

5-15-2005

The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?

Arthur L. Rizer III

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Election Law Commons](#), and the [Judges Commons](#)

Recommended Citation

Arthur L. Rizer III *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 Pepp. L. Rev. Iss. 4 (2005)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol32/iss4/5>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?

Arthur L. Rizer III*

TABLE OF CONTENTS

- I. INTRODUCTION
- II. HISTORY OF THE FILIBUSTER
 - A. *The Filibuster in America*
 - 1. The Birth of the American Filibuster
 - 2. Filibuster v. Cloture
 - 3. The Filibuster Reaches Adulthood
 - B. *The Judicial Nomination Process*
 - 1. Senate's Committee on the Judiciary
 - 2. The American Bar Association's Role
- III. WHY THE PRACTICE IS UNCONSTITUTIONAL
 - A. *The Advice and Consent Clause is Non-Discretionary*
 - 1. Filibuster of Legislation v. Judicial Nominees
 - a. *History*
 - b. *Legal Obligation*
 - 2. Due Process
 - B. *Separation of Power*
 - 1. Usurping the Executive Branch

* LL.M. Candidate, Georgetown University Law Center, Spring 2007; J.D., Gonzaga University School of Law, 2003, *magna cum laude*; Attorney Advisor, United States Department of Justice, Executive Office of Immigration Review, March 2005 – Present (The views expressed in this article do not necessarily represent the views of the Department of Justice or the United States); Federal Judicial Clerk for the Honorable Edwin M. Kosik, August 2003 – March 2005. I would like to thank my wife, Monique Rizer, and sons, Gabriel and Asher, for their support. In addition, I would like to thank the editorial staff at the *Pepperdine Law Review* for their hard work on this paper, specifically Dina Klepner.

2. Usurping the Judicial Branch
 - a. *Log-Jamming*
 - b. *Court Packing*
3. Presentment and Bicameralism
- C. *A New Supermajority*
 1. The True Supermajorities
 2. A Simple Reading
- D. *Constitutional Amendment by Proxy*
- IV. CLEAN HANDS: THE STENCH OF POLITICS
 - A. *Same Sin, Different Apple*
 - B. *Do Unto Others as Done to You*
 - C. *The Role of Ideology in the Advice and Consent Stage*
- V. CONSTITUTIONAL IMPACT
 - A. *Impact on the Constitution*
 1. Circumventing with Recess Appointments
 - B. *Impact on the Legislative Process*
 - C. *Remedies*
 1. If You Can't Beat Them — Sue Them
 - a. *Standing*
 - b. *Political Question*
 - c. *Causes of Action*
 2. Change the Rules
 - a. *Increase the President's Power*
 - b. *Keep it Simple*
- VI. CONCLUSION

I. INTRODUCTION

The scene played out in *Mr. Smith Goes to Washington*¹ of the independent and moral-grounded Senator using the filibuster as his “line in the sand” against corruption is a romantic vision. The reality is that there is a darker side to the practice rooted in partisan motives and a disrespect for the rule of law.

It is well established that the founding fathers sought to avoid a “rule by mob” approach to government.² However, is it reasonable to conclude that they wished for a government that was ruled by a discontented minority?

1. MR. SMITH GOES TO WASHINGTON (Columbia/Tristar Studios 1939).

2. See Jolanta Juszkiwicz, *Listen, the Public Is Speaking Out on Crime*, 61 FED. PROBATION, Sept. 1997, at 82 (noting that “[w]hile expounding the virtues of ‘one man one vote’ the Founding Fathers feared unbridled rule by the masses (translated as mob rule, or rule by unrestrained, uninformed, perhaps even uneducated, majorities)”). After the revolution the Founding Fathers discovered that the people were just “as capable of despotism as any prince” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, 410 (1969); see also Christopher L. Mass, *Proposition 103: Too Good to Be True*, 12 WHITTIER L. REV. 403, 432 (1991) (“The Founding Fathers were cognizant of the detrimental effects of ‘mob rule’ or direct democracy when they formulated our system of representative government. In other words, the inherent danger with direct democracy or legislation passed by initiative is ‘tyranny of the majority.’”); Daniel Mark Cohen, *Begging the Court's Pardon: Justice Denied for the Poorest of the Poor*, 14 ST. THOMAS L. REV. 825, 845 (2002).

That is arguably what is happening today in the United States of America's Senate.

Today, a minority of Senators have engaged in questionably unprecedented filibusters to obstruct the confirmations of President Bush's judicial nominees, thereby preventing the Senate as a whole from voting on his nominations. The national arena is the stage for this backbiting, illustrated with the recent headlines of an all-night Senate session staged by Republicans as a demonstration against the filibuster over three of the President's nominations: California Supreme Court Justice Janice Rogers Brown, Texas Supreme Court Justice Priscilla Owen, and California Judge Carolyn Kuhl.³ Another recent filibustered nominee was Miguel Estrada, who in September 2004 asked the President to withdraw him from consideration after his nomination went through seven unsuccessful cloture votes.⁴

In addition, it is important to note that while a record number of President Bush's nominees have been successfully confirmed, there is nonetheless a constitutional problem. For example, if one person's civil rights were not honored, one could not legitimately counter by arguing that hundreds of others' civil rights were not violated – that one person was still harmed. The vast majority of our constitutional law has been developed one case at a time. Thus, by disregarding the constitution, even in a “small amount,” we weaken the document as a whole.

It is the intent of this article to specially discuss the constitutionally of filibustering judicial nominations – not the filibuster itself. Part II will

3. Tom Curry, *Senate Pulls All-Nighter on Nominees*, MSNBC, available at <http://msnbc.msn.com/id/3475120/> (last visited Feb. 20, 2005). Janet Hook, a *Los Angeles Times* staff writer commented on the thirty-hour talk marathon:

Beginning this evening, Senate Republicans plan to invoke the spirit of that tradition by forcing Democrats to talk through the night to sustain their filibuster of several controversial judicial nominations.

But no one expects the staged 30-hour talkathon to break the yearlong deadlock over judges, and Republicans admit the event is more a public relations effort to spotlight an obscure issue than a realistic drive to break the opposition.

The fanfare that has gone into holding the Senate in an all-night session, the outcome of which is preordained, underscores just how marginal the old-style filibuster has become. Long gone are the days when the filibuster was deployed mostly for issues of great national significance such as civil rights and war, with senators holding the floor by reciting recipes, reading from the Bible and devising ways to avoid trips to the bathroom.

Janet Hook, *The Nation*; *Long-Winded Senate Tradition; The GOP Plans to Force a Filibuster Today, But the All-Night Talkathon Lost Its Relevance Years Ago*, LOS ANGELES TIMES, Nov. 12, 2003, at A18.

4. Robert S. Greenberger, *Despite Estrada's Wishes, Race Is an Issue*, WALL ST. J., Mar. 7, 2003, at A4; Neil A. Lewis, *Stymied by Democrats in Senate, Bush Court Pick Finally Gives Up*, N.Y. TIMES, Sept. 5, 2003, at A1; Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Confirmations Process*, 8 TEX. REV. L. & POL. 89, 101 (2003) (stating that “[t]he filibuster succeeded when on September 4, 2003, Estrada asked the President to withdraw his nomination—thus making him the first nominee for a court of appeals defeated by the filibuster weapon”).

explore the historical aspects of filibustering in America and discuss how the practice has mutated into its current state. In addition, this section will briefly discuss the history of the judicial nomination system, including the American Bar Association's involvement in the matter. Part III will address the constitutionality of filibustering judicial nominees, in addition to the impact of the advice and consent clause and the notion of separation of powers. This section goes on to discuss the wording of the constitution itself and how it sheds lights on this debate. Lastly, it is argued that the structure of the Senate Rules may be unconstitutional due to the imposition of those Rules on new Senates. Part IV will briefly describe the political dimension to this entire debate and how both sides of the aisle are mudding the waters instead of seeing the situation for what it really is – a constitutional crisis. Lastly, Part V will address the constitutional impact of this issue and suggest potential remedies.

II. HISTORY OF THE FILIBUSTER

The term “filibuster” means prolonged speaking that obstructs the progress of legislative action by the “use of obstructionist tactics.”⁵ It dates back to early Dutch, but did not become prolifically used until the French used the word *flibustier* to describe pirates who pillaged the Spanish colonies in the West Indies.⁶ The history of the filibuster in American politics is a bit more complicated.

A. *The Filibuster in America*

As is often done in a debate over constitutional jurisprudence, the history of the subject must be conversed to set the backdrop for the discussion. One could not write a legal article pertaining to the art of filibustering without discussing the 1997 article written by Erwin Chemerinsky and Catherine Fisk titled *The Filibuster*, where the authors wrote:

Depending on one's perspective, the filibuster appears to be either a pillar of the Senate's venerable tradition of unlimited debate and a bulwark against tyranny of the majority, or evidence of the rise of partisanship and the decline of principle, reason, and collegiality in the Senate. Both of these accounts tend to suffer from the sorts of problems often associated with the instrumental use of history: Senate “tradition” in this context is often more normative than

5. THE AMERICAN HERITAGE COLLEGE DICTIONARY 518 (4th ed. 2002). The word is also used to describe an “irregular military adventurer” or “an American engaged in fomenting insurrections in Latin America in the mid-19th century” or anybody trying to carry out insurrectionist activities in any foreign country. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 468 (11th ed. 2003).

6. The word *filibuster* was greatly influenced by the Spanish word *flibustero* which ultimately, is believed, to come from the Dutch word *freebooter*. COMPACT OXFORD ENGLISH DICTIONARY 522 (2d ed. 1991).

descriptive; that is, it is less about the way things *were* than about the way they were *supposed to have been*.⁷

In addition, the authors concluded that the filibuster of 2004 is not the same as the filibuster of 1794.⁸ The “event” has moved from a *practice*, rooted in tradition and some rational sense of unlimited debate, to an *institution* of a political quagmire.⁹ The 2004 filibuster dominates over its earlier employment, in that it gives a minority group of senators more power in a legislative veto with less accountability.¹⁰

1. The Birth of the American Filibuster

The notion of a strategic use of debate dates back to the very notion of a senate in Rome.¹¹ In the United States, the first recorded instance of “tactical debate” occurred in 1790, “when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia.”¹² There, the motion had come to a vote and the House of Representatives turned it down.¹³ The vote was so close the second time that “an ailing senator had to be carried into the Senate on his bed to cast the swing vote.”¹⁴ On a day that the ill senator could not be carried in, the members in favor of the Philadelphia site tried to bring the issue to a vote, but the senators of the South, preferring a Capitol closer to home, made lethargic motions which prevented the vote.¹⁵

The term “filibuster” started to be used to describe dilatory motions and speeches in the mid 1800s.¹⁶ At first, both the House of Representatives and the Senate could and would use the filibuster technique.¹⁷ However, as the House grew in size, it became necessary to revise House rules to limit debate.¹⁸ Limited at 100 members, the Senate did not feel the need to do the

7. Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 185 (1997). *The Filibuster* proved extremely useful in writing this article and provided much of the historical research in this article.

8. *See id.*

9. *Id.* at 186.

10. *Id.*

11. *Id.* at 187 (citing ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 277-78 (1922)).

12. *Id.*

13. *Id.*

14. *Id.* at 187-88.

15. *Id.* at 188.

16. U.S. Senate, *Filibuster and Cloture*, available at http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited June 22, 2004) [hereinafter U.S. Senate].

17. *Id.*

18. *Id.*

same.¹⁹ In 1856, the Senate officially established a right to unlimited debate.²⁰ By the mid-1860s, filibustering had become a phenomenon rather than a sporadic escapade.²¹

Despite the rise in the practice, most filibusters were unsuccessful in preventing a measure to a vote.²² Indeed, “almost every filibustered measure before 1880 was eventually passed.”²³ It was not until 1880 that Senators started to use the filibuster more frequently and with much more potency.²⁴ “By the time the cloture rule was adopted in 1917, senators and the public alike perceived filibustering to be a serious problem.”²⁵

2. Filibuster v. Cloture

In 1841, a small Democratic minority attempted to block a bank bill promoted by Henry Clay.²⁶ As a result of this maneuver, Clay threatened to lobby for a change to the rules that would allow the majority of the Senate to

19. *Id.*

20. Fisk & Chemerinsky, *supra* note 7, at 190.

21. *See id.* at 193. Professors Chemerinsky and Fisk point out that there is a problem of identifying and counting filibusters:

The difficulty stems from the ambivalence senators have always had about them. On the one hand, senators have from the beginning derided filibusters as obstructive, an affront to the Senate colleagues—and perhaps to the House and the President—who support legislation. Filibusters waste time and create inconvenience and conflict in a body that values collegiality. On the other hand, filibusters can be a courageous way of taking a stand, which can be popular with constituents and can even gain grudging respect from colleagues. Not surprisingly, therefore, senators have often been reluctant to acknowledge filibustering when it occurred, and conversely, have used the threat of the filibusters to achieve policy goals without intending to actually filibuster.

Id. at 194.

22. *Id.* at 195.

23. *Id.*

24. *Id.*; see also Adam D. Glassman, *The Imposition of Federal Caps in Medical Malpractice Liability Actions: Will They Cure the Current Crisis in Health Care?*, 37 AKRON L. REV. 417 (2004).

25. Fisk & Chemerinsky, *supra* note 7, at 195. As Professors Fisk & Chemerinsky note:

One of the most notorious filibusters was Progressive Senator Robert M. LaFollette's 1908 filibuster of a currency bill that he believed was a power grab by the rich. This filibuster set records for length, sophistication of procedural combat, and treachery, and contributed significantly to the Senate's sense that something needed to be done to limit debate. During his eighteen hours holding the floor in the stifling heat of the Senate chamber, including an all-night speech made necessary by a parliamentary ruling that prohibited him from using quorum calls to get a moment's rest, LaFollette sustained himself with turkey sandwiches and eggnog from the Senate restaurant. After taking a large swallow from a particular glass of eggnog, he rejected it as adulterated. And indeed it was; the glass was laced with enough ptomaine to kill him. The ptomaine he had swallowed made him quite ill, but he managed by forcing roll calls to escape for a few minutes of respite, and he continued his speech for another eight hours. The filibuster was ultimately lost when Senator Gore, who was blind, yielded the floor as prearranged to a colleague, who, unbeknownst to Gore, had just stepped out to the cloakroom.

Id. at 196.

26. U.S. Senate, *supra* note 16.

close debate.²⁷ “Thomas Hart Benton angrily rebuked his colleague, accusing Clay of trying to stifle the Senate’s right to unlimited debate.”²⁸

The unlimited debate doctrine continued to be the rule of the Senate until 1917.²⁹ It was at that time, at the suggestion of President Woodrow Wilson, that the Senate adopted Rule XXII, which allowed the Senate to end a debate with a two-thirds majority vote, a technique known as “cloture.”³⁰ The push for this new rule was a result of a filibuster of the President’s bill to arm merchant ships to defend themselves from German U-boats during World War I. On March 4, 1917, after the bill was blocked, the President made a speech that was published in *The New York Times* stating that the filibuster was:

[A] situation unparalleled in the history of the country, perhaps unparalleled in the history of any modern Government. In the immediate presence of a crisis fraught with more subtle and far-reaching possibilities of national danger than any other the Government has known within the whole history of its international relations, the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than 500 of the 531 members of the two houses were ready and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven Senators had determined that it should not. . . . 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. The country can be relied upon to draw the moral. I believe that the Senate can be relied on to supply the means of action and save the country from disaster.³¹

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 41 THE PAPERS OF WOODROW WILSON 318-20 (Arthur S. Link ed., 1983); see also Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & POL. 1, 10 (2004). There were numerous attempts during the second half of the 19th century and in the first few years of the 20th century to amend the rules and allow debate to end with a vote. Seitz & Guerra, *supra*, at 10. However, although the proposals were frequent, they were defeated just as frequently. *Id.* “It was ultimately a crisis occasioned by the First World War

Rule XXII was put to the test in 1919, when the Senate invoked cloture to end a filibuster against the Treaty of Versailles.³² However, despite the new cloture rule, filibusters continued to be a successful means to block legislation.³³ In fact, for almost fifty years after Rule XXII was enacted it “served a purpose more symbolic than real. Between 1917 and 1927, cloture was voted on only ten times and it was adopted only four times.”³⁴ From the 1930s to 1960s it became even more seldom to see the cloture rule evoked.³⁵ This had much to do with the fight brewing in Washington over the civil right movement.³⁶

3. The Filibuster Reaches Adulthood

The “great” filibuster against the Civil Rights Act in 1964 is unrivaled in duration and infamy. Senators, mostly from the Southern states, were resolute to resist a federal law that would undermine a tradition of segregation.³⁷ The resistance lasted eighty-two days and took up 63,000 pages in the Congressional Record.³⁸

The “coalition of Southern senators enjoyed extraordinary power in the Senate, as a result of . . . seniority that came from serving in safe seats representing one-party states and the use of the filibuster[s] to block civil rights legislation. The Senate did not vote cloture once between 1927 and 1962.”³⁹ The civil rights filibusters

sparked controversy unequalled since 1917. Beginning during Reconstruction and continuing for nearly a century, anti-civil rights filibusters played a major role in blocking measures to prohibit lynching, poll taxes, and race discrimination in employment, housing, public accommodations, and voting. Although the filibuster was not solely responsible for the delay of civil rights legislation—some responsibility must attach to Franklin Roosevelt’s reluctance to alienate the powerful Southerners whose

that brought about the first cloture rule in the Senate. In 1917, the so-called Armed Ship Bill, sought by President Woodrow Wilson to arm American merchant vessels against German submarine attacks, was defeated by a Senate filibuster.” *Id.*; see Fisk & Chemerinsky, *supra* note 7, at 197.

32. U.S. Senate, *supra* note 16.

33. *Id.*

34. Fisk & Chemerinsky, *supra* note 7, at 198.

35. *Id.*; U.S. Senate, *supra* note 16.

36. Fisk & Chemerinsky, *supra* note 7, at 199; U.S. Senate, *supra* note 16.

37. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 492 (2000). *Contra* Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 485 (1984) (stating that “[i]n political terms, Southern defenders of the segregation regime had been dramatically isolated and even shamed by the unprecedented amassing of two-thirds of the Senate to override filibusters against the Civil Rights Acts of 1964, 1965, and 1968”). In fact, when cloture was first voted on in 1964, there were only seven non-Southern Senators who voted against cloture: Goldwater and Hayden of Arizona, Young of North Dakota, Bible of Nevada, Mechem of New Mexico, Byrd of West Virginia, and Simpson of Wyoming. *Id.* at 485 n.97 (citing 110 CONG. REC. 13,327 (1967)).

38. Post & Siegel, *supra* note 37, at 492.

39. Fisk & Chemerinsky, *supra* note 7, at 199.

support was crucial for the New Deal to survive—the filibuster was indispensable in the Southerners’ fight.⁴⁰

“The 1970s mark the beginning of the modern era of filibustering and a dramatic change in the nature of its practice.”⁴¹ Particularly, in 1975, the Senate reduced the amount of Senators needed for a cloture vote from two-thirds to three-fifths.⁴² This had a considerable impact considering a new trend of conservatives beginning to vote for cloture.⁴³

The most significant change to the filibuster came from the implementation of the two-track debate system on the Senate floor. The then Senate Majority Leader, Mike Mansfield, developed a system where the morning would be dedicated to filibustered legislation and the afternoon to other legislation.⁴⁴ This new rule actually helped filibustering by reducing the amount of time the minority senators must hold the floor.⁴⁵ This was viewed as an acceptable “evil” because it allowed other legislation to be passed in the afternoon session.⁴⁶ “The adoption of the two-track system changed the game profoundly: It created the silent filibuster—a senator could filibuster an issue without uttering a word on the Senate floor.”⁴⁷

The civil rights legislation removed the motivation for restraint and made any and all bills subject to a possible filibuster.⁴⁸ Liberal Senators began to filibuster Republican legislation proffered by the Nixon Administration.⁴⁹ This resulted in Southern senators, who previously defended filibustering as a promotion of free debate, to vote for cloture.⁵⁰

Eventually, because of the immense workload facing the Senate, the two track system transformed in to a “fantasy track.” Bills that are threatened with a filibuster are now pushed off until the bill’s supporters can muster sixty votes, giving rise to the term “stealth-filibuster.”⁵¹ There no longer is a “distinction between a filibuster and a threat to filibuster; any credible threat to filibuster is a filibuster . . .”⁵² Consequently, the old filibuster portrayed in *Mr. Smith Goes to Washington* is all but dead. There is no longer the need to sweat for your conviction by reading Tom Sawyer or the complete

40. *Id.* (citations omitted).

41. *Id.* at 200.

42. U.S. Senate, *supra* note 16.

43. Fisk & Chemerinsky, *supra* note 7, at 200-01.

44. *Id.* at 201.

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *See id.*

50. *Id.* (citing GARY ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 39-43 (1975)).

51. *Id.* at 202-03.

52. *Id.* at 203.

collection of Edgar Allen Poe. It appears that the noble undertones behind the filibuster of unlimited debate, has dissolved into a pure unadulterated political scheme to subvert the will of the majority.

B. The Judicial Nomination Process

It has not been but for the last few years that the country has seen the filibuster tactic used to assail judicial nominees. Indeed, for most of the existence of this country, judges did not go through the confirmation process as we see today.⁵³

1. Senate's Committee on the Judiciary

The Senate's Committee on the Judiciary did not exist during the first half-century of America's existence.⁵⁴ Instead, the Senate would either accept or reject the President's nominees without protracted hearings and debates.⁵⁵ In 1925, Harlan Fiske Stone became the first nominee for the Supreme Court that appeared in person before the Judiciary Committee.⁵⁶ However, it was not until John Marshall in 1955 that the modern practice of nominees testifying at length before the Senate began.⁵⁷ Even then, confirmation hearings were generally ephemeral, even when the nominee was to be confirmed to the Supreme Court.⁵⁸ For instance, in 1962 Justice

53. See Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 On the Senate's Role in the Judicial Confirmations Process*, 30 OHIO N.U. L. REV. 235, 235-37 (2004).

54. Cf. Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75, 90 (2001).

55. See generally Arlen Specter, *Concluding Address: On the Confirmations of a Supreme Court Justice*, 84 NW. U. L. REV. 1037 (1990).

56. William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 666-67 (1987).

No nominee testified before the Senate until 1925, when Harlan Fiske Stone appeared before the Judiciary Committee in order to defend his investigation as Attorney General into the conduct of Senator Burton Wheeler. Although Stone's appearance before the Judiciary Committee was a "complete success," his testimony did not establish a custom, and three decades passed before testimony by a nominee became an established practice. The testimony of the few nominees appearing before the Judiciary Committee between 1925 and the 1950s was limited to questions about the nominee's past actions. The committee did not question nominees about judicial philosophy or their opinions on legal issues. One nominee, Sherman Minton, declined an invitation to appear; and Felix Frankfurter agreed to testify only about his past actions, explaining that "[m]y attitude and outlook on relevant matters have been fully expressed over a period of years and are easily accessible. I should think it not only in bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplant my past record by personal declarations."

Id. (citations omitted).

57. Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 183 (2004).

58. See William G. Ross, *The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees*, 62 TUL. L. REV. 109, 119 (1987) ("[T]he scope and length of questions asked by Senators have become increasingly extensive. Prior to the nomination of Harlan in 1955, no nominee had been questioned about his views on substantive legal issues.").

Byron White's confirmation process lasted merely two hours.⁵⁹ Currently, nominees average eighty-nine days from the presidential nomination to the senatorial confirmation.⁶⁰

In 1968, President Johnson nominated Justice Fortas to the position of Chief Justice.⁶¹ Many argue that Justice Fortas was not confirmed due to the first filibuster of a judicial nominee.⁶² This, however, is not completely accurate, as Justice Fortas was denied the Chief Justice position because his nomination could not muster the fifty-one votes needed for his confirmation - not because of a judicial filibuster.⁶³ The debate over his nomination lasted several days; when supporters of Fortas's nomination filed for a cloture, the vote failed by a margin of 45-43.⁶⁴ "In other words, the Fortas nomination failed to obtain the support of fifty-one Senators."⁶⁵

59. Mark C. Rahdert, *The Toughest Job Interview in the Land*, 2 TEMP. POL. & CIV. RTS. L. REV. 293, 300 n.25 (1993).

60. The average time from nomination to confirmation for President Reagan was thirty-nine days, President George H.W. Bush was eighty-eight days, and President Clinton 115 days. Virginia Armstrong, *The Inevitability of Inseparability: Religion, Ethics, and Federal Judicial Politics*, 43 S. TEX. L. REV. 35, 45 (2001). President George W. Bush averages 112 days from nomination to confirmation, making the total average 88.5 days. Lloyd Cutler & Mickey Edwards, *End the Judicial Blame Game*, WASH. POST, Mar. 13, 2002, at A29. Interestingly, during the Bush administration, minorities and women average eight months to get through the confirmation process, whereas white males only take five months. Joan Biskupic, *Politics Snares Court Hopes of Minorities and Women*, USA TODAY, Aug. 22, 2000, at 1A.

61. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 218 (2003).

62. *Id.*

63. *Id.* (citing C. Boyden Gray, *A Filibuster Without Precedent*, WALL ST. J., June 10, 2003, at A18).

64. *Id.* at 220. The events were summarized by Senator Robert P. Griffin as follows:

An examination of the *Congressional Record* of October 1 . . . clearly reveals that the will of the majority was not frustrated.

It will be noted that the votes of 12 Senators were not recorded. It appears in the *Congressional Record* that seven of that number sent word and indicated how they would have voted had they been present.

The Senator from Oregon [*Mr. Morse*] and the Senator from Idaho [*Mr. Church*] would have voted "yea," raising the total of those in favor of invoking cloture from 45 to 47.

The *Record* reflects that the Senator from Vermont [*Mr. Aiken*], the Senator from Nevada [*Mr. Bible*], the Senator from Louisiana [*Mr. Ellender*], the Senator from Alaska [*Mr. Gruening*], and the Senator from Maine [*Mrs. Smith*] would have voted "nay," raising the total of those opposed to cloture from 43 to 48.

Accordingly, if every Senator who made his position known in the *Record* had actually been present and had voted, there would have been 47 votes for cloture and 48 votes [] against cloture.

There is no indication in the *Record* how the other five absent Senators would have voted.

It should not be overlooked that the distinguished Senator from Kentucky [*Mr. Cooper*] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice.

Id. at 220-21 (quoting 114 CONG. REC. 29,150 (1968) (statement of Sen. Griffin on Lawyers' Committee on Supreme Court Nominations)).

65. *Id.* at 220.

2. The American Bar Association's Role

In addition to the Senate Judiciary Committee, the American Bar Association (ABA) plays a role in the confirmation of federal judges. Since 1952, the ABA has served as quasi-official reviewer and referee of America's judges by conducting their "peer reviews."⁶⁶ The ABA does this by rating potential judges and sending the results back to the Senate Judiciary Committee.⁶⁷

In the past, the ABA's recommendation carried significant weight. In fact, every President since Eisenhower has relied on the organization's expertise to screen and rate potential nominees.⁶⁸ It was not until 1997 that Senator Hatch stated: "I think the time has come, once and for all, to decide what role, if any, the ABA should play in the Senate's judicial confirmation process."⁶⁹ Today, the ABA still gives its opinions, which are well received by some and ignored by others.⁷⁰

Worth mentioning is the process that was taken with regard to Miguel Estrada, Justice Priscilla Owen, and other Bush nominees.⁷¹ Senator Leahy, then the ranking Democrat on the Committee, stated that the above individuals would "go through all right" pending the rating from the ABA.⁷² Indeed, the ABA did send a response to the Senate, and gave Estrada and Owen its highest approval: *well-qualified*.⁷³

66. See *Bush Dumps Bar Association's Role in Picking Judges*, NewsMax.com, available at <http://www.newsmax.com/archives/articles/2001/3/22/182324.shtml> (last visited July 20, 2004) ("[The Bush] administration has abandoned a practice used by presidents for a half century. Since 1952, the bar association has received advance notice on potential judicial appointees. After examining each candidate's professional reputation, experience and legal writings, a 15-member committee voted the nominee well qualified, qualified or not qualified."). Also, it is interesting to note that President Truman asked for such advice informally in 1948. Ronald D. Rotunda, *Innovations Disguised as Traditions: A Historical Review of the Supreme Court Nominations Process*, 1995 U. ILL. L. REV. 123, 129 (1995).

67. See Cornyn, *supra* note 61, at 182.

68. Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 270 (1999).

69. *Id.* (citing Neil Lewis, *Head of Senate Judiciary Panel Reconsiders A.B.A. Advisory Role*, N.Y. TIMES, Feb. 19, 1997, at A15).

70. Compare Carl Tobias, *Federal Judicial Selection in the Fourth Circuit*, 80 N.C. L. REV. 2001, 2018 (2002) ("Senator Hatch voiced increasing concern about this involvement and, in February 1997, the chair ended formal ABA participation. During March 2001, the Bush Administration notified the American Bar Association that it would not solicit its advice prior to submitting nominations.") and Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready To Give Up On the Lawyers?*, 10 WM. & MARY BILL RTS. J. 37, 44 n.41 (2001) (reporting that Republicans in general are "critical of [the] ABA[']s track record with judicial nominations"), with Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. DAVIS L. REV. 721, 734 (2003) (stating that "President Clinton relied upon the [ABA] rankings for his entire second term" when picking judicial nominees).

71. Cornyn, *supra* note 61, at 182.

72. See *id.* (quoting Joseph Curl, *Bush Sends Nominees in "Good Faith"; Leahy Foresees Few Foes to "Encouraging" Judicial Batch*, WASH. TIMES, May 10, 2001, at A1).

73. *Id.*

III. WHY THE PRACTICE IS UNCONSTITUTIONAL

The focus of this article is to discuss the constitutionality of the filibuster with respect to judicial nominations. The first argument proffered rests on the idea that the advice and consent clause is non-discretionary, thus, *requiring* the Senate to either vote for or against a nominee. Another argument involves an analysis of the separation of power clause and its effects on filibustering judicial nominees.

Additional arguments involve the notion of “majoritarianism” and the fact that the filibuster creates a supermajority where one is not identified in a “plain” reading of the constitution. Moreover, it may be that the Senate Rule that sets forth the filibuster is unconstitutional, because it does not allow for “new” Senates to change the rule with a majority vote.

A. The Advice and Consent Clause is Non-Discretionary

Firefighters do not have a choice to run into a burning building—they have a moral and professional duty to do so. True, they choose firefighting as a profession but with that choice comes responsibility. Likewise, many functions of government are obligations rather than choices, including the advice and consent clause. The Senate is a body of public servants, sitting to serve their constituents. Therefore, the power vested to the upper-house of Congress is to be used for the people.

The constitution reads that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”⁷⁴ Simply put, the President tenders candidates for judgeships, and the Senate – after debating their qualifications – either accepts or rejects the candidate with a vote. It does not appear from the text of the constitution that the Senate has a third option; the third option being an infinite debate over the confirmation or rejection of the individual, regardless if the debate is carried out by a majority or a disgruntled minority. Thus, unlike the firefighter with a moral and professional duty to act, the Senate, with regard to the advice and consent clause, also has a legal duty to act.

1. Filibuster of Legislation v. Judicial Nominees

The constitutionality of filibustering legislation is another heated debate. While many of the arguments made within this article may apply to the filibustering of legislation, there are two chief distinctions.

74. U.S. CONST. art. II, § 2, cl. 2.

a. History

First, unlike the British system, the American political system is not built on the foundation of tradition; rather, it is built on a written document of law. However, it is often helpful to look into the past for guidance. When looking at the filibuster of legislation we see a long history dating back to 1790.⁷⁵ The motive behind the practice may have changed drastically from a want of unlimited debate, to a political firestorm, but nonetheless, the institution has stood for over 200 years.⁷⁶ This stands in stark contrast of judicial filibusters, which date back to the “ripe” year of 2003.⁷⁷

b. Legal Obligation

The second, and most important, difference between filibustering legislation and judicial nominees is there is no advice and consent clause with respect to legislation. As stated, Congress has a *responsibility* to perform for the people. One such expected performance is the passing of legislation. However, unlike voting on the President’s nominees, the only obligation the Senate has to legislate is a moral and political one, as distinguished from a constitutional one.

Moreover, because the constitution empowers *all* lawmaking authority within Congress, the filibustering of bills does not have the same constitutional implications as filibusters against the President’s nominees. This is primarily because in the case of judicial nominees, the main branch involved is the executive, instead of the legislature as in the passing of bills.

2. Due Process

There are those who believe that in filibustering judicial nominees, Congress may be in violation of the constitutional requirement of due process of law.⁷⁸ “The Senate’s duty to hold hearings and, at a minimum, a full vote on judicial nominees could be construed as part of a larger set of procedural obligations imposed on the legislature by the Constitution and enforceable via the Due Process Clause.”⁷⁹

The constitution has a plethora of clauses dealing with how laws are made.⁸⁰ This fact suggests that the Founding Fathers were concerned with

75. Fisk & Chemerinsky, *supra* note 7, at 185.

76. *Id.* at 186.

77. See, e.g., Helen Dewar, *Nomination of Texas Judge is Blocked*, WASH. POST, May 2, 2003, at A2 (addressing the first two filibustered nominees).

78. Lee Renzin, *Advice, Consent, and Senate Inaction-Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1759 (1998); see also U.S. CONST. amend. V.

79. Renzin, *supra* note 78, at 1759.

80. *Id.* at 1761.

“procedure,” at least with the procedure of how laws were enacted.⁸¹ The nucleus of this argument is that a fair procedure will lead to accountability, which leads to “the basic standard of legislative legitimacy under a republican form of government.”⁸² Therefore, not only must the substance of congressional activity pass due process muster, but so must the procedure in which that activity is developed – a concept called “legislative due process.”⁸³ Hence the next question that must be asked: Is the filibustering of judicial nominees procedurally legal?

Justice John Paul Stevens answered this question in *Fullilove v. Klutznick*⁸⁴ where he stated: “[f]or just as procedural safeguards are necessary to guarantee impartial decision making in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process.”⁸⁵ Justice Stevens’s concern in *Fullilove* was rooted in what he saw as Congress enacting massive amounts of legislation with almost no deliberation or debate.⁸⁶ According to one author: Given the enormity of the subject, Justice Stevens felt Congress gave the matter too “perfunctory” a consideration, and saw “no reason why the character of [Congress’s] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law.”⁸⁷

Applying Justice Stevens’s logic to the issue at hand, “[t]here can be no more basic a component of accountable democratic process than an open vote conducted by elected representatives.”⁸⁸ Indeed, by effectively rejecting the President’s judicial candidates without a vote, “the Senate is failing to ‘play by the rules,’ and [] violating legislative due process.”⁸⁹

B. Separation of Power

“A trifurcated government structure is arguably the most remarkable creation of the Framers. It was designed both to enhance the functioning of each branch and to prevent the aggrandizement of power by one branch.”⁹⁰

81. *Id.* (citing Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 291 (1975) and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067-72 (1980)).

82. *Id.* at 1761-62 (citing Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 253 (1976)).

83. *See id.* at 1762.

84. 448 U.S. 448 (1980).

85. *Id.* at 549 (Stevens, J., dissenting) (citing Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 255 (1976)).

86. *See Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting); Renzin, *supra* note 78, at 1762.

87. Renzin, *supra* note 78, at 1762 (quoting *Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting)).

88. *Id.* at 1766.

89. *Id.*

90. *Id.* at 1751.

Thus, when one branch commandeers the power or responsibility of another, there should be immediate concern.

1. Usurping the Executive Branch

To legislate is a function intrinsic to Congress; however, to appoint judges is an executive function, a power reserved for the President.⁹¹ As such, obstructing the President from exercising his power and duty to appoint judges could be seen as an encroachment on an executive function.

Just as the advice and consent clause of the Senate is non-discretionary, so too is the duty of the President to make appointments.⁹² The constitution states that the President “shall nominate” judicial candidates, thus the President has the *sole* power to nominate and the *primary* power in the appointment process.⁹³ However, true-to-form in our government design, there is a separation of power aspect to the nomination process, which checks the President’s authority.⁹⁴ The Senate, being the secondary player in the judicial confirmation process, has a quasi-veto over the President’s picks, which acts as the “check.”⁹⁵

Historically speaking, the idea of a greater role of the Senate in the confirmation process was discussed and rejected during the constitution’s formation. The reasons were numerous but the most prominent was the notion that “public bodies [do not] feel [a] personal responsibility and [] give full play to intrigue and cabal.”⁹⁶ Basically, there was a belief, promulgated by James Madison that the President would be less susceptible to special interest groups and personal favoritism than would a collective body.⁹⁷

The authority given to the Senate, as envisioned by the Framers, was indeed a powerful one; however, it was not intended as an ability to “undermine the President’s ultimate responsibility for the appointments he made.”⁹⁸ Alexander Hamilton makes this clear in *The Federalist No. 66* when he wrote that:

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

91. See U.S. CONST. art. II, § 2, cl. 2.

92. See *supra* Part III-A.

93. U.S. CONST. art. II, § 2, cl. 2 (emphasis added); John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 635 (2003). Professor Eastman states that “[t]he appointment power of Article 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.” *Id.* at 635 n.6.

94. U.S. CONST. art. II, § 2, cl. 2.

95. *Id.*

96. Eastman, *supra* note 93, at 635 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 42 (Max Farrand ed., 1911)).

97. *Id.* at 642-43; see THE FEDERALIST NO. 10 (James Madison); see also THE FEDERALIST NO. 51 (James Madison).

98. Eastman, *supra* note 93, at 646.

they cannot themselves *choose*—they can only ratify or reject the choice he may have made.⁹⁹

By filibustering judicial nominees because of their personal philosophy, which is arguably what is happening now, the Senate is moving well beyond their authority and trespassing on a clear executive function. By imposing an ideological litmus test on presidential nominees, the Senate is doing more than rejecting or accepting – they are effectively choosing by narrowing the type of individual that can be nominated. “In this way, the Senate seems to be arrogating to itself the nomination as well as the confirmation power.”¹⁰⁰ This is a clear violation of the separation of power clause.

2. Usurping the Judicial Branch

“The Framers never thought that one branch of government should love another. Despite the old working definition of a federal judge as a lawyer who has friends in the Senate, a fairly high level of hostility is built into the relationship between Congress and the courts.”¹⁰¹

a. Log-Jamming

Beyond the philosophical argument above, there is a pragmatic argument suggesting that filibustering judicial nominees is a breach of separation of power. Essentially by preventing nominees from being confirmed, the Senate is placing a burden on the rest of the judiciary.

Chief Justice Rehnquist echoed this concern by stating in his annual report that there is a crisis in the judiciary due to “an alarming number of judicial vacancies.”¹⁰² Currently, there are forty-four judicial vacancies with an additional sixteen planned future vacancies; eighteen of these have individuals who have been nominated by the President to fill the judgeships

99. THE FEDERALIST NO. 66 (Alexander Hamilton).

100. Eastman, *supra* note 93, at 652. Professor Eastman also explains this idea of senatorial encroachment by stating that “[t]he 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.” *Id.* at 645.

101. Dennis Jacobs, *Trust and Jurisdiction – The Tug-of-War Between Congress and the Federal Courts*, 22 HARV. J.L. & PUB. POL’Y 55, 55 (1998).

102. 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 Aug. 1, 2004) [hereinafter Rehnquist, 2001]. Justice Rehnquist addressed this issue again in 2002 by stating that there are “too many judicial vacancies.” William H. Rehnquist, *2002 Year-End Report on The Federal Judiciary*, available at <http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html> (last visited Aug. 1, 2004) [hereinafter Rehnquist, 2002]. In 2003 Justice Rehnquist once more expressed concern about the vacancies in the Circuit Courts. William H. Rehnquist, *2003 Year-End Report on The Federal Judiciary*, available at <http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html> (last visited Aug. 1, 2004) [hereinafter Rehnquist, 2003].

and are awaiting the Senate's confirmation.¹⁰³ More worrisome are the twenty "emergency vacancies," some of which have been pending for nearly ten years.¹⁰⁴

The separation of power between the branches is breached when one branch, the legislative, is able to subjugate another branch, the judiciary, with a workload beyond its capacity. The Senate may not have put the judiciary into a position where it is crumbling due to a massive caseload with too few judges; however, this argument exposes the truth about filibustering judicial nominees. The framers clearly wanted each branch to be an independent entity, without domination of one branch over another. Therefore, is it reasonable that the framers would have made such error – to allow one half of one branch to strangle another with work?

It is important to note that there is little dispute that Congress, through legislation and the President's signature, could eradicate the lower court altogether.¹⁰⁵ However, this action requires both houses of Congress; distinguished from the one house filibuster.¹⁰⁶

b. Court Packing

Just as the court-packing scheme was an attempt by the Executive, then President Franklin Roosevelt, to appropriate power from the Judicial Branch, so is the filibustering of judicial nominees an attempt by the Legislative Branch to steal power from the courts.

The entire purpose of giving federal judges life tenure was to limit politicking within the Judicial Branch.¹⁰⁷ Therefore, just as impeaching judges "to enforce [a] political orthodoxy"¹⁰⁸ would be a devastating blow to the independence of the Judicial Branch, so is the "ideological litmus test" currently being implemented against judicial nominees.¹⁰⁹ By filibustering nominees that do not fit into a particular political box, the current Senate is participating in the modern day court-packing scheme.

103. Federal Judicial Vacancies, *Reports*, United States Courts, available at <http://www.uscourts.gov/vacancies/emergencies2.htm> (last visited Mar. 22, 2005).

104. *Id.*

105. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953) (discussing the fact that Congress's power over the courts is only inhibited on actions which will "destroy the essential role of the Supreme Court in the constitutional plan").

106. *See id.*

107. *See* Jason C. Matson, *Running Circles Around Marathon? The Effects of Accounts Receivable as Core or Noncore Proceedings on the Article III Courts*, 20 EMORY BANKR. DEV. J. 451, 505 (2004).

108. Eastman, *supra* note 93, at 651.

109. *Id.*

3. Presentment and Bicameralism

The constitution is unequivocally clear that in order for a bill to become law it must pass through both the lower and upper house and be presented to the President of the United States for signature or veto.¹¹⁰

The Court in *INS v. Chadha* held “that a one house legislative veto was unconstitutional because of the absence of bicameralism and presentment.”¹¹¹ Moreover, the Court went on to say that if the action is determined, upon scrutiny, to be “essentially legislative in purpose and effect” then passage by a majority of both Houses is necessary.¹¹²

Therefore, as the Senate continues to filibuster judicial nominees and reduce the judiciary by attrition, a violation of the constitution becomes evident.¹¹³ This is so in that “the Senate’s actions are equivalent to a de facto one house repeal of legislation establishing the size of the judiciary, in violation of the constitutional requirements of bicameralism and presentment.”¹¹⁴

Congress has been given the authority by the constitution to establish laws controlling the number of positions in the federal courts.¹¹⁵ However, in exercising this authority, it must act within the procedures proscribed in Article I of the Constitution, including bicameralism and presentment.¹¹⁶

C. A New Supermajority

The constitution establishes a general structure of majority rule.¹¹⁷ Accordingly, there is a presumption that a majority of Congress is all that is necessary for most decisions.¹¹⁸ This is true, except decisions for which the constitution specifically requires a supermajority or two-thirds.

110. U.S. CONST. art. I, § 7, cl. 2.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

Id.

111. See Renzin, *supra* note 78, at 1770 (citing *INS v. Chadha*, 462 U.S. 919, 957-59 (1983)); see also *INS v. Chadha*, 462 U.S. 919, 957-59 (1983).

112. *INS*, 462 U.S. at 952.

113. See Renzin, *supra* note 78, at 1770.

114. *Id.*

115. See *Palmore v. United States*, 411 U.S. 389, 400-01 (1973) (stating that Congress has no constitutional obligation to make Article III courts); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 341 (1977) (remarking that Congress has “broad, perhaps plenary power to limit federal jurisdiction . . .”).

116. *INS*, 462 U.S. at 921.

117. Fisk & Chemerinsky, *supra* note 7, at 242-45.

118. See *id.*

1. The True Supermajorities

Presently the constitution calls for a supermajority on seven occasions. As discussed in detail below, the Senate must vote with two-thirds to ratify a President's treaty.¹¹⁹ Also, in order for the Senate to convict an officer in an impeachment trial they must be able to muster two-thirds of the senators present.¹²⁰ As seen in President Clinton's trial, this is easier said than done. In addition to impeachment, both the Senate and the House have the ability to oust one of their members for bad conduct; but again, this requires a two-thirds vote from the expelling house.¹²¹

In some cases the action sought by Congress is so momentous that the constitution requires a supermajority in both the Senate *and* the House. For instance, individuals that have engaged in insurrection or rebellion may not hold office unless Congress as a whole removes the disability by a two-thirds vote.¹²² The President's veto is one of the most significant powers in the "checks and balances" form of government.¹²³ As such, in order for Congress to override the executive veto they need a two-thirds vote from both the Senate and the House.¹²⁴ Another supermajority is necessary with regard to the President's capacity to govern. Specifically one step in determining that the President is disabled is a two-thirds vote from both chambers in Congress.¹²⁵

119. U.S. CONST. art. II, § 2, cl. 2. ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . ."); *see also infra* Part III-B-2.

120. U.S. CONST. art. I, § 3, cl. 6. ("The Senate shall have the sole Power to try all Impeachments. . . . When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

121. U.S. CONST. art. I, § 5, cl. 2. ("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.").

122. U.S. CONST. amend. XIV, § 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Id.

123. *See generally* U.S. CONST. art. I, § 7, cl. 3.

124. *Id.*

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Id.

125. U.S. CONST. amend. XXV, § 4 ("Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office . . .").

The last supermajority pertains to the most dramatic change legally available in our republic: a constitutional amendment. A proposal for a change to the Document must be accompanied by a two-thirds vote.¹²⁶ After that, the proposal moves to the State Legislatures for consideration.¹²⁷

2. A Simple Reading

Theodore Sedgwick's *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law*,¹²⁸ published in 1857, stated the plain meaning rule: "if the [constitutional wording] is plain and unambiguous there is no room for construction or interpretation."¹²⁹

Article II, Section 2, Clause 2 of the constitution reads that the President "shall have Power, by and with the *Advice and Consent of the Senate* to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . . Judges of the supreme Court . . ." ¹³⁰ Here, the founding fathers made it clear that the President needs two-thirds of the Senate to ratify a treaty. This is an extremely significant sentence in this present debate not for what it says, but rather, for what it does not say – that the President needs two-thirds of the Senate to confirm nominees for the bench.

This is a clear example involving the canon of constitutional construction, *expressio unius est exclusio alterius*. Roughly, this canon reads that to state "one thing is to exclude the other."¹³¹ Pertaining to the issue at hand, by requiring a supermajority for treaties, the framers excluded the requirement for judicial confirmation.¹³²

While no serious scholar or politician would argue that there is, in fact, a constitutional supermajority requirement for confirming judicial nominees, one has effectively been invented by the filibustering senators. It is of little consequence if the reason for requiring a supermajority for judicial nominees is political squabbling, a true effort to defend unlimited debate in the Senate, or the new *modus operandi* to keep radical judges off the bench –

126. U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . .").

127. *Id.*

128. THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* (1857).

129. *Id.* at 231.

130. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

131. M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 414 (1985).

132. *See id.*

the effect is the same, an eighth supermajority requirement where one was never intended.

D. Constitutional Amendment by Proxy

Interestingly, the tradition behind the right of unlimited and free debate was established by the Senate's desire for autonomy from the Executive Branch, rather than from trepidation over minority rights.¹³³

In *United States v. Ballin*,¹³⁴ the Supreme Court unanimously held that "[t]he Constitution empowers each house to determine its rules of proceedings. [However,] [i]t may not by its rules ignore constitutional restraints" ¹³⁵ "The 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, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."¹³⁶ For this reason, Congress could not enact a law that subsequently could not be repealed by a majority in a future Congress.¹³⁷ Within the same logic, the Senate cannot entrench rules that do not allow change by a majority of a future Senate.

This principle of the legislature not being allowed to bind future legislatures dates back to Blackstone:

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.¹³⁸

Unlike the rules in the House of Representatives, which are adopted every two years, the Senate's rules are continuous.¹³⁹ Rule V states that the rules "continue from one Congress to the next Congress unless they are changed as provided in [the] rules."¹⁴⁰ Compounding the problem is that

133. Fisk & Chemerinsky, *supra* note 7, at 190.

134. 144 U.S. 1 (1892).

135. *Id.* at 5. The Court went on to say:

[T]here 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. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time.

Id.

136. *Id.*

137. *See id.*

138. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 505 (1995) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90) (stating that Blackstone traces the traditional view to Cicero).

139. Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role*, 100 DICK. L. REV. 341, 357 n.78 (1996).

140. Standing Rules of the Senate, Rule V, Precedence of Motions, *available at* <http://rules.senate>.

unlike the House, which requires only a majority vote to change its internal rules, the Senate demands a super-majority to alter or abolish its rules, including the filibuster.¹⁴¹ Rule XXII itself provides that “on a measure or motion to amend the Senate rules . . . the necessary affirmative vote shall be two-thirds of the Senators present and voting”¹⁴² Consequently, unless one party can amass a two-third advantage on a movement, the minority party can always conduct a filibuster and defeat any attempt to modify the rules regulating the filibuster.¹⁴³ “Because the filibuster enormously increases the minority’s power and gives it the ability to block bills it opposes, the minority party would have every incentive to do so.”¹⁴⁴

What has effectively happened is that the Senate that adopted Rule XXII has barred the possibility of a future majority in the Senate to change it.¹⁴⁵ This is evidenced by the fact that Rules V and XXII together have the effect of allowing one session of the Senate to bind all future sessions to its method of enacting legislation or confirming nominees.¹⁴⁶

Rule XXII effectively extends a supermajority requirement to the passage of any measure before it, including proposed rule changes. Rule V preserves all Senate rules from one session to the next. The Senate thus violates the Court’s declaration in *Newton* [*v. Commissioners*, 100 U.S. 548, 559 (1879)] by depriving “succeeding legislature[s] . . . [of] the same jurisdiction and power . . . as its predecessors.”¹⁴⁷

Contradictorily, the Supreme Court has specifically prohibited this type of action,¹⁴⁸ holding that there are undeniable grounds forbidding such

gov/senaterules/rule05.htm (last visited Aug. 1 2004) [hereinafter Standing Rules of the Senate]. “Because the entire membership of the House is determined every two years, the House is not considered to be a continuing body. In contrast, the Senate considers itself to be a continuing body because only one-third of the Senate seats are the subject of election every two years.” Fisk & Chemerinsky, *supra* note 7, at 245.

141. Compare Delker, *supra* note 139, at 382 n.78 (1996) (stating that “[s]ince every two years the House is considered a separate body from preceding Houses, rules of a prior House are not binding on a subsequent House”), with Standing Rules of the Senate, *supra* note 140, at Rule V.

142. Standing Rules of the Senate, *supra* note 140, at Rule XXII.

143. Fisk & Chemerinsky, *supra* note 7, at 245-46.

144. *Id.* at 246.

145. *See id.*

146. *Id.* at 248.

147. *Id.* at 248-49 (quoting *Newton v. Commissioners*, 100 U.S. 548, 559 (1879)).

148. *Id.* at 247-48.

The United States Supreme Court often has expressed this principle against legislative entrenchment. In *Ohio Life Insurance and Trust Co. v. Debolt*, the Court held that one session of a legislature could not limit the ability of a future session to impose taxes. [57 U.S. (16 How.) 416, 440 (1853).] Similarly, in *Newton v. Commissioners*, the Court ruled that the Ohio legislature could move its state capitol, notwithstanding decisions by a legislature thirty years earlier as to its location. [100 U.S. 548 (1879).] Although the American Constitution rejects the notion of parliamentary sovereignty, it retained that of

legislative entrenchment.¹⁴⁹ “First, American democracy is premised upon government by the people, as expressed through representatives. Popular sovereignty is frustrated when one session of the legislature can prevent or limit action by future sessions.”¹⁵⁰

Second, such entrenchment upsets the balance of legislative accountability that is essential for a properly functioning democratic government.¹⁵¹ A central tenant to the Democracy form of government is that the people can hold their representatives accountable by threatening to elect a different representative.¹⁵² “The knowledge that behavior in office must be submitted to the voters for approval deters unwise judgments, or failing that, enables the people to replace public officials with others who will implement better policies.”¹⁵³

Therefore, the entrenchment of the Senate’s filibuster rule obstructs the accountability that is necessary in a democratic society.¹⁵⁴ As has been noted:

Absent the very unlikely event that a Senate is elected where two-thirds of the members will vote for repeal or reform, the people cannot change filibuster rules no matter how much they may dislike them. The senators responsible for enacting the rules cannot be

legislative equality — “the legislature does not have the power to bind itself in the future.” [John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 506 (1995).] In *Stone v. Mississippi*, the Court held that the contract clause in Article I, Section 10 of the Constitution did not limit the ability of legislatures to adopt laws that they believed to be reasonable exercises of the police power. [101 U.S. 814 (1880).] It was the Court’s belief that any other view would impermissibly allow one legislature’s acts to bind the hands of the future sessions of the legislature. [See *id.* at 818.]

In many other cases, the Court has expressed the same view that it is unconstitutional for a legislature to bind its successors. In *Connecticut Mutual Life Ins. Co. v. Spratley*, the Court said: “[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.” [172 U.S. 602, 621 (1898).] In *Reichelderfer v. Quinn*, the Court echoed this and remarked that “the will of a particular Congress which does not impose itself upon those to follow in succeeding years.” [287 U.S. 315, 318 (1932).]

Id.

149. *Id.* at 249.

150. *Id.*

Just as the members of Congress lack power to extend their terms beyond those set by the Constitution, they may not undermine the spirit of that document by immutably extending their influence beyond those terms. Each election furnishes the electorate with an opportunity to provide new direction for its representatives. This process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters.

Id. (quoting Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1897 AM. B. FOUND. RES. J. 379, 404-05) (internal quotations omitted).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 250.

held accountable because they are no longer members of the body.¹⁵⁵

This vicious circle continues where the present senators cannot be fairly held accountable for not passing legislation over filibusters or changing the rules themselves because of the exhausting and nearly impossible requirements of doing so.¹⁵⁶ This “[e]ntrenchment’s obstruction of the legislature’s inherent authority to adapt to current circumstances represents a serious infringement upon the right of the electorate to rule according to its will.”¹⁵⁷

IV. CLEAN HANDS: THE STENCH OF POLITICS

“A nomination delayed is justice delayed. As we know, justice delayed is justice denied. A vacancy unfilled is justice unfulfilled.”¹⁵⁸ This was a comment made by Senator Russ Feingold from Wisconsin addressing the GOP’s failure to confirm President Clinton’s nominees.¹⁵⁹ Apparently, Senator Feingold has had a change in philosophy, because in 2003 he became a leader in filibustering President Bush’s nominees, thus, in his very words, denying justice.¹⁶⁰

It is not clear why some of the recently opposed nominees face resistance in the first place. Senator Clinton tried to answer this question by stating that the nominees were “lemons.”¹⁶¹ Senator Edward Kennedy went further, when he stated that the nominees were “Neanderthal[s].”¹⁶²

This political wrangling came to a boiling point “after portions of more than a dozen memos from Judiciary Democrats were published in a *Wall Street Journal* editorial . . .”¹⁶³ The memos suggested that the filibusters were an attempt to deny, “qualified minority nominees because powerful far-left interest groups [] want to deny Republicans the perceived political capital associated with appointing minorities to the federal bench.”¹⁶⁴

Maybe even more amazing than the spectacle of “secret memos” (which has to be politics at its worst) is the outrageous hypocrisy that follows the

155. *Id.*

156. *Id.*

157. *Id.*

158. Craig Gilbert, 3 *Seeking Feingold Seat Attack Him on Judges Issue*, THE MILWAUKEE J. SENTINEL, Nov. 18, 2003, at 2A (quoting Sen. Russ Feingold).

159. *Id.*

160. *See id.* (quoting Feingold as saying in reference to “the GOP’s failure to move a Clinton nominee [in 1999]: ‘A nomination delayed is justice delayed. As we know, justice delayed is justice denied.’”).

161. *Id.*

162. *Id.*

163. Paul Kane, *Democrats on Judiciary Scoff at Hatch’s Overture*, ROLL CALL, Feb. 4, 2004, available at, 2004 WL 61550661.

164. Jonathan M. Stein, *Legal Memo to the Democrats; The Leakers Are Not the Problem*, WASH. TIMES, Dec. 4, 2003, at A23.

controversy. Democrats presently claim that their principles determine when a filibuster should be engaged to prevent a nominee from taking the bench, however, that was not always their stance.¹⁶⁵ Likewise, Republicans wail and gnash their teeth at the filibustering of nominees, unfortunately, while they have not engaged in filibustering *per se*, they have been just as obstructive in the nominee process.¹⁶⁶

A. *Same Sin, Different Apple*

Many of the Senators that are supporting the filibusters have made comments in the past rebuking the practice under the veil of a moral code.¹⁶⁷ On the Congressional Record, Senator Daschle stated:

The Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote. *The Founders* debated the idea of requiring more than a majority to approve legislation. They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock.¹⁶⁸

The Senator went on to say in 1999 with regard to the nominees proffered by President Clinton that:

As Chief Justice Rehnquist has recognized: “The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.” An up-or-down vote, that is all we ask . . . they deserve at least that much . . . I must say, I find it simply baffling that a Senator would vote against even voting on a judicial nomination. Today’s actions prove that we all understand that we have a constitutional outlet for antipathy against a judicial nominee—a vote against that nominee . . . Thus, today, I implore, one more time, every Senator to follow Senator Leahy’s advice, and treat every nominee “with dignity and dispatch.” Lift your holds, and let the Senate vote on every nomination.¹⁶⁹

Conversely, now that a Republican is doing the nominating, Senator Daschle is not as enthusiastic of his stated conviction. In fact, Senator

165. Gilbert, *supra* note 158.

166. See Heidi Pauken, *Injudicious*, AM. PROSPECT, Apr. 1, 2004, at 11.

167. See Cornyn, *supra* note 61, at 198-99.

168. *Id.* (citing 141 CONG. REC. 2832 (statement of Sen. Daschle) (emphasis added)).

169. *Id.* at 207 (citing 145 CONG. REC. S11,919 (daily ed. Oct. 5, 1999) (statement of Sen. Daschle)).

Daschle, along with other Democrats has led the effort to filibuster certain nominees, thus, preventing them from receiving an up or down vote.¹⁷⁰

Regrettably, this double-standard crosses party lines. In 1994 Senator Hatch stated he “personally d[id] not want to filibuster Federal judges. The President won the election. He ought to have the right to appoint the judges he wants to.”¹⁷¹ More recently, he has been one of the leaders in the Senate to stop the filibustering of judicial nominees. Despite this rhetoric, Senator Hatch, during the Clinton years, personally facilitated the “committee filibustering” by frustrating certain nominees’ ability to have committee hearings.¹⁷²

“To say that many Clinton nominees never received hearings during President Clinton’s second term oversimplifies what occurred.”¹⁷³ Many of President Clinton’s nominees were placed on an informal hold.¹⁷⁴ This

170. See Carl Hulse, *Congress Goes Home After Surly Session*, PITT. POST-GAZETTE, Nov. 30, 2003, at A14. Other Senators who are participating in the filibustering objected to the very practice when President Clinton was in office. See Cornyn, *supra* note 61, at 207. Senator Biden stated:

[E]veryone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor . . . It is totally appropriate . . . to reject every single nominee if they want to. That is within their right. But it is not . . . appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote.

Id. (citing 143 CONG. REC. S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden)). Senator Boxer also showed disdain for obstructing judicial nominees when she stated that “[a]ccording 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.” *Id.* (citing 143 CONG. REC. S4420-21 (daily ed. May 14, 1997) (statement of Sen. Boxer)). Senator Durbin agreed, stating, “[i]f, after 150 days languishing on the Executive Calendar that name has not been called for a vote, it should be. Vote the person up or down.” *Id.* (citing 144 CONG. REC. S11031 (daily ed. Sept. 28, 1998) (statement of Sen. Durbin)). Senator Feinstein also agreed with this premise when she stated:

A nominee is entitled to a vote. Vote them up; vote them down . . . What this does to a [nominee’s] life is, it leaves them in limbo . . . It is our job to confirm these judges. If we don’t like them, we can vote against them. That is the honest thing to do. If there are things in their background, in their abilities that don’t pass muster, vote no.

Id. (citing 145 CONG. REC. S11,014-15 (daily ed. Sept. 16, 1999) (statement of Sen. Feinstein)).

171. See Cornyn, *supra* note 61, at 208 (citing 140 CONG. REC. 27,470 (1994) (statement of Sen. Hatch)).

172. Pauken, *supra* note 166, at 11.

During the six Clinton years that Republicans controlled Congress, Judiciary Committee Chairman Orrin Hatch faithfully administered the “blue-slip” policy, which allowed home-state senators to effectively veto nominees by not returning their evaluation forms to the committee. In 1998, the slips carried language stating that “[n]o further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee’s home state senators.”

Today Hatch still reigns, but the blue-slip policy doesn’t: The Utah Republican announced early in 2003 that the slips were merely advisory, claiming that that had always been the case.

Id. However, it was widely known that the blue-slip was a tactic used to contain an unwanted nominee in committee for an indefinite period. See *id.*

173. Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 527 (2003).

174. *Id.*

resulted in Senate Republicans never allowing the nominees on hold to appear before the Senate Judiciary Committee.¹⁷⁵ “Some nominees went years before they received a hearing; other nominees never even received hearings. The number of confirmed judges declined steadily after 1996, leading many commentators to claim that a vacancy crisis existed in the federal judiciary.”¹⁷⁶

The “committee filibuster” fundamentally has the same constitutional implications argued above; it is essentially a judicial filibuster with a different wrapping.¹⁷⁷ In fact, many argue that this type of filibustering is more egregious because instead of an exhausting debate, which is viewed virtuous, there is no debate at all.¹⁷⁸

B. Do Unto Others as Done to You

Clearly, some Democrats are filibustering President Bush’s nominees as a response to the treatment President Clinton’s nominees received while he was in office.¹⁷⁹ Republicans have launched elaborate, grand standing

175. *Id.*

Senate Democrats accused Senate Republicans of changing the “rules of the game” in the confirmation process. Senate Republicans, of course, claimed that they were merely exercising the powers of “advice and consent.” Others noted that Senate Republicans were gaining political revenge for the Bork nomination. Advice and consent became “abuse and dissent”; few people were satisfied with the confirmation process. The confirmation process stalled completely in President Clinton’s last year in office, prompting President Clinton to utilize a recess appointment to nominate Roger Gregory for a seat on the Fourth Circuit.

Id. (internal citations omitted).

176. *Id.*; see also Elliot E. Slotnick, *Prologue: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587, 592-93 (2003); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-For-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups”*, 12 CORNELL J.L. & PUB. POL’Y 503, 527 (2003).

Democrats subjected George H.W. Bush’s federal district court nominees to an average of 92 days’ delay after their nomination before granting them hearings. In contrast, during the first half of Clinton’s second term, Republicans delayed hearings for Clinton’s district court nominees an average of 161 days. These averages do not include nominees denied a hearing altogether. At the end of the 106th Congress, 40 nominees remained stalled in the Senate Judiciary Committee, 36 of whom had never been granted a hearing.

Id.; see also Rehnquist, 2001, *supra* note 102; Rehnquist, 2002, *supra* note 102; Rehnquist, 2003, *supra* note 102.

177. See *supra* Part III.

178. *Senate Republican Leaders Prepare For Marathon Debate*, CONGRESS DAILY, Nov. 12, 2003, available at 2003 WL 65939184. The irony is by arguing that the bottling up a nominee in committee is worse than filibustering a nominee, you are essentially saying that “yes, holding up a nominee is wrong, but they are ‘wronger,’ thus, my behavior is OK.” This complements the notion that the practice is more about getting back than it is about convictions. See *infra* Part IV-B.

179. See Judge Andrew Napolitano & Major Garrett, *Fox News: The Big Story With John Gibson*, FOX NEWS, Nov. 13, 2003, available at 2003 WL 7106085 (stating that it is time for Democrats to payback “Republicans who as the majority party in the latter stages of the Clinton presidency buried dozens of Clinton judicial nominees in committee, denying them hearings and votes on the Senate floor. Democrats called these tactics less visible means of obstruction and a filibuster by another name.”). This point is again exemplified by Senator Hillary Clinton, when she stated in response to filibustering that “Republicans had stifled 63 judicial nominees without giving them even a committee vote during the Clinton administration,” thus, showing a clear motive for the filibuster

speeches and demonstrations against the filibustering.¹⁸⁰ At the same time, Republicans have taken very little real steps to stop the abuse.¹⁸¹

This lack of effort could be the result of Republicans realizing that they will not hold the majority in the Senate indefinitely. Therefore, they do not want to completely ban the tactic because they may use it on a future Democratic President's nominees. As one commentator said:

Where Congress is concerned, the old truism that "what goes around comes around" needs to be amended. Around here, it comes back around with a vengeance, creating a precedent for more vengeance the next time. In the Senate, Republicans blocked President Bill Clinton's judicial nominations in the Judiciary Committee and now Democrats are filibustering President Bush's nominees. When a Democrat next becomes president, Republicans surely will filibuster his (or her) nominees.¹⁸²

This mind-set is the epitome of politics gone astray.

C. The Role of Ideology in the Advice and Consent Stage

New York Senator Charles Schumer stated that the role of the Senate in the confirmation process is to gain a balance of judicial ideologies on the bench.¹⁸³ In other words, some in the Senate believe that judicial nominations should fall into a predetermined category based on political ideology of the party of the nominating president.¹⁸⁴ Senator Schumer, speaking about the D.C. Circuit, went on to say that the circuit was "balanced" because it has "four Republican judges, four Democrats . . . Some of us believe that this all-important court should be kept in balance."¹⁸⁵ This notion is impossible considering the structure of our government. What would be done if a Democrat or Republican sat in the Oval office for twelve, sixteen, or twenty years? Would Senator Schumer suggest we keep any empty seats vacant until the opposite party won an election? As mentioned, this is a type of court packing that breaches the separation of power doctrine.

being retribution. Anne Q. Hoy, *In Senate, Change Is a 4-Letter Word*, NEWSDAY, Nov. 14, 2003, at A05.

180. Major Garrett & Brian Wilson, *Senate Talkfest Long on Drams, Short on Substance*, FOX NEWS, available at <http://www.foxnews.com/story/0,2933,102938,00.html> (last visited Nov. 13, 2003).

181. *See id.*

182. Editorials, *Oppression*, ROLL CALL, June 18, 2003, available at 2003 WL 7691054.

183. *See Judicial Nominations: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002).

184. *See id.*

185. *Id.*

There is no constitutional requirement of a balance of ideology on the bench. Indeed, it is the duty to decide cases without passion or ideology that is required of judges.¹⁸⁶ In reading the *Federalist Papers*, we see that the founding fathers stressed the qualification of judges on judicial philosophy, rather than judicial ideology.¹⁸⁷ In particular, Alexander Hamilton stated:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.¹⁸⁸

This attitude about a balance of ideology in the judiciary may be the root of the problem. On several occasions, senators from both sides of the aisle have proffered the logic that they are not only entitled to holding up nominees, but they are, in fact, noble because the candidates are “extreme.”¹⁸⁹ This argument seems disingenuous. For instance, when democrats say they are blocking a prospective judge because that judge is “pro-life,” they are essentially saying that to be a federal judge, you must be “pro-choice.”¹⁹⁰ This is an inequitable argument because on the one hand they want judges that are not “extreme,” but they define “extreme” as anything that is not encompassed in their political spectrum. A more appropriate definition of an extreme candidate would be any one who gives indications on how she would rule on a potential case, thus, wearing her ideology on her sleeve.

186. Stephen B. Presser, *The Role of the Senate in Judicial Confirmations*, 4 ENGAGE J. FED. SOC. PRACT. GRP. 66, 67 (2003).

187. THE FEDERALIST NO. 78 (Alexander Hamilton); Presser, *supra* note 186, at 67.

188. THE FEDERALIST NO. 78 (Alexander Hamilton).

189. See, e.g., Walpin, *supra* note 4, at 100-01 (stating that “[t]hose who opposed Estrada’s nomination did not even question his ability and integrity. Rather, the Democratic opposition was directed solely to Estrada’s purported ideology, as exemplified by Senators Hilary Clinton (D-NY) and Charles Schumer’s (D-NY) description of Estrada as a ‘far-right stealth nominee’”). But see, e.g., Shane, *supra* note 176, at 526-27.

190. See, e.g., Ronald J. Tabak, *Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1109 (2003).

At the federal level, ranking minority member on the Senate Judiciary Committee, Orrin G. Hatch, who now chairs the Committee, announced in 1993 that Republicans would challenge any judicial nominees of the new President, Bill Clinton, who would “look for excuses not to carry” out capital punishment. Republican staffers pointed out that “the death penalty is a politically potent issue and worth raising, even if they have limited success in opposing judicial nominees.” Among those whom Senate Republicans unsuccessfully opposed in their two years in the minority at the outset of the Clinton administration were Rosemary Barkett and Martha Craig Daughtrey, both of whom were confirmed for court of appeals positions. The Republicans gained control of the Senate in 1995, and continued to use the death penalty as an issue in the judicial confirmation process.

Id. (citations omitted).

V. CONSTITUTIONAL IMPACT

The next question that must be raised after determining that filibustering judicial nominees is unconstitutional is “so what?” Just because the practice may, by the black letter of the law, be technically unconstitutional does not necessarily mean there is negative impact. Furthermore, a verdict of unconstitutionality and injury has no weight if it has no teeth. Thus, in order to have a meaningful debate, one must proffer solutions to remedy the situation or, at the minimum, reduce the hemorrhaging.

A. Impact on the Constitution

The ACLU has long argued that to protect the constitution one must fight every battle ferociously in order to protect the entire document.¹⁹¹ Hence, the result is a precarious position of a civil rights organization defending neo-Nazi’s right to march in a Jewish settled city, many of whom were holocaust survivors.¹⁹² The same argument has been tendered by the NRA, where members argue that allowing *any* “anti-gun” legislation would fray the rug and eventually unravel the entire Second Amendment. This “slippery slope” argument also applies to the situation at hand. Here, as argued, the Senate is conducting blatant constitutional violations, by violating: the advice and consent clause; separation of power doctrine; presentment clause; bicameralism clause; and the majority doctrine. Therefore, by discounting the constitution in one aspect, there is a weakening of the document as a whole.

1. Circumventing with Recess Appointments

An additional unintended constitutional ramification is being played out in the recess appointment debate. Here, the President, in response to the filibustering of his nominees, may act in an unconstitutional manner by circumventing the Senate with such appointments.

191. See generally ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM 4-5 (1979).

192. *Id.*; see also *Nat’l Socialist Party v. Vill. of Skokie*, 432 U.S. 43 (1977) (per curiam) (holding that a state may not impose prior-restraint of the swastika being displayed during a Nazi assembly without also providing immediate appellate review of such restraint); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that a state may not convict a KKK member of criminal syndicalism because his activity was not intended for inciting imminent lawless conduct that was likely to succeed); *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1978) (holding that Skokie law barring Nazi marches violated the first amendment because the law was a content-based restriction of speech), *aff’d*, 578 F.2d 1197 (7th Cir. 1978); *Rockwell v. Morris*, 12 A.D.2d 272 (N.Y. 1961) (holding that the first amendment allows a neo-Nazi leader to hold a rally in a park despite anticipated hostile reaction from spectators, and that police are obligated to protect them), *aff’d*, 176 N.E.2d 836 (1961), *amended*, 177 N.E.2d 48 (1961).

In accordance with the Recess Appointment Clause, the President is authorized to make appointments to vacant offices when the Senate is in recess.¹⁹³ Specifically the clause reads that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”¹⁹⁴ These appointments originated as a means to temporarily fill vacancies during the days when Congress adjourned for extended periods.¹⁹⁵

Recently, many have argued, and the President has complied in a limited sense, that the President should use this approach as an end-run around the Senate entirely and appoint his filibustered nominees.¹⁹⁶ However, this argument of “two wrongs make a right” only compounds the problem. “[P]residents have come to refrain from using their undoubtedly constitutional power to make recess appointments, in part out of concern about possible intrusions on judicial independence that arise from the possibility that a recess nominee will not receive a permanent position”¹⁹⁷ The idea of a “one-term” judge was never intended by the framers.¹⁹⁸

B. Impact on the Legislative Process

Beyond the obvious impacts of creating supermajorities where one was not intended, and increasing the leverage an individual Senator has on the floor agenda, filibustering has affected the overall legislative process.¹⁹⁹ By holding up votes on the nominees, the filibustering senators are holding the Senate hostage. As Senator Daschle stated “[w]e only wish they would devote [this] kind of attention . . . to the matters that the American people care most about[, such as] the fact that 3 million of them don’t have jobs[, or] that their health insurance is rising by more than 15 percent a year.”²⁰⁰

Essentially, Senator Daschle makes the argument that by spending so much time talking about filibustered nominees, attention and time is taken away from pressing national business.²⁰¹ Interestingly, Senator Daschle fails to mention that if he and his colleagues refrained from filibustering judicial nominees there would be no issue to waste time on in the first place.

193. U.S. CONST. art. II, § 2, cl. 3.

194. *Id.*

195. Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 41 (2003).

196. *See id.*

197. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 525-26 (2004).

198. *See* Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691, 708 (2004) (stating that “[i]f the Democrats keep filibustering and the President continues to make recess appointments, the courts of appeals potentially could be left with a series of one-year-term judges”).

199. Fisk & Chemerinsky, *supra* note 7, at 213-14.

200. This statement was made in response to a Republican-led, thirty-hour, all-night protest of Democratic tactics to block four of President Bush’s judicial nominees. Garrett & Wilson, *supra* note 180.

201. *See id.*

C. Remedies

1. If You Can't Beat Them – Sue Them

The problem with using the federal court system in trying to fix this particular problem is that it runs into numerous procedural problems. Most predominantly, the federal courts cannot hear political question cases or cases where the plaintiff has no standing.

a. Standing

“In order to persuade a federal court to force the Senate to fulfill its advice and consent responsibilities, a plaintiff would first have to demonstrate that he or she has standing sufficient to satisfy Article III’s requirement of a case or controversy.”²⁰² Thus, a potential plaintiff must be able to demonstrate a “sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy”²⁰³ The Court in *Lujan v. Defenders of Wildlife* developed a three part test to evaluate the presence of a case or controversy.²⁰⁴

First, the prospective plaintiff must demonstrate an “injury in fact” that is concrete and particularized, as well as actual or imminent. A generalized complaint of a citizen that the government is not carrying out its duties is not sufficient to fulfill the injury-in-fact requirement. Second, the plaintiff must show a causal connection between that injury and the defendant’s actions, in this case the Senate’s failure to meet its responsibilities. Finally, it must be likely—not merely speculative—that judicial intervention would redress the injury.²⁰⁵

As such, there are several individuals who would qualify under the *Lujan* standard. Most obvious would be a presidential nominee who has been filibustered and whose name was never presented in front of the full Senate.²⁰⁶

Another possible plaintiff would be a Senator who has been denied his right under the constitution to exercise the power vested in him to vote on a presidential nominee.²⁰⁷ Lastly, “a federal judge who is unable to carry out

202. Renzin, *supra* note 78, at 1774 (citing U.S. CONST. art. III, § 2).

203. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

204. 504 U.S. 555, 560-61 (1992).

205. Renzin, *supra* note 78, at 1774 (citing *Lujan*, 504 U.S. at 560-78).

206. *Id.* at 1775.

207. *Id.*

his or her responsibilities adequately because of an excessive workload, [would have] suffered injur[y] that should satisfy *Lujan*.²⁰⁸

b. Political Question

The root of the political question doctrine comes from the Court's attempt to avoid policy questions that are fundamentally areas reserved to the legislature and, in a limited sense, the executive branch.²⁰⁹ "A court would likely be hesitant to inject itself into a battle between the Senate and the President over an issue that, on first glance, appears to be a matter squarely delegated to those two branches."²¹⁰

The Court in *Baker v. Carr* laid out the following six-part test to determine whether the political question doctrine applies:

1) express textual language in the Constitution committing the issue to another branch of government; 2) an absence of standards by which a court could resolve the issue; 3) an inability to resolve the issue without resorting to political policymaking; 4) the danger of disrespecting another branch of government; 5) a strong need to adhere to a previously made political decision; and 6) the potential for embarrassment, caused by resolution of the issue in different ways by different branches.²¹¹

Pertaining to the advice and consent clause, while the constitution does not specifically lay out how that obligation should be performed, "a court would be remiss in failing to find an implied obligation to carry out these responsibilities."²¹² Thus, "the Senate's systematic failure to hold a vote would be by definition a failure to fulfill that obligation rather than simply a choice as to how to fulfill that obligation."²¹³ The Court in *United States v. Ballin* stated that "[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 . . ."²¹⁴ Therefore, the political question doctrine should not be available to shield the filibustering of judicial nominees because of its encroachment on coequal branches.²¹⁵

208. *Id.* at 1775-76 (citations omitted).

209. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

210. *Renzin*, *supra* note 78, at 1780.

211. *Id.* (citing *Baker*, 369 U.S. at 217).

212. *Id.* at 1783.

213. *Id.* at 1783-84.

214. 144 U.S. 1, 5 (1892).

215. *See Renzin*, *supra* note 78, at 1784-85.

c. *Causes of Action*

Once it is established that a plaintiff has a right to address his or her grievance in court, the question then becomes, what type of action can be used? Despite the prevailing view that a *writ of mandamus* does not apply to the Congress, it is possible it could be used to force the Senate to vote on a particular nominee.²¹⁶ Unquestionably, the Court could not require the Senate “to confirm a particular candidate; if the Senate were to vote down every presidential nominee, there would be little that a court could do in response.”²¹⁷ However, that being said, if a court agrees with this article – that the advice and consent clause was a mandate and not an option – the *writ of mandamus* would be a viable option to enforce that mandate.²¹⁸

Another, and more powerful, legal tool that may be implemented to challenge the filibusters is a declaratory judgment.²¹⁹ Here a court would simply hold that the Senate is in violation of the constitution.²²⁰ This is precisely what the Court did in *National Treasury Employees Union v. Nixon*,²²¹ where a declaratory judgment was issued that the President had a constitutional duty to comply with a federal pay increase that Congress had passed.²²² Moreover, “federal courts have demonstrated a willingness to use declaratory judgments in reviewing legislative procedure. A federal court could, after finding that the constitution imposes upon the Senate an obligation to vote on nominees, declare that the Senate currently is acting in violation of that duty.”²²³

216. See *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). The *writ of mandamus* is used by the federal courts to compel a government official to act when that official has refused to act in accordance to a clear legal obligation. See *id.* “[M]andamus will issue ‘only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.’” *Id.* (quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931)); accord *Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (stating that mandamus is appropriate for a plaintiff “only if [the plaintiff] has exhausted all other avenues of relief and only if the defendant owes [the plaintiff] a clear nondiscretionary duty”).

217. See Renzin, *supra* note 78, at 1750.

218. See *id.* at 1749.

219. *Id.* at 1748; 28 U.S.C. § 2201(a) (1994) (giving federal courts power to grant declaratory relief).

220. See Renzin, *supra* note 78, at 1748.

221. 492 F.2d 587 (D.C. Cir. 1974).

222. See *id.* (citing *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d at 587).

223. *Id.* at 1748-49.

2. Change the Rules

a. Increase the President's Power

One solution proffered by many, specifically Professor Eastman, has been to increase the President's power and role in the confirmation process.²²⁴ The first increase of power would be to pass legislation that gives the President the ability to appoint lower court judges without the advice and consent requirement under Article II of the constitution.²²⁵

Another suggestion for fixing the problem with an increase in presidential power is to vest the entire appointment power in the President alone when the Senate fails to confirm or reject a nominee within a reasonable period of time.²²⁶ Professor Eastman argues that this approach "would ensure that the Senate's check on Presidential power does not itself become a blank check."²²⁷ It is important to note that Professor Eastman is not the only one advocating this approach; in fact, President Bush himself proposed that the Senate Judiciary Committee hold hearings on judicial nominees within ninety days, with a vote by the full Senate not later than 180 days after the President sends a nomination to the Senate.²²⁸

b. Keep It Simple

The simplest way to stem the filibustering would be to change the Senate's rules to disallow it. Indeed, a group of Senators led by Senate Majority Leader, Bill Frist, tried to do just that with the introduction of Senate Resolution 138.²²⁹ This proposal would amend Rule XXII of the Standing Rules of the Senate to allow a simple majority in the Senate to end debate and hold a vote on a particular nominee.²³⁰ Presently, Rule XXII necessitates that after a motion for cloture is filed with the President of the Senate, 60 Senators must vote affirmatively to close the debate.²³¹ Senate Resolution 138 would still require sixty votes to end debate, however, each attempt to close debate after that would decrease the necessary vote to fifty-seven, then fifty-four, then finally to a simple majority of fifty-one.²³²

Accordingly, this proposal strikes an appropriate balance between the right to debate and the need for a majority eventually to close debate and take action on a nominee. The proposal has a strong

224. See Eastman, *supra* note 93, at 634-36.

225. U.S. CONST. art. II, § 2, cl. 2; Eastman, *supra* note 93, at 634-35.

226. See Eastman, *supra* note 93, at 636.

227. *Id.* at 636-37.

228. *Id.* at 636 n.13; see also John C. Eastman, *Confirmation Logjam*, WALL ST. J., Oct. 17, 2002, at A18 (proposing six-month timetable).

229. S. Res. 138, 108th Cong. (2003).

230. *Id.*

231. Walpin, *supra* note 4, at 98.

232. S. Res. 138, 108th Cong. (2003).

Democratic pedigree. It originates with the filibuster reform proposal introduced by Senators Harkin and Lieberman in 1995, which would have applied to all filibusters, and reintroduced by Senator Miller earlier this year. Indeed, the Harkin-Lieberman proposal was endorsed by nineteen Senate Democrats, as well as the New York Times, which editorialized in 1995 that “[n]ow is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose.”²³³

VI. CONCLUSION

The recent flurry of filibusters against judicial nominees has set forth a troubling precedent that invokes several constitutional concerns. The Framers knew that the Achilles’ heel in government was epitomized in Lord Acton’s saying that “[p]ower tends to corrupt, and absolute power corrupts absolutely.”²³⁴ For this reason, they set in place the sacrosanct separation of power doctrine. Thus, when one branch finds a loophole in that doctrine, the country as a whole should take heed—especially our elected officials who take an oath to protect the constitution.

As radical as it may sound, the simple act of filibustering judicial nominees threatens not only the role of the President in the nomination process, but also the Judiciary’s independence. This political maneuver wanes on the doctrines of presentment and bicameralism, and the very notion of majority rule. The Senate’s obligation to the advice and consent clause has been displaced by politics and a desire to place ideology on the checklist for employment as a federal judge. It appears that the Senate is more concerned with nursing old grudges than with fixing the problem. As Senator John Cornyn stated:

It is time to end the blame game, fix the problem, and move on. Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House and no matter which party is the majority party in the Senate. Unnecessary delay has for too long plagued the Senate’s judicial confirmation process. And filibusters are by far the most virulent form of delay imaginable.²³⁵

233. Cornyn, *supra* note 61, at 211.

234. Great Thinkers on Liberty, *Lord Acton*, Liberystory.net, available at <http://libertystory.net/LSTHINKACTON.html> (last visited Sept. 21, 2004).

235. Cornyn, *supra* note 61, at 227.

