IN DEFENSE OF FILIBUSTERING JUDICIAL NOMINATIONS

Catherine Fisk* & Erwin Chemerinsky**

INTRODUCTION

President George W. Bush has enjoyed success in gaining Senate confirmation of his judicial nominees that President Clinton could only dream of. All but ten of President Bush’s nominees who have completed the Senate’s process have been confirmed, and the vacancy rate on the federal courts is lower now than it was at the end of the Clinton Administration. By contrast, sixty-five of Clinton’s nominees were never confirmed.1 Fifty-five never got a hearing and ten never got a floor vote. Thus the judicial confirmation process is working more smoothly in the President’s favor now than at any time in recent memory. Confirmations occurred at the normal pace for the President even during the year and a half when Democrats controlled the Senate, as one-hundred of Bush’s nominees were confirmed and only two were rejected.

Nevertheless, conservative activists still successfully portray the filibusters of ten2 nominees as an unprecedented thwarting of the majority rule principle that they claim is the bedrock of democracy generally and the advise and consent process in particular. As President Bush begins his second term, there is again speculation that Republicans in the Senate are going to try and eliminate the filibuster for judicial nominations to ensure that every nominee, especially for the Supreme Court, will be confirmed.

In this paper, we defend the proposition that filibusters are a desirable feature of the current judicial confirmation process. We argue that the filibuster is a part of the Senate’s procedures that is virtually as

---

* Professor of Law, Duke University School of Law.
** Alston & Bird Professor of Law, Duke University School of Law.
2 As of November 15, 2003, the Democrats filibustered ten Republican nominees. See Helen Dewar, Senate Filibuster Ends With Talk of Next Stage in Fight, WASH. POST, Nov. 15, 2003, at A9.
old as the Senate itself. It is one of a number of checks that is part of American government. Without the filibuster, a President whose party controls the Senate could fill judicial vacancies without any check or balance. Moreover, we contend that if the Senate’s rules concerning the filibuster are to be changed, this should be done in compliance with the Senate’s rules.

It is important to place the Democratic filibusters of Bush’s ten judicial nominees in context. During the first two years of the Clinton Presidency, when Republicans were a minority, they used filibusters to block nominations, including the nomination of the prominent African-American physician Dr. Henry Foster to be Surgeon General, \(^3\) Sam Brown to be Ambassador, \(^4\) Janet Napolitano to be United States Attorney for the District of Arizona, \(^5\) and Ricki Tigert to be a member of the board of the FDIC. \(^6\) Later, Republicans filibustered the nomination of moderate Duke Law School professor Walter Dellinger to be the Assistant Attorney General and Solicitor General, \(^7\) Derek Shearer to be Ambassador to Finland, \(^8\) and Dr. David Satcher to be Surgeon General. \(^9\) Cloture votes were held on as many Democratic judicial nominees during the Clinton Administration as during the Bush Administration. Cloture votes were held on Judge Rosemary Barkett, Edward Carnes, \(^10\) H. Lee Sarokin, \(^11\) Richard Paez, \(^12\) Marsha Berzon, \(^13\) and Brian Theodore Stewart, \(^14\) which suggests that all of those nominees were filibustered as well. In addition, Republicans

---


\(^12\) See U.S. Senate Roll Call Vote No. 37 (Mar. 8, 2000), 106th Cong., 2nd Sess., available at http://library2.cqpress.com/cqweekly.


filibustered key pieces of President Clinton's legislative agenda, including an economic stimulus package, campaign finance reform, lobbying reform, health care reform, a bill to prohibit hiring permanent replacements for striking workers, and racial justice provisions in a crime bill.\(^{15}\)

There is no historical basis for the Republican claim that filibustering has not been used to block judicial nominations.\(^{16}\) Strom Thurmond led a filibuster against President Johnson's nomination of Abe Fortas as Chief Justice and Homer Thornberry to be an Associate Justice. In fact, filibustering nominations and appointments for reasons of party advantage or ideological opposition has a history as long as the history of the filibuster itself. As early as 1841, the Democratic minority in the Senate used extended debate strategically in an effort to block the Whig majority from making an appointment (publishers of the *Congressional Globe*) in a dispute over partisan control of the Senate. Huey Long conducted a famous fifteen hour one-man filibuster over the appointment of officials under a provision of the controversial National Recovery Administration.\(^{17}\) During the Clinton Administration, Republican Senators filibustered five nominations to the State Department to gain leverage in a dispute about whether the State Department had adequately investigated alleged wrongdoing by an employee.\(^{18}\) Republicans also filibustered the nomination of Henry Foster to be Surgeon General because of his views on abortion, and Walter Dellinger's nomination to be Solicitor General because of his views on a host of issues. This history shows that there is simply no truth to the claim that the Democrats' use of filibusters has increased partisan rancor to an unprecedented level. In fact, parliamentary maneuvering to block action has, for much of American history, been used for party advantage or for reasons of ideology.\(^{19}\) The partisan rancor has as much or more to do with the narrow division in


\(^{16}\) For the Republican claim, see http://cornyn.senate.gov/062403rulesreform.html ("There has never been a filibuster of a judicial nominee—now there are two," Sen. Cornyn said in describing the Senate Rules Committee's vote to pass Senate Resolution 138 that would change Rule XXII). See also Judicial Nominations, Filibusters, and the Constitution: Hearing Before Subcomm. on the Constitution, Civil Rights, and Property Rights, Sen. Comm. on the Judiciary, 108th Cong. (2003) (statement of Steven Calabresi, Professor, Northwestern School of Law) ("Now for the first time in 214 years of American history an angry minority of Senators is seeking to extend the tradition of filibustering from legislation to judicial nominees.") [hereinafter Calabresi, *Hearings*].

\(^{17}\) See FRANKLIN L. BURDETT, FILIBUSTERING IN THE SENATE 3-4 (1940); 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 413-14 (1960).


\(^{19}\) See Fisk & Chemerinsky, *supra* note 15, at 182.
the Senate over the last few years, deep ideological divisions in American society, and lingering anger about *Bush v. Gore*\(^20\) as it does with the filibuster.

Moreover, we strongly disagree with those who see partisan rancor concerning judicial nominations as inherently undesirable. Republicans who want to see President Bush's nominees confirmed have every reason to decry partisan rancor and ask for painless approval of all of his picks for the courts. But this is disingenuous. These same Republicans had no reservations about partisan rancor in blocking a Democratic President's picks. The reality is that the identity of judges matters enormously in determining the results of cases and it is completely appropriate for both sides to use all of the tools at their disposal, including the filibuster, to influence the process.

In fact, the discussion over partisan rancor in judicial appointments misses a key point: President Bush could avoid it, and the prospect of filibusters, by selecting moderate Republicans rather than very conservative ones. The blame for rancor should not be placed on the Democrats who filibustered a small number of Bush judicial nominees, but on a President who invited the fights by picking very conservative individuals.

In this paper, we defend the desirability of filibusters as a check on judicial appointments both normatively and as being consistent with Senate history. We show that this is particularly true in regard to Bush's judicial nominees who are both extremely conservative and quite willing to use their life tenure actively to overturn long-settled and desirable aspects of American law. We then show that the Republican objections to filibustering judicial nominees are misplaced as a matter of principle. Finally, we conclude by explaining that if the Senate rules are to be changed, Republicans should be wary of invoking the so-called "nuclear option" (which would be an effort to change the supermajority rules by simple majority vote).

