then were given hearings only after far-left interest groups thought they had dug up enough dirt to scuttle the nominations.⁹⁰ The Senate Judiciary Committee refused, by straight party-line vote, to report Judge Pickering and Justice Owen out of committee. It appears that the Committee is poised to do the same with Michael McConnell and Miguel Estrada, both of whom have received unanimous well-qualified ratings from the American Bar Association.⁹¹ The remaining five have not even received a hearing, 519 days as of the date of this hearing and counting since their nominations were first announced.⁹²

Even assuming that the refusal to confirm President Bush's nominees is an exercise of legitimate congressional power to protect the country from unqualified judges, one cannot justify the refusal to hold hearings or have confirmation votes by the full Senate. If the President's nominees are so dangerous, the Senate should hold the hearings and vote them down. The fact, however, is that these nominees are, in general, of impeccable character, many with outstanding legal minds and all of whom have received "well-qualified" or "qualified" ratings from the **[*660]** American Bar Association.⁹³ Senator Leahy refuses to hold hearings precisely because, if he did so, it would become clear that there are no legitimate objections to the President's nominees and that, in fact, the nominees enjoy majority support in the Senate, including support by some Democrats. The delays are meant as a starvation campaign - or, worse, to bide time for radical interest groups to discover (or invent) grounds for objecting to the nominees.⁹⁴

This tactic, too, has been previously addressed by the Senate. After Andrew Jackson defeated John Quincy Adams for President in 1828, Adams had several months as a lame duck

President in which to nominate Judges to the federal bench. Because the President no longer had the confidence of the people, several Senators wanted to postpone consideration of John J. Crittendon, whom President Adams had nominated as an Associate Justice of the Supreme Court. Although the Senate ultimately rejected the Crittendon nomination, the arguments made against the delay were profoundly important and ultimately carried the day throughout most of this nation's history. Senator Holmes argued, for example, that while the Senate had a right to deliberate and evaluate the character and qualifications of a candidate in performing its advice and consent role, it had "no constitutional power to resist its execution." Delays beyond what were necessary to deliberate about the nominee's qualifications were, he asserted, "an abuse of a discretion" given by the Constitution.⁹⁵ Senator Johnson echoed the sentiment, stating that "the duty of the Senate is confined to an inquiry into the character and qualifications of the person, and to a decisive action upon the nomination, in a reasonable time."⁹⁶ Johnson made the following dire prediction: "The moment you depart from the constitution, and begin an attack upon the other departments of the Government, you commence a conflict of authority where there is no arbiter, which will end in perpetual collision, or in the destruction of the Government."⁹⁷ That, and a similar prediction by Senator Chambers - "Once let discretion be adopted as the rule of conduct for those in power, and no man can prescribe limits to the mischief which must ensue"⁹⁸ - should give us all pause at the actions, or rather inaction, currently being [*661] undertaken in the Senate.

Another dangerous change that has occurred in the confirmation process involves an expansion of the so-called "blue slip" policy - the practice whereby home state Senators are essentially given a veto power of the President's nominees to positions in that state.⁹⁹ Although the policy has always been constitutionally suspect,¹⁰⁰ as historically exercised, it at least had some grounding in the original purpose that underlay the advice and consent clause. Home state Senators were extended this courtesy because it was assumed that they would have first-hand knowledge of nominees from their home state. Such insider knowledge would allow them to more adequately judge nominees' character and fitness for office - just the kind of role envisioned by the framers of the clause.¹⁰¹ More importantly, the blue slip practice, again as historically exercised, had natural limits protecting against its abuse. A Senator who used the blue slip too often could easily find that the President simply nominated a judge from another state in the circuit.¹⁰²

[*662] Neither the original purpose nor the inherent limit is found in the current, expanded blue slip policy. Now, Senators essentially have a veto power over any nominee from the entire circuit in which their state is located.¹⁰³ This power belies any claim to special knowledge of the nominee's character derived from home-state familiarity, and removes the check on the policy's potential for abuse. Not surprisingly, without the check that was built into the original policy, the blue slip has become a much more favored tool for advancing a Senator's own views, further undermining the President's constitutional role in appointments.

Ironically, senatorial inaction toward judicial nominations came under increasing fire during the Clinton Administration, when Democrats complained that the Republican-controlled Senate was refusing to confirm President Clinton's nominees.¹⁰⁴ Now that the tables have turned, however, Democrats are defending their inaction not only as a political game of turnabout-is-fair-play,¹⁰⁵ but as a solemn duty to defend the constitutional structure, as they see it.¹⁰⁶ Of course, the turn-about, tit-for-tat argument depends entirely on the starting point. One need only query John Roberts and Terrence Boyle, both nominated originally in the first Bush administration, to rebut any claim that the "inaction" that has been attributed to the Republicans during the second term of the Clinton administration was the first shot in this confirmation war.¹⁰⁷ In any event, one of the three main examples of Republican "inaction," [*663] Roger Gregory, was re-nominated to the Fourth Circuit by President Bush, promptly confirmed, and is now sitting on the bench. Confirmation of another Clinton nominee, Merrick Garland, was delayed for a year by Senator Charles Grassley in response to

the Democrat's 1992 blockage of John Roberts,¹⁰⁸ but he was ultimately confirmed and now sits on the D.C. Circuit. The final frequently-cited example, Helene White of Michigan, who languished for several years, was the sister-in-law of Senator Carl Levin. The blue-slip opposition by Michigan's other Senator to the blatant display of nepotism was precisely the kind of check on the appointment power envisioned by the framers. The blue slip opposition hardly serves as precedent for the broad-based delay and opposition to the highly qualified nominees currently before the Senate.

But inaction and the blue slip process are not the only tactics being employed against President Bush's nominees. Recently, Judge D. Brooks Smith received a remarkable letter from Senator Charles Schumer of New York, asking Smith

to imagine it is 1965 and you are a Supreme Court justice. The Griswold opinion¹⁰⁹ has not yet been written. Chief Justice Warren turns to you in conference and asks you for your opinion on whether there is a right to privacy in the Constitution and why. He further asks you to articulate how that right, if it exists, should be applied in Griswold. Please provide your answers to those inquiries.

Schumer was, in his own words, "interested in how you personally read and interpret the Constitution."¹¹⁰

Senator Schumer's questions quite obviously have nothing to do with preventing nepotism, or the appointment of incompetent political cronies by the President. Instead, Senator Schumer's questions serve merely to test Judge Smith's commitment to the standard of "evolving constitutionalism" advocated by Schumer and some of his colleagues. Senator Schumer's question is designed precisely to elicit the nominee's political ideology in an attempt to enforce political orthodoxy on the bench. Yet Schumer is not "responsible" for the nomination in the sense that the founders envisioned. Citizens throughout most of the country who might be appalled by Senator Schumer's questions cannot vote the **[*664]** Senator from New York out of office. While President Bush, in nominating Judge Brooks, must be, in Madison's words, "considered as a national officer, acting for and equally sympathizing with every part of the United States," Senator Schumer is only required to serve his liberal constituency in New York. That constituency includes groups such as the National Organization for Women, which targeted Judge Smith's nomination, claiming that he is "unfit" to be a Circuit Judge because he did not resign fast enough from a men's hunting club, and because, in its words, he has "ultraconservative buddies."¹¹¹

A similar dynamic was at play in the Senate Judiciary Committee's rejection of Texas Supreme Court Justice Priscilla Owen to a seat on the U.S. Court of Appeals for the Fifth Circuit. The main source of opposition to Justice Owen was her vote to uphold a Texas statute requiring that minor girls notify their parents before obtaining an abortion. The Texas statute contained a judicial bypass mechanism, as required by existing Supreme Court precedent. In fact, there was little doubt that the statute was constitutional under prevailing precedent. The opposition to Justice Owen, then, was based on her refusal to ignore existing, binding Supreme Court precedent in favor of the expanded, unfettered right to abortion being propounded by the litigants in the case. What the opponents of Justice Owen wanted instead, apparently, was a judge who would ignore the law and existing Supreme Court precedent to advance her particular causes from the bench.¹¹²

In short, the opposition to Justice Owen, like Senator Schumer's opposition to Judge Smith, was ultimately grounded in the fear that they would honor their oaths and uphold the law rather than bend the law to their own will (or, more precisely, to the will of those who would vote to confirm them). That such is an abuse of the advice and consent process should be obvious, as should the intrusion upon both other branches of government - the President's

power to nominate and the very independence of the judiciary in upholding the rule of law.

[*665] Of course, Congress has one constitutional power that would enable it to advance causes not currently authorized by the Constitution: It can propose constitutional amendments that would authorize such action. For example, it could propose to repeal the constitutional protections for property rights found in the Fifth Amendment and elsewhere, by writing an amendment and submitting it to the states for ratification. But it is unlikely that such an amendment would ever succeed, so some members of Congress instead pursue a new, extra-constitutional method of constitutional change, relying on the courts to push their agenda from the bench.

This is essentially the difference between raw, abusive power and constitutional norms. Having failed to accomplish their policy goals in the constitutional fashion, some members of the Senate are attempting to accomplish them by submitting judicial nominees to a vetting by radical interest groups that will decide whether the nominees can be relied upon to decide the "right" way on the cases that come before them. The irony is the Constitution already requires judges to decide the "right way" - that is, it requires judges to abide by an oath to "support and defend the Constitution." ¹¹³ But it also requires Senators to do the same thing. ¹¹⁴ Some Senators have arguably abandoned that duty by supporting and defending a governmental scheme totally alien to that contemplated by the framers. Now those Senators are seeking to block the confirmation of any judge who might force them to abide by the constitutional limits on their power.

Conclusion

In June of 2001, President Clinton's White House Counsel, Lloyd Cutler, told the Senate Judiciary Committee that

it would be a tragic development if ideology became an increasingly important consideration in the future. To make ideology an issue in the confirmation process is to suggest that the legal process is and should be a political one. That is not only wrong as a matter of political science; it also serves to weaken public confidence in the courts. ¹¹⁵

[*666] Today the Senate is doing precisely what one delegate to the North Carolina ratification convention warned against: it is taking over the nomination power which the Constitution vested in the President alone. "The President may nominate, but they have a negative upon his nomination, till he has exhausted the number of those he wishes to be appointed: He will be obliged finally to acquiesce in the appointment of those which the Senate shall nominate, or else no appointment will take place." ¹¹⁶ The dangers posed by such a system are as real today as they were to the founding generation. It is time to rid ourselves of all ideological litmus tests save one: "Mr. or Ms. Nominee, are you prepared to honor your oath to support the Constitution as written and not as you would like it to be, if we confirm you to this important office?" Any nominee who answers that question in the negative deserves to be rejected. Unfortunately, the Senate is today refusing a hearing or denying a vote to several nominees precisely because the current leadership knows that those nominees would honestly answer that question in the affirmative.

FOOTNOTES:

↑n1. See U.S. Const. art. II, 2, cl. 2.

†n2. See 28 U.S.C. 44, 133 (1994 & Supp. 2002) (specifying that President "shall appoint" 179 circuit court judges and 651 district court judges) (emphasis added).

†n3. See A Diminished Judiciary: Causes and Effects of the Sustained High Vacancy Rates in the Federal Courts, 107th Cong. (2002) (statement of Todd F. Gaziano, noting that as of October 10, 2002, 15.1% of circuit court judgeships were vacant), available at <http://www.house.gov/judiciary/gaziano101002.htm> (last visited Jan. 12 2003).

†n4. See Written Testimony of Ralph G. Neas, 107th Cong. (2002) (statement of Ralph G. Neas, President, People for the American Way), available at <http://www.house.gov/judiciary/neas101002.htm> (last visited Dec. 4, 2002).

†n5. Id.

†n6. The appointment power of Art. II, 2 is divided into two clauses - the power to nominate and the power to appoint. The former is committed exclusively to the President; the latter is also committed to the President, but with the advice and consent of the Senate.

†n7. See infra notes 21-34 and accompanying text.

†n8. See infra note 25 and accompanying text.

†n9. U.S. Const. art. II, 2 ("[The President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint, Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, ... but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

†n10. Statement of Ralph G. Neas, *supra* note 4.

†n11. See, e.g., Hearing Before the Senate Comm. On the Judiciary Subcomm. on Administrative Oversight and the Courts on Should Ideology Matter?: Judicial Nominations 2001, 107th Cong. (2001) (statement by Charles E. Schumer), reprinted in Senate Committee Hearings on the Judicial Nomination Process, 50 Drake L. Rev. 429, 435 (2002).

†n12. See, e.g., Senate Comm. on the Judiciary, Reorganization of the Federal Judiciary, S.

Rep. No. 75-711, at 1, 13, 23 (1937) (describing President Roosevelt's court-packing plan as "vicious precedent which must necessarily undermine our system" of independent judiciary and "which should be so emphatically rejected that its parallel will never again be presented to free representatives of free people of America").

✦n13. Less than three weeks after the hearing at which this testimony was presented, President Bush himself proposed that the Senate Judiciary Committee hold hearings on judicial nominees within 90 days, with a vote by the full Senate not later than 180 days after the President sends a nomination to the Senate. See Press Release, President George W. Bush, Remarks on Judicial Confirmations (Oct. 30, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021030-6.html> (last visited Jan 12, 2003); see also John C. Eastman, Confirmation Logjam, Wall St. J., Oct. 17, 2002, at A18 (proposing six-month timetable). Whether Circuit Court Judges are constitutionally "inferior officers" whose appointment can be vested in the President alone is, of course, an open question. In *Edmond v. United States*, the Supreme Court held that judges on the Court of Appeals for the Armed Forces were "inferior officers" for purposes of the appointments clause for two reasons. First, they were somewhat under the supervision of the Judge Advocate General. Second, their decisions were subject to reversal by a higher court. Although the former ground is not apt with respect to Article III circuit judges, the latter clearly is, and the treatment of circuit judges as "inferior" officers comports with the language of Article III, which denominates all courts below the Supreme Court as "inferior" courts. *Edmond v. United States*, 520 U.S. 651, 664-65 (1997).

✦n14. That is, October 9, 2002.

✦n15. Between the time of the hearing at which this testimony was presented and the present publication of that testimony, Republicans regained control of the Senate as a result of the mid-term elections held November 5, 2002. See, e.g., Jim VandeHei & Jonathan Weisman, Republicans Poised to Enact Agenda, Washington Post, Nov. 7, 2002, at A1. Following the election, the Senate Judiciary Committee reported out several additional nominees, who were promptly confirmed by the full Senate. See, e.g., Edward Walsh, Two More Senate Victories for Bush, Washington Post, Nov. 20, 2002, at A5; U.S. Department of Justice, Office of Legal Policy, Confirmed Nominees During the 107th Congress, available at <http://www.usdoj.gov/olp/confirmed107.htm>. Smoother sailing is therefore expected for President Bush's nominees, at least in the short term, but the concerns raised in this article about the abuse of the advice and consent process remain valid, for at least two reasons. First, one of the Circuit Judges recently confirmed by the Senate - Dennis Shedd - was confirmed with enough opposition votes to signal that the Democrats had the solidarity to sustain a filibuster, should they so choose. Walsh, *supra* note 15. Second, both parties have been accused of improper obstruction in recent years. See, e.g., Carl Tobias, Federal Judicial Selection in the Fourth Circuit, 80 N.C. L. Rev. 2001, 2006-07 (2002). A strong case can be made that the recent obstructionist tactics began when the Democrat-controlled Senate blocked a number of nominations made by President George H. W. Bush. Denis Steven Rutkus, Congressional Research Service, President Bush's Judicial Nominations During the 101st and 102d Congresses 9-18 (1993) (listing Bush I Circuit Court nominees who were not confirmed). Furthermore, most (though perhaps not all) of the delays imposed by Republicans on Clinton nominees during the 1990s were quid pro quos for the Bush I nominees blocked by Senate Democrats. See, e.g., Michael J. Gerhardt, Toward a Comprehensive Understanding of the Federal Appointments Process, 21 Harv. J.L. & Pub. Pol'y 467, 516 (1998) (describing Senator Charles Grassley's hold on Merrick Garland in

response to Democrat blocking of John Roberts to D.C. Circuit Court of Appeals). However, there is every reason to expect that the obstructionist tactics will only grow worse with each succeeding period of divided government. It is better, therefore, to address the problem now, when neither party will know whether it will be on the giving or receiving end of the next round of obstructionism, for it is only when the calculations of base partisan advantage are hidden behind a "veil of ignorance" that remedies can truly be addressed on their merits. Cf. John Rawls, *A Theory of Justice* 136-38 (1971).

✦n16. William H. Rehnquist, 2001 Year-End Report on The Federal Judiciary, available at <http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html> (last visited Oct. 25, 2002).

✦n17. Press Release, Reaction of Sen. Patrick Leahy, D-Vt., Ranking Member, Senate Judiciary Committee, to Chief Justice Rehnquist's Year-End Report on the Federal Judiciary (Dec. 31, 1997), available at <http://leahy.senate.gov/press/199801/980101.html> (last visited Oct. 25, 2002). See also 143 Cong. Rec. S6492 (1997) (statement of Sen. Leahy).

✦n18. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in James Madison: Writings 39, 42 (Jack N. Rakove ed., 1999).

✦n19. U.S. Const. art. II, 2, cl. 2; art. III 1.

✦n20. See also *Weiss v. United States*, 510 U.S. 163, 185 n.1 (1994) (Souter, J., concurring) ("The President was...rightly given the sole power to nominate.").

✦n21. 2 The Records of the Federal Convention of 1787, at 41 (Max Farrand ed., 1911).

✦n22. *Id.*

✦n23. *Id.* at 42. Mason's objections were actually more complicated. He argued that the President should not appoint judges because the judges might try impeachments of the President. This problem was later avoided by having the Senate try impeachments with the Chief Justice of the Supreme Court merely presiding. See U.S. Const. art. I, 3, cl. 6. Gouverneur Morris, in replying to Mason, argued that impeachments should not be "tried before the Judges." 2 The Records of the Federal Convention, *supra* note 21, at 42. Mason also worried that "the seat of Govt. must be in some state," and the President would form personal attachments to people in that state, which might exclude citizens of other states from the federal bench - an understandable objection from an anti-federalist like Mason. *Id.* This problem was at least partly obviated by placing the capital in a federal district which would not be subject to the jurisdiction of any state. See U.S. Const. art. I, 8, cl. 17.

↗n24. 2 The Records of the Federal Convention, supra note 21, at 42.

↗n25. Id.

↗n26. Id. at 43.

↗n27. Id.at 42.

↗n28. Id.at 43.

↗n29. Id. at 44. The Convention voted by state. Id. at 8. Georgia abstained from this vote, and Rhode Island never sent a delegate. Id. at 44. Other states' delegates were sometimes absent for various reasons. For instance, although the Convention had been underway for more than a month, New Hampshire's delegates had still not arrived. Id. In addition, this debate came during one of the lowest points of the Convention, when the differences between the delegates were at their most severe. Two of New York's delegates, Robert Yates and John Lansing, left the Convention on July 10, opposed to all its proceedings. New York's third delegate, Alexander Hamilton, had left ten days earlier. See Catherine Drinker Bowen, *Miracle at Philadelphia* 115 (1966). The day Lansing and Yates left the Convention, Washington wrote to Hamilton that he "almost despaired" of the Convention's success. Id. at 140. Hamilton returned to the Convention in September and was New York's only signer. 2 Records of the Federal Convention, supra note 21, at 664; Lisa Marie DeCarolis, *From Revolution to Reconstruction*, at <http://odur.let.rug.nl/~usa/B/hamilton/hamil16.htm> (last visited Dec. 8, 2002). Thus, the vote on July 18 was Massachusetts, Pennsylvania, Maryland, and Virginia in favor of Ghorum's motion, and Connecticut, Delaware, North Carolina, and South Carolina against. 2 The Records of the Federal Convention, supra note 21, at 44.

↗n30. See The Federalist Nos. 10, 51 (James Madison).

↗n31. 2 The Records of the Federal Convention, supra note 21, at 81.

↗n32. Id.

↗n33. Id.at 539.

†n34. *Edmond v. United States*, 520 U.S. 651, 659 (1997).

†n35. 2 *The Records of the Federal Convention*, *supra* note 21, at 81.

†n36. See *supra* text accompanying note 25.

†n37. *The Federalist* No. 76, at 481 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

†n38. *Id.*

†n39. *Id.* at 482.

†n40. *Id.*

†n41. Joseph Story, *Commentaries on the Constitution of the United States* 1525 (1833) (emphasis added).

†n42. *Id.* 1523, at 375-76.

†n43. James Iredell, *Debate in the North Carolina Ratifying Convention* (July 28, 1788), reprinted in 4 *The Founders' Constitution* 102 (Philip B. Kurland & Ralph Lerner eds., 1987).

†n44. See *infra* note 45.

†n45. Letter from John Adams to Roger Sherman (circa July 20, 1789), reprinted in 4 *The Founders' Constitution*, *supra* note 43, at 107. John Adams was a lifelong champion of judicial independence. See John Adams, *The Independence of The Judiciary: A Controversy Between William Brattle And John Adams* (1773), reprinted in 2 *The Works of John Adams* 511 (Easton Press, 1992). He was the author of the Massachusetts state constitution, which Ghorum cited as his precedent for giving the President the power to appoint, and the Senate

to advise and consent on, judicial nominees. See David McCollough, John Adams 220-22 (2001) ("it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected ... that Adams made one of his greatest contributions not only to Massachusetts, but to the country, as time would tell"); 1 Page Smith, John Adams 440 (1962) ("even with minor changes and deletions and one major change in the article dealing with religious freedom, the constitution [of Massachusetts] was Adams' handiwork").

†n46. Letter from John Adams to Roger Sherman (circa July 20, 1789), reprinted in 4 The Founders' Constitution, supra note 43, at 107. See also James Madison, Speech in Congress on the Removal Power (June 16, 1789), in James Madison: Writings, supra note 18, at 453, 456 ("if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws").

†n47. James Wilson, Lectures on Law (1791), reprinted in 4 The Founders' Constitution, supra note 43, at 110; see also John Stevens Jr., Americanus (Jan. 21, 1788), reprinted in 2 Debate on the Constitution 58, 59-60 (Bernard Bailyn ed., 1993) ("Instead of controlling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government solely to the President...").

†n48. James Madison, Speech in Congress on the Removal Power (May 19, 1789), reprinted in James Madison: Writings, supra note 18, at 434, 436.

†n49. Story, supra note 41, 1525, at 377.

†n50. It might seem ironic, then, that President John Adams nominated Bushrod Washington, the nephew of his predecessor, George Washington, to the Supreme Court in 1798. But Justice Washington was easily confirmed and served a long and successful term on the Supreme Court. David A. Faber, Justice Bushrod Washington and the Age of Discovery in American Law, 102 W. Va. L. Rev. 735, 735, 751 (2000). His most famous opinion, *Corfield v. Coryell*, was an important early case interpreting the Privileges and Immunities Clause in Article IV. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823); see also *Saenz v. Roe*, 526 U.S. 489, 524-25 (1999) (Thomas, J., dissenting); *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 281 n.10 (1985).

†n51. The Federalist No. 66, at 434 (Benjamin Fletcher Wright ed., 1961).

†n52. This is not to say that the founding generation did not use the confirmation power as a political tool. It and subsequent generations have done so very frequently. See Jeffrey K. Tulis, The Appointment Power: Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court, 47 Case W. Res. L. Rev. 1331 (1997). But in these confirmation battles, the Senate more often used its power to block nominees in opposition to the President's policies, not in order to enforce a particular vision of the Constitution. In

the original understanding, judicial philosophy was a matter for the President's consideration. In those unusual cases in which the Senate did attempt to enforce an orthodoxy on the Court, the Senate was subjected to severe criticism.

✦n53. For more on the Jay Treaty, see Thomas A. Bailey, *A Diplomatic History of the American People* 75-82 (7th ed. 1964); James MacGregor Burns, *The Vineyard of Liberty* 103-04 (Alfred A. Knopf ed., 1982).

✦n54. Washington's nomination of Rutledge was delivered to the Senate on December 10, 1795. See S. Exec. J. at 194 (Dec. 10, 1795), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ej001285\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ej001285))). The nomination was delayed and finally rejected on December 15. See id. at 195-96 (Dec. 15, 1795), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(ej001289\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(ej001289))). No official record exists of floor debates on the nomination.

✦n55. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995, 999 (2000) (noting that some contemporary observers claimed that "after the death of his Wife, his mind was frequently so much deranged, as to be in a great measure deprived of his senses"). As Garrow notes, "Professor Haw concludes that the nomination 'was defeated primarily for political reasons,' but even in the weeks immediately preceding the Senate's vote, Chief Justice Rutledge's mental health appears to have taken a very decided turn for the worse. In November, while riding circuit in North Carolina, Rutledge became seriously ill, and his illness exacerbated his depression to such an extent that on his way home to Charleston Rutledge apparently tried 'to drown himself at Camden' but without success." Id. at 1000; see also Letter from James Madison to Thomas Jefferson (Feb. 7, 1796), in 2 *The Republic of Letters* 917, 919 (James Morton Smith ed., 1995) ("There is some reason to think that Jno. Rutledge is not right in his mind."). But see Matthew D. Marcotte, Note, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. Legis. & Pub. Pol'y 519, 538 (2001/2002) (arguing that allegations of Rutledge's insanity were tool in partisan campaign against Rutledge).

✦n56. Letter from Thomas Jefferson to William Branch Giles (Dec. 31, 1795), in 9 *Writings of Thomas Jefferson* 318 (A. Bergh ed., 1907).

✦n57. David Mayer argues that Jefferson "gave only lukewarm support" to the attempt to impeach Chase. David Mayer, *The Constitutional Thought of Thomas Jefferson* 273-74 (1994). Dumas Malone shares this view. Dumas Malone, *Jefferson The President: First Term, 1801-1805*, at 468 (1970). For an interesting evaluation of the impeachment power as a mechanism for redressing the problem of faction, see Jonathan Turley, *Senate Trials And Factional Disputes: Impeachment As A Madisonian Device*, 49 *Duke L.J.* 1 (1999).

✦n58. President Jefferson referred the question of Judge Pickering's impeachment to the Congress on February 4, 1803. See 12 *Annals of Cong.* 460 (1803). The House reported

articles of impeachment to the Senate on March 2. *Id.* at 642. The Senate took up the impeachment proceedings on October 26. 13 *Annals of Cong.* 315 (1803). The actual trial began January 4, 1804. *Id.* at 317.

†n59. Act of July 14, 1798, ch. 74, 1 Stat. 596 (1798).

†n60. Randolph was a cousin of Jefferson, but while he started out as a leading member of Jefferson's party, he ended up being Jefferson's chief antagonist in the House. See Alf J. Mapp, Jr., *Thomas Jefferson: Passionate Pilgrim* 41-42 (1991).

†n61. 13 *Annals of Cong.* 807 (1804) (statement of Mr. Elliott).

†n62. Malone, *supra* note 57, at 469 (quoting *New York Evening Post*, Jan. 20, 1804).

†n63. 13 *Annals of Cong.* 808-09 (1804).

†n64. Mayer, *supra* note 57, at 268, discusses Jefferson's view of the proper role of ideology in the judiciary - a view too complex to address fully here. In brief, "Jefferson's constitutional theory ... relied upon the independence of the judiciary as a guardian of individual rights against executive and legislative tyranny; [so] his quarrel with the judiciary was that under the control of the Federalists, it failed to fulfill this vital function and had become the destroyer rather than the protector of the Constitution and citizens' liberties." *Id.* at 268. As I argue *infra*, section II, today's attempt by Senate liberals to delve into the ideology of judicial nominees gets this Constitutional theory backwards: their quarrel with the judiciary is precisely that it threatens to place roadblocks in the way of the left's attempt to increase government control over citizens' lives. Where Jefferson believed the judiciary should not be independent "of the will of the people," modern liberals want the judiciary dependent on the will of political interest groups. Witness the liberal reaction to the recall of California Chief Justice Rose Bird - an expression of "the will of the people" that the left denounced as a corruption of the rule of law by thoughtless mob rule. See generally Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 *S. Cal. L. Rev.* 1985 (1988). Witness also the notion of a "living Constitution," by which unelected judges exercise the power to nullify duly enacted laws based on their own unaccountable consciences rather than any specific constitutional prohibition.

†n65. The *Diary of John Quincy Adams 1794-1845*, at 35 (Allan Nevins ed., 1928). Adams, of course, would become much more familiar with such "party prosecutions" late in his career, when the House of Representatives attempted to expel him for his outspoken opposition to slavery. See William Lee Miller, *Arguing About Slavery* 429-44 (1996).

†n66. Mapp, *supra* note 60, at 89.

†n67. See generally Bob Woodward & Scott Armstrong, *The Brethren* 75-79 (1979).

†n68. See, e.g., William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 Sup. Ct. Rev. 347.

†n69. See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 324 (1935) ("The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.").

†n70. See Roger Pilon, *The Purpose and Limits of Government* 31 (Cato Institute 1999) (quoting Rexford G. Tugwell), available at <http://www.cato.org/pubs/catosletters/cl-13.pdf>.

†n71. See also *United States v. Carolene Products*, 304 U.S. 144, 152 (1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937); *West Coast Hotel v. Parrish*, 300 U.S. 379, 398 (1937). See generally Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (1994); Thomas Fleming, *The New Dealer's War: Franklin D. Roosevelt and the War Within World War II* 59-62 (2001); Bernard Seigan, *Economic Liberties And The Constitution* (1980); Timothy Sandefur, *The Common Law Right to Earn A Living*, 75 *Independent Review* 51 (Summer 2001).

†n72. Press Release, Senator Charles E. Schumer, *Clinton Judicial Nominees to Set the Record Straight at Court's Subcomm. Hearing on "Ghosts of Nomination Past"* (May 9, 2002), available at <http://schumer.senate.gov/SchumerWebsite/pressroom/press<uscore>releases/PR00978.html> (last visited Jan. 13, 2003).

†n73. John Johnson, *Judge Harry Pregerson Choosing Between Law and His Conscience*, *Los Angeles Times*, May 3, 1992, at B5.

†n74. In 1992, Judge Pregerson ordered a stay to the execution of the serial killer Robert Alton Harris, the fourth such stay that was issued on the night of Harris' scheduled execution. The result was an unprecedented decision from the Supreme Court of the United States, ordering that "no further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." *Vasquez v. Harris*, 503 U.S. 1000 (1992); see also Charles Fried, *Impudence*, 1992 Sup. Ct. Rev. 155, 188-92.

†n75. Antonin Scalia, *God's Justice and Ours*, First Things, May 1, 2002, at 17.

†n76. The oath of office is prescribed in U.S. Const. art. VI, 1, cl. 3.

†n77. Letter from James Madison to Thomas Jefferson (June 27, 1823), in James Madison: Writings, *supra* note 18, at 798, 801 (emphasis added).

†n78. The most strident criticism leveled against Fifth Circuit nominee Priscilla Owen, for example, was based on the fact that as a Texas Supreme Court Justice, she had not voted to invalidate a Texas law requiring parental notification (with the requisite judicial bypass mechanism) before a minor girl could receive an abortion even though the Texas law was in full conformity with prevailing Supreme Court precedent. See, e.g., Alliance for Justice, Texas Supreme Court Justice Priscilla Owen, Nominee to the U.S. Court of Appeals for the Fifth Circuit 16-19 (October 2002), available at [http:// www.allianceforjustice.org / judicial //research<uscore>publications/research<uscore>documents/owen<uscore>full<uscore>](http://www.allianceforjustice.org/judicial/research/publications/research/documents/owen/full) (last visited Dec. 9, 2002); Judicial Nominations, 107th Cong. (2002) (statement of Sen. Orin Hatch), available at <http://judiciary.senate.gov/member<uscore>statement.cfm?id=322&wit<uscore>id=51> (last visited Dec. 9, 2002).

†n79. The Federalist No. 78, at 491 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

†n80. *Id.*

†n81. *Id.*

†n82. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in James Madison: Writings, *supra* note 18, at 418, 421.

†n83. See, e.g., James Wilson, Debate in Pennsylvania Ratifying Convention (Dec. 4, 1787), reprinted in 4 *The Founders' Constitution*, *supra* note 43, at 139.

†n84. For example, Professor Michael McConnell, one of the leading constitutional law scholars in the country, did not receive a hearing until September 18, 2002, more than 16 months after his nomination and despite the fact that he had received a unanimous "well qualified" rating from the American Bar Association. Even then, the Senate Judiciary Committee refused to vote on the nomination until after the November 2002 election. When

the nomination was finally permitted a vote on the Senate floor, Professor McConnell was confirmed by unanimous consent. U.S. Senate Comm. on the Judiciary, Confirmed Nominees, available at <http://judiciary.senate.gov/nominations<uscore>appeals.cfm> (last visited Dec. 9, 2002); American Bar Ass'n, Ratings of Article III Judicial Nominees, 107th Congress, available at <http://www.abanet.org/scfedjud/ratings.pdf> (last visited Dec. 9, 2002).

✦n85. See Lee Renzin, Note, Advice, Consent, and Senate Inaction: Is Judicial Resolution Possible? 73 N.Y.U. L. Rev. 1739, 1755 (1999) (quoting 1 Exec. J. 19).

✦n86. The arrogation of the nomination power to individual Senators is also evident in new structures that have been devised for the selection of district court judges. Patterned after the commissions established by Gerald Parsky in California with the enthusiastic support of Senators Feinstein and Boxer, these "vetting" commissions essentially have veto power over candidates submitted for the President's consideration. Because the committees are structured so that block voting by the Feinstein and Boxer appointees can prevent any candidate's name from being forwarded to the White House, the commissions amount to much more than "advice" to the President. They represent a transfer of the nomination power itself to individual Senators who are not even members of the President's own political party. Reportedly, the appointees of Senators Feinstein and Boxer have used this newfound power to question candidates about their religious views, in violation of the Constitution's ban on religious tests, and about their positions on cases likely to come before the candidate as judge, in violation of the Canons of Judicial Ethics. See generally John Fund, Boxer Rebellion, Opinion Journal from the Wall St. J. (June 5, 2002), available at <http://www.opinionjournal.com/diary/?id=110001801> (last visited Dec. 9, 2002).

✦n87. See Judicial Nominations, 107th Cong. (2002) (statement of Sen. Patrick Leahy, Member, Senate Comm. on the Judiciary), available at <http://judiciary.senate.gov/member<uscore>statement.cfm?id=268&wit<uscore>id=50> (last visited Jan. 13, 2003).

✦n88. Judge Parker was nominated on May 9, 2001 and confirmed on October 11, 2001. David G. Savage, Bush's Judicial Nominees Go 28 for 80 in The Senate, Los Angeles Times, Dec. 31, 2001, at A12. Judge Gregory was nominated on May 9, 2001 and confirmed on July 20, 2001. Jonathan Ringel, Senate Confirms Three Bush Judicial Nominees, The Legal Intelligencer, July 24, 2001, at 4.

✦n89. See Press Release, President George W. Bush, Remarks by the President During Federal Judicial Appointee Announcement (May 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html> (last visited Dec. 9, 2002); see also Amy Goldstein & Helen Dewar, 11 Judicial Nominees Names; Bush Urges Senate to Rise Above Partisan Bitterness, Washington Post, May 10, 2001, at A2 (quoting then Senate Minority Leader Thomas Daschle as "pleased that the White House [had] chosen to work with [Democrats] on the first group of nominations" and Judiciary Committee ranking Democrat Patrick Leahy as "encouraged" by President's choices).

†n90. See, e.g., Alliance for Justice, About Judicial Selection Project, available at <http://www.allianceforjustice.org/judicial/about/index.html> (last visited Dec. 9, 2002); People for the American Way, The Dissents of Priscilla Owen: A Judicial Nominee Who Would Make the Law, Not Interpret It, available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=1323> (last visited Dec. 9, 2002); Statement of Senator Orin Hatch, *supra* note 78 (describing "organized and untruthful opposition" to Justice Priscilla Owen" from usual leftist, Washington special interest groups").

†n91. American Bar Ass'n, Ratings of Article III Judicial Nominees, *supra* note 84. As previously noted, Michael McConnell was reported out of committee on a voice vote and unanimously confirmed by the Senate following the November 5, 2002 election at which Republicans regained a majority in the Senate. Confirmed Nominees, *supra* note 84. Miguel Estrada has not yet received a vote in the Judiciary Committee. U.S. Senate Comm. on the Judiciary, Pending Nominees, available at <http://judiciary.senate.gov//nominations<uscore>appeals.cfm> (last visited Dec. 9, 2002).

†n92. John Roberts, one of the leading Supreme Court practitioners of the day, was nominated to the D.C. Circuit for the second time, and his nomination by the elder Bush was stalled until it died with the expiration of the Congressional session following President Bush's defeat to Bill Clinton in 1992. Terrence Boyle was nominated to the Fourth Circuit for the second time and his nomination by the elder Bush was also stalled until it died after the 1992 election. Dennis Shedd was nominated to the Fourth Circuit and subsequently confirmed after the November 2002 election. Deborah Cook and Jeffrey Sutton were both nominated to the Sixth Circuit. See Pending Nominees, *supra* note 91.

†n93. American Bar Ass'n, Ratings of Article III Judicial Nominees, *supra* note 84.

†n94. See, e.g., Statement of Senator Orin Hatch, *supra* note 78 (describing false accusations against Justice Priscilla Owen).

†n95. 5 Reg. Deb. 86, 88 (1829).

†n96. *Id.* at 92.

†n97. *Id.*

†n98. *Id.* at 86.

✦n99. See Brannon P. Denning, *The "Blue Slip": Enforcing The Norms of the Judicial Confirmation Process*, 10 Wm. & Mary Bill Rts. J. 75, 96 (2001).

✦n100. See *id.* at 88. The advice and consent power is given to the Senate as a body, not to individual Senators. U.S. Const. art. II, 2. The procedural power to make its own rules would not seem sufficient to support a transfer of this substantive power to individual Senators or committees, at least not where confirmation by the full Senate seems assured. According to its defenders, on the other hand, the blue slip procedure enforces the Constitutional scheme of advice and consent by serving as a "formal sanction for violation of the Senate norm of the courtesy from presidents, who are expected to seek advice from Senators prior to making judicial appointments." Denning, *supra* note 99, at 97. But the President is not expected to seek advice from individual Senators, or at least not from the two Senators from a nominee's home state, whose views will be based primarily on the nominee's party loyalty and the Senator's political ambitions. See *id.* at 88-90. The Constitution expects the President to seek advice from the Senate. *Id.* at 89-90. In fact, as the convention history of the Advice and Consent Clause shows, the founders would have preferred a system which required the President to seek the advice from Senators of states other than the nominee's home state because they would be less likely to be influenced by that nominee's home-grown political connections. See, e.g., 2 *The Records of the Federal Convention*, *supra* note 21, at 42 (statement of Ghorum). In any case, the Constitution does not confer the confirmation power on the home-state Senators; it vests it in the Senate, and only to prevent unqualified or politically driven nominations. See Denning, *supra* note 99, at 89-90.

✦n101. See *supra* note 22 and accompanying text.

✦n102. North Carolina Senator Jesse Helms' blue-slip hold on President Clinton's nominees from North Carolina to the Fourth Circuit arguably resulted in the appointment of Judges from Maryland, West Virginia, and Virginia for the "North Carolina" seat. See Alliance for Justice, *Active Judges Report*, available at <http://www.allianceforjustice.org/judicial/judicial<uscore>selection<uscore>resources/selection> (last visited Jan. 14, 2003); see also 28 U.S.C. 44(c) (1994 & Supp. 2002) (specifying that there shall be "at least one circuit judge in regular active service appointed from the residents of each state in that circuit").

✦n103. Michigan Senators Carl Levin and Deborah Stabenow, for example, have reportedly blocked two Ohio nominees to the U.S. Court of Appeals for the Sixth Circuit, Jeff Sutton and Deborah Cook, both of whom have the support of their home-state Senators. Jonathan Groner, *A Major Shift in the Battle for the Bench*, *Legal Times*, Nov. 11, 2002, at 8.

✦n104. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 233 (1997) (proposing lawsuit to force Senate to hold hearings on nominees); Renzin, *supra* note 64, at 1748 (arguing that blue slip procedure and Senatorial inaction are unconstitutional). Of course, in reality, the Congress did not refuse to confirm President Clinton's judicial nominees - it confirmed 377, almost as many as the 382 confirmed during the Reagan Administration, despite the fact that for six of his eight years in office, President

Clinton was faced with a Senate majority of the opposite political party, while President Reagan had a Senate majority of his own party for six of his eight years in office. See Hearing Before the Senate Comm. On the Judiciary Subcomm. on Administrative Oversight and the Courts on Should Ideology Matter?: Judicial Nominations 2001, 107th Cong. (2001) (statement by C. Boyden Gray), reprinted in Senate Committee Hearings on the Judicial Nomination Process, 50 Drake L. Rev. 429, 435 (2002).

✦n105. See, e.g., Statement of Senator Patrick Leahy, *supra* note 87 (complaining about Republican inaction on President Clinton's judicial nominations).

✦n106. See generally Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 Nexus J. Op. 75 (2001) (describing how modern liberalism's view of constitution is contrary to that of founders).

✦n107. See Rutkus, *supra* note 15 (listing Bush I Circuit Court nominees who were not confirmed).

✦n108. See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 Harv. J. L. & Pub. Pol'y 467, 516 (1998).

✦n109. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

✦n110. Byron York, *Schumer's Attack*, Nat'l Rev. Online (May 14, 2002), at <http://www.nationalreview.com/york/york051402.asp> (last visited Jan. 14, 2002).

✦n111. Press Release, National Organization of Women, NOW Activists Protest Nomination of D. Brooks Smith Outside Federal Court Building (May 20, 2002), at <http://www.now.org/press/05-02/05-20.html>.

✦n112. Compare the recent attempt by the Ninth Circuit to strike down a Montana statute that, in full accord with prevailing Supreme Court precedent, required abortions to be performed by a physician. The effort was met with a rare, summary reversal by the Supreme Court without oral argument. *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) ("The Court of Appeals' decision is also contradicted by our repeated statements in past cases - none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them - that the performance of abortions may be restricted to physicians.").

✦n113. U.S. Const. art. VI, cl. 3.

↗n114. Id.

↗n115. Testimony of Lloyd N. Cutler Before the Administrative Oversight and the Courts Subcomm., Senate Judiciary Comm., 107th Cong. (2001) (statement of Lloyd N. Cutler), 2001 WL 21756493.

↗n116. Samuel Spencer, Speech at the North Carolina Ratification Convention (July 28, 1788), reprinted in 2 Debate on the Constitution, supra note 47, at 879.

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May 1, 2003

Judicial Nominations, Filibusters, and the Constitution:

**What Happens When a Majority Is Denied
the Opportunity to Express its Consent?**

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Issue Presented

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

– Senator Henry Cabot Lodge (1893)

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

– Catherine Fisk & Erwin Chemerinsky,
The Filibuster, 49 Stan. L. Rev. 181, 187 n.26 (1996)

“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,
The New York Times, Mar. 5, 1917

The United States Senate is currently facing an unprecedented blockade of the President’s judicial nominees. Never in the history of this nation has a majority of the Senate, when fully prepared to exercise its constitutional function to express its consent to a judicial nominee, been denied the opportunity to do so. This memorandum will explore the constitutional questions that arise out of the current crisis – a crisis in which a minority of Senators are arguably trying to change the Constitution by establishing a 60-vote requirement to confirm judicial nominees – and discuss potential solutions.

At a minimum, the current controversy clearly demonstrates that the judicial confirmation process is badly broken, and that the Senate needs a fresh start. The current crisis presents serious constitutional issues which the Senate should explore. But even if no constitutional or other legal problems with the current use of the Senate Rules to obstruct judicial nominations are ultimately identified, at the very least it is a gross abuse of the Rules, one that turns the filibuster into a tool of obstruction – just as the worst lawyers in our nation abuse our litigation system and use otherwise legitimate discovery tactics as tools of harassment. Obstruction by Senators and harassment by lawyers alike are intolerable in a fair and just society, and the American people rightfully demand a stop to both.

Defining the Issue

The constitutional issue presented by the current controversy is simply this:

Can a minority of Senators use the Senate Rules to prevent a majority of the Senate from exercising its constitutional function to consent to a judicial nominee, when the majority is fully prepared to do so?

The Senate clearly has the power to make its own rules. Article I, Section 5 states that “[e]ach House may determine the Rules of its Proceedings.” But that power is not unlimited. As the Supreme Court unanimously held in *United States v. Ballin* (1892), “[t]he constitution empowers each house to determine its rules of proceedings. It may not 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 sought to be attained.” Therefore, the question is whether the Senate can constitutionally establish a rule under which a majority can be prevented from expressing its consent to a judicial nominee as contemplated under Article II of the Constitution.

It is important that we not be distracted by what is not at issue in this controversy:

- ***The number of filibusters that have occurred in the past.*** The issue is not whether a filibuster is constitutional or not. The issue is whether a filibuster may be used specifically to prevent a majority of the Senate from exercising its constitutional authority to consent to a judicial nominee, when it is fully prepared and motivated to do so. A group of Senators may decide to filibuster in a situation in which there is no majority prepared to exercise its constitutional powers. Such a filibuster would not raise any constitutional questions whatsoever.
- ***The number of cloture votes taken in the past.*** Cloture is simply a parliamentary procedure by which the Senate may place a time limit on debate. Cloture votes thus have little to do with the constitutional issue presented here.
- ***Filibusters of legislation.*** Filibusters of legislation involve constitutionally and structurally different government powers than filibusters of judicial nominees. There is also a significantly broader tradition and practice to support filibusters of legislation than filibusters

of judicial nominees. Evidence of the former therefore cannot be used to justify the latter.

- ***Senate Judiciary Committee procedures.*** Delay or rejection of a judicial nominee by the Senate Judiciary Committee (whether through the blue slip, through a committee vote of rejection, or through committee delay) does not directly implicate the constitutional issues addressed by this memorandum. What is at issue here is the power of a majority of the entire Senate to express its consent to a judicial nominee. Delay or rejection by the Senate Judiciary Committee does not raise constitutional questions. (A majority of the Senate can adopt a resolution of discharge pursuant to Senate Rule XVII to bring before the entire Senate a judicial nomination being held by the Senate Judiciary Committee.)

To fully appreciate the constitutional issues presented by the current controversy, one needs a precise understanding of the relevant terminology and concepts:

- ***The Fundamental Constitutional Principle of Majority Rule.*** Although the Constitution does not explicitly state that a majority of the Senate is required to consent to nominees (or to make rules or to enact legislation, for that matter), it has long been understood that majority rule is implied. As the Supreme Court unanimously held in *United States v. Ballin* (1892), “the 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.” Moreover, had the Founders intended for the Senate to set supermajority requirements for the confirmation of nominees, it presumably would have done so explicitly – as it did with respect to the authorization of treaties, the proposal of constitutional amendments, or the overturning of presidential vetoes of legislation.
- ***The Right to Debate.*** The Senate has long operated under a tradition of extended debate. That tradition of debate is not without limit, however. Indeed, according to section 17 of Thomas Jefferson’s *Manual of Parliamentary Procedure*, which informally governed the Senate in the early Congresses, “[n]o one is to speak impertinently or beside the question, superfluously or tediously.”

- ***Previous Question.*** For nearly the first two decades of Congress, the Senate operated under a rule in which a majority of Senators could force an immediate vote on a matter by approving a “motion for the previous question.” This rule was operative from 1789 to 1806.
- ***Cloture.*** Cloture is a procedure provided by Senate Rule XXII under which sixty Senators may impose a 30-hour time limit on further debate. Thus, cloture is simply a parliamentary procedure to place limits on debates. A vote for cloture is not necessarily a vote in support of a particular matter, and a vote against cloture is not necessarily an act of obstruction. Refusal to invoke cloture therefore is not *per se* an offense against the majority’s will on the underlying matter.
- ***Filibuster.*** An act of filibuster is likewise not a *per se* offense against majority will. There may not be a majority prepared to support a matter. Even if there is a majority prepared to support a matter, there may be a majority that wishes to allow debate at least for a certain period of time, just as a majority may vote for cloture even if only a minority supports the underlying matter.

Range of constitutional theories

There are a number of possible viewpoints on the current controversy. Under any of these viewpoints, however, the case for reform seems strong. The varying viewpoints are listed here, in increasing order of hostility to filibusters of judicial nominations:

1. **Filibusters of judicial nominations, although an arguably legitimate tool for the minority to ensure an adequate opportunity to debate, are objectionable when they are abused.**

*It is one thing for filibusters to be used to ensure adequate debate on a nomination. It is quite another thing, however, for filibusters to be used simply to **change the Constitution** and impose a 60-vote standard to confirm judicial nominees – which is precisely what is going on today.*

*Senate Democrats have made clear that the real purpose of the current use of filibusters against judicial nominees is to permit the minority party to establish, at will, a 60-vote standard for confirmation. For example, on April 8, **Senator Harry Reid** objected to any time agreement for any number of hours of debate followed by a vote on Justice Owen, stating that, “[s]peaking for the Senator from Nevada, there is not a number in the universe that would be sufficient.”*

2. **Filibusters of judicial nominees are not only objectionable, but raise serious constitutional questions. Under the Constitution, a majority of the Senate has the constitutional power to express its consent to judicial nominees, regardless of what Senate Rules may provide.**

The Constitution implicitly establishes a majority vote requirement for Senate confirmation of judicial nominations. In contrast, the Constitution expressly provides for supermajority vote requirements when the Founders believed that such requirements were appropriate. Therefore, any attempt to use the Senate Rules to impose a supermajority requirement for the confirmation of judges raises serious constitutional questions.

*Unlike the enactment of legislation, the filibustering of judicial nominations lacks historical practice or pedigree. Indeed, only once in U.S. history has a majority of the Senate ever been prevented from consenting to a judicial nominee. That one example, **Justice Abe Fortas**, is a poor precedent because Fortas suffered under a cloud of ethical and other controversies, his nomination was opposed by a bipartisan coalition of Senators, and President Johnson quickly withdrew his nomination after the first attempt to impose time limits on debate. There is no evidence that a majority was actually prepared to exercise its constitutional function to consent to Fortas over bipartisan opposition and despite serious ethical allegations.*

*Only twice has a majority of the Senate been prevented from consenting to an executive branch nominee: the 1994 nomination of **Sam Brown** to be Ambassador to the Conference on Security and Cooperation in Europe, and the 1995 nomination of **Dr. Henry Foster** to be Surgeon General. Importantly, neither case involved critical positions in our nation's government which might have motivated a majority to press its constitutional right to consent to executive branch nominees.*

The filibustering of judicial nominations raises greater constitutional concerns than the filibustering of legislation or even executive nominations. Congress exercises primary control and responsibility in the area of legislation. With respect to nominations, by contrast, the Senate is intruding upon an executive function, and traditional separation of powers analysis has always dictated that Congressional incursions into executive functions be construed narrowly in the absence of clear text. Filibusters of judicial nominations additionally poses a threat to judicial independence by increasing the politicization of the courts. Accordingly, judicial filibusters, even more so than filibusters of legislation or of executive nominations, are especially dubious, because they alone present this trifecta of constitutional concerns.

3. **All filibusters, whether applied to legislation or nominations, raise serious constitutional questions.**

*The most aggressive opponents of filibusters – which include prominent Democrats like **Lloyd Cutler** and **Senators Lieberman**,*

Daschle, and Harkin – have argued that all filibusters are constitutionally problematic, because the Constitution dictates a majority rule for legislation and nominations alike, and no Senate rule can be used to prevent a majority from exercising those constitutional functions, regardless of historical practice. Such individuals typically point out that, during the Founding Era, debate could be ended in the Senate by majority vote, through a motion for the previous question – a practice that lasted in the Senate for nearly two decades.

This constitutional theory has even been the cause of litigation, although no court has ever addressed the issue on the merits.

It is unlikely that a majority of the Senate will coalesce around this position. Some members who may be willing to forego opportunities to filibuster judicial nominees may not be willing to forego opportunities to filibuster legislation. That said, it may be useful to point out that prominent Democrats adopt this view. After all, it would be very difficult to argue the inverse position: that filibusters of legislation are unconstitutional, but filibusters of nominations are permissible.

The Senate should also explore an additional constitutional question:

Whether a majority of the Senate has the constitutional power to change Senate rules, notwithstanding Rule XXII (under which debate on a rule change can be filibustered and cloture can be invoked only with the approval of two-thirds of the Senators present and voting).

A majority of the Senate always retains the constitutional power to change the rules, regardless of what the Senate Rules might state – as Vice Presidents Richard Nixon and Hubert Humphrey, in their capacities as presiding officers of the Senate, and numerous legal scholars, from Erwin Chemerinsky to John McGinnis, have opined.

Just as one Congress cannot enact a law that a subsequent Congress cannot amend by majority vote, one Senate cannot enact a rule that a subsequent Senate cannot amend by majority vote. Such power would be tantamount to amending the Constitution by majority vote.

Thus, the Supreme Court has unanimously held that "[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." After all, "[e]very 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. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

Even assuming the validity of this constitutional theory, however, a constitutional point of order is debatable and thus, under Senate Rule XXII, cannot be forcibly ended except with the support of three-fifths of the Senate.

AMENDING THE SENATE RULES

In 1994, a bipartisan group of former Senators established an organization known as **Action, Not Gridlock!**, to ensure that a majority could vote after reasonable time for debate. That group was comprised of **Senators Birch Bayh (D-IN), Edward Brooke (R-MA), Dick Clark (D-IA), Barry Goldwater (R-AZ), Floyd Haskell (D-CO), Charles Mathias (R-MD), Gaylord Nelson (D-WI), William Proxmire (D-WI), and Robert Stafford (R-VT)**. The previous year, **Norman Ornstein** of the American Enterprise Institute and **Thomas Mann** of the Brookings Institution specifically urged that “the Senate should look hard at adopting a sliding scale for cloture votes, 60 votes required to cut off debate initially, 55 votes after a week of debate, and a simple majority 2 weeks after the initial cloture vote.”¹

In light of recent events, it is appropriate to revisit these efforts and to consider the need for reform. Indeed, just last year, the **American Bar Association** announced its policy under which “[t]he ABA urges the President to nominate candidates for vacant federal judicial positions promptly and urges the Senate to hear and vote on those nominations in an expeditious manner.” And earlier this year, **Chief Justice William Rehnquist** reiterated in his 2002 year-end report on the federal judiciary what he had said at the end of both 1997 and 2001: “We simply ask that the President nominate qualified candidates with reasonable promptness and that the Senate act within a reasonable time to confirm or reject them.”

Under any of the possible viewpoints discussed in this memorandum, there is an argument for reform of the Senate Rules to ensure that, once adequate debate has taken place, a willing and ready majority of the Senate has the opportunity to exercise its constitutional function to consent to judicial nominees.

¹ Thomas E. Mann & Norman J. Ornstein, *Renewing Congress: A Second Report* (1993).

Proposals to Amend the Senate Rules

There are a number of proposals already on the table to change the Senate Rules in order to achieve final resolution and a vote after adequate debate.

- **Senator Miller** has reintroduced in the current Congress (as S. Res. 85) a proposal by **Senators Harkin and Lieberman**, which they had introduced just as they returned to minority status following the 1994 elections (as Amendment 1 to S. Res. 14). As he explained in a *Wall Street Journal* op-ed of March 10, 2003, the Miller proposal would dramatically strengthen the majority's ability to vote, by providing for a declining vote requirement for placing time limits on debate with each cloture petition. The first cloture petition would require 60 votes. The second would require 57 votes. The third would require 54 votes, and all subsequent cloture petitions would require 51 votes. As Senator Harkin explained in 1995, "the minority would have the opportunity to debate, focus public attention on a bill, and communicate their case to the public. In the end, though, the majority could bring the measure to a final vote, as it generally should in a democracy."

On January 1, 1995, the *New York Times* editorialized that "[t]he Harkin plan . . . would go a long way toward making the Senate a more productive place to conduct the nation's business. . . . Now is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose." On January 5, 19 Senators voted against a motion to table the Harkin-Lieberman proposal, and thereby voted to support it: **Senators Bingaman, Boxer, Bryan, Bumpers, Feingold, Graham, Harkin, Kennedy, Kerrey, Kerry, Lautenberg, Lieberman, Moseley-Braun, Pell, Pryor, Robb, Sarbanes, Simon, Wellstone**. The motion to table succeeded by a bipartisan vote of 76-19. But as Senator Lieberman stated just prior to the vote, "Senator Harkin and I are prepared to keep fighting until this change occurs because of what is on the line, which is the credibility and the productivity of the U.S. Senate."

As currently crafted, the Miller proposal would apply to all filibusters, and not just filibusters of judicial nominations. The Miller proposal could be limited, however, to just cloture petitions filed on judicial nominations. Those who voted against the Harkin proposal could without being inconsistent vote for such a limited proposal.

- **Senator Specter** has proposed to go even further than the Miller proposal, which would only redress filibusters of nominations. As he explained in a *Legal Times* op-ed of July 8, 2002, Specter would propose a rule change to do two things: (1) restrict the discretion of the majority not to schedule votes, as well as the power of the minority to obstruct votes, by imposing strict time deadlines on both the majority and the minority for considering judicial nominees, and (2) remove the ability of the Senate Judiciary Committee to prevent floor action on judicial nominees.

President Bush endorsed a similar proposal on October 30, 2002. That proposal echoed statements made by then-Governor Bush during the presidential campaign of 2000. Announcing "A New Approach" in Knoxville, Tennessee on June 8, 2000, Bush said that "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."

Senator Leahy repeatedly endorsed Bush's campaign statements and urged colleagues to apply those same principles to the Senate's consideration of President Clinton's nominees. Moreover, in 1998, Leahy introduced S. 1906, which would have forbidden Senate recesses of more than 9 days, whenever a nomination for a judicial vacancy, designated an emergency pursuant to 28 U.S.C. § 46, has been pending for 60 days or longer.

Presumably, under the Specter-Bush-Leahy approach, a filibuster would not be permitted once the applicable time deadline has expired.

Under any of these approaches, there would be ample opportunity for debate on a judicial nominee. After a specified amount of time has passed, however, a majority of the Senate would have full opportunity to exercise its constitutional function and express its consent to a judicial nomination.

History of Majority Rule in the Senate

From 1789 to 1806, a majority of the Senate had the power to close debate through a motion for the previous question. Since 1806, the number of votes necessary to close debate has changed from time to time (from the highest possible requirement of unanimous consent, down to the current 3/5 vote of the entire Senate), but the voting requirement has never returned to a simple majority vote.

However, there have been a total of 30 proposals to restore the majority vote rule since 1806, and starting with the first recorded filibuster in 1841. Such proposals were made in 1841, 1850, 1869, 1873, 1883, 1890, 1893, 1918, 1925, 1947, 1951-58, 1960-68, 1995 and 2003.

Every instance in which the rule or proposed rule would have allowed a majority to close debate (whether a majority of the entire Senate, or just of all Senators present and voting) appears in underlined text.

- 1789-1806: For nearly the first two decades of Congress, the Senate operated under a rule in which a majority of the Senate could take immediate action on a matter under debate, by approving by a majority vote a “motion for the previous question.” This rule was operative from 1789 to 1806.
- 1806: The previous question motion was eliminated from the Senate Rules, but the Senate nevertheless continued to operate in tranquility for decades. According to Senate records, the first filibuster did not take place until 1841.
- 1841: The Senate’s first filibuster.
 - 1841: Proposal to restore previous question motion by Senator Henry Clay.
 - 1850: Proposal to restore previous question motion (Douglas).
 - 1869: Proposal to restore previous question motion.
 - 1873: Proposal to restore previous question motion (Wright).
 - 1883: Proposal to restore previous question motion (Frye).

- 1890: Proposal to introduce majority vote cloture rule (Aldrich).
- 1893: Proposal to introduce majority vote cloture rule (Platt, Hoar, Hill and Gallinger).
- 1916: Proposal to introduce 2/3 vote cloture rule.
- 1917: 2/3 vote cloture rule enacted. President Wilson asked Congress to approve the arming of merchant ships against Germany in World War I. The measure was supported by an overwhelming majority, but the minority continued debate to deny Wilson a vote. Wilson angrily denounced the Senate and called for a rule change. The Senate adopted the Martin Resolution by a vote of 76-3. That resolution established a cloture rule – the precursor of today’s Senate Rule XXII – which allowed 2/3 vote of those Senators present and voting to impose time limits on debate. It was a compromise measure between those who sought to impose majority rule and those who were opposed to cloture altogether.
- 1918: Proposal to restore previous question motion (Underwood).
- 1925: Proposal to restore previous question motion (Underwood).
- 1947: Proposal to reduce cloture rule to majority vote (Saltonstall, Knowland, Morse and Pepper).
- 1949: Cloture rule amended. Cloture opponents and proponents agreed to a compromise amendment. Cloture could now be invoked to limit debate on motions or other pending matters, including purely procedural votes (except for rule changes), and not just substantive matters. But the vote requirement was raised from 2/3 vote of Senators present and voting to 2/3 vote of the entire Senate.
- 1951-52: Proposal to reduce cloture rule to majority vote (Morse and Humphrey).
- 1951-52: Proposal to reduce cloture rule to majority vote of the entire Senate (Ives and Lodge).

- 1951-52: Proposal to change cloture rule: 2/3 vote after 48 hours or majority vote after 15 days following motion (Lehman).
- 1951-52: Proposal to change cloture rule: 2/3 vote of Senators present and voting (Wherry).
- 1953: Proposal to change cloture rule to majority vote (Anderson).
- 1953-54: Proposal to change cloture rule: 2/3 vote of Senators present and voting (Jenner).
- 1953-54: Proposal to change cloture rule to majority vote after 12 days following motion (Ives).
- 1953-54: Proposal to change cloture rule to majority vote after 14 days following motion (Lehman).
- 1953-54: Proposal to change cloture rule to majority vote (Morse).
- 1955-56: Proposal to change cloture rule: 2/3 vote after one day or majority vote after 15 days following motion (Lehman).
- 1957-58: Proposal to change cloture rule: 2/3 vote after 48 hours or majority vote after 15 days following motion (Douglas).
- 1957-58: Proposal to change cloture rule: 2/3 vote of Senators present and voting, but in no case less than a majority of entire Senate (Case).
- 1957-58: Proposal to change cloture rule to majority vote (Morse).
- 1957-58: Proposal to change cloture rule to majority vote (Ives).
- 1957-58: Proposal to change cloture rule: 2/3 vote of Senators present and voting (separate proposals by Knowland, Bush, and Jenner).
- 1959: Cloture rule amended to 2/3 vote of Senators present and voting. Cloture could now be invoked in debates on rule changes.
- 1960: Proposal to reduce cloture rule to majority vote of the entire Senate (Javits).

- 1961-62: Proposal to reduce cloture rule: 3/5 vote (Anderson).
- 1961-62: Proposal to reduce cloture rule to majority vote (Humphrey and Kuchel).
- 1961-62: Proposal to restore previous question motion.
- 1963-64: Proposal to reduce cloture rule: 3/5 vote (Anderson).
- 1963-64: Proposal to reduce cloture rule to majority vote of the entire Senate 15 days after motion (Humphrey).
- 1963-64: Proposal to reduce cloture rule: 3/5 vote of entire Senate.
- 1965-66: Proposal to reduce cloture rule: 3/5 vote (Anderson).
- 1965-66: Proposal to reduce cloture rule to majority vote of the entire Senate (Douglas).
- 1965-66: Proposal to reduce cloture rule to majority vote (Morse).
- 1965-66: Proposal to reduce cloture rule to 3/5 vote (Miller).
- 1967-68: Proposal to reduce cloture rule to 3/5 vote (McGovern and Morton).
- 1967-68: Proposal to reduce cloture rule to majority vote after 20 days of debate (Kuchel).
- 1969-70: Proposal to reduce cloture rule to 3/5 vote (Church and Pearson).
- 1971: Proposal to reduce cloture rule to 3/5 vote (Church and Pearson).
- 1971: Proposal to reduce cloture rule: 2/3 vote of all Senators for first cloture petition; reduce cloture vote requirement by one vote on each successive cloture vote, until 3/5 vote (Dole).

- 1975: Cloture rule amended to 3/5 vote of entire Senate.
 - 1995: Proposal to reduce cloture vote: first vote requirement would remain 60; second vote requirement would be reduced to 57; third vote requirement would be reduced to 54; fourth and subsequent vote requirements would be 51, a majority of the entire Senate (Harkin and Lieberman).
 - 2003: Proposal to reduce cloture vote: first vote requirement would remain 60; second vote requirement would be reduced to 57; third vote requirement would be reduced to 54; fourth and subsequent vote requirements would be 51, a majority of the entire Senate (Miller).

Frequency of attempted filibusters

It is difficult to quantify the number of filibusters that have been attempted in the history of the United States Senate, in part because it is difficult to identify precisely when a filibuster is taking place. The taking of a cloture vote (since cloture was first made available in 1917) is one way to count filibusters, but it is an imprecise way. Cloture petitions can be used to attempt to limit debate when debate is being used to delay indefinitely consideration of a matter. But cloture can also be a simple way to manage the Senate, when there is no actual desire by any member to engage in a filibuster.

In 1994, the Democratic Study Group of the U.S. House of Representatives published a study, entitled *A Look at the Senate Filibuster*, which endeavored to count all filibusters in U.S. Senate history up to that date. The results of that count are listed below, by number of attempted filibusters per year.

Importantly, this count does not distinguish between filibusters used not to block all action, but simply to ensure adequate debate and opportunity for amendment, on the one hand, and filibusters used to block action altogether, on the other hand. Naturally, only those filibusters of the latter kind trigger constitutional questions.

1841	2	1917	1	1946	4	1972	4	1991	13
1846	2	1919	7	1948	1	1973	4	1992	22
1850	1	1921	1	1949	1	1974	10	1993	9
1863	1	1922	7	1950	2	1975	12		
1865	1	1923	1	1953	1	1976	3		
1876	1	1925	1	1954	1	1977	4		
1879	1	1926	2	1957	1	1978	4		
1881	2	1927	6	1960	2	1979	2		
1890	3	1928	1	1961	1	1980	9		
1893	1	1929	1	1962	2	1981	2		
1897	1	1930	2	1963	1	1982	8		
1901	1	1931	1	1964	2	1983	8		
1903	4	1933	1	1965	3	1984	9		
1907	1	1935	5	1966	2	1985	11		
1908	1	1936	2	1967	2	1986	12		
1911	2	1937	1	1968	2	1987	9		
1913	1	1939	1	1969	3	1988	12		
1914	5	1942	1	1970	5	1989	10		
1915	1	1944	1	1971	4	1990	14		

The Dark History of the Filibuster

Arguably, the history of the filibuster is largely the history of obstruction to the progress of civil rights, including the feared filibuster of Thurgood Marshall and the current filibusters of Miguel Estrada and Justice Priscilla Owen.

- 1841: John C. Calhoun fought Henry Clay's efforts to restore the previous question motion and his alternative proposal to impose time limits on debates. Calhoun was motivated by a desire to accommodate the views of the slaveholding white South.
- 1879, 1890-91: Senator George Hoar tried to end Democratic filibuster of bill to allow military to police elections and combat intimidation of black voters in the South. Bill killed.
- 1922, 1935, 1938: Anti-lynching legislation filibustered.
- 1942, 44, 46: Anti-poll-tax legislation filibustered.
- 1946, 1950, 1957, 1960, 1962, 1964, 1965, 1966, 1968, 1972, 1975: Filibusters of anti-race discrimination statutes in employment, housing, public accommodation, and voting
- 1961: President Kennedy gave Marshall a recess appointment to the Second Circuit after determining that Senate Democrats might not quickly confirm him, and then sent his nomination to the Senate for its consideration. Senate Democrats considered, but ultimately decided not to conduct, a filibuster against Marshall. The Senate did not confirm Marshall, however, until eleven months after he first began serving his recess appointment. Marshall would serve on the Second Circuit until appointed Solicitor General in 1965, and then Associate Justice in 1967.²
- 2003: A bipartisan majority of Senators is prepared to confirm Miguel Estrada to the federal bench and make him the first Hispanic ever to serve on the prestigious U.S. Court of Appeals for the D.C. Circuit, but a partisan minority of 45 Democrats will not allow the Senate to vote on his nomination.

² See Mark V. Tushnet, *Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991*, at 9-13 (1997).

FILIBUSTERS AND THE CONSTITUTION

Majority vs. supermajority voting rules in the Constitution

The text of the Constitution nowhere contemplates a supermajority vote requirement to confirm judges. To the contrary, Article II states that “[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges.” It has long been understood that simple majority vote is always the implicit rule except where the Constitution expressly states otherwise.

- As the Supreme Court unanimously held in *United States v. Ballin* (1892), “the 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.”
- **Section 41 of Thomas Jefferson’s *Manual of Parliamentary Procedure***, which still governs the House today, and which Thomas Jefferson used to govern the Senate when he was Vice President, states: “The voice of the majority decides. For the *lex majoris partis* is the law of all councils, elections, &c. where not otherwise expressly provided.”
- In **Federalist 22**, **Alexander Hamilton** declared that “the fundamental maxim of republican government . . . requires that the sense of the majority should prevail.”
- In **Federalist 58**, **James Madison** stated that “the fundamental principle of free government would be reversed” if supermajority voting requirements were the norm. “It would be no longer the majority that would rule: the power would be transferred to the minority.”

Had the Founders intended to impose supermajority requirements for the confirmation of nominees, they presumably would have done so explicitly. For example:

- “[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 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 of the Articles of Confederation stated 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.”

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.

May 1, 2003

Finally, it would be odd to argue, for example, that treaties require a two-thirds vote, but that the Senate can set any vote requirement it wants for nominees – including a vote requirement even higher than two-thirds. The Founders clearly intended for Senate consent to treaties to be more difficult to obtain than Senate consent on nominees.

Indeed, the Senate Rules contemplate, but nowhere explicitly state, that a simple majority is required to confirm Presidential nominees. No express rule is necessary, because the constitutional implication is clear and un rebuttable.

Extraconstitutional supermajority voting rules

Given that the Constitution implicitly establishes a majority vote requirement for the confirmation of judicial nominees, it seems reasonable to conclude that the Senate may not use its power to make rules to add an extraconstitutional supermajority vote requirement.

After all, the Senate's power to make its own rules is not unlimited. As the Supreme Court unanimously held in *United States v. Ballin* (1892), "[t]he constitution empowers each house to determine its rules of proceedings. It may not 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 sought to be attained."

A supermajority cloture rule to ensure adequate debate is one thing. Supermajority vote requirements to close debate prematurely arguably survives the *Ballin* test of reasonableness. But use of that supermajority cloture rule to effectively **change the Constitution** and increase the vote requirement altogether is quite another thing. At least as an initial matter, it is difficult to see how such a regime could survive scrutiny under *Ballin*.

- The strongest counterargument is that there is a long tradition of filibusters and supermajority cloture vote requirements preventing the enactment of legislation in the Senate. (This tradition is bolstered by House Rule XXI(5), enacted as part of the Contract with America in 1995, under which tax increases can be enacted only by a 3/5 vote.)

The best legal response is that this tradition, however regrettable, at most applies primarily to legislation, and not to nominations. Moreover, as explained in the following pages, there are important constitutional distinctions between Congress's power with respect to legislation and its power respect to nominations.

- A second counterargument is that the cloture rule is not a substantive rule on the merits of the underlying matter, but rather a mere procedural rule.

The best response is that such a distinction, especially when the cloture rule is being used effectively to change the vote requirement on the underlying matter, and not merely to ensure adequate debate, elevates form over substance and violates the *Ballin* rule of reasonableness.

Prominent Democrats Who Call ALL Filibusters Unconstitutional

A number of prominent Democrats have previously argued that all filibusters – whether of legislation or any other matter requiring majority rule under the Constitution – are unconstitutional:

- **Senator Lieberman** on January 4, 1995: “the filibuster rule . . . there is no constitutional basis for it. . . . it is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate.” And on January 5: “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 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.” *Congressional Record*.
- **Senator Daschle** on January 30, 1995: “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 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.” *CR*.
- **Senator Harkin** on March 1, 1994: “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.” *CR*.
- **Lloyd Cutler** on April 19, 1993: “requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional.” And again on May 3, 1993: “the Senate rule requiring a super-majority vote to cut off debate is unconstitutional.” *Wash. Post*.

The argument, if anything, is even stronger with respect to judicial nominations.

Filibustering Legislation vs. Nominations

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 power to appoint judges and executive officials, by contrast, are vested in the President pursuant to Article II, Section 2.

It is well established that, unlike the power to enact legislation, the appointment power is an executive power.

- The Senate itself recognizes this dichotomy by establishing two separate calendars of business: the legislative calendar and the *executive calendar*. Senate business on nominations is recorded in a separate Senate *executive journal*, conducted during *executive session*, and coordinated by an *executive clerk*.

Thus, the Senate’s tradition of allowing a minority to obstruct legislation by filibuster does not, alone, justify allowing a minority to obstruct nominations. Even assuming that the Senate’s power to make rules extends to supermajority vote requirements in the legislative context, it does not automatically follow that such power extends to 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 power of appointment – are construed narrowly, and are not permitted absent a clear expression in the constitutional text.
 - As Alexander Hamilton once noted, and the Supreme Court once quoted, “The general doctrine of our Constitution then 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.” *Myers v. United States*, 272 U.S. 52, 138-39 (1926).

- The Founders deliberately made it difficult to enact legislation, by imposing both the constitutional requirement of bicameralism – approval by two separately elected representative bodies – and the element of presentment – approval by the President, or in the alternative, the approval of two-thirds of each house of Congress. The Founders did not intend, by contrast, to make it difficult to appoint individuals to government office. To the contrary, Article II *mandates* that the President “*shall* nominate” and, with the Senate’s consent, “*shall* appoint” individuals such as judges.
- Filibusters of nominations are offensive to constitutional structure and separation of powers, because they effectively re-order the Constitution’s allocation of executive power with respect to appointments. The Senate may not by rule enhance its own power at the expense of the President by giving itself a larger role in the appointment process than originally contemplated by the Constitution.
 - As D.C. Circuit Chief Judge Harry Edwards once explained, “[i]f Congress is allowed to employ the rulemaking clause to impose new supermajority requirements beyond those already stated in the Constitution, the potential for mischief is great.” For example, the Senate might “adopt an internal rule of procedure that requires the votes of three-fifths, rather than one-half, of its Members to confirm a presidential appointee. The Senate, acting unilaterally, could thereby increase its own power at the expense of the President. I think it is clear 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.” *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997) (Edwards, C.J., dissenting).
 - As one legal commentator has noted, “if the Senate were allowed to adopt such a rule, it would be able singlehandedly to 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 distort the balance of powers established by the Constitution.” Susan Low Bloch, *Congressional Self-Discipline: The*

Constitutionality of Supermajority Rules, 14 Const. Comment. 1, 4 (1997).

- Filibusters of **judicial** nominations are especially offensive because they offend not only constitutional structure and separation of powers with respect to the executive branch, but also constitutional structure and separation of powers with respect to the judiciary. Article III clearly endeavors to establish an independent judiciary. Increasing the role of the Senate increases the politicization of the judiciary and presents an inherent threat to the constitutional independence of the judiciary.

Absence of Filibuster Practice Against Nominations

Unlike the extensive Senate tradition of using filibusters against legislation to prevent a majority from enacting laws, no such tradition exists with respect to judicial nominations.

- According to the Congressional Research Service, only one judicial nominee has ever been blocked by filibuster.
 - In 1968, President Lyndon Johnson nominated **Justice Abe Fortas** to be Chief Justice, but the Senate defeated a motion to invoke cloture by a vote of 45-43. In this case, there was apparently no majority of the Senate that was actually prepared to press its constitutional prerogative to consent to Fortas. Quite the contrary, Fortas suffered under a substantial ethical cloud – indeed, one that eventually led him to resign from the bench altogether, under threat of impeachment. So the strength of his support was likely quite weak. Moreover, opposition to Fortas was bipartisan – 24 Republicans and 19 Democrats voted against cloture – a significant obstacle that would obviously discourage any majority of the Senate from enforcing its constitutional authority. In any event, President Johnson withdrew Fortas's nomination just a few days after the cloture vote, thereby depriving the Senate from taking further action anyway. In addition, Fortas was unable to muster the support of 51 votes, let alone 60 votes, to invoke cloture, so it is hardly obvious that Fortas would have even received a majority had everyone voted.
- According to the Congressional Research Service, only two executive nominees have ever been blocked by filibuster: (1) the 1994 nomination of **Sam Brown** to be Ambassador to the Conference on Security and Cooperation in Europe, and (2) the 1995 nomination of **Dr. Henry Foster** to be Surgeon General. Importantly, neither case involved critical positions in our nation's government which might have motivated a majority to press its constitutional right to consent to executive branch nominees. And in neither situation, of course, presented any threat to the independence of the judiciary.

The Senate has no tradition of tolerating filibusters of judicial nominees in the face of majority support. To the contrary, the Senate has repeatedly confirmed judicial nominees in recent years with the support of less than 60 votes. (See next page.)

Judges confirmed with less than 60 votes (97th-108th Congresses)

The tradition and practice of the Senate strongly favors confirmation when a majority of the Senate is prepared to exercise its constitutional power to give its consent to the President's judicial nominees. On numerous occasions when a judicial nominee has enjoyed the support of a majority of Senators, but fewer than the 60 votes necessary under the Senate's cloture rule, the Senate has confirmed the judicial nominee. This Senate tradition and practice has been applied at every level of the federal judiciary.

<u>Judge</u>	<u>Court</u>	<u>Vote</u>	<u>Date of Vote</u>
J. Harvie Wilkinson III	4th Cir.	58-39	Aug. 9, 1984
Alex Kozinski	9th Cir.	54-43	Nov. 7, 1985
Sidney A. Fitzwater	N.D. Tex.	52-42	Mar. 18, 1986
Daniel A. Manion	7th Cir.	48-46	June 26, 1986
Clarence Thomas	S. Ct.	52-48	Oct. 15, 1991
Susan O. Mollway	D. Haw.	56-34	June 22, 1998
William A. Fletcher	9th Cir.	57-41	Oct. 8, 1998
Richard A. Paez	9th Cir.	59-39	Mar. 9, 2000
Dennis W. Shedd	4th Cir.	55-44	Nov. 19, 2002
Timothy M. Tymkovich	10th Cir.	58-42	April 1, 2003
Jeffrey Sutton	6th Cir.	52-41	April 29, 2003

N.B. Opponents may cite the one judicial nominee whose confirmation was actually obstructed by filibuster. In 1968, President Johnson nominated Justice Abe Fortas to be Chief Justice. The Senate denied cloture by a 45-43 vote.

We have a number of responses. The most important is that, in the Fortas case, there was apparently no majority of the Senate that was actually prepared to press its constitutional prerogative to consent to Fortas. Quite the contrary, Fortas suffered under a substantial ethical cloud – indeed, one that eventually led him to resign from the bench altogether, under threat of impeachment. So the strength of his support was likely quite weak. Moreover, opposition to Fortas was bipartisan – 24 Republicans and 19 Democrats voted against cloture – a significant obstacle that would obviously discourage any majority of the Senate from enforcing its constitutional authority. In any event, President Johnson withdrew Fortas's nomination just a few days after the cloture vote, thereby depriving the Senate from taking further action anyway. In addition, Fortas was unable to muster the support of 51 votes, let alone 60 votes, to invoke cloture, so it is hardly obvious that Fortas would have even received a majority had everyone voted.

Litigation against supermajority vote requirements

The constitutionality of filibusters, and other attempts to establish extraconstitutional supermajority voting rules, have been repeatedly challenged in court, in three distinct cases filed in the District of Columbia. No court has ever addressed the issue on the merits, however.

Courts instead have dismissed such challenges on procedural grounds – specifically, the absence of a qualified plaintiff with standing to sue. Moreover, it may be that courts have no jurisdiction whatsoever over these suits, because such issues are inherently political questions involving the Senate’s internal rulemaking procedures and thus cannot be resolved by courts due to separation of powers concerns. For example, in *Nixon v. United States* (1993), the Supreme Court held that courts have no jurisdiction to opine upon the constitutionality of Senate impeachment trial proceedings and procedures. A similar principle could be applied to the making and interpretation of Senate rules.

That said, Lloyd Cutler has publicly opined that, “if you were able to get the issue before a court, it is a winnable case.” *Roll Call*, Oct. 14, 1993. In two *Washington Post* op-eds, Cutler argued that the “requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional.” *Washington Post*, Apr. 19, 1993.

- In 1993, Douglas R. Page, a California voter, challenged the constitutionality of the supermajority voting rule for invoking cloture on legislation, in a case styled *Page v. Dole*. In 1994, the district court dismissed the case for lack of standing. In *Page v. Dole*, 1996 WL 310132 (D.C. Cir.), the D.C. Circuit ordered that the case be dismissed as moot, on the ground that the Democrats no longer held a majority of the Senate.
- Page filed suit again in *Page v. Shelby*, 995 F. Supp. 23 (D.D.C. 1998). The court again dismissed the complaint for lack of standing. In doing so, however, the court noted that “Mr. Page is not challenging a super-majority requirement for legislative passage, but an internal, procedural rule requiring a super-majority vote to close debate,” even though such a distinction may elevate form over substance when the cloture rule is abused for purposes other than ensuring adequate debate. The D.C. Circuit affirmed the district court’s dismissal order for substantially the same reasons, 1998 WL 700165 (D.C. Cir.).

- Relatedly, in *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997), members of the House of Representatives challenged the constitutionality of the House's three-fifths rule for approving tax increases. On appeal, a majority of the court found no standing for the suit. The court found no injury in part because "the House Rules allow any Member to introduce a resolution to amend or to repeal" the three-fifths rule and "any such resolution could be adopted by the vote of a simple majority." The court also noted that "the appellants point to no instance in which a Member . . . proposed to waive the Rule but the House voted against waiving the rule." Accordingly, the rule did "did not appear in practice to prevent a simple majority from enacting an income tax increase."

Moreover, Chief Judge Edwards dissented in *Skaggs*, addressed the merits, and concluded that the House rule is unconstitutional. He is apparently the only Article III judge ever to have commented on the merits of an extraconstitutional supermajority voting rule in a judicial opinion. He stated that, "[i]f Congress is allowed to employ the rulemaking clause to impose new supermajority requirements beyond those already stated in the Constitution, the potential for mischief is great." For example, the Senate might "adopt an internal rule of procedure that requires the votes of three-fifths, rather than one-half, of its Members to confirm a presidential appointee. The Senate, acting unilaterally, could thereby increase its own power at the expense of the President. I think it is clear 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."

The Edwards dissent is carefully crafted not to condemn filibusters, however. Quite the contrary, Judge Edwards expressly stated that "[r]equiring a supermajority to pass a bill into law can be distinguished from procedural rules – like the Senate cloture rule – that require a supermajority to bring an issue to a vote. Although such supermajority requirements may hinder or help a bill to become law, these procedural rules do not explicitly conflict with the presentment clause requirement that a bill that has passed be presented to the President."

RULEMAKING AND THE CONSTITUTION

Separate and apart from the issue of whether Senate Rules may deny a majority its constitutional power to consent to judicial nominees is the question whether Senate Rules may deny a majority its constitutional power to make or change Senate Rules. Under Rule XXII, debate on a rule change can be forcibly ended only with the approval of two-thirds of the Senators present and voting. The Constitution implicitly imposes a majority vote requirement for making rules, however.

- Arguably, a majority of the Senate always retains the constitutional power to change the rules, regardless of what the Senate Rules might state. Vice Presidents Richard Nixon and Hubert Humphrey, in their capacities as presiding officers of the Senate, and numerous legal scholars, from Erwin Chemerinsky to John McGinnis, have so opined.

(In previous Congresses, however, this constitutional view has been rejected by Senate majorities.)

- Just as one Congress cannot enact a law that a subsequent Congress cannot amend by majority vote, one Senate cannot enact a rule that a subsequent Senate cannot amend by majority vote.
 - Such power would violate our common law understandings that one parliament cannot bind another. As 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 it’s ordinances could bind the present parliament.”
 - Such power would violate our U.S. Constitution because it would be a power tantamount to amending the Constitution by majority vote.
 - Thus, as the Supreme Court unanimously held in *United States v. Ballin* (1892), “[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.”

After all, “[e]very 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. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.” *Newton v. Commissioner* (1879).

“[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.” *Connecticut Mutual Life Ins. Co. v. Spratley* (1898).

- It has been argued that, because the Senate is a continuing body, the Senate may restrict its authority to change its own rules in the future. Specifically, Senate Rule V states that “[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”
 - But the Senate has precisely the same power to make its rules as the House. Neither the House nor the Senate possesses the constitutional power to entrench its own rules as against the will of future legislators.

History of Majority Rule to Change Senate Rules

On a number of occasions, individual senators and even Vice Presidents (in their role as presiding officers of the Senate) have argued or concluded that, as a constitutional matter, a majority of the Senate has the power to change the rules, notwithstanding Rule XXII. The entire Senate has rejected such arguments on every occasion in which the argument has been attempted, however. (Also noteworthy: in 1967-68 and in 1975, it appears that the constitutional question could have been decided by non-debatable (and thus non-filibusterable) tabling motion, and thus by majority vote.)

Individuals whose names are underlined below took the position that Rule XXII cannot constitutionally prevent a majority from changing the rules.

- 1953: Senator Clinton Anderson (D-NM) moved at the opening of a new Congress that the Senate was not constitutionally bound by its old rules, and that a majority had the constitutional power to adopt new rules. The motion was tabled by Senator Robert Taft (R-OH) on a 70-21 vote.
- 1957: Senator Anderson again moved to adopt new rules by majority vote at the opening of a new Congress, and the motion was again tabled, this time by Senator Lyndon Johnson (D-TX) on a 55-38 vote. During the course of debate, however, Vice President Richard Nixon opined that, as a constitutional matter, the Senate could always adopt new rules by majority vote regardless of the Senate Rules. He stated that Rule XXII was unconstitutional as applied to rule changes supported by a majority. But he also concluded that constitutional questions, unlike nonconstitutional parliamentary procedural issues, could be decided only by the Senate itself, and not by the presiding officer.
- 1959: Senate adopts new rule expressly affirming the Senate's existence as a continuing body, stating that "[t]he rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."
- 1961: Vice President Nixon reaffirmed his 1957 advisory opinion.
- 1967-68: Senators George McGovern (D-SD) and Thurston Morton (R-KY) proposed a rules change at the beginning of the Congress, and

moved that, as a constitutional matter, the Senate could always adopt new rules by majority vote regardless of the Senate Rules. Senator Everett Dirksen (R-IL) raised a point of order that McGovern's motion violates Rule XXII. McGovern moved to table the Dirksen point of order. Vice President Hubert Humphrey ruled that the Senate must decide constitutional questions. Humphrey further ruled that a successful tabling motion would affirm the validity of McGovern's constitutional position. But the McGovern tabling motion failed on a 37-61 vote, and Dirksen's point of order subsequently carried on a 59-37 vote. Hence, the Senate rejected McGovern's constitutional motion.

- 1969: Senator Frank Church (D-ID) inquired of the Chair whether a majority of the Senate could vote to determine the constitutional issue of the majority's power to change the rules, notwithstanding Senate Rule XXII. Vice President Humphrey agreed, stating: "On a par with the right of the Senate to determine its rules . . . is the right of the Senate, a simple majority of the Senate, to decide constitutional questions." The Senate voted 51-47 in favor of Church's cloture motion, and Vice President Humphrey ruled that cloture had been successfully invoked, pursuant to the Constitution and notwithstanding Senate Rules. But the Vice President's decision was appealed and reversed on a 53-45 vote.
- 1971: Senator Javits appealed the decision of the Chair that cloture on a rule change had not been invoked pursuant to a 2/3 vote rule, raising the question whether the Senate could change the rules by majority vote notwithstanding Rule XXII. Majority Leader Mike Mansfield moved to table the appeal, and the motion to table carried on a 55-37 vote.
- 1975: Senator Pearson moved that a majority would be sufficient to close debate and to adopt a rule change to Rule XXII, notwithstanding Rule XXII. Mansfield raised a point of order that the effort to end debate by a simple majority vote violates Senate rules. A constitutional issue having been raised, Vice President Nelson Rockefeller submitted the question to the Senate whether Mansfield's point of order is well taken. On motion of Senator Mondale, the Senate tabled the point of order by a 51-42 vote and thereby temporarily endorsed majority cloture for rule changes as a constitutional matter. But the Senate subsequently reconsidered the vote to table Mansfield's point of order on a 53-38 vote, the motion to table was then rejected on a 40-51 vote, and the point of order is sustained on a 53-43 vote.

DRAFT

The provision of Rule 22 of the Standing Rules of the Senate that provides that an affirmative vote of "two-thirds of the Senators present and voting" shall be necessary for cloture on a motion to amend the Senate rules is unconstitutional.

- The Constitution provides: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a member." Art. I, § 5, cl. 2. This provision plainly contemplates that a majority of each House may determine its rules.
 - In a single sentence like this, the *expressio unius* inference is at its strongest. This sentence certainly appears to contemplate that a different, lower standard will be required to determine the Rules of Proceedings than to expel a member. Indeed, James Madison suggested that the two thirds provision be added precisely because "the right of expulsion ... was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused." James Madison, 2 Debates in the Federal Convention of 1787, 378. This indicates that he understood majority rule to be the background principle in this sentence in particular.
 - As the Supreme Court stated in a case involving the rulemaking authority of the House of Representatives: "[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 in so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations." *United States v. Ballin*, 144 U.S. 1, 6 (1892).
- The Constitution prohibits the Senate from requiring a supermajority to change a rule. A House does not have the power to alienate its (and its successors') ability to revise its rules in the future.
 - It has universally been recognized that, absent a change in the foundational document, each legislature must have the same powers as its predecessors and its successors. This means that a legislature cannot bind, and thereby limit, the power of its successors.
 - As Blackstone 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 it's [sic] ordinances could bind the present parliament."¹
 - The Supreme Court has ratified this principle of legislative equality over

time in a long and unbroken string of opinions. For example:

- “Every succeeding legislature possesses the same jurisdiction and power ... 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. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.” *Newton v. Mahoning County Commissioners*, 100 U.S. 548, 559 (1879).
- “No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. . . . The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances.” *Stone v. Mississippi*, 101 U.S. 814, 819-20 (1879) (internal quotation omitted).
- “The power [of each House] to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house. . . .” *United States v. Ballin*, 144 U.S. 1, 5 (1892).
- “By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses. The dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years.” *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932).

- [Add any more recent cases]
- OLC has also embraced this principle:
 - In considering one supermajority proposal, for example, we opined: “[U]nlike a constitutional amendment, the draft legislation would not have a truly binding effect on Congress. Clearly, Congress cannot by legislation prevent itself from enacting future legislation pursuant to whatever procedures it chooses to follow at that future time. A future Congress can always legislatively change what a previous Congress has done. In a legally enforceable sense, therefore, such future lawmaking would be regulated only by the requirements of the Constitution. Thus, notwithstanding the provisions of the draft bill, a future Congress could follow whatever procedures it chooses to apply with respect to a particular appropriations bill, including passage by less than a supermajority.” Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Draft Budget Process Reform Legislation*, at 2 (May 26, 1987).
 - In reviewing another statute, we found that a provision did purport to entrench itself, and thus “would prospectively nullify the ability of Congress and the President to enact effective legislation on a designated subject.” We concluded that “[s]uch a measure is incompatible with the provisions for the enactment of laws set forth in Art. I, § 7 of the Constitution because it purports to invalidate by statute subsequent legislation duly enacted through valid constitutional processes.” Memorandum for the General Counsel, Department of Veterans Affairs, *Re: Gulf War Veterans Health Statutes*, 1999 WL 33219988 (O.L.C.) (1999) (preliminary print).
- A long line of scholarship also affirms this principle:
 - In 1868, Thomas Cooley explained: “To say that the legislature may pass unrepealable laws, is to say that it may alter the very constitution from which it derives its authority; since in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors, and the process might be repeated until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision, that the legislative power

shall be vested in two houses, would be to a greater or less degree rendered ineffectual." Thomas M. Cooley, *A Treatise on Constitutional Limitations* 125-26 (photo reprint 1972) (1868).

- "Although the law made by any branch—whether by legislation, executive order, or judicial decision—may extend beyond the tenure of particular officeholders, the Constitution limits trans-temporal commandeering of a branch by its current occupants through the device of generally preventing any branch from making the meta-law necessary to tie the hands of future officeholders of that branch." Laurence H. Tribe, *American Constitutional Law* §2- 3, at 125 n.1 (3d ed. 2000). *See also* Catherine Fisk & Edwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 245-52 (1996); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 *Yale L.J.* 483, 503-07 (1995); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 *Harv. L. Rev.* 2085, 2114- 2120 (2002).
- This principle also means that the Senate cannot bind itself through an entire Congress.
- As OLC has previously stated: "In holding that an act of Congress cannot bind 'future Congresses,' *Lopez Andino* and other cases using such phrasing do not implicitly suggest that an act of Congress can bind the same Congress when that Congress subsequently undertakes to enact legislation contrary to the earlier enactment. In either circumstance, the controlling general principle is that an act of Congress (as distinguished, for example, from an amendment to the Constitution) cannot prohibit the enactment of subsequent contrary legislation through valid constitutional processes." Memorandum for the General Counsel, Department of Veterans Affairs, *Re: Gulf War Veterans Health Statutes*, 1999 WL 33219988 (O.L.C.) (1999), at n.2 (preliminary print).
- In any event, the current Senate has not itself adopted Rule XXII. That rule remains in effect by virtue of having been adopted in a previous Congress. [When?]
- The two-thirds cloture rule, even though not a rule on final passage, effectively requires a supermajority

¹ John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 *Yale L.J.* 483, 505 (1995) (alteration in original) (quoting 1 William Blackstone, *Commentaries* 90).



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CORNYN TO CONVENE HEARING TO DISCUSS "FRESH START" IN JUDICIAL CONFIRMATION PROCESS

Senators, leading constitutional scholars to testify

WASHINGTON – U.S. Sen. John Cornyn, Chairman of the Judiciary Committee's subcommittee on the Constitution, announced Thursday a list of witnesses scheduled to testify in the hearing he will convene on reforming the broken judicial confirmation process. The hearing, **Judicial Nominations, Filibusters, and the Constitution: When a majority is denied its right to consent**, will be held in 226 Dirksen on Tuesday, May 6, 2003 at 2:30 p.m.

The witnesses scheduled to testify are Sens. Zell Miller (D-Ga.), Chuck Schumer (D-NY), and Arlen Specter (R-Pa.), as well as constitutional scholars Bruce Fein, Fein & Fein; Dean Douglas W. Kmiec, Catholic University School of Law; Professor Steven G. Calabresi, Northwestern School of Law; and Professor John C. Eastman, Chapman Law School.

"These witnesses, with their vast constitutional knowledge and confirmation process expertise, will provide a broad range of insight and ideas into how best to reform the judicial confirmation process. We hope to identify not only the flaws in the current system, but how they can best be addressed," Sen. Cornyn said. "The hearing will provide a forum for all sides to raise important concerns and suggestions with the intent of creating a fair and reasonable process of confirming judicial nominees."

The hearing comes two years after President Bush announced his first class of nominees to the federal courts of appeals, including Texas Supreme Court Justice Priscilla Owen, whose nomination is being filibustered by a partisan minority of the Senate. Five of the 11 nominees have still not had a vote by the full Senate.

"It's encouraging that Sen. Schumer, my colleague on the subcommittee, has acknowledged that the system is broken and has offered a proposal of his own. Our hearing will review his, and many other proposals," Chairman Cornyn added.

Sen. Cornyn chairs the subcommittee on the Constitution, Civil Rights & Property Rights, and is the only former judge on the committee. He also serves on the Armed Services, Environment and Public Works, and Budget Committees. He served previously as Texas Attorney General, Texas Supreme Court Justice, and Bexar County District Judge.

-See below for biographies of the witnesses-

Bruce Fein, Fein & Fein

Bruce Fein is a nationally acclaimed expert on constitutional law. He has more than 25 years of experience in legal fields ranging from antitrust to communications to national security law. He is former Associate Deputy Attorney General in the Department of Justice and former General Counsel of the Federal Communications Commission. Both parties in Congress have repeatedly summoned Mr. Fein to testify on various constitutional subjects. According to National Law Journal, he is one of the seven most quoted attorneys in the nation. He regularly appears on national radio and television, including National Public Radio, Face the Nation, C-Span and MSNBC.

Douglas W. Kmiec, Catholic University School of Law

One of the nation's leading experts in constitutional law, Douglas W. Kmiec previously held the Caruso Family Chair in Constitutional Law at Pepperdine University School of Law. Prior to that post, he taught constitutional law at the University of Notre Dame for nearly two decades. Professor Kmiec has previously served as Assistant Attorney General for the Office of Legal Counsel in the U.S. Department of Justice.

Dean Kmiec has authored or co-authored numerous books and articles on constitutional issues and the role of the U.S. Supreme Court. These include books co-authored with distinguished legal historian Stephen B. Presser - *The American Constitutional Order, Individual Rights and the American Constitution*, and *The History, Structure and Philosophy of the American Constitution*.

Steven G. Calabresi, Northwestern School of Law

Professor Calabresi is a member of the faculty of the Northwestern University School of Law and is a graduate of the Yale Law School and of Yale College. He served as a Law Clerk to Justice Antonin Scalia of the United States Supreme Court. From 1985 to 1990, he served in the Reagan and Bush Administrations working both in the White House and before that in the U.S. Department of Justice. Since joining the Northwestern Faculty in 1990, Professor Calabresi has participated in constitutional reform conferences with Eastern European officials.

John C. Eastman, Chapman School of Law

John Eastman is a Professor of Law at the Chapman University School of Law, specializing in Constitutional Law and Legal History. He is also the Director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute for the Study of Statesmanship and Political Philosophy. Prior to joining the Chapman law faculty, Dr. Eastman served as a law clerk to the Honorable Clarence Thomas, Associate Justice, Supreme Court of the United States.

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SENATE.]

Proceedings.

[August, 1789.]

Mr. IZARD, in behalf of the committee appointed the 6th of August, "to wait on the President of the United States, and confer with him on the mode of communication," &c. reported:

The consideration of which was postponed until to-morrow.

FRIDAY, August 21.

The Senate proceeded to the consideration of the bill for registering and clearing of vessels, regulating the coasting trade, and for other purposes.

Ordered, That the bill be read the third time to-morrow.

The Senate entered on Executive business. They proceeded to consider the report made by Mr. IZARD, yesterday, as follows:

The committee appointed to wait on the President of the United States, and confer with him on the mode of communication proper to be pursued between him and the Senate, in the formation of treaties, and making appointments to offices, reported:

Resolved, That when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration; that when the President of the United States shall meet the Senate in the Senate Chamber, the President of the Senate shall have a chair on the floor, be considered as at the head of the Senate, and his chair shall be assigned to the President of the United States; that when the Senate shall be convened by the President of the United States to any other place, the President of the Senate and Senators shall attend at the place appointed. The Secretary of the Senate shall also attend to take the minutes of the Senate.

That all questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States; and the Senators shall signify their assent or dissent by answering, *viva voce*, aye or no.

Another Message was received from the PRESIDENT, viz:

Gentlemen of the Senate:

In addition to the nomination which I made yesterday, of Benjamin Lincoln, as one of three commissioners to be employed to negotiate a treaty with the Southern Indians, I now nominate Cyrus Griffin and David Humphreys, as the two other commissioners to be employed to negotiate the before-mentioned treaty.

GEO. WASHINGTON.

NEW YORK, August 21, 1789.

Proceeded to the consideration of the last recited nominations, and the Senate did advise and consent to the appointments accordingly.

Also, the following Message:

Gentlemen of the Senate:

The President of the United States will meet the Senate, in the Senate Chamber, at half-past eleven o'clock to-morrow, to advise with them on the terms of the treaty to be negotiated with the Southern Indians.

GEO. WASHINGTON.

NEW YORK, August 21, 1789.

SATURDAY, August 22.

The memorial of John Cox, and others, citizens of the State of New Jersey and of the State of Pennsylvania, praying that the future seat of Government might be established on the banks of the Delaware, and proposing a cession of a tract of land of ten miles square, was then read, and, together with a draft of the said tract, was laid on the table for consideration.

Proceeded to the third reading of the bill for registering and clearing of vessels, regulating the coasting trade, and for other purposes; and after progress.

The Senate again entered on Executive business.

The PRESIDENT of the UNITED STATES came into the Senate Chamber, attended by General Knox, and laid before the Senate the following statement of facts, with the questions thereto annexed, for their advice and consent:

"To conciliate the powerful tribes of Indians in the southern district, amounting probably to fourteen thousand fighting men, and to attach them firmly to the United States, may be regarded as highly worthy of the serious attention of Government.

"The measure includes not only peace and security to the whole southern frontier, but is calculated to form a barrier against the colonies of a European Power, which in the mutations of policy, may one day become the enemy of the United States. The fate of the Southern States, therefore, or the neighboring colonies, may principally depend on the present measures of the Union towards the Southern Indians.

"By the papers which have been laid before the Senate, it will appear that, in the latter end of the year 1785, and the beginning of 1786, treaties were formed by the United States with the Cherokees, the Chickasaws, and Choctaws. The report of the commissioners will show the reasons why a treaty was not formed at the same time with the Creeks.

"It will also appear by the papers, that the States of North Carolina and Georgia protested against said treaties as infringing their legislative rights, and being contrary to the confederation. It will further appear, by the said papers, that the treaty with the Cherokees has been entirely violated by the disorderly white people on the frontiers of North Carolina.

"The opinion of the late Congress respecting the said violation will sufficiently appear by the proclamation which they caused to be issued on the 1st September, 1788.

"By the public newspapers, it appears, that on the 16th June last, a truce was concluded with the Cherokees, by Mr. John Steele, on behalf of the State of North Carolina; in which it was stipulated that a treaty should be held, as soon as possible, and that in the meantime all hostilities should cease on either side.

"As the Cherokees reside principally within the territory claimed by North Carolina, and as that State is not a member of the present Union, it may be doubted whether any efficient measures

May 6, 2001

DRAFT
MONDAY
9:30 PM

Dear Senator Schumer:

On behalf of President Bush, I write in response to your letter of April 30.

You propose that the President and Senate leader of the opposite party select in equal numbers members of citizen judicial nominating commissions in each State and circuit who would then select one nominee for each judicial vacancy. The President then would be required to nominate the individual selected by the commission and the Senate required to confirm that individual, at least absent "evidence" that the candidate is "unfit for judicial service." You propose this as a permanent change to the constitutional scheme for appointment of federal judges.

We appreciate and share your stated goal of repairing the "broken" judicial confirmation process and the "vicious cycle" of "delayed" Senate nominees. But we respectfully disagree with your proposal as inconsistent with the Constitution, with the history and traditions of the Nation's federal judicial appointments process, and with the soundest approach for appointment of highly qualified federal judges, as the Founders determined. Rather, as President Bush and many Senators of both parties have stated in the past, the solution to the broken judicial confirmation process is for the Senate to exercise its constitutional responsibility to vote up or down on judicial nominees within a reasonable time after nomination, no matter who is President or which party controls the Senate.

I. The Constitution, the Current Problem, and the Solution

Article II of the Constitution provides: The President "shall nominate, and by with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . ." During the first Congress and throughout most of this Nation's history, the Senate has both recognized and exercised its constitutional responsibility under Article II to hold majority, up-or-down votes on a President's nominees within a reasonable time after nomination. The Framers intended that the Senate vote on nominations would prevent Presidential appointment of "unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." *Federalist* 76.

Your proposal would effectively transfer the nomination power of the President and the confirmation power of the Senate to a group of unelected and unaccountable private citizens. As the Supreme Court has explained, however, the Appointments Clause is "more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches. This disposition was also designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body." *Edmond v.*

United States, 520 U.S. 651, 659 (1997) (citations omitted). Importantly, as the Supreme Court has also explained, the Appointments Clause not only guards against encroachment “but also preserves another aspect of the Constitution’s structural integrity by preventing the diffusion of the appointment power.” *Freytag v. CIR*, 501 U.S. 868, 878 (1991). Therefore, “neither Congress nor the Executive can agree to waive this structural protection” afforded by the Appointments Clause. *Id.* at 880. These principles and precedents amply demonstrate the constitutional and structural problems with any proposal to transfer the constitutional responsibilities of the President and the Senate to a group of unelected and unaccountable private citizens.

That said, we very much appreciate your recognition that the Senate’s judicial confirmation process is “broken.” The precise problem, in our judgment, is that the Senate has too often failed in recent years to hold votes on judicial nominees within a reasonable time after nomination (often because a *minority* of Senators has used procedural tactics to prevent the Senate from voting and expressing its majority will). Many appeals court nominees have waited years for votes; many others have never received votes. Today, for example, although the Senate never before has denied a vote to an appeals court nominee on account of a filibuster, a minority of Senators are engaged in unprecedented simultaneous filibusters to prevent up or down votes on *two* superb nominees, Priscilla Owen and Miguel Estrada, who were nominated two years ago and who have the support of a majority of the Senate.

The problem of the Senate not holding votes on certain judicial nominees is a relatively recent development, albeit not new to this Presidency. In the Administrations of both President George H.W. Bush in the 102nd Congress and President Clinton in the 106th Congress, for example, too many appeals court nominees never received up-or-down votes. As President Bush has explained, however, the problem has persisted and significantly worsened in the 107th and 108th Congresses during this President’s tenure.

President Bush’s commitment to solving this problem also is not new. In June 2000, during the Presidential campaign, then-Governor Bush emphasized that the Senate should hold up-or-down votes on all nominees within a reasonable time after nomination (60 days). Last fall, after two additional years of Senate delays that were causing a judicial vacancy crisis (an “emergency situation,” in the words of the American Bar Association), the President proposed a comprehensive three-Branch plan to solve the problem. President Bush stated that this three-Branch plan should apply now and in the future, no matter who is President or which party controls the Senate. In particular, he proposed that judges provide one-year advance notice of retirement where possible; in March 2003, the Judicial Conference adopted the President’s recommendation. The President proposed that Presidents nominate judges within 180 days of learning of a vacancy; the President is complying with this part of the plan and already has submitted nominations, for example, for the 15 new judgeships created on November 2, 2002. The President also proposed that the Senate vote up or down on judicial nominees within 180 days of receiving a nomination, a generous period of time for all Senators to evaluate nominees and to have their voices heard and their votes counted.

In the past, you and Senators of both parties have publicly agreed with the need for timely Senate votes on judicial nominees. On March 7, 2000, for example, you stated: “The

basic problem is it takes so long for us to debate those qualifications. It is an example of Government not fulfilling its constitutional mandate because the President nominates, and *we are charged with voting on the nominees*. . . . I also plead with my colleagues to move judges with alacrity – *vote them up or down*. But this delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of very sincere people who have put themselves forward to be judges and then they hang out there in limbo.”

In the 2000 campaign, moreover, several Democrat Senators such as Senator Leahy and Senator Harkin publicly and expressly agreed with then-Governor Bush’s proposal for timely votes on nominees. In addition, Senator Specter in 2002, Senator Leahy in 1998, and Senator Bob Graham in 1991 all introduced Senate proposals to ensure timely up-or-down votes on judicial nominees. The Chief Justice, speaking on behalf of the federal Judiciary, also has expressly asked the Senate to ensure up-or-down votes on nominees. And the American Bar Association, for its part, adopted a resolution last summer asking the Senate to hold prompt votes on judicial nominations, stating: “Vote them up or down, but don’t hang them out to dry.”

In seeking to fix the broken Senate confirmation process, we respectfully ask that you and other Senators consider these past statements ~~and the prescription~~ a sample of which are listed below, and ensure timely up-or-down Senate votes on all judicial nominees, no matter who is President or which party controls the Senate:

- *Senator Leahy* on October 3, 2000, stated: “Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don’t leave them in limbo. *Frankly, that is what we are paid to do in this body. 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.”
- *Senator Leahy* on June 18, 1998, stated: “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.”
- *Senator Daschle* on October 5, 1999, stated: “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 for Berzon and Paez.* And

after years of waiting, they deserve at least that much. . . . *I find it simply baffling that a Senator would vote against even voting on a judicial nomination.*"

- *Senator Harkin* on September 14, 2000, stated: "I'll just close by saying that *Governor Bush had the right idea*. He said the candidate should get an up or down vote within 60 days of their nomination."
- *Senator Harkin* on October 6, 2000, stated that then-Governor Bush's proposal for an up-or-down vote within 60 days of nomination was a "great idea."
- *Senator Biden* on March 19, 1997, stated: "I respectfully suggest that everyone 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.*"
- *Senator Bob Graham* on April 24, 1991, introduced a bill that would require the Judiciary Committee to report a nomination within 90 days of nomination and *would require an up-or-down vote on the floor within 120 days of nomination*. Senator Graham stated: "I consider it a judicial emergency when a judgeship is vacant for one day more than necessary."
- *Senator Kennedy* on February 3, 1998, stated: "We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. *But give them a vote.*"
- On September 21, 1999, *Senator Kennedy* stated: "It is true that some Senators have voiced concerns about these nominations. But that should not prevent a roll call vote which gives every Senator the opportunity to vote 'yes' or 'no.' . . . *These delays can only be described as an abdication of the Senate's constitutional responsibility to work with the President and ensure the integrity of our federal courts.*"
- *Senator Durbin* on September 28, 1998, stated: "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.*"
- *Senator Feinstein* on September 16, 1999, stated: "*A nominee is entitled to a vote. Vote them up; vote them down.*"
- *Senator Feinstein* on October 4, 1999, stated: "Our institutional integrity requires an up-or-down vote."
- *Senator Harry Reid* on June 9, 2001, stated: "I think we should have up-or-down votes in the committee and on the floor."

- *Senator Feingold* on March 8, 2000, stated: "All Judge Paez has ever asked for was this opportunity: an up or down vote on his confirmation. Yet for years, the Senate has denied him that simple courtesy."
- *Senator Kohl* on September 21, 1999, stated: "These nominees, who have to put their lives on hold waiting for us to act, *deserve an up or down vote.*"
 - *Senator Kohl* on May 15, 1997, stated: "[L]et's breathe life back into the confirmation process. Let's vote on the nominees who already have been approved by the Judiciary Committee, and let's set a timetable for future hearings on pending judges. *Let's fulfill our constitutional responsibilities.*"
- *Senator Lincoln* on September 14, 2000, stated: "If we want people to respect their government again, then government must act respectably. It's my hope that we'll take the necessary steps to give these men and these women especially *the up or down vote that they deserve.*"
- *Senator Boxer* on January 28, 1998, stated: "I think, whether the delays are on the Republican side or the Democratic side, let these names come up, *let us have debate, let us vote.*"
 - *Senator Boxer* on May 14, 1997, stated: "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.*"
- *Senator Sarbanes* on December 15, 1997, stated: "This politicization . . . has been extended to include the practice of denying nominees an up or down vote on the Senate floor or even in the Judiciary Committee. *If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served.*"
 - *Senator Sarbanes* on March 19, 1997, stated: "It is not whether you let the President have his nominees confirmed. *You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today.*"
- *Senator Levin* on September 14, 2000, stated: "The truth of the matter is that the leadership of the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts."

- *Senator Levin* on May 24, 2000, stated: “These Michigan candidates . . . deserve to have *an up or down vote* on their nominations. . . . The Senate slowdown has a serious impact on the administration of justice.”

II. Other Points Regarding Your Proposal

I also want to make three other points regarding your proposal.

First, contrary to an implicit suggestion in your proposal, the members of these citizen committees themselves will bring their own views about the best qualities for judicial candidates, and their own preferences and visions and ideologies. But there is an important difference between these private citizens, on the one hand, and the President and 100 Senators, on the other. The American people did not elect these citizens to exercise this critical constitutional responsibility and cannot hold them accountable for their exercise of it.

Moreover, the Framers of the Constitution expressly considered and rejected a committee nomination process, concluding that such a process was unlikely to focus on the “intrinsic merit of the candidate.” *Federalist* 76. As Hamilton explained, “in every exercise of the power of appointing to offices by an assembly of men we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly.” It will “rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.”

By contrast, “[t]he sole and undivided responsibility of one man” – the President – “will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.” The Framers wanted the President alone to exercise the power of nomination, moreover, because the “blame of a bad nomination would fall upon the President singly and absolutely.” In a committee nomination process, by contrast, “all idea of responsibility is lost.”

For these reasons, the Framers concluded that the President alone was to nominate and the Senate as a body was to vote up or down on the President’s nominations.

Second, you explain that your proposal would ensure the merit of federal judges. In your letter to President Bush of March 16, 2001, however, you and Senator Leahy expressed the view that the American Bar Association ratings provide “unique, unbiased and essential information” about judicial candidates, and provide an “independent, apolitical” evaluation of their qualifications. You referred to the ABA rating as the “gold standard” for evaluating nominees. All 42 of the President’s appeals court nominees rated so far have received “well-qualified” or “qualified” ABA ratings. By the standard outlined in your letter of March 16, 2001, all of these appeals court nominees warrant your support.

Third, you explain that your proposal would avoid “extremist” judges. The Framers intended that the President would nominate judges and the Senate as a body would vote up-or-

down on the nominations to express the majority will of the Senate. The constitutional scheme of Presidential appointment and majority vote in the Senate ensures that the nominees are not unfit. And your proposal would not preclude judges you might label as "extremist" from emerging from the citizen committees. Indeed, even more troubling is the fact that your proposal would not prevent judges whom both the President *and* a majority of the Senate might view as "extremist" from emerging from the citizen committees, yet the President and Senate would be essentially powerless to prevent the appointment.

One final point warrants mention. We assume that you include Miguel Estrada and Priscilla Owen in your description of "extremists" given the extraordinary ongoing filibusters of their nominations. But Miguel Estrada and Priscilla Owen represent the mainstream of American law and American values, as indicated by the fact that the President nominated them and a majority of the Senate supports them. Moreover, Miguel Estrada is supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and by a bipartisan group of 14 former colleagues in the Solicitor General's office, among many others. He worked for four years in the Clinton Administration. He was unanimously rated "well-qualified" by the American Bar Association. Priscilla Owen is supported by three former Democrat Justices on the Texas Supreme Court with whom she served and 15 past Presidents of the State Bar of Texas. She also received a *unanimous* "well-qualified" rating from the American Bar Association.

These two nominees are the mainstream. It bears note, moreover, that you and other Democrat Senators have supported nominees such as Jay Bybee and Michael McConnell who (unlike Mr. Estrada and Justice Owen) have taken strong and significant public positions contrary to yours on issues that concern you. We believe that an unfair double standard is being applied to both Miguel Estrada and Priscilla Owen.

* * *

We appreciate your desire to fix the broken judicial confirmation process. The President believes that the fix is for the Senate to exercise its constitutional responsibility and ensure that every judicial nominee receives an up-or-down Senate vote within a reasonable time after nomination, no matter who is President or which party controls the Senate.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Charles Schumer
United States Senate

Copy: The Honorable Bill Frist
The Honorable Thomas Daschle
The Honorable Orrin Hatch

The Honorable Patrick Leahy

	A	B	C
1	First Name	Last Name	Title
2	Janice	Amundson	
3	Robert	Vagley	
4	Jan	Baran	
5	Boyden	Gray	
6	Lloyd	Cutler	
7	Lovida	Coleman	
8	William	Barr	former Attorney General
9	Walter	Dellinger	
10	Alfed	Carlton	President
11	Blair	Carlton	
12	Richard	Wiley	
13	Elizabeth	Wiley	
14	Richard	Thornburgh	former Attorney General
15	Bradford	Clark	Professor
16	Carolyn	Lamm	
17	Peter	Halle	
18	Todd	Gaziano	
19	Leonard	Leo	
20	Eugene	Meyer	
21	Douglas	Kmiec	Dean
22	Stephen	Presser	Professor
23	Todd	Zywicki	Professor
24	Robert	Turner	Professor
25	Michael	Krauss	Professor
26	Cynthia	ConnorKrauss	
27	Christopher	Wright	
28	Maureen	Mahoney	
29	William	Kelley	
30	Neal	Katyal	Visiting Professor
31	Jon	Axelrod	
32	David	Axelrod	Student
33	George	Jones	
34	Duard	Bradshaw	National President
35	Lewis	Laboy	
36	Roberto	dePosada	

	A	B	C
37	Ramon	Rodriguez	
38	Albert	Zapanta	
39	Steven	Duffield	
40	Jay	Sekulow	
41	Jordan	Sekulow	
42	Dan	Carter	
43	Joel	Pardue	
44	Robert	McConnell	
45	Michael	Fried	
46	James	Gauch	
47	Warren	Belmar	
48	John	Fund	
49	Joseph	Whitley	
50	William	Mellor	
51	Katherine	Comerford	
52	Jonathan	Cohn	
53	Jay	Jorgensen	
54	Judah	Best	
55	Leah	Lorber	
56	Charles	Cooper	
57	Victoria	Toensing	
58	Phillip	Howard	
59	Carol	Crawford	
60	Sean	Rushton	
61	John	Nowacki	
62	John	Abegg	
63	Thomas	Jipping	
64	William	Smith	
65	Jeffrey	Mazzella	
66	Stanton	Anderson	
67	James	Ho	
68	Barbara	Ledeen	
69	Deecy	Gray	
70	Manuel	Miranda	
71	Alvin	Williams	
72	Andrea	Lafferty	

	A	B	C
73	Charles	Francis	
74	Donald	Capoccia	
75	John	Kramer	
76	Claudia	Barlow	
77	Clifford	Pintak	
78	Curt	Levey	
79	Thomas	Readmond	
80	Diana	Banister	
81	Douglas	Johnson	
82	George	Landrith	
83	Grover	Norquist	
84	James	Doyle	
85	Kenneth	Boehm	
86	Laurie	Abramson	
87	Lori	Waters	
88	Matthew	Forys	
89	Michael	Oneill	
90	Mark	Fried	
91	Mike	Hotra	
92	Eileen	Atwood	
93	Richard	Lessner	
94	Roger	Pilon	
95	Scott	Berkowitz	
96	Sheila	Dearyburywalcoff	
97	Stephen	Thayer	
98	Joseph	Wollersheim	
99	Ashley	Martin	
100	Christopher	Morris	
101	Tripp	Baird	
102	Rochelle	Tedesco	
103	Patrick	Guerriero	
104	Kenneth	Weinstein	
105	Todd	Lindberg	
106	Paul	Skoczylas	
107	Josie	Graziadio	
108	Cassandra	Oshinnaiye	

	A	B	C
109	Catherine	EasbySmith	
110	Stephen	Higgins	
111	Edmund	Amorosi	
112	Timothy	Bergin	
113	Elliot	Berke	
114	David	Blackwood	
115	James	Boggs III	
116	Derek	Brown	
117	Craig	Burkhardt	
118	Mark	Carter	
119	Nicholas	DiCostanzo	
120	Patsy	Drain	
121	Robert	Dyer	
122	Raymond	Friedlob	
123	Gary	Gallant	
124	Anderson	Grennan	
125	Dean	Heyl	
126	Deborah	Holmes	
127	Robert	Horn	
128	Joshua	Kaplan	
129	Gerhard	Kelm	
130	Grant	Lally	
131	Alicemary	Leach	
132	Jeffrey	Mamorsky	
133	Scott	McCandless	
134	Timothy	Mills	
135	Francisco	Orellana	
136	Lenore	Ostrowsky	
137	Jose	Pardo-Kronemann	
138	Cameron	Quinn	
139	Kimberly	Reed	
140	Charles	Shearer	
141	Richard	Siehl	
142	Betty	Southard Murphy	
143	Thomas	Spencer	
144	Harvey	Tettlebaum	

	A	B	C
145	Melinda	Thielen	
146	Michael	Thielen	
147	James	Troupis	
148	Dean	Winkjer	
149	Ralph	Winnie, Jr.	
150	John	Zaccone	
151	Jim	Martin	President
152	James	Swanson	Editor & Chief
153	Smith	Megan	
154	Morton	Blackwell	
155	Jerris	Leonard	
156	Ellen	Leitch	
157	Henry	Cashen	
158	Jeffrey	Bell	
159	Deal	Hudson	
160	Deborah	Fonseca	
161	Hector	Fonseca	
162	Nancy	ScottFinan	
163	Jeff	Brown	
164	Ken	Wise	
165	Levi	Benton	
166	Bruce	Oakley	
167	Grant	Dorfman	
168	Patrick	Mizell	
169	Alec	Koromilas	
170	Richard	Robinson	
171	Joseph	Landen	
172	Allison	Hudgins	
173	Jennifer	Oschal	
174	Jeffrey	Hunt	
175	Beverly	Lake	
176	Ola	MoseElLewis	
177	Robert	Orr	
178	David	Rhoades	
179	Keith	Vaughan	
180	Susan	Forrester	

	A	B	C
181	Juan	Iturregui	
182	John	Ashcroft	Attorney General
183	Larry	Thompson	
184	Ted	Olson	
185	Ed	Whelan	
186	Paul	Clement	
187	Kristi	Remington	
188	Robert	Mccallum	
189	Adam	Charnes	
190	Shannen	Coffen	
191	Shiela	Joy	
192	Nancy	Bryson	
193	Lucy	Clark	
194	Alex	Azar	
195	Howard	Radzely	
196	Will	Taft	
197	Timothy	Mcclain	
198	Lizette	Benedi	
199	Bridget	Coehins	
200	Mark	Chenoweth	
201	Gary	Cunningham	
202	William	Hall	
203	Marc	Kesselman	
204	Nathan	Sales	
205	(b)(6), (b)(7)c, (b)(7)e, (b)(7)f		
206			
207			
208			
209	Jerry	Kilgore	Virginia AG
210	Michael	Cox	Michigan AG
211	Thomas	Hogan	Chief Judge
212	Leonidas	Mecham	Director
213	William	Burchill	Associate Director and General Counsel
214	Michael	Blommer	Assistant Director for Legislative Affairs
215	Daniel	Cunningham	Deputy Assistant Director for Legislative Affairs
216	Steven	Tevlowitz	Assistant General Counsel

	A	B	C
217	Jennifer	Veerman	
218		Coleman	Senator
219		Cornyn	Senator
220		Hatch	Senator
221		McConnell	Senator
222		Miller	Senator
223		Specter	Senator
224	Mary	Brewer	
225	Olinda	Glorioso	
226	Peter	Sengelmann	President
227	Everett	Kavanaugh	
228	Henry	Ramirez	

	D
1	Organization
2	NAM
3	American Insurance Association
4	Wiley, Rein & Fielding
5	Wilmer Cutler & Pickering
6	Wilmer Cutler & Pickering
7	Wife of former Secretary of Transportation
8	General Counsel for Verizon
9	O'Melveny & Myers
10	American Bar Association
11	
12	Law Day Chair for the American Bar Association
13	
14	
15	George Washington University
16	White & Case
17	
18	Heritage Foundation
19	Federalist Society
20	Federalist Society
21	Catholic University Law School
22	Northwestern University
23	George Mason University
24	University of Virginia
25	George Mason University
26	
27	Washington
28	Latham & Watkins, Washington
29	Notre Dame School of Law
30	Yale Law School
31	Milwaukee, Wisconsin
32	Harvard Law School
33	Sidley & Austin, DC
34	HNBA
35	American GI Forum
36	Hispanic Business Round Table

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37	U.S. Hispanic Chamber of Commerce
38	U.S. Mexico Chamber of Commerce
39	Republican Policy Cmte.
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44	Hawthorne & York
45	Jones Day Reavis & Pogue
46	Jones Day Reavis & Pogue
47	Capital Counsel Group
48	Wall Street Journal
49	DHS
50	Institute for Justice
51	Wiley Rein & Fielding
52	Sidley & Austin
53	Sidley & Austin
54	Debevoise & Plimpton
55	Shook, Hardy & Bacon
56	Cooper & Kirk
57	DiGenova & Toensing
58	Covington & Burling
59	Independent Consultant
60	Committee for Justice
61	Free Congress Foundation
62	Sen. McConnell
63	CWA
64	Sen. Sessions
65	Center for Ind. Freedom
66	US Chamber of Commerce
67	Sen. Cornyn
68	Senate Republican Committee
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70	
71	BAMPAC
72	Traditional Values Coalition

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73	Republican Unity Coalition
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75	Institute of Justice
76	CFJ
77	MPGH
78	Center for Individual Rights
79	Americans for Tax Reform
80	Craig Shirley & Associates
81	National Right to Life
82	Frontiers of Freedom
83	ATR
84	National Troopers Coalition
85	NLPC
86	PNC
87	Eagle Forum
88	Landmark Legal Foundation
89	Landmark Legal Foundation
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91	ALCJ
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93	FRC
94	Cato
95	RAINN
96	USCC Instute for Legal Reform
97	ACU
98	Christian Coalition
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100	CRC
101	Heritage Foundation
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104	Hudson Institute
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111	Smith Pachter McWhorter Allen
112	Squire, Sanders & Dempsey LLP
113	U.S. Dept. of Housing and Urban Dev.
114	Selzer Gurvitch Rabin & Obecny
115	Partner, Blank Rome LLP
116	Sidley Austin Brown & Wood
117	Sorling, Northrup, Hanna, Cullen and Cocham
118	Fed. Service Impasses Panel/Dinsmore & Shohl, LLP
119	Student - George Washington University
120	Sole Practioner
121	U.S. Postal Service
122	Friedlob Sanderson Paulson and Tourtillot, LLC
123	Swidler Berlin Shereff and Friedman
124	Student - George Washington University
125	Heyl Consulting, Inc.
126	Sorling, Northrup, Hanna, Cullen and Cocham
127	Patton Boggs, LLP
128	Student - George Washington University
129	Gerhard Kelm, P.C., Law Office
130	Lally & Lally, LLP
131	Republican National Lawyers Association
132	Greenberg Traurig
133	PricewaterhouseCoopers
134	Patton Boggs, LLP
135	Williams Mullen
136	Greenberg Traurig
137	U.S. Dept. of Housing and Urban Dev.
138	International Foundation for Election Systems
139	House Ways and Means Committee
140	U.S. Dept. of the Army
141	Baker and Hostetler LLP, Columbus, OH
142	Baker and Hostetler LLP
143	Spencer & Klein, P.A.
144	Husch and Eppenberger, LLC

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145	N/A
146	Republican National Lawyers Association
147	Michael Best & Friedrich, LLP
148	The Fred and Clara Eckert Foundation for Children
149	Self Employed
150	Law Offices of John Wm. Zaccone
151	60 Plus Association
152	Cato Supreme Court Review
153	Men's Health Network
154	Leadership Institute
155	Foley & Lardner
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163	TX State Judge, Harris County
164	TX State Judge, Harris County
165	TX State Judge, Harris County
166	TX State Judge, Harris County
167	TX State Judge, Harris County
168	former TX State Judge, Harris County
169	Chairman and Chief Judge of the U.S. Employees' Compensation Appeals Board, Dept of Labor
170	Richard L. Robinson is partner in charge of the Northern Kentucky office of Graydon Head & Ritchey, LLP, the oldest law firm in the Greater Cincinnati
171	J. Jeffery Landen is also a partner in the Northern Kentucky office of Graydon Head & Ritchey, LLP. He is licensed to practice law before the courts
172	Progress for America
173	Progress for America
174	President-elect, NC Association of District Attorneys
175	Chief Justice, NC Supreme Court
176	Judge, NC Superior Court (one of only two African-American Female Superior Court Judges in NC; recently switched parties from Democrat to
177	Associate Justice, NC Supreme Court
178	Esquire, Litigator
179	Chairman, Mangmnt Committee - Womblye Carlyle (the largest law firm in NC)
180	Progress for America

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182	DOJ
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191	DOJ
192	USDA
193	DHS
194	HHS
195	DOL
196	State
197	VA
198	OLP
199	OLP
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201	OLP
202	OLP
203	OLP
204	OLP
205	FBI
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211	D.C. District Court
212	Administrative Office of the U.S. Courts
213	Administrative Office of the U.S. Courts
214	Administrative Office of the U.S. Courts
215	Administrative Office of the U.S. Courts
216	Administrative Office of the U.S. Courts

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217	American Association of Christian Schools
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224	Senator Dole
225	Honduran Unity
226	Crossroads, Inc.
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170	Jim Bunning's Finance Director/Treasurer.			
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