Filibustering the Filibuster: A Reexamination of the Legislative Role in Establishing a Fair Judiciary

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The separation of power is a fundamental characteristic of United States government. However, the mechanics of this separation are tested often, particularly in areas where branches of government directly collide. One such area is the judicial confirmation process, where the Senate, a body of the legislative branch, is charged with confirming or rejecting an executive’s appointment to the judicial branch. While the judicial confirmation process has always been affected by political ideology, the use of filibusters to halt judicial nominations has been practiced with more regularity in recent years. This paper scrutinizes the current state of the judicial confirmation process and the appropriate role of the Senate filibuster. It concludes that that the use of Senate filibusters to halt judicial nominations is not in the best interest of the judiciary and instead proposes a 60-vote standard for confirming federal judicial nominations.

INTRODUCTION

The debate over judicial filibusters is, I believe, the greatest single constitutional issue to confront the Senate in our lifetime. That is because this issue involves the very special and unique relationship between the Senate and the Presidency and the special relationship between the Senate and the courts. It involves all three branches of government. In addition, it involves the interaction between the minority and majority parties within the Senate (United States Senate Majority Leader Bill Frist, May 2005).

President George W. Bush’s appointments of judges Janice Rodgers Brown and Priscilla Owen to the D.C. Circuit Court of Appeals highlighted a mounting stress in the United States Senate. While Brown and Owen gained little national exposure before May, 2005, they received immediate notoriety when mentioned in the context of a potential dramatic change in American government: ending the use of Senate filibusters regarding judicial confirmations. Brown and Owen were initially appointed to the D.C. Court of Appeals, widely considered the second most powerful court in the country, in 2001 and 2003, respectively. However, Brown and Owen were two of ten judges that were strategically filibustered during President George W. Bush’s first term of office. Although Brown and Owen were both eventually confirmed in June of 2005, the debate around their nominations reflects an increasing partisan polarization in Washington that is transforming judicial confirmations.

This situation prompts further inquiry into the status of the judicial/legislative relationship:

• What is the appropriate legislative role in judicial appointments?
• What is the appropriate role of the Senate filibuster?
• Should the U.S. Senate consider changing its judicial confirmation policy?

This paper argues that the judicial confirmation process needs to be changed. A variety of current influences, which will be discussed in greater detail, has given a new face to the political battles that perpetually surround all branches of government, the judiciary not excluded. While the politics surrounding the judiciary may not be dramatically increasing, interest groups have had greater impact and success influencing judicial confirmations in recent years.

A central contention of this essay is that increased interest group influence in the politics of judicial nominations has sparked a significant response from the United States Senate. A primary marker of this response is the increased use of the Senate filibuster. While the filibuster was originally intended as a tool to extend debate on controversial legislative agenda items, senators now use the filibuster as a weapon to block unwanted judicial nominations.

1The words “judiciary” and “judicial” refer to the United States Supreme Court, the U.S. Circuit Court of Appeals, and the U.S. District Courts. The phrase “The Court” refers to the U.S. Supreme Court.
A second thesis is that the filibuster's use as a tool for the minority to block judicial nominations is not in the best interest of American Government. It proposes a constitutional amendment that would require a 60-vote standard for all judicial confirmations as a potential "filibuster fix."

This paper also reviews the separation of power, the structure and history of the judicial confirmation process, and more recent events in the Senate that have brought the "filibuster pot" to a boil. Because judicial confirmations directly involve all three branches of government, it is appropriate to begin a survey of the judicial confirmation process by examining the renowned, yet delicate separation of power in American government.

**Separation of Power**

French philosopher Montesquieu is widely credited with outlining the doctrine of separation of power. Montesquieu not only declared the necessity of separating the legislative from the executive, but also contended "there is no liberty" if the judiciary power is not separated from the legislative and the executive (Montesquieu, 1734, p. 152). However, Montesquieu, whose theories evolved from studying the English constitution in the early 18th century, could only moderately gauge the complications of separating power.

Nearly 180 years ago Frenchman Alexis De Tocqueville noted an absence of centralized authority as a primary mechanism in maintaining a system of governmental balance:

> In the United States the majority, which so frequently displays the tastes and the propensities of a despot, is still destitute of the most perfect instruments of tyranny... The majority has become more and more absolute, but has not increased the prerogatives of the central government; those great prerogatives have been confined to a certain sphere; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all... when the central government which represents that majority has issued a decree, it must entrust the execution of its will to agents over whom it frequently has no control and whom it cannot perpetually direct (De Tocqueville, 1831, 1:15:16).²

As De Tocqueville has noted, American democracy remains balanced because no branch of government is ever intentionally allowed to usurp power past the scope of its appointed authority. While the judicial branch may interpret laws, it has no power to pass or execute them; while the legislative branch may pass laws, it has no power to execute or interpret them; and while the executive branch may enforce laws, it has no power to pass or interpret them. This system prevents any branch of government from hording excess power and gives life to James Madison's admonition, "The powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others" (Madison, 1788).

In the early days of the country, the legislative branch was viewed as superior to the executive andjudicial. From 1774 to 1781, the legislative branch had to perform all the actions of government; there was no executive or judicial branch (Fisher 1981, p. 2). The spirit of legislative superiority continued as the Constitution took shape. As Madison noted:

> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments (Madison, 1788).

Such legislative superiority, combined with increased executive power as the country sought to distance itself from the "executive-less" and ineffective Articles of Confederation, left the judiciary being viewed as the weakest of the three branches by many of the founding fathers. Said Alexander Hamilton:

> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power (Hamilton, 1788b).

Further, many of President George Washington's original Supreme Court appointees declined the nomination, feeling they could have a more significant impact investing their energies into other branches of government. This early judicial "inferiority complex" seems to have triggered a long journey of defining and redefining what the judicial role really is in the separation of power.

**A Fair, Independent, and Empowered Judiciary**

Much of the judicial theory of the United States is reflected in carefully constructed symbolism at the entrance of the Supreme Court. On the left of the steps leading into the building sits a female figure, entitled The Contemplation of Justice. She is blindfolded, representing that justice doesn't discriminate against those who come before her. On the right sits a male figure entitled The Guardian or Authority of Law. Sixteen marble columns support the foundation. On the architrave above is written "Equal Justice Under the Law." Each of these symbols teaches that above all other public bodies, the judiciary has a unique obligation to maintain a standard of fairness in all of its practices.

However, because government is replete with opposing views, conflicting personalities, and differing ideologies, thoughtful judicial observers recognize a fair judiciary is an independent judiciary. The legal community aggressively

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²Denotes volume, chapter, and page number.
defends judicial independence as a key contributor to collective justice in America. The New York State Bar said of the necessity for judicial independence:

Our bar association feels that fostering an independent judiciary is the best way to ensure fundamental fairness in our society, especially during a time of crisis. In a democracy such as ours, it is the job of judges to hold the government accountable for its actions and uphold the rule of law, even if the law may seem inconvenient at the time (Gomez, 2004, p. 11).

Particularly in the high tide of partisanship in the country, with consecutive presidential elections being decided by less than one percent of one state's electorate, the majority party in both houses of Congress holding less than 56% of the total seats, highly divided public opinion regarding the role of the U.S. military in world affairs, and a lack of unified direction over natural disaster response, it is crucial that the courts remain free from the suspicion of bias that shadows each of these phenomena. A judge that is heavily dependent on a particular ideology when issuing decisions is much less likely to give the "equal justice under the law" that the court system promises than is a judge who is not as tied to one particular ideology. Judges must be selected who represent an objective standard of law rather than a particular ideology, personal opinion, or an adherence to changing winds of public opinion. New York Bar President Thomas Levin articulates this idea:

Like the umpire at the ball game, whose job is to "call them as you see them," judges must be free to study and analyze the facts and law applicable in each case. If judges are to be selected only if they can be counted upon to decide cases a certain way, or in accord with the popular view, regardless of the facts, we sacrifice an essential part of our unique system (Levin, 2004, p. 3).

JUDICIAL APPOINTMENTS
Continuing on the same metaphor, if judges are in fact "umpires" officiating a political game, it is crucial that the process by which these umpires are selected is sound. Figure 1 (Epstein and Segal, 2005, p. 23) displays the process of a judicial vacancy being filled.

This process applies to all three levels of the judiciary, but the intensity of the process decreases as the nominee's scope of influence lessens. A Supreme Court nomination will be accompanied by extensive media coverage, high level of public interest, aggressive interest group jockeying, and thorough Senate hearings. Each of these also occurs at the circuit and district court levels, but will occur with less and less intensity.

JUDICIAL EMPOWERMENT
Alexis De Tocqueville recommended "judicial power" as one of the "democratic procedures for securing liberty against despotism" (De Tocqueville, 1831, 1:1:4). The judiciary's functioning as a body of independent power was not defined with great detail in the Constitution, and so has developed much of this power through judicial opinions in high profile and closely watched cases.

Some early examples of such cases include:

- **Marbury v. Madison** (1803)
  This case solidified the process of judicial review, empowering courts to interpret the constitutionality of laws and potentially strike them down.
- **McCulloch v. Maryland** (1819)
  In the first major decision involving state and federal rights, the Court, in a unanimous decision, declared that the power to tax involves the power to destroy and that the federal government's national bank was immune to state taxation. In this case, the Court set clear precedent for future issues regarding state and federal boundaries.
- **Gibbons v. Ogden** (1824)
  Again establishing precedent regarding state and federal jurisdiction, the Court used this case to put forth the position that Congress can legislate and regulate all matters of interstate commerce as long as there is some commercial connection with another state.

De Tocqueville noted the judiciary's continued maturation, commenting in 1831, "a more immense judicial power has never been constituted in any people" (De Tocqueville, 1831, 1:1.5). More recent significant Supreme Court cases including **Dred Scott v. Sandford** (1857), **Lochner v. New York** (1905), **Brown v. Board of Education** (1954), and **Roe v. Wade** (1973), increased the judiciary's stature in American government. As the judiciary has molded itself into a significant power player, special interests and partisan politicking have closely followed it.

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3Many of the influences affecting the confirmation process (i.e., media publication, interest group participation) occurs before and during Senate hearings as well as after.
4Until 2001, the American Bar Association released its rating on all potential candidates before the president announced his nominee. The George W. Bush administration preferred the ABA to only rate a nominated candidate. Future administrations may choose to again have all potential candidates rated prior to selecting one.
JUDICIAL PARTISANSHIP

Although the political atmosphere surrounding judicial confirmations evolves constantly, politics have surrounded the judiciary from the dawn of the country. Although many believe partisanship in judicial nominations and confirmations is increasing, there is evidence that today’s political influence on the judiciary is no different than it has always been. Lee Epstein and Jeffrey Segal (2005, p. 4) noted, “We do indeed dispute the idea of an escalating reliance on ideology and partisanship on the part of senators and presidents [regarding judicial nominations and confirmations]; we do not believe a wholesale change has occurred in this respect.”

George Washington, in establishing the first Supreme Court, appointed 14 justices from the Federalist Party during his administration. Former Supreme Court Chief Justice William Rehnquist stated:

It is normal and desirable for presidents to attempt to pack the judiciary. Surely we would not want it any other way. We want our federal courts, and particularly the Supreme Court, to be independent of public opinion when deciding the particular cases or controversies that come before them. The provision for tenure during good behavior and the prohibition against diminution of compensation have proved more than adequate to secure that sort of independence. The result is that judges are responsible to no electorate or constituency. But the manifold provisions of the Constitution with which judges must deal are by no means crystal clear in their import, and reasonable minds may differ as to which interpretation is proper. When a vacancy occurs on the Court, it is entirely appropriate that the vacancy be filled by the President, responsible to a national constituency, advised by the Senate (Rehnquist, 1987, p. 236).

Washington’s practice of appointing judges from one’s own party has continued to this day. All but 17 of the 147 candidates for a position on the U.S. Supreme Court belonged to the same party as the President that nominated them. No president has made a cross-party Supreme Court appointment since 1971, when Richard Nixon appointed Virginia Democrat Lewis Powell as an electoral appeal to southern voters.

Partisan appointments have traditionally occurred in lower court appointments as well. When the federal judiciary was expanded in the 19th century, presidents continued a strong trend in filling these seats with judges who shared their party and ideology. Grover Cleveland, Woodrow Wilson, and Ronald Reagan virtually never nominated a judge not from their party; even Democrat Jimmy Carter, known more than any president of his time for reaching across party lines, only nominated Republican judges 16% of the time. Cumulatively speaking, the 135 year period of the expanded federal judiciary (1870-2005) has seen 3,082 appointments, 92.5% of whom have been from the appointing president’s political party (Epstein and Segal 2005, p. 26).

While an impartial judiciary ought to be a goal of all three branches of government, those in power to influence this process learned very quickly that selecting members for the judiciary required more than evaluating law school grades, American Bar Association ratings, or peer recommendations. Executives and legislatures understood that each judicial nominee would carry a distinct flavor of partisanship that would need to be considered when being approved for the federal bench. Epstein and Segal commented on this unwritten policy:

Practice and time also have settled the issue of the role of politics in judicial appointments. However loud the critics may be, the simple reality is that both the Senate and the President take into account nominees’ partisanship and ideology, in addition to their professional qualifications, when they make their decisions, and they always have. The evidence is too overwhelming to ignore (Epstein and Segal, 2005, p. 26).

Even members of the judiciary themselves recognize the politics affecting their appointments and often try to keep their hands in the political game even as they retire. Justices and judges have a history of seeking to influence their replacement, often strategically planning when to retire in order to ensure a replacement most ideologically to their liking. Epstein and Segal (2005, p. 39) offer the following examples, quoted directly:

- Potter Stewart (1958-1981)
  According to the Republican Stewart, while he became eligible for retirement in 1980, he did not want the vacancy created by his retirement to become an election issue. So he delayed his retirement until 1981, which perhaps not so coincidentally, was the year Ronald Reagan replaced Jimmy Carter.

  The Wall Street Journal reported that the conservative Republican Burger was “concerned about the coming Senate elections and the possibility that Republicans could lose their majority. A Democratic controlled Senate would be far less amenable to confirming conservative Reagan-appointed justices.” Indeed, the Republican Senate in 1986 overwhelmingly confirmed Rehnquist to replace Burger and unanimously confirmed conservative Antonin Scalia to replace Rehnquist. But just one year later a Democratic Senate rejected conservative Robert Bork.

  Growing increasingly ill, the liberal Marshall reportedly told his clerks that should he die during the Reagan years, they should “prop him up and keep on voting.” Too sick to wait for the election of a democratic president, however, Marshall retired while George H.W. Bush was in office.

  Though appointed by Nixon, Blackmun moved increasingly to the left during his years on the Court. Wanting to ensure that his replacement would also be a liberal, he waited until a Democrat won the presidency.

- Sandra Day O’Connor (1981-2005)
  The press reported that O’Connor was disappointed when she thought Al Gore won the presidential election of 2000. She remained on the Court to see George W. Bush win a second term and has now retired with Republicans in control of the Senate as well.
Hence, as Epstein and Segal noted, “a wholesale change has not occurred” (Epstein and Segal, 2005, p. 4) in respect to the politicization of the judiciary; however, there is some change manifesting itself in the politics surrounding the judiciary. One significant change is the recent increased presence of interest groups surrounding judicial nominations, most particularly in the judiciary’s lower levels. Rather than try to establish partisan interests through the legislative or executive branches, where such interests are fair game, and risk a court striking down one’s agenda, many interest groups are focusing energies primarily at lobbying for their kind of people to be appointed to the courts.

There is little evidence that interest groups had significant influence in judicial nominations in the 19th century. William Ross said of interest group participation in 19th century judicial nominations:

> Although thousands of individuals, some of them members of organizations, pressured senators [to vote a certain way regarding judicial confirmations], organized interests as interests did not participate in the process. Even if they had participated, senators probably would not have responded (Ross, 1990, p. 5).

Interest groups did not heavily influence judicial nominations in the early 20th century. Gregory Caldeira and John Wright commented, “until recently [referring to the 1980’s], the active participation of a diverse set of organized interests had not been a regular feature of our politics, or had not been, in the parlance of political science “institutionalized” (Caldeira and Wright, 1995, p. 44). However, interest group participation in judicial nominations began to greatly increase in the 1980’s. Caldeira and Wright noted:

> As Republican judges chosen by Ronald Reagan took their seats alongside the liberal appointments of Jimmy Carter, organized interests clashed again and again in the Senate Judiciary Committee and on the floor of the Senate, fighting for control of the federal bench. As a result, the selection of federal judges, once a cozy triangle of senators, the executive branch and the bar, became a major arena for the participation of interest groups. Senators and presidents came to expect interest groups to stake out positions and work on judicial nominations; organized conflict became a part of the political calculus of participants. What is more despite changes in administration, the broad participation of organized interests and the battle lines drawn in the 1980’s over the politics of judicial nominations have persisted in the 1990’s (Caldeira and Wright, p. 44).

Figure 2 (Scherer, 2005, p. 4) shows the increased interest group participation to which Caldeira and Wright are referring.

As the clashes over judicial appointments in the 1980’s began to gather momentum, the media and general public have taken an increased interest in the judicial confirmation process as well. Figure 3 (Scherer, 2005, p. 5) displays the rising public interest in judicial nominations.

As the public interest in judicial appointments has rapidly increased, it follows that senators’ desire to know details about judicial nominees is also increasing. In turn, judicial nominees make careful preparations for hearings before the Senate Judiciary Committee and are often purposefully vague about responses on issues that may spark controversy, such as abortion or affirmative action. This practice was clearly displayed in the recent hearings of John Roberts and Samuel Alito. This can frustrate senators, particularly those in the minority who may be seeking to scrutinize a nominee’s ideology before voting for confirmation. Greg Caldeira and John Wright commented:

> Senators themselves often have difficulty determining exactly what effect a nominee’s confirmation might have on the ideological balance of the Court as a whole, so we can readily understand that constituents are even more uncertain. Assessing exactly what constituents want under these conditions is problematic, as many constituents will not have opinions; and some of those who do will vacillate between support and opposition. If we assume senators care about maintaining their seats, they must anticipate not only the immediate reactions of their constituents to their decisions but also future reactions at the next election (Caldeira and Wright, 1998, p. 503).
Filibustering the Filibuster:  
A Reexamination of the Legislative Role in Establishing A Fair Judiciary  

Adam Reiser

Hence, senators often search from as many other sources as possible to find out the real judicial intentions and views of a nominee. Interest groups are often the sources of this information and so become pivotal players in senators’ voting decisions. Arthur Denzau and Michael Munger commented, “Our explanation for why interest groups are an important part of the legislative equation is that they play a vital role in providing the information that senators and constituents use to resolve their uncertainty about policy and politics” (Denzau and Munger, 1986, p. 90). Caldeira and Wright commented:

By providing information to senators and their constituents about how nominees are likely to behave on the Court if confirmed; and by communicating information about constituents’ preferences through grassroots lobbying campaigns, interest groups help shape senators’ preferences for nominees and inform them about the appropriate importance to attach to constituency preferences…Our empirical analyses indicate that interest group lobbying has a statistically significant effect on senators’ confirmation votes (Caldeira and Wright, 1998, p. 499).

Interestingly, Caldeira and Wright's research indicates that the confirmation decisions of Robert Bork and Clarence Thomas would have been different had lobbying efforts changed. According to Caldeira and Wright, had the lobbying effort against Bork been decreased by 50%, he would have been confirmed; had the lobbying effort in favor of Thomas been reduced by only 10%, he would not have been confirmed (Caldeira and Wright, p. 501).

Filibustering Judicial Nominations

The increased influence of interest groups in judicial nominations has led senators to more regularly vote down judicial nominations, or use tactics to block judicial nominations from receiving a vote, as evidenced by Figure 4 (Scherer, 2005, p. 2).

"Rejected by procedure" may be referring to many tactics senators use to thwart an unwanted nomination; one such tactic is the filibuster. A “filibuster” is the use of dilatory or obstructive tactics to block a measure by preventing it from coming to a vote (Congressional Research Service, 2003a, 2). If a judicial nomination is filibustered until the end of the Congressional session, the name is returned to the president. The president is under no obligation to re-nominate the judge, and, especially in cases where there is a change in the White House, often chooses not to.

The filibuster is especially effective in presidential election years. In these years there is not only an opportunity for the minority to gain the Senate majority and reject any re-nominated, unwanted nominees by vote, but there is also the possibility of a party change in the White House. A presidential party change will usher judges not suitable to the new president off the nomination agenda entirely and replace them with judges sharing the president’s own ideology. President Reagan chose to re-nominate only 18% of President Carter’s pending nominations, President Clinton chose to re-nominate only 6% of President George H.W. Bush’s nominations, and President George W. Bush chose to re-nominate only 22% of President Clinton’s pending nominations (Congressional Research Service, 2003b, p. 42).

A presidential party change is also responsible for the first recorded successful filibuster of a judicial nomination, Abe Fortas. Fortas was nominated as Chief Justice of the Supreme Court in 1968, but a Republican minority, anticipating a Richard Nixon win in the fall’s presidential election, filibustered him. True to the Republican prediction, Nixon did take over the White House in 1969, Fortas was never allowed a vote for Chief Justice, and newly elected Nixon instead appointed the conservative Warren Burger to the high post on the Court (Epstein and Segal 2005, 24).

Figures 5 and 6 (Congressional Research Service, 2003b, p. 27) display recent percentages of judges whose nominations were pending at the end of Congressional sessions.

A revealing feature of the graphs is the significant increase of pending nominations in presidential election years. Senators appear to be recognizing that an upcoming election may bring a new president who is willing to offer fresh appointments to vacant judicial seats and so senators are keeping an increasing number of unwanted nominees from receiving floor votes in presidential election years.

However, it is important to note that filibusters are not the only tactic used to prevent a nominee from receiving a floor vote; there may be many reasons for a “pending nomination.” Most obvious is that the Senate has a busy agenda and may not always get around to voting on a nominee before a Congressional session ends, particularly those that were nominated late in the session. However, the dramatic increase in pending nominations in recent years indicates that there is more than a busy agenda preventing nominees from receiving a floor vote.
“Dilatory or obstructive” tactics to prevent a floor vote vary depending on whether government is “divided” (when the president and the Senate majority are of different parties) or “unified” (when the president and the Senate majority are of the same party). In times of “divided government”, the majority party may prevent a floor vote by never allowing the nominee a committee hearing or never placing the nominee on the Senate agenda to receive a confirmation vote. In times of “unified government”, the minority party does not have the same options as the majority does in “divided government” to prevent a nominee from receiving a floor vote. If they choose to prevent a nominee from receiving a floor vote, they must do it by extending debate on the nominee when he or she has already been placed on the Senate floor agenda.

This practice of the minority extending floor debate to halt a judicial nomination has generally been the only practice specifically categorized as a judicial filibuster. Georgetown law professor Mark Tushnet explains why this is:

There’s a difference between the use of a filibuster to derail [a judicial nomination] and the use of other Senate rules, on scheduling, on not having a floor vote without prior committee action, to do so etc. All those other rules… can be overridden by a majority of the Senate… whereas the filibuster can’t be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can’t do so in respect to the filibuster (Cornyn, 2004, p. 221).

However, while the “other Senate rules” of which Tushnet was referring (refusing to allow hearings, refusing to place on Senate agenda etc.) are not categorized as true filibusters, it is important to note that they are a key piece to the current day’s judicial confirmation puzzle.

Both the majority preventing nominees from receiving a hearing or leaving them in committee in times of “divided government”, as well as the minority extending debate on nominees in times of “unified government”, have been practiced more regularly in recent years. During the Clinton administration, six years of Republican Senate control (“divided” government) led to 66 of Clinton’s district court and 38 circuit court appointments never receiving a floor vote. Putting this in perspective, only 103 district court and 32 circuit court nominations did not receive floor votes in the previous 16 years (H.W. Bush, Reagan, Carter) (Congressional Research Service, 2003b, p. 18).

Clinton also received the highest percentage of judicial nominations being rejected in over 70 years (see Figure 4). Likely as a retaliation measure, Democrats, who were in the Senate minority for two and a half years of George W. Bush’s first term (“unified” government), used filibusters to prevent ten of Bush’s first term judicial nominations from receiving a floor vote. Bush also received an abnormally high rejection rate of judicial nominations (see Figure 4).

Both Republicans using obstructive tactics in time of divided government in the 90’s and Democrats using filibusters in time of unified government in the 21st century have effectively lowered the overall number of judicial nominations receiving floor votes. Figures 7 and 8 (Congressional Research Service, 2003b, p. 32) display this pattern:

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5The Senate Majority Leader has traditionally set the agenda for Senate floor votes and so may choose to never place an unwanted nominee on that agenda.
Filibustering Judicial Nominations Harms the Judiciary

The practice of preventing significantly increasing numbers of judicial nominations from receiving floor votes is harming the judiciary, and the remainder of this paper will discuss why it is harmful and offer a potential solution to fix the problem. Although both a Senate majority using special strategic tactics in a “divided” government and a Senate minority using filibusters in “unified” government effectively prevent floor votes, the contention of this paper will focus primarily on arguing against filibusters. Filibusters are especially harmful to government because they represent a minority preventing a majority from acting, whereas “other tactics” to prevent action are practices of the majority.

The constitutionality of filibustering judicial nominations is debatable. The Congressional Research Service stated:

The question of the constitutionality of a Senate filibuster of a judicial nomination has divided scholars and has not been addressed directly in any court ruling. The constitutionality of the filibuster of the nomination turns on an assessment of whether the Senate’s power to make rules governing its own proceedings is broad enough to apply the filibuster rule to nominations. Supporters and critics of the filibuster of judicial nominations disagree about the relative roles of the Senate and the President in regard to judicial appointments, about whether the Senate has a duty to dispose of the President’s judicial nominations in a timely fashion, and about whether a simple majority of Senators has a constitutional right to proceed to vote on a nomination. The constitutionality of a filibuster might be challenged in court, but it is uncertain whether such an action would be justifiable (Congressional Research Service, 2005, p. 17).

However, regardless of the constitutionality of a filibuster, there are multiple reasons why it is an unwise practice in the judicial confirmation arena.

Filibusters Frustrate the Presidential Duty to Appoint Judges

Under the U.S. Constitution, it is the duty of the president to appoint judges “by and with the advice and consent of the Senate.” While the Senate may reject any nominee they feel is not fit for judicial office, it is not appropriate to “reject” by leaving the nomination in “limbo” for months or even years at a time. The average time a judicial nominee must wait before taking office is increasing significantly. Consider the graph in Figure 9 (Congressional Research Service, 2003b, p. 28):

The added time between nomination and confirmation leaves the nominees in a stressful career limbo, not knowing if they will ever be confirmed, or even receive a vote. One such example of a drawn out wait for confirmation is George W. Bush’s 2001 circuit court appointment of Miguel Estrada. Estrada was filibustered for 21 months and finally withdrew his name from consideration in 2003. American Bar Association President Alfred Carlton said of the Estrada filibuster:

The spectacle of the Miguel Estrada filibuster grinds on, a living testament to the inability of both sides to cooperatively fulfill the grave constitutional duty entrusted to them... this is to say nothing to the secondary effects current intramural disputes will have on a legion of other nominees—all awaiting hearings or confirmation, many for months or even years at a time, having all put professional careers and private lives on hold (Cornyn, 2004, p.7).

Carlton concluded that judges need to be nominated and confirmed faster. As Carlton notes, in addition to slowing the federal appointment process, cases like Estrada’s may deter qualified people considering a career on the federal bench.

In response to the increasing time between judicial nomination and confirmation, former Chief Justice William Rehnquist said in his 1997 year-end report, “the President should nominate candidates with reasonable promptness and the Senate should act within a reasonable time to confirm or reject them” (Rehnquist, 1997). He repeated the same message in his 2001 and 2002 year-end reports. The American Bar Association has recommended that “judicial vacancies be filled without delay” (ABA, 1997) and “urges the Senate to hear and vote on judicial nominations in an expeditious manner” (ABA, 2002).
Further, during these times waiting for confirmation, the federal bench is often left without judges. Except in cases such as Sandra Day O’Connor’s, where the judge agrees to stay on the bench until a replacement is confirmed, seats on the bench sit empty until the Senate confirms a new appointment. (Refer to Figures 5 and 6 for the number of pending nominations at the end of each Congressional session.) If a vacancy has been vacant for more than 18 months, or if it is vacant for any period of time and the number of court filings reach a certain level, it is considered a “judicial emergency.” As of March, 2006 there were 23 judicial emergencies in the federal judiciary (U.S. Courts, 2006).

“ADVICE AND CONSENT” SHOULD ENTAIL AN ACTUAL VOTE

Former Senator Henry Cabot Lodge declared in 1893: “To vote without debating is perilous, but to debate and never vote is imbecile” (Cornyn, 2004, p. 181). Former Chief Justice Rehnquist stated, “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” (Rehnquist, 1997). Senators from both sides of the aisle have commented on the importance of giving judicial nominations a floor vote. In response to Republicans using their majority to implement previously described strategic tactics and prevent Bill Clinton’s nominees from receiving a floor vote, Democratic judiciary committee members stated:

- Senator Dianne Feinstein (D-CA): “Our institutional integrity requires an up-or-down vote” (Feinstein, 1999).
- Senator Herb Kohl (D-WI): “These nominees, who have to put their lives on hold waiting for us to act, deserve an ‘up or down’ vote” (Kohl, 1999).
- Senator Edward Kennedy (D-MA): “We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don’t like them, vote against them. But give them a vote” (Kennedy, 2000).

Republican judiciary committee members said of Democrats using filibusters to prevent floor votes on George W. Bush’s nominees:

- Senator Orrin Hatch (R-UT): “It is also unfair to nominees who have agreed, often at personal and financial sacrifice, to judicial service only to face scurrilous attacks, trumped up charges, character assassination, and smear campaigns. They should not also be held in permanent filibuster limbo. Senators can vote for or against any judicial nominee for any reason, but senators should vote” (Hatch, 2005).
- Senator Lindsey Graham (R-SC): “Filibustering judges will destroy the judiciary over time. It is unconstitutional” (Graham, 2005a).
- Senator Chuck Grassley (R-IA): “The reality is that no other Senate majority has been excluded from the judicial confirmation process in over 200 years. We need to restore tradition and the law to the judicial process - we need to give these nominees an up or down vote. We need to stop this systematic denial of our advice and consent responsibility by use of the filibuster” (Grassley, 2005a).

While the contention of this paper is aimed primarily at stopping judicial filibusters, it is important to note that the Republican practices of using strategic tactics to block Clinton’s nominees from receiving a floor vote were a trigger to the current filibuster dilemma; these strategic tactics also frustrate the judicial confirmation process and are harmful to the judiciary. However, a key component to the Republican practices of the 90’s is that they were acting with a Senate majority. As such, it is primarily the duty of American voters to hold the majority accountable for its actions, and to elect a new majority if they feel the current majority has misused its power.

In contrast, filibustering judicial nominees is a practice of the minority. The practice of the minority preventing the majority from acting was the cause of the Senate “nuclear option” (as referred to by Democrats) or “Constitutional option” (as referred to by Republicans) battles of 2005. Republican leaders, feeling that Democrats were overstepping minority bounds by preventing votes on judicial nominations, threatened to remove the power to filibuster altogether, effectively preventing the minority from ever stopping the majority’s action regarding judicial confirmations again.

Nevertheless, while filibustering judicial nominations does exceed appropriate governmental bounds because it thwarts the majority from acting, preventing nominees from receiving a floor vote by using previously mentioned strategic tactics also harms the judiciary and lays groundwork for future filibuster battles such as the Senate is now experiencing. “Advise and consent”, whether in divided or unified government, Republican or Democrat majority, ought to mean an actual floor vote.

“FILIBUSTER TRADING” IS A LESS EFFECTIVE WAY TO GIVE “ADVICE AND CONSENT”

Senator Lindsay Graham (R- South Carolina) remarked, “If we ever go down the filibuster road, we will never go back” (Graham, 2005b). Graham’s words reflect the ultra-sensitive issue of changing Senate precedent and also reveal a key piece to the current judicial confirmation puzzle: once a pattern of filibustering judicial nominees is established, it is very difficult to reverse. Washington’s partisan momentum makes future judicial filibusters coming from both sides of the aisle a very realistic possibility. Once down that proverbial road, it would take a monumental compromise to undo the damage “filibuster trading” could do to the Senate judicial confirmation process.

Filibustering judicial nominations creates a political Russian roulette in the Senate that is a poor way to “advise” the president. The Senate has a long established tradition that “advise and consent” has meant the entire body voting to

Losing the Senate majority has significant effects on partisan strategy, such as losing the privileges of appointing committee chairs and setting the floor agenda, as well as having the necessary votes to pass any legislation the majority supports.
confirm or reject the nomination. As previous data has shown, only recently has there been a significant increase in judicial nominations not receiving a vote. Although senators from both parties have spoken out against the practice of preventing floor votes, the current partisan tension has made the filibuster option too difficult to resist, especially when there are party changes in the Senate majority and the presidency.

The current guideline of allowing judicial nominations to be filibustered opens too many doors for political revenge that frustrates the constitutional duties of the Senate.

Former President Woodrow Wilson commented, “The United States Senate is the only legislative body in the world which cannot act when its majority is ready for action. The remedy? There is but one remedy. The only remedy is that the rules of the Senate be altered so it can act” (Cornyn, 2004, p. 181). Wilson points out a reasonable notion: if a majority of members of a legislative body desire to act, the body ought to be able to act. However, the current Senate rules of allowing a judicial nomination to be confirmed with simple majority vote are a significant exception to Wilson’s argument. It is not in the best interest of American government to give a lifetime federal bench appointment to judicial nominees who may have only received 51 votes.

With partisan polarization in Washington increasing, any effort toward compromise is commendable. Requiring some minority approval for important decisions such as judicial nominations is one such way to compromise. As data has shown, the minority is establishing a pattern of having some say in judicial nominations; they are achieving this by filibuster currently and, as previously argued, it is harming the judicial nomination process. Changing the rules to require more than a simple majority vote would usher filibustering out of the judicial nomination arena, while also allowing the minority to have their desired say in who is confirmed to the federal bench.

However, proposals to change Senate rules themselves can be more complicated than any filibuster battle. Consider the following statement by former United States Senator Arthur Vandenberg, issued in 1945:

The rules of the Senate as they exist at any given time and as they are clinched by precedents should not be changed substantively by the interpretive action of the Senate’s Presiding Officer, even with the transient sanction of an equally transient Senate majority. The rules can be safely changed only by the direct and conscious action of the Senate itself, acting in the fashion prescribed by the rules. Otherwise, no rule in the Senate is worth the paper it is written on, and this so-called “greatest deliberative body in the world” is at the mercy of every change in parliamentary authority, which means the Republicans are in power today and the Democrats may be tomorrow, and a simple majority can change anything (Reid, 2005).

As Vandenberg explained, changing the rules with a simple majority leaves too much room for politicking and partisanship; tides of opinion and political revenge would be given too much influence in such important decisions as the rules under which the Senate operates.

Passing a Congressional statute to require 60 votes for a judicial confirmation may be a more appropriate step than changing Senate rules. However, since a 60-vote confirmation standard would take power from the President, it is very likely that a President would veto any bill of this type. A 60-vote statute could also face stiff constitutionality battles in the courts. Hence, a constitutional amendment to require 60 votes on all judicial nominations may be the best remedy to fix a broken judicial confirmation process while also providing a check on all three branches of government. Although the likelihood of such a controversial amendment passing is small, it nevertheless is an option that must be explored to fix what is increasingly appearing as a broken judicial confirmation system.

A Check on the Legislative Branch

In its most important matters of order, the Senate has built in checks for itself. The Senate Ethics Committee, a body that most can agree must be insulated from partisan influence, provides an excellent example. The Senate Ethics Committee has six members, three of which must be Democrat, and three Republican. Four votes are needed to move forward with any action (even if one Senator is absent, giving one side a 3-2 majority, four votes are still required). This committee is intentionally structured so that there must be some level of bipartisanship to conduct any matter that may affect such important matters as to how the Senate’s ethical standards will be enforced.

Should not judicial confirmations, a process that can determine the shape of an entire branch of government—a branch, like the ethics committee, be insulated from partisanship to the maximum extent possible? If so, the Senate needs to restructure the process so that it, too, requires some level of bipartisanship to proceed in this pivotal Senate function. Requiring 60 votes for judicial confirmations is a feasible solution. In the post-Civil War era, one party has held a 3/5 majority (or what the 60 vote requirement would be in today’s Senate) 21% of the time (U.S. Senate, 2005). Hence, except in those rare times, when American voters have given a strong senatorial mandate to one party, 60 votes is an appropriate threshold that would require at least some approval from the minority side of the aisle when confirming a judge.

A Check on the Executive Branch

To achieve their objectives, presidents are prone to overstepping their bounds of authority, as evidenced in the following examples:

• In 1801, after being defeated in his attempt for reelection, outgoing President John Adams appointed 18 judges the night before he left office. These infamous “midnight appointments” were intended as an obstructionist gesture to the incoming administration.

• In the early 1830’s, President Andrew Jackson, in response
to his strained relationship with the judicial and legislative branches of government, angrily refused to enforce judicial decisions regarding Cherokee Indian removal policy.

- In the mid 1930’s, frustrated by a Supreme Court that derailed many of his constitutionally questionable New Deal proposals, President Franklin Roosevelt sought to legislate a reordering of the federal judiciary, and "pack" it with pro-New Deal judges.

These presidential missteps serve as reminders of the critical role of checks and balances between the branches. The Senate role in judicial nominations is certainly one example of such checks and balances. A 60-vote confirmation standard urges executives to give consideration to both sides of the political aisle when appointing judges and fulfills Montesquieu’s admonition of linking judging with political moderation in order to obtain the political balance not found in republicanism or liberalism (Carrese, 2004, p. 12). It also gives life to Alexander Hamilton’s statement, “political jar- ring promotes deliberation” (Hamilton, 1788a), a worthy goal for a Senate that refers to itself as the “greatest deliberative body in the world.” Executives would also be mindful that if they rupture their relationship with the Senate, they will have to answer to a three-fifths majority for any judge they want on the bench.

A Check on the Judicial Branch

Both legislative and executive branch officials require a simple majority to obtain their respective offices, which raises the question of why the judiciary should be any different. The following quote by Alexis De Tocqueville provides insight:

As the people in democracies are more constantly vigilant in their affairs and more jealous of their rights, they prevent their representatives from abandoning that general line of conduct which their own interest prescribes. In the second place, it must be remembered that if the democratic magistrate is more apt to misuse his power, he possesses it for a shorter time. But there is yet another reason which is still more general and conclusive. It is no doubt of importance to the welfare of nations that they should be governed by men of talents and virtue; but it is perhaps still more important for them that the interests of those men should not differ from the interests of the community at large; for if such were the case, their virtues might become almost useless, and their talents might be turned to a bad account (De Tocqueville, 1831, 1:14).

De Tocqueville makes reference to democratic ballot accountability; the duty elected officials have to report to their constituents at some point and, if they desire further tenure in governance, request reelection. As De Tocqueville points out, when an official in democratic government “is more apt to misuse his power, he possesses it for a shorter time.” Certainly this is true with legislators and executives; legislators must face reelection often— every two or six years— and executives may only serve two terms no matter their job approval and efficiency.

However, the judiciary is immune from this electoral check, and was constitutionally intended to be. This makes a thorough pre-confirmation examination all the more necessary when considering a nominee for a lifetime; an aggressive confirmation debate and 60-vote requirement greatly decreases the possibility of appointing those that may “differ from the interests of the community at large” and hence “their virtues become useless, and their talents turned to a bad account.”

Conclusion

It is essential that the Senate take measures to decrease the politicization of the judicial nominating process. As current Senate Judiciary Chairman Arlen Specter stated “Hearings for a Supreme Court nominee should not have a political tilt for either Republicans or Democrats. They should, in substantive fact and in perception, be for all Americans” (Specter, 2005). Because the legislative and executive branches are heavily party-saturated, seeking bipartisan approval will help to confirm judges that are as nonpartisan as reasonably possible. This bipartisan participation also provides a necessary check on the executive and legislative branches.

While the judicial branch also requires a firm check on its power, using the filibuster to block a judicial confirmation severely damages the integrity of both the judicial confirmation process and the filibuster itself. The Economist reported in May, 2005:

Amid all this uncertainty, the filibuster debate has almost certainly harmed one institution: the Senate. It was deliberately designed by the Founding Fathers to be the deliberative branch of the American government. Senators, who sit for six years rather than the two years of the populist House, have long prided themselves on their independence. The politics of partisanship has now arrived in the upper chamber with a vengeance (Armageddon for the Senate, 2005, p. 29).

These negative partisan feelings are being recognized by Senators and outside observers. A bipartisan letter addressed to Senate leadership from every freshman senator elected in 2002 stated:

As the ten newest members of the United States Senate, we write to express our concerns about the state of the federal judicial nomination and confirmation process. The apparent breakdown in this process reflects poorly on the ability of the Senate and the administration to work together in the best interests of our country. The breakdown also diserves qualified nominees to the federal bench whose confirmations have been delayed or blocked, and the American people who rely on our courts for justice. All of us were elected to do a job. Unfortunately, the current state of our judicial confirmation process prevents us from doing part of that job. We seek a bipartisan solution that will protect the integrity and independence of our nation’s courts, ensure fairness for judicial nominees, and leave the bitterness of the past behind us (Cornyn, 2003, p.49).

American Bar Association President Alfred Carlton stated of the current judicial confirmation process: “There is a crisis in
our federal judiciary, constituting a clear and present danger to the uniquely American foundation of our tripartite democracy— an independent judiciary” (Carlton, 2003, p. 8). Likewise, Senior Clinton Justice Department official Walter Dellinger concluded that the confirmation system is “badly broken” (Dellinger 2003, p. 23).

If these comments reflect reality, is it not time to reevaluate the judicial confirmation process? Requiring 60 votes for judicial confirmations will foster a greater level of compromise that benefits all branches of government, but most particularly in reviving the constitutional mandate that the president nominate judges with the advice and consent of the Senate. As the filibuster battles of 2005 displayed, leaving judicial confirmations to simple majority vote leaves too many doors open for the filibuster to be used where it should not be. Additionally, the rigorous requirements of amending the Constitution regarding a 60-vote confirmation standard would bring this important issue into the public view, so that citizens can learn the best approach to such a critical process.

It is imperative the Senate take steps toward restoring integrity to the filibuster and fixing the judicial confirmation process. Requiring 60 votes for judicial confirmations would allow the filibuster to remain as a tool for extending debate on legislation while removing it as a tool for holding judicial nominees hostage. It would also more properly balance the power of each branch of government regarding judicial appointments. Most importantly, a 60-vote standard would help decrease partisanship in the judiciary, and maintain it as a branch of government that represents the justice to which all Americans are entitled.

REFERENCES