I. *The Desirability of Filibusters as a Check on Judicial Appointments*

A. *Filibusters are a Check on Legislative and White House Action, but They are Not Necessarily Anti-Majoritarian*

Much of the debate about filibustering judicial nominations assumes that they are anti-majoritarian. They are only if one uses a reductionist model of majoritarianism that suggests any procedural

device in the Senate that prevents a vote on a nomination is anti-majoritarian. Considering the nomination and confirmation process as a whole, both as it currently operates and as it has operated over the last generation, one concludes that identifying majority sentiment, and a thwarting of it, is difficult indeed. One cannot be sure, therefore, whether many filibusters promote or thwart the will of the "majority."

To begin at the beginning of the judicial nomination process, the nomination process in the White House is not necessarily majoritarian, if we mean reflective of and responsive to the views of the majority of the American electorate. The handful of people who identify and vet prospective nominees have enormous power to control the agenda of the nomination process, with little responsiveness to the electorate or even to the President. The power to set the agenda by determining which names will surface as possible nominees is perhaps the most significant power in the entire nomination process.

Moreover, the views of the people who are chosen through the White House process do not necessarily reflect the views of the majority. Virtually every analyst from both parties and all major newspapers believe that the judicial nominations process over the last few years has been designed primarily to appeal to the conservative and liberal base of each party. Take Janice Brown, President Bush's nominee for a vacancy on the United States Court of Appeals for the District of Columbia Circuit, as an example. She has questioned the constitutionality of New Deal legislation, including Social Security. She dissents even from the moderately conservative decisions of the almost-entirely Republican California Supreme Court. She has questioned whether the Bill of Rights should apply to the states. We very much doubt that the majority of the American public would favor her vision of the American legal system or would vote for it if they were given the chance. Preventing her confirmation may actually be entirely consistent with the views of the majority as to the future of American law.

It is also important to recall that the President has sought greater ideological control over the appointments process by eliminating the historic role of American Bar Association evaluation of judicial nominees. Instead, the White House chose the conservative Federalist Society to play an important role in evaluating nominees. The Administration's view was that the ABA, which is dominated by partners in major law firms and other established leaders in the profession, is too liberal. (One wonders how it is that the non-partisan and big-firm dominated American Bar Association can be characterized as too liberal, particularly since it had been vetting judicial nominees for Republicans and Democrats alike for years). At every step of the nomination process, the current Administration has attempted to
immunize its process from the influence of moderate and liberal ideologies with which it disagrees. Restraining this extreme conservative push is not necessarily anti-majoritarian.

So the real question is not whether the filibuster is “anti-democratic” in the sense of “anti-majoritarian.” The question is whether it, in the context of all other aspects of the nomination process, is a desirable check on White House action. In fact, the filibuster plays an important majoritarian check in the context of the inherently anti-majoritarian United States Senate. Since every state, regardless of population size, has two senators, it is possible for a majority of Senators representing a minority of the population to act. The filibuster allows a minority of Senators who represent a majority of the population to prevent action. Three senators from states with small populations—Wyoming, Idaho, and Alaska, to take three examples—can outvote two senators from states with larger populations—New York and California, for example. To the extent that the filibuster enables the minority of senators who represent the majority of the American population to restrain the actions of the majority of senators who represent the minority, it operates in a manner that is, in one sense, majoritarian. In fact, at this point in time, Democratic Senators represent a majority of the population and thus a Democratic filibuster of Bush’s judicial nominations may be seen as majoritarian, not anti-majoritarian in nature.

B. Why a Check is Needed

Even if we assume that the majority vote of the Senate is our definition of majoritarian, and therefore assume that the filibuster is anti-majoritarian, it is a mistake to regard this as making it illegitimate. The reality is that the American constitutional system values and institutionalizes checks on majoritarian preferences. It is simply wrong to define American democracy as majoritarian. The President, as was seen as recently as 2000, is chosen by the Electoral College and not the majority of the voters; Republicans who complained during his first term that the nominations process was undemocratic because it is anti-majoritarian seemed to have missed the irony that the President himself was chosen by a minority of the voters. The Senate is anti-majoritarian because every state, regardless of size, has two Senators. Some part of the population—the District of Columbia, for example—has no voting representation in Congress at all. Much governance is done by administrative agencies, whose officials were elected by no one. And the entire federal judiciary was chosen in a non-majoritarian process, by the President with Senate confirmation, with no public participation.
This, of course, is not to criticize any of these features of American government. These processes would be objectionable only if it is assumed that strict majoritarianism is desirable and necessary. Critics of the filibuster present their argument in this way, but their rhetorical appeal to democracy as majoritarianism stands at odds with the actual structure and operation of American government.

Normatively, there are good reasons for having non-majoritarian features of American government, including the filibuster. The Constitution and a number of government processes that it ordains are designed to protect minorities of various kinds, including political, social, and racial minorities. The religion clauses of the First Amendment are designed to protect religious minorities. The post-Civil War amendments are designed to protect racial minorities. The Constitution cannot be changed by a majority of the population. The constitutional limits on legislative action, including of course the Bill of Rights, thwart the will of the majority of the state and federal government and executives. The filibuster, to the extent that it blocks or delays legislative action, is one among many restraints on a legislative majority.

A check is especially important when it comes to federal judges. Of all the branches of government, the federal judiciary is obviously the least majoritarian. A President elected by a minority of the voters, as President Bush was during his first term, can pick federal judges and have them confirmed by Senators representing a minority of the population. The federal judges then hold their positions for life, subject only to the extremely unlikely possibility of impeachment. It is therefore misguided to criticize filibustering judicial nominations as anti-majoritarian, when the entire nature of the federal judiciary is anti-majoritarian. The filibuster is just another check that exists within an overall process that is filled with checks and balances.

C. The Filibuster in the Context of the Nomination and Confirmation Process

To assess the allegedly anti-democratic character of the filibuster, it is essential to put it in context. Currently, the Republicans control both houses of Congress and the White House. As explained below, most of the other conventional checks on action favored by the White House do not currently operate. Thus, the filibuster remains as one of the very few brakes on majority action. One might be tempted to see the Republican domination in Washington as all the more reason to oppose filibusters—Republicans certainly would like to say they have a strong mandate from the American public to see their nominees
confirmed. But of course one might point out that for his first term, George W. Bush lost the popular vote and won in the Electoral College due to the intervention of five members of the Supreme Court. Thus, it is far from clear whether filibustering Bush judges reflects or thwarts the will of the majority.

Historically, there have always existed checks on the power of the President to pursue his or his party’s agenda. The current majority party has eliminated many of them, especially with regard to judicial confirmations. Thus, one might argue that, in fact, the current majority enjoys historically unprecedented levels of power to nominate and confirm any candidates whom they choose.

First, the Senate historically granted considerable power to the Senators from the state in which the judicial nominee was to sit to identify or to object to judicial nominees. Traditionally, Presidents have allowed Senators from their political party to pick judicial nominees for their states. Moreover, Senators, even from a different political party from the President, historically have had the power to block judicial nominees from their states.

For nominees to the federal courts of appeals during the Clinton Presidency and before, the Senate Judiciary Committee leadership allowed home-state Senators to fill out a blue form stating their views on nominees for appellate judgeships in their state. When a Senator expressed opposition on the blue slip, the nominee would not be voted out of committee. For the six years that Republicans controlled the Senate during Clinton’s presidency, Orrin Hatch, the chair of the Judiciary Committee, used the blue slip to give home-state Senators absolute veto power. He even expanded it to allow senators to block any nominee to any court in the circuit, not merely in the state. In this way, Jesse Helms was able to block every single non-white Clinton nominee to the Fourth Circuit, even those nominated from states other than North Carolina. In this way, he was able to keep the Fourth Circuit as the last circuit in the country to be entirely white. This “blue slip” system was honored most when the Senators were members of the President’s political party, but blue slips were even honored when they were not in the same party.

In 2003, however, Senator Hatch announced that blue slips would henceforward be only advisory and, as a result, a number of nominees, including Carolyn Kuhl in the Ninth Circuit and Henry Saad in the Sixth Circuit, were voted out of the committee over the objection of both home-state Senators.

Second, until Republicans regained the majority in 2002, the Senate leadership routinely honored “holds.” Although holds had existed for a number of years as an informal way for Senators to allow themselves time to study a matter, they began to operate as a way of
announcing an intent to filibuster. They had the additional advantage in that the Senator holding up action did not need to reveal either his or her identity or reasons. During the first two years of the Clinton presidency, holds were used as a form of stealth filibuster. Not surprisingly, the Republican majority in 2002 ceased honoring some of these holds.

Third, the committee system historically allowed a small number of Senators from both the majority and the minority party to express reservations, and even to bottle up nominations and other action. During the Clinton Administration, Republicans stalled for years nominees whose ideology they considered objectionable in committee—Richard Paez waited nearly four years for a floor vote, while William Fletcher waited for over three years and Marsha Berzon waited for over two years for a floor vote. By contrast, the conservatives and/or Republicans whom Clinton nominated, such as Ted Stewart, a Utah Republican, sailed through the committee quite quickly. The committee system allows even a single Senator to delay committee action indefinitely for reasons that may have nothing to do with the views of the majority party. Orrin Hatch exercised this power for six months in 1999, refusing to hold any hearings on nominees in order to get a friend nominated to a judgeship in Utah. President Clinton eventually nominated the Republican that Hatch implicitly demanded.

During the period early in the first George W. Bush Administration when Democrats were in the majority, Republicans exerted leverage in the fight over the confirmation of George W. Bush’s judicial nominees by stalling other legislation that was considered important to pass, such as a large foreign aid spending bill and four other spending bills that they had filibustered for two weeks after the start of the fiscal year in an effort to force the Democratic majority to act on Bush’s nominations.

Since regaining control of the Senate in 2002, Senate leadership has, in some cases, completely eliminated the minority members of committees from involvement in some actions. Senator Hatch no longer

25 See Jeffrey Toobin, Advice and Dissent: The Fight Over the President’s Judicial Nominations, New Yorker, May 26, 2003, at 42.
honors the old Judiciary Committee tradition of declining action on a nominee unless the minority offers one vote of support. Republican leadership completely excluded Democrats from the important conference committee work on energy and important non-military funding legislation. On the Medicare prescription drug legislation, Republicans excluded all House Democrats and all but two Senate Democrats (and those two had publicly stated that they would support the Republican bill). After being excluded from crucial conferences, Democrats began to block House-Senate conferences unless Republicans guaranteed that they would be able to participate, and, according to the Washington Post, the tactic worked: Democrats won compromises on forest fire and credit reporting legislation.

Unlike other committees, the Judiciary Committee still involves Democratic Senators. However, the current Republican majority has certainly become more aggressive in its efforts to stymie their Democratic colleagues, as was revealed recently. Manuel Miranda, a lawyer who joined the Republican Judiciary Committee staff in December 2001 encouraged a clerk, Jason Lundell, to snoop through the confidential computer files of Democratic committee staff to aid the Republicans in defeating Democratic opposition to judicial nominees. Over eighteen months, Lundell searched nearly 5,000 confidential files and secretly provided the stolen information to his Republican bosses. He continued to spy when he left the committee staff to become nominations counsel for Senate Majority Leader Bill Frist.

Republicans have argued that the confirmation process, in particular, has become more subject to minority vetoes than ever before. However, it is unclear that this is so. In the first place, there is a considerable list of nominees subject to the advise and consent process who have failed to win confirmation. Democrats and Republicans have used the confirmation hearing process to block nominations. President Nixon’s first two choices to fill the Supreme Court vacancy eventually filled by Harry Blackmun were blocked. Famously, President Reagan’s nomination of Ronald Bork was blocked. President Clinton’s nominations of Kimba Wood, Zoe Baird, and Lani Guinier were blocked. The committee hearing process has long allowed the minority to block nominees whose views they find objectionable, and the minority has used that power whenever it seemed politically wise to do so.

According to Professor Gerhardt:

28 See Dewar, supra note 27, at A6.
Among the nominations defeated by protracted debate or dilatory tactics are eight Supreme Court nominations in the nineteenth century, one Supreme Court nomination in the twentieth century, and at least two nominees to non-judicial offices in the mid 1990s. A recent Congressional Research Service study shows that from 1949 through 2002, senators have employed the filibuster against 35 presidential nominations, on 21 of which senators had sought and invoked cloture. Since 1980, cloture motions have been filed on 14 nominees to Article III courts.  

There is also historical precedent for minorities using other tools of legislative oversight, besides the advise and consent process, to control the White House’s policy and legislative choices on ideological grounds. Republicans, in both the House and the Senate, used oversight hearings vigorously during the Clinton Administration to thwart particular policies with which they disagreed. For example, Republicans forced the Equal Employment Opportunity Commission to back away from its position that Hooters’ employment policies allowing only large-breasted young women to work as table servers constituted illegal sex discrimination. Republicans used oversight hearings and threats of budget cuts to force the National Labor Relations Board to moderate its position on a host of issues, including the rights of undocumented workers.  

There are, in addition, a number of specific laws regarding supermajority requirements for some legislation and prohibiting filibusters for others. One way both houses of Congress deal with controversial issues is by enacting what Beth Garrett has called “framework legislation.” Not surprisingly, framework legislation sometimes eliminates supermajority requirements or filibusters in order to expedite its passage, as is the case with budget legislation in the Senate. Sometimes, however, the houses use framework legislation to make it harder to act on certain matters, as when the conservative leadership of the House under Gingrich in 1994 and 1995 adopted a rule requiring any tax increase to pass by a three-fifths vote.  

Finally, forcing cloture votes is one of the most visible ways in

---

30 Senate Rule XXII and Proposals to Amend this Rule: Hearings Before the Senate Comm. on Rules and Admin., 108th Cong. (2003) (prepared statement of Michael J. Gerhardt, Professor, William & Mary School of Law) (citing Richard S. Beth, CRS Report for Congress, Congressional Research Service (Dec. 11, 2002)).


33 The three-fifths rule was touted in the House as being intended to “make it virtually impossible to raise taxes.” Andrew Taylor, Budget Amendment Vote Likely to Be First Up, 52 CONG. Q. WKLY. REP. 3331, 3331 (1994); Alissa J. Rubin, Democrats Hope Tax-Raising Rule Will Come Back to Haunt GOP, 53 CONG. Q. WKLY. REP. 2045 (1995) (describing partisan struggles which erupted over the three-fifths rule).
which Senate minorities can force the White House to moderate its nomination choices. Those familiar with the White House judicial selection process in the Clinton Administration (some of whom are participants in this Symposium) know that the Republicans asserted substantial influence over the President’s choice of judicial nominees, but they did not resort to cloture votes to do it. Rather, particularly after they gained a majority in the 1994 elections, they used the threat of stalling the President’s legislative program to force him to moderate his picks for judicial seats. They communicated informally that certain issues—including a prospective nominee’s stance (or at least outspokenness) on abortion, affirmative action, and immigration—might jeopardize a nomination. They did not have to force a cloture vote; it was enough to threaten to tie up the President’s legislative program on issues—such as welfare, trade, or criminal procedure—that the President valued more than judicial nominations. Thus, President Clinton picked moderates and even some Republicans for appellate courts.

In short, the filibuster is not alone among the various legislative devices by which minorities control action of the majority in each house of Congress and the White House. Moreover, as we have explained elsewhere, it can be used to counteract other legislative tactics that enable a minority to thwart action favored by the majority party. A filibuster against one bill can force a recalcitrant committee to release a bill favored by a majority to the Senate floor for a vote. As we explained above, Republicans themselves used this tactic in the first George W. Bush Administration to pressure the Judiciary Committee, when controlled by the Democrats, to move quickly on Bush’s judicial nominees.

D. Filibusters Operate to Moderate the Nominations Process not to Prevent Nominations

Although Republicans lately claim that the filibuster is preventing vacancies from being filled and is creating a crisis in the judicial nomination process, the reality, of course, is far different. President Bush in his first term was enormously successful in getting his nominees confirmed. Over 200 judges were confirmed and just ten were blocked by a filibuster.

The real effect of the filibuster is to push nominees for the federal judicial bench more to the middle. The Democrats used the filibuster to block some of the most conservative of President Bush’s nominees,

34 See Fisk & Chemerinsky, supra note 15 at 213-22.
such as Janice Brown, Carolyn Kuhl, Miguel Estrada, and William Pryor (who later received a recess appointment to the Eleventh Circuit). The filibuster thus has a moderating effect on the composition of the federal bench in two ways: the Senate blocks the most extreme nominees from being confirmed and the President is given a strong incentive to pick more from the middle. It means, of course, that if John Kerry had won the presidency in 2004, he could not have picked very liberal nominees, just as the filibuster will keep President Bush from selecting very conservative ones.

At a time when the country is deeply ideologically divided, as it is today, choosing judges more from the middle is a good thing. It means that judges' views align with the views of a larger number of people. It makes it less likely that judicial decisions will exacerbate the ideological divisions that already exist.

Finally, it should not be forgotten that a President can avoid filibusters of judicial nominees by selecting individuals who the Senate will find acceptable. In the last four years, for example, Democrats did not filibuster or object to the vast majority of Bush nominees, virtually all of whom were Republican. The Democrats reserved the filibuster for the most conservative of Bush's picks. President Bush can avoid filibusters by simply selecting more toward the middle rather than from the far right.

II. THE OBJECTIONS TO FILIBUSTERING JUDICIAL NOMINATIONS ARE MISPLACED

As President Bush begins his second term, there again are proposals to eliminate the filibuster for judicial nominations. In this section, we consider some of the arguments that have been advanced for doing so.

A. *Is There a Distinction Between Filibustering Judges and Filibustering Other Matters?*

Some Republican supporters argue that there is less justification for filibustering judges than for filibustering legislation because, as Professor Calabresi put it, "if a mistake is made with a judicial confirmation...impeachment is always available to rectify the error. There is no similarly easy remedy if Congress passes a bad law."35 On the contrary: it is far easier to repeal a law than to impeach a judge.

---

35 Calabresi, *Hearings, supra* note 16.
Impeachment requires a vote of two-thirds of the Senate after action by the House. Only a few judges have been impeached, while thousands and thousands of bills have been passed and repealed. Professor Calabresi's argument points in exactly the opposite direction of his conclusion: it explains why the filibuster for judges is particularly important.

Even if there were a principled basis for eliminating filibusters over judicial nominations while retaining them for other legislative action, it would be extremely difficult to implement such a rule. Senators wishing to block a nomination would simply filibuster another piece of legislation and quietly signal that the filibuster would be lifted only if the nominee were confirmed. As we explained above, Republicans themselves used such a tactic (unsuccessfully) during the period in 2001 when they were the minority party, and threatened to do so throughout the Clinton Administration as well.\footnote{See Helen Dewar, supra note 26, at A23.}

B. **Filibusters: Deliberation or Blocking Action**

Republicans have argued that recent filibusters are illegitimate (in contrast, presumably, to Republican filibusters during the Clinton Administration and before) because they are being done not for the purpose of "deliberation" but for the purpose of blocking nominations.\footnote{See Judicial Nominations, Filibusters, and the Constitution: Hearing Before Subcomm. on the Constitution, Civil Rights, and Property Rights, Sen. Comm. on the Judiciary, 108th Cong. (2003) (statement of John Eastman, Professor, Chapman University School of Law); Judicial Nominations, Filibusters, and the Constitution: Hearing Subcomm. on the Constitution, Civil Rights, and Property Rights, Sen. Comm. on the Judiciary, 108th Cong. (2003) (prepared testimony of John Eastman, Professor, Chapman University School of Law); Senate Rule XXII and Proposals to Amend this Rule: Hearing Before the Senate Comm. on Rules and Admin., 108th Cong. (2003) (statement of Sen. Trent Lott). Senator John Cornyn (R-TX) has repeated the same statement numerous times, including on his webpage, http://cornyn.senate.gov/062403 rulesreform.html, and on the PBS NewsHour Show on May 8, 2003, available at www.pbs.org/newshour/bb/congress/jan-june03/judicial_05-08.html.} The claim is that filibusters are appropriate if they are used to encourage deliberation, but not if they are employed to block Senate action. In fairness, the Democrats leveled the same charge when Republicans filibustered President Clinton's nominees and legislative agenda in 1993 and 1994. The distinction is specious both as a matter of current practice as well as a matter of historical precedent.

In the first place, it is impossible to distinguish a filibuster used for delay from a filibuster used for obstruction except, perhaps, by whether the filibuster succeeds. Even if you label all failed filibusters as being about deliberation, and therefore legitimate, the distinction is still questionable. Filibusters used at the conclusion of a legislative session
are more likely to succeed in blocking action than those launched early in the session on account of the shortage of time. On that reasoning, filibustering the same nomination would be permissible early in the president’s term as compared to those done late in the term. Professor Kmiec argued as much when he suggested that a filibuster that prevented Rutherford B. Hayes from filling vacancies in the 46th Congress seemed permissible because the vacancies should “more properly [be] filled by the newly elected James A. Garfield.” While there may be some superficial appeal to the idea that a lame-duck President ought not to be choosing judges whose tenure will long outlast his, the same argument could be used to argue that a President should never nominate judges because almost invariably a federal judge remains on the bench long after any particular President, and his party, have left the White House. Filibusters are more likely to succeed at the end of a legislative session, but they are neither more nor less legitimate then than at any other time.

C. The Appropriateness of Using Ideology

Critics of the filibuster for judicial nominations also argue that it is inappropriate for Senators to use ideology as a consideration in evaluating judicial nominations. The argument is that judicial nominees should be evaluated solely on the basis of their character and professional qualifications, but not their views on key issues of the day that are likely to come before the courts. We disagree. Ideology always has been, and should be, a crucial part of the selection and confirmation of judges.

First, most simply and most importantly, ideology should be considered because ideology matters. Judges are not fungible; a person’s ideology influences how he or she will vote on important issues. It is appropriate for an evaluator—the President, the Senate, and the voters in states with judicial elections—to pay careful attention to the likely consequences of an individual’s presence on the court.

This seems so obvious as to hardly require elaboration. Imagine that the President nominates someone who turns out to be an active member of the Ku Klux Klan or the American Nazi Party and repeatedly has expressed racist or anti-semitic views. Assume that the individual has impeccable professional qualifications: undergraduate

---


and law degrees from prestigious universities, years of experience in high level law practice, and a strong record of bar service. We would think that virtually everyone would agree that the nominee should be rejected. If we are correct in this assumption, then everyone agrees that ideology should matter and the only issue is what views should be a basis for excluding a person from holding judicial office.

On the Supreme Court, the decisions in a large proportion of cases are a product of the Justices’ views. The federalism decisions of recent years—limiting the scope of Congress’ powers under the Commerce Clause and Section Five of the Fourteenth Amendment, reviving the Tenth Amendment as a limit on federal power, and the expansion of sovereign immunity—almost all have been 5-4 rulings that reflect the ideology of the Justices.\(^\text{40}\)

Beyond the obvious controversial issues, like abortion, affirