

February 2006

A Proposal: Codification by Statute of the Judicial Confirmation Process

Charles W. Pickering

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Judges Commons](#)

Repository Citation

Charles W. Pickering, *A Proposal: Codification by Statute of the Judicial Confirmation Process*, 14 Wm. & Mary Bill Rts. J. 807 (2006), <https://scholarship.law.wm.edu/wmborj/vol14/iss3/2>

Copyright c 2006 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

A PROPOSAL: CODIFICATION BY STATUTE OF THE JUDICIAL CONFIRMATION PROCESS

Charles W. Pickering, Sr.*
Bradley S. Clanton**

INTRODUCTION

There are few issues in modern day politics upon which there is little to no disagreement among members of Congress, political commentators, the media, and the public at large. One such issue relates to the confirmation of judges to the federal judiciary: the process of confirming judges in the United States Senate is broken and should be reformed.¹

The flaws in the current system are varied, but each is ultimately linked to opposition to the judicial philosophy of the President's nominees. Because the Senate confirmation process is based on inconsistently-applied traditions and precedents rather than fixed procedural rules, a small minority of ideologically-driven senators have engaged in the unprecedented use of senatorial traditions, including the filibuster, to prevent up or down votes on judicial nominees — even those that enjoy the support of a majority of the Senate — leaving nominees sometimes languishing for years.

* Senior Counsel, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Jackson, Mississippi. Judge Pickering retired from the U.S. Court of Appeals for the Fifth Circuit in December 2004, where he served under a recess appointment from President George W. Bush. Judge Pickering served as U.S. District Judge for the Southern District of Mississippi from 1990 until January 2004 when he was appointed to the Fifth Circuit. He received his law degree from the University of Mississippi School of Law, where he graduated first in his law school class. For some thirty years prior to going on the federal bench, Judge Pickering was engaged in the active practice of law and in political, civic, community, and religious activities in Mississippi. The views expressed herein are those of the authors alone and do not represent the views of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

* Of Counsel, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Jackson, Mississippi and Washington, D.C. Before joining Baker Donelson, Mr. Clanton served as Chief Counsel to the U.S. House Judiciary Committee, Subcommittee on the Constitution. Prior to that, Mr. Clanton practiced law in Washington, D.C. after serving as a law clerk to the Honorable Judge David A. Nelson, U.S. Court of Appeals for the Sixth Circuit. Mr. Clanton received his juris doctorate in 1996 with special distinction from the Mississippi College School of Law, and his B.A. *cum laude* from the University of Mississippi in 1992. The views expressed herein are those of the authors alone and do not represent the views of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

¹ See generally John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2003).

Some senators, at the behest of partisan interest groups, distort and misrepresent the legal and political philosophies of nominees. Nominees to the federal bench face withering (and unwarranted) public attacks on their character and integrity. The same partisan interest groups spend millions of dollars on attack ads and investigations combing through nominees' lives in search of anything that might be used to discredit, attack, or defeat them.

As a result of this flawed process, vacancies on an already overburdened federal judiciary remain unfilled; political hostility within the Senate and between the President and Senate has reached a boiling point; nominees' lives and careers are left in limbo for months and years; the personal toll of sustained personal attacks often overwhelms both the nominees and their families; many nominees simply give up and withdraw, and other well-qualified prospective nominees simply decline to submit to such a degrading process.² Unless steps are taken to correct the defects in the current system, the quality, integrity, independence, and diversity of the judiciary will be severely compromised. As described by one commentator, "[p]ast ideological scrutiny by senators of both parties has embittered many nominees, threatened judicial independence, discouraged individuals from enduring the confirmation process, and contributed to the vacancy crisis in the federal judiciary."³ In addition, "the boundary between law and politics has eroded substantially," and "[p]olitical necessity, not principled evaluation, is the currency in the confirmation process."⁴

There is little reason to believe the political battle over judicial nominations will decrease in the foreseeable future. Yet, the implementation of procedural changes may expedite the confirmation process and reduce the potential harm to the quality, integrity, independence, and diversity of the judiciary. Some propose reforming the filibuster rules in the Senate to prohibit the filibuster of judicial nominees.⁵ Such a proposal is fine as far as it goes, and it should be implemented if there is another filibuster of a judicial nominee. However, there are numerous other defects in the confirmation process unrelated to the filibuster, and a change to the filibuster rule can easily be reversed in the future when someone else's ox is being gored.

² See generally E. Martin Enriquez, Comment, *Tyranny of the Minority: The Unconstitutional Filibuster and the Superimposed Supermajority on the Advice and Consent Clause of the Constitution*, 21 T.M. COOLEY L. REV. 215 (2004). During the first two years of President George W. Bush's Administration, the confirmation rate for judges was only 55 percent. *Id.* at 237. By contrast, during the first two years of the Reagan Administration, the rate was of confirmation was 98 percent, while President George H.W. Bush's rate for the first two years was 93 percent, and President Clinton's was 90 percent. *Id.*

³ Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513, 516-17 (2003) (footnotes omitted).

⁴ *Id.* at 517.

⁵ See generally Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004).

A more comprehensive and long-term procedural reform to the confirmation process would be a statute codifying the procedures for the confirmation of federal judges.⁶ The specific contours of a statutory confirmation process are obviously up to Congress to create. However, such a statute should, in our view, include specified time periods within which a nominee would receive a hearing before the Senate Judiciary Committee, a vote in Committee, and a debate and a vote on the Senate floor. The statute should also include procedures to extend the deadlines in extraordinary circumstances for reasonable but limited periods of time.

A statutory solution will provide a number of benefits to the confirmation process. First, statutory procedures will provide much more stability and predictability in the confirmation process, ensuring all Presidents — regardless of party affiliation — that their nominees will be treated the same as nominees of the other party. Second, statutory procedures will provide senators and prospective nominees with clear and predictable rules for the confirmation process. Nominees will know that, regardless of which party is in control of the Senate, within a specified time period they will be either confirmed or rejected. In any event, the nominees will be allowed to move on with their lives. Third, codifying the rules for the confirmation process will stop the endless cycle of retaliation in the Senate when control of the Senate changes hands or when different parties control the Senate and the Presidency. Statutory procedures will provide both parties with a fresh start in confirming judges, leaving behind actual or perceived mistreatment of past nominees.⁷ We harbor no illusion that codifying the procedures for confirmation of judges will cure all the ills caused by the politicization of the judicial selection process. However, it will at least bring some stability, predictability, and order to what has become an almost chaotic and intolerable process.

I. THE CONFIRMATION MESS: HOW WE GOT HERE

A. *The Rise of Ideological Scrutiny of Judicial Nominees.*

For much of our nation's history, "judges nominated by the President were confirmed based on their experience, qualifications, and integrity, rather than on their political stance and ideology."⁸ This practice was consistent with the view of the

⁶ There are numerous precedents for statutory codification of the procedures for consideration of certain matters in Congress. See notes 62–70 and accompanying text.

⁷ In addition, an open debate on the appropriate procedures for handling judicial nominations will be beneficial to the judiciary, the Senate, and the country as a whole.

⁸ Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Confirmation Process*, 8 TEX. REV. L. & POL. 89, 90 (2003). See also Gallagher, *supra* note 3, at 522–23.

Many commentators argue that the history of the appointments clause proves that the Senate should not utilize ideology as a criterion in evaluating a nominee. Significant historical evidence supports this

Framers, who generally saw the Senate's role in the confirmation process as limited to the prevention of "the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."⁹ There is scant support in the debates over the Constitution "about the need for a Senate check on the president's power to appoint judges on the grounds of ideological concerns."¹⁰ During the last half of the twentieth century, however, the ascendancy of the notion of the "Living Constitution" shifted the resolution of many of the most important issues of the day from the legislative and executive branches of the government to the judiciary. The most widely-recognized example of this shift was the Supreme Court's decision in *Roe v. Wade*,¹¹ declaring state laws prohibiting abortion unconstitutional.¹² Since *Roe* was decided, "the confirmation process has transformed into a sustained ideological battle that now extends to lower court judges, even though they are powerless to overturn that controversial decision."¹³ Another example is *Engel v. Vitale*,¹⁴ which "declared that the daily recitation of a voluntary twenty-two-word, non-denominational prayer in New York's public schools violated the Establishment Clause, notwithstanding the fact that the Congress that had authored the First Amendment had itself begun its days with prayer."¹⁵ The Court's holding in *Engel* "ended a practice that had been part of the American experience since the

conclusion. The grounds for rejecting a nominee, such as political favoritism by the President, or ethical lapses by the nominee, are especially compelling. Notably, the great majority of historical evidence does not mention ideology as a criterion.

Id. (footnotes omitted).

⁹ THE FEDERALIST NO. 76, at 386 (Alexander Hamilton) (Bantam Books 1982). As Madison wrote in *Federalist 51*, "The primary consideration [for confirmation of judges] ought to be . . . qualifications." The Federalist No. 51 (James Madison), *supra*, at 262. See also John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 187 (2001) ("The advice and consent prerogative of the Senate has been designed to prevent (although historically it has not always prevented) the President from appointing 'political hacks' (political appointees who lack competence and/or character).").

¹⁰ Christopher Wolfe, *The Senate's Power to Give "Advice and Consent" in Judicial Appointments*, 82 MARQ. L. REV. 355, 357 (1999). The limited role of the Senate was noted by historian Joseph Harris, who wrote that "[t]he debates of the Convention indicate that 'advice and consent' was regarded as simply to vote of approval or rejection. The phrase was used as synonymous with 'approbation,' 'concurrence,' and 'approval,' and the power of the Senate was spoken of as a 'negative' on the appointment by the President." JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 376 (Greenwood Press 1968) (1953).

¹¹ 410 U.S. 113 (1973).

¹² *Id.*

¹³ See Baker, *supra* note 9, at 186.

¹⁴ 370 U.S. 421 (1962).

¹⁵ James L. Buckley, Essay, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J.L. & PUB. POL'Y 189, 194-95 (2000).

outset of public education and that an overwhelming majority of American parents wished to have continued.”¹⁶

As a result of this politicization of the judiciary, “judicial appointments to lower federal courts as well as the Supreme Court ‘are now one of the principal ideological battlegrounds of American politics.’”¹⁷ As described by Professor John Eastman:

The reason that some Senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a “living document,” modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called “progressive” policies that could never emerge from the legislative process.¹⁸

Most agree that President Reagan’s nomination of Judge Robert Bork to the U.S. Supreme Court in 1987 was “a turning point in the nomination process and a triumph for unrestrained politicization of the judicial confirmation process.”¹⁹ Following Judge Bork’s defeat, the confirmation process steadily spiraled downward. Republicans, angry over the mistreatment of Judge Bork, vowed revenge.²⁰ That anger only increased after the bitter confirmation battle over Justice Clarence Thomas in 1991.²¹ When the Republicans gained control of the Senate in 1994, it was time for that vow of revenge to be fulfilled.²² Many of President Clinton’s nominees were placed on hold, others never appeared before the Senate Judiciary Committee, some waited years before receiving a hearing, and others never had a hearing at all.²³ Like the Republicans

¹⁶ *Id.* at 195.

¹⁷ Brannon P. Denning, *Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent”*, 53 ADMIN. L. REV. 1, 11 (2001) (quoting G. CALVIN MACKENZIE, *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997*, at 11 (1998)).

¹⁸ John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 652 (2003); *see also id.* (“The Senate’s expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary, the Senate’s part in the nomination process has become a powerful political tool.”).

¹⁹ Walpin, *supra* note 8, at 95. *See also* Gallagher, *supra* note 3, at 523 (“The Senate’s consideration of a nominee’s ideology finds its historical roots not in 1787, but in 1987, the year of the Bork nomination.”).

²⁰ Gallagher, *supra* note 3, at 526.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 527.

following the defeat of Judge Bork's nomination, the Democrats became increasingly embittered by the confirmation process.²⁴

With President George W. Bush's election, it was payback time for the Democrats.²⁵ In addition to the lingering bitterness over the perceived mistreatment of President Clinton's nominees, Democrats were furious over the Supreme Court's decision in *Bush v. Gore*,²⁶ which they perceived as nothing more than an ideologically-driven decision in favor of President Bush.²⁷ Republicans, by contrast, saw the Court's actions in *Bush v. Gore* as merely upholding the Constitution in the face of a lawless Florida Supreme Court. As a result of this conflict, Democrats promised severe scrutiny, obstruction, and opposition to President Bush's nominees, and some liberal commentators even urged that none of Bush's nominees receive a hearing.²⁸ Democrats have so far fulfilled their promise by engaging in the unprecedented use of the filibuster to block votes on ten of President Bush's nominees to the U.S. Courts of Appeals²⁹ and by "threaten[ing] filibusters of[f] six more."³⁰ Other nominees were blocked when Democrats controlled the Judiciary Committee and voted in lock step to prevent the nominees from moving forward to a vote by the full Senate.

B. The Current "Procedures" for Confirmation of Judicial Nominees in the Senate

The judicial confirmation process in the Senate is not codified in Senate rules, but instead consists primarily of a hodgepodge of traditions and precedents that empower a small group of senators, or even an individual senator, to delay interminably the confirmation of judicial nominees. One of the oldest of these precedents is known as "senatorial courtesy," which allows a senator from the home state of a nominee

²⁴ *Id.*

²⁵ *Id.* at 529.

²⁶ 531 U.S. 98 (2000).

²⁷ Gallagher, *supra* note 3, at 529.

²⁸ *Id.*

²⁹ See Wendy E. Long, *Filibuster Myth-Busters: How Senate Democrats Mask Obstruction*, WASH. TIMES, Apr. 15, 2005, at A23.

³⁰ 151 CONG. REC. S5859, 5859 (daily ed. May 25, 2005) (statement of Sen. Majority Leader Frist) [hereinafter *Frist*]. One of the authors of this paper, Charles W. Pickering, Sr., was a judicial nominee who was filibustered during the 108th Congress. Despite having been rated "Well-qualified" by the American Bar Association, having been unanimously confirmed to the United States District Court for the Southern District of Mississippi in October of 1990, and having the support of the majority of the Senate, the Senate Democrats chose to filibuster Judge Pickering's promotion to the U.S. Court of Appeals for the Fifth Circuit. The President placed Judge Pickering on the Fifth Circuit by recess appointment on January 16, 2004, but at the expiration of that recess appointment on December 8, 2004, Judge Pickering retired from the bench.

to block a nomination to an office in that state.³¹ Although senatorial courtesy has generally been granted to senators of the president's party, senators from the minority party have also successfully blocked nominations on numerous occasions.³²

Similar to senatorial courtesy, the "blue slip" is a tradition whereby the chairman of the Senate Judiciary Committee sends a blue slip to a judicial nominee's home state senators seeking their position on the nominee.³³ Whether or not a home state senator's disapproval kills the nomination has depended upon the chairman of the Judiciary Committee at the time.³⁴ For example, Senator James O. Eastland (D-Miss.), Judiciary Chairman from 1956 to 1978, would not allow a nomination to proceed without approval from both home state senators.³⁵ Other chairmen gave negative blue slips strong consideration but did not always allow a negative blue slip to defeat a nomination.³⁶

A third device used by senators to delay or block judicial nominees is the "hold," which allows an individual senator to "hold" indefinitely and prevent consideration of a nominee for any reason at all.³⁷ The hold is "a little-known, but apparently venerable, custom in the Senate, [that] has lately evolved into a formidable weapon for minority control, enabling *any* senator to prevent consideration of any matter, including nominations."³⁸ The hold's origins are uncertain, but "it has been suggested that the custom evolved to aid senators who had to be absent from debate on a particular matter, and did not want the matter resolved in their absence."³⁹ However, "[t]he custom has evolved, . . . and now senators regularly use holds to express personal opposition to a particular nominee, or as leverage with the Administration on another, usually unrelated, matter."⁴⁰

Although historically not used to block judicial nominees, the "filibuster" recently became the tool of choice of Democratic senators seeking to prevent confirmation

³¹ 2 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 740 (1938).

³² See JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 224 (1953).

³³ See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 147 (2000).

³⁴ See SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 12 n.j. (1997).

³⁵ See *id.*

³⁶ Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 *JUDICATURE* 218, 220 (2002).

³⁷ Walpin, *supra* note 8, at 105.

³⁸ Denning, *supra* note 17, at 20 (footnote omitted) (emphasis in original).

³⁹ *Id.* at 20–21; see also Walpin, *supra* note 8, at 105 (noting that the hold "evolved from the Senate custom of allowing senators to postpone consideration from debate of a specific matter in their absence").

⁴⁰ Denning, *supra* note 17, at 21.

of President Bush's appointees to the federal bench.⁴¹ The filibuster "allows one or more Senators from the minority party to hold a nomination hostage, thereby preventing a vote, unless sixty Senators vote to end debate by invoking cloture."⁴² Sometimes "[c]onsidered Congress's most famous procedural tool, the filibuster has a lengthy history. However, one should not be proud of its heritage. It was utilized for nearly a century to defend Jim Crow laws and to prevent the enactment of civil-rights legislation."⁴³ Indeed, the Senate recently passed a resolution apologizing for failing to enact anti-lynching laws during the Jim Crow era, a failure directly caused by the use of the filibuster.⁴⁴

The term "filibuster" has its origins in the Dutch word "vrijbouter," which means "looters and robbers."⁴⁵

Vrijbouter was then adopted by the English and anglicized into *freebooter* — meaning pirates. Lastly, it was adopted and translated into Spanish — *filibusteros*. The Spaniards used this word to describe pirates who looted the Spanish West Indies in the seventeenth century. Similarly, the Americans adopted the word in the mid-nineteenth century to refer to men who looted across Central America — including William Walker, who in the 1850s tried to incite a revolution in Nicaragua. Finally, the term was applied to "legislative minorities who used what the majority deemed piratical, disorderly, [and] lawless methods" of obstructing business in the Senate.⁴⁶

For over two hundred years of American history, the filibuster was not used to block confirmation of judicial nominees with majority support.⁴⁷ As noted above,

⁴¹ See Walpin, *supra* note 8, at 90.

⁴² *Id.* at 98.

⁴³ Enriquez, *supra* note 2, at 215 (footnotes omitted).

⁴⁴ See S. Res. 39, 109th Cong., 151 CONG. REC. S6347, 6364–65 (daily ed. June 13, 2005); *id.* at 6372 (statement of Sen. Allen) ("Three [anti-lynching] bills passed the House of Representatives, but were filibustered on the Senate floor.").

⁴⁵ Enriquez, *supra* note 2, at 224.

⁴⁶ *Id.* (footnotes omitted) (emphasis and alteration in original) (quoting ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 283 (1922)).

⁴⁷ The impropriety of filibustering judicial nominees was "well-stated in 1968 by a non-partisan coalition which called itself the 'Lawyers' Committee on Supreme Court Nominations,'" which was comprised of the "deans of most major law schools and . . . [the] past president[s] of the American Bar Association." Walpin, *supra* note 8, at 98. The Committee wrote:

If . . . nominations do not win the support of a majority of the Senate, they will fail. If they do win such support, they deserve the Senate's

this historical practice changed dramatically during the 108th Congress in 2003 and 2004, when Democrats filibustered ten of President Bush's nominees to the U.S. Courts of Appeals and threatened filibusters of six more.⁴⁸ During that Congress, only eighteen of President Bush's thirty-four nominees to the courts of appeals were confirmed.⁴⁹ Sixteen nominees to the courts of appeals — an astounding 47 percent — failed to be confirmed by the Senate.⁵⁰ As described by Professor Stephen Calabresi:

[F]or the first time in 214 years of American history a minority of senators is seeking to extend the tradition of filibustering from legislation to judicial nominees who [the minority of senators] know enjoy the support of a majority of the Senate. This is a change of constitutional dimensions and amounts to a kind of coup d'état.⁵¹

consent. Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority but to be thwarted because the majority is denied a chance to vote.

Id. at 98–99 (alteration in original) (citation omitted).

⁴⁸ See discussion *supra* note 30 and accompanying text. The nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit was filibustered *seven* times. See Frist, *supra* note 30 at 5860. Mr. Estrada, who has one of the brightest legal minds in America, eventually withdrew himself from consideration for the D.C. Circuit. Office of Legal Pol'y, U.S. Dep't of Justice, Nominations, <http://www.usdoj.gov/olp/judicial/nominations108.htm> (last visited Jan. 15, 2006) [hereinafter Nominations]. During that same period, the nomination of Judge Priscilla Owen to the Fifth Circuit was filibustered for four years. See Frist, *supra* note 30, at 5860. When Senate Minority Whip Harry Reid was asked how many hours were necessary to debate the nomination of Judge Owen, he responded: "[T]here is not a number in the universe that would be sufficient." 149 CONG. REC. S4919, 4949 (daily ed. Apr. 8, 2003) (statement of Sen. Reid).

⁴⁹ Nominations, *supra* note 48.

⁵⁰ See *id.*

⁵¹ Steven G. Calabresi, *Pirates We Be*, WALL ST. J., May 14, 2003, at A14. Some Democrats cite the 1968 nomination of Justice Abe Fortas to the position of Chief Justice as precedent for their use of the filibuster to block President Bush's judicial nominees. See Long, *supra* note 29. However, the historical record does not support the claim that Justice Fortas's nomination was filibustered. See Cornyn, *supra* note 1, at 220. In fact, Justice Fortas's nomination failed because it could not obtain "the support of fifty-one Senators . . . due to allegations of ethical improprieties and the bipartisan opposition of twenty-four Republicans and nineteen Democrats." *Id.* (footnotes omitted). When a cloture vote was sought on the Fortas nomination, Fortas had the support of only forty-five senators. President Johnson subsequently withdrew the nomination, and Justice Fortas eventually resigned from the Supreme Court under the threat of impeachment. See *id.* at 222. Moreover, whether or not the Fortas nomination is accurately characterized as a "filibuster," it was clearly inconsistent with almost two hundred years of Senate precedent. And it provides no support for the use of the filibuster by Senate Democrats to block votes on President Bush's nominees, who enjoy the support of a majority of the Senate. Nor do President Clinton's nominations of

After Majority Leader Bill Frist threatened to use what has been described as “the constitutional option”⁵² to amend Senate rules to bar the filibuster of judicial nominees, an agreement was reached by a “gang of fourteen” senators (seven from each party), who agreed to allow certain nominees to move forward and to vote against filibusters in the future absent “extraordinary circumstances.”⁵³ As this discussion clearly illustrates, the judicial confirmation process is badly broken and should be reformed.

II. STATUTORY PROPOSAL FOR THE JUDICIAL CONFIRMATION PROCESS.

We believe that the Constitution authorizes Congress to statutorily codify the procedures for confirming federal judges, and that Congress should exercise that authority. Article II, section 2 of the Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”⁵⁴ Although this provision obviously requires that nominees to the U.S. Supreme Court be confirmed by the Senate, it does not specify exactly how the Senate is to carry out that responsibility.⁵⁵ And, while the Constitution gives the Senate and the House the authority to adopt rules to govern proceedings in each body,⁵⁶ we believe there is no constitutional impediment to the Senate choosing to adopt such a rule by statute.⁵⁷

Richard Paez and Marsha Berzon to the Ninth Circuit provide support for Democrat filibusters. When a small number of senators sought to filibuster Paez and Berzon, then-Senate Majority Leader Trent Lott joined Minority Leader Tom Dashle to oppose the filibuster, with twenty Republican senators who actually opposed the nominees joining with Democrats to invoke cloture by votes of 85–14 and 86–13, respectively. *See* 146 CONG. REC. S1247, 1301–1302 (daily ed. Mar. 8, 2000). Both Paez and Berzon are on the federal bench today.

⁵² *See generally* Gold & Gupta, *supra* note 5.

⁵³ *See* Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1.

⁵⁴ U.S. CONST. art. II, § 2, cl. 2.

⁵⁵ *See* Gallagher, *supra* note 3, at 520 (“Unfortunately, the Constitution says little about the precise contours of ‘advice and consent.’”).

⁵⁶ U.S. CONST. art. I, § 5, cl. 2.

⁵⁷ There is some dispute among legal scholars regarding whether the Rules of Proceedings Clause bars Congress from statutorily codifying rules governing legislative proceedings. *See generally* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 384–93 (2003). Some argue that the provision is not exclusive and that Congress may adopt rules either unilaterally in each house or through bicameral approval and presentment to the President. *See id.* at 388. Others argue that the provision is exclusive and that any statutorily-created rule that cannot be amended without the participation of the other body and the president violates the Constitution. *See id.* at 389. We believe the former is the better interpretation of

Unlike the Supreme Court, the federal district courts and courts of appeals were created by Congress pursuant to Article III, Section 1 of the Constitution, which vests the judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁵⁸ Because Article II, Section 2 authorizes Congress to vest the appointment of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments,”⁵⁹ judges appointed by the President to those courts could, theoretically, be authorized by Congress to be appointed without Senate confirmation.⁶⁰ However, because lower federal court judges are given lifetime appointments, it is certainly wise policy to allow the Senate to exercise advice and consent with respect to those appointments.⁶¹ Yet, if Congress has the authority to create the lower federal courts and to vest the appointment of its judges solely in the President, it follows that Congress has the authority — if it chooses to provide for Senate confirmation — to specify the procedures whereby the Senate is to confirm (or not confirm) nominees to those judgeships.

There are numerous instances where Congress has enacted legislation establishing statutory rules to determine how it will deal with specific types of legislative responsibilities.⁶² In the specific context of the judicial confirmation process,

the provision, given its permissive language. *See* U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”); *cf.* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (arguing for a similarly non-exclusive interpretation of the Treaty Clause).

⁵⁸ U.S. CONST. art III, § 1. *See* 28 U.S.C. § 132(a) (2000) (“There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.”); 28 U.S.C. § 43(a) (2000) (“There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.”).

⁵⁹ U.S. CONST. art. II, § 2, cl. 2.

⁶⁰ *See* Eastman, *supra* note 18, at 634.

⁶¹ *See* 28 U.S.C. § 133(a) (2000) (“The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts . . .”); 28 U.S.C. § 44(a) (2000) (“The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits . . .”).

⁶² *See* 2 U.S.C. §§ 631–45a (2000) (congressional budget process); 2 U.S.C. §§ 658d–658e (2000) (legislation containing unfunded mandates); 5 U.S.C. § 802 (2000) (legislation that nullifies agency regulations); 5 U.S.C. §§ 901–12 (2000) (executive reorganization plans); 8 U.S.C. § 1255a(h) (2000) (Senate rules for legislation adjusting the status of certain aliens); 15 U.S.C. § 719f (2000) (procedures for approving presidential determinations concerning Alaskan natural gas pipelines); 16 U.S.C. § 1823 (2000) (procedures for disapproving international fisheries agreements); 29 U.S.C. § 1306(b) (2000) (procedures for considering Pension Benefit Guaranty Corporation premium revisions); 42 U.S.C. § 2210(i) (2000) (procedures for nuclear accident compensation legislation); 42 U.S.C. § 6249c (2000) (legislation implementing certain petroleum contracts); 50 U.S.C. § 1622 (2000) (procedures for terminating presidentially declared states of emergency); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 205, 111 Stat. 2570, 2582 (1997) (Senate procedures for considering Amtrak restructuring and liquidation plans); Foreign Operations,

legislation regulating the process has been introduced (albeit unsuccessfully) numerous times in the past. In 1998, for example, Senator Richard Durbin offered an amendment to S. 2176 which provided that after any nomination had been pending for 150 days, the nominee would be deemed discharged from the committee and reported favorably to the Senate.⁶³ Senator Durbin also proposed an amendment requiring a vote in the Senate within five calendar days following the 150th day the nomination was pending.⁶⁴ During that same Congress, Senator Leahy introduced S. 1906, the Judicial Emergency Responsibility Act of 1998.⁶⁵ That legislation would have prohibited the Senate from recessing during any session for more than nine days when a judicial nomination had been pending for more than sixty days in a circuit in which a judicial emergency had been declared.⁶⁶

In 1991, Senators Bob Graham and Connie Mack introduced S. 910, the Judicial Nomination and Confirmation Reform Act.⁶⁷ That legislation required that the Senate Judiciary Committee review and report on a judicial nominee no later than ninety days after receiving the nomination.⁶⁸ If the Committee failed to meet that ninety-day deadline, the nomination would be automatically discharged from committee without recommendation for a full vote in the Senate.⁶⁹ The legislation further required a full Senate vote within thirty days after the nomination was discharged from committee.⁷⁰

Our statutory proposal is similar to those offered by Senators Durbin, Graham, and Mack. In particular, we recommend legislation to accomplish the following: First, any Senate Judiciary Committee hearings on a judicial nominee should be held within 120 days after the President submits the name to the Senate. Second, within thirty days of any such hearings (no more than 150 days after the nomination was received), a nominee should be reported out of the Senate Judiciary Committee, with a favorable recommendation, unfavorable recommendation, or no recommendation

Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 518A, 110 Stat. 3009-121-3009-145 (1996) (procedures for approving presidential findings regarding population planning funding); Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 208, 102 Stat. 2623, 2632-33 (1988) (procedures for considering recommendations to close military bases); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4467 (1988) (Senate procedures for habeas corpus reform legislation).

⁶³ See S. Amend. No. 3658, amending S. 2176, 144 CONG. REC. S10945, 10997 (daily ed. Sept. 25, 1998).

⁶⁴ See S. Amend. No. 3659, amending S. 2176, 144 CONG. REC. S10945, 10997.

⁶⁵ S. 1906, 105th Cong. (1998); see also 144 CONG. REC. S3023, 3122 (daily ed. Apr. 2, 1998) (statement of Sen. Leahy).

⁶⁶ S. 1906

⁶⁷ S. 910, 102d Cong. (1991); see also 137 CONG. REC. 9075, 9138-40 (1991) (statements of Sen. Graham).

⁶⁸ S. 9102(a) (proposing addition of 28 U.S.C. § 493(a)(1)).

⁶⁹ *Id.* (proposing addition of 28 U.S.C. § 493(a)(2)).

⁷⁰ *Id.* (proposing addition of 28 U.S.C. § 493(b)).

at all. If the Senate Judiciary Committee fails to report the nominee, the nominee should be automatically discharged from Committee without recommendation. Third, within sixty days after a nominee is reported out of Committee (no more than 210 days after the nomination was received), the nominee should receive an up or down vote before the full Senate. And, finally, any judicial nominee receiving majority support should be confirmed.

We recognize that this proposal, if adopted, will diminish the power of an individual senator or a minority of senators to block judicial nominees. However, as noted above, a major problem in the current confirmation system is that there are no clearly-defined and binding procedures to control the process. Consequently, traditions and precedents have been abused. The present conflict over the confirmation of judges not only threatens the quality, integrity, independence, and diversity of the federal judiciary, it also undermines the collegiality of the Senate and threatens the ability of the Senate to fulfill its constitutional responsibilities. A problem of this magnitude demands a solution and justifies some concession of power.

We also recognize that some conservative commentators and Republican officials have cautioned against reforming the confirmation process, as Republicans may one day find themselves in the position of the Democrats today, seeking to block a Senate vote on the judicial nominees of a Democratic president. While we understand the political expediency of this argument, we believe it is inconsistent with the structure created by the Constitution for the selection of federal judges. The Constitution vests the selection of judges in the President, subject to the advice and consent of the Senate.⁷¹ As historically understood, the Senate's advice and consent role is limited to questions of qualification for office, judicial temperament, and integrity. Like it or not, it is the President's constitutional prerogative — regardless of party — to nominate judges, and judicial nominees should be confirmed by the Senate if they meet the requisite qualifications. In addition, the Constitution provides for confirmation by a majority vote, not a super-majority.⁷² In our view, the Constitution should be interpreted as written, regardless of whether we favor the outcome as a matter of public policy.

As long as the “Living Constitution” is part of the judicial landscape, we will continue to have battles over judicial confirmations. However, we believe our statutory proposal will at least cure some of the procedural problems and reduce retaliation. Such a statute will provide consistency, continuity, and stability to the confirmation process. Any solution to the confirmation battle must be fair and reasonable to both sides, and both sides must have meaningful input in the process. We believe our recommendations meet these criteria.

⁷¹ U.S. CONST. art. II, § 2, cl. 2.

⁷² *Id.*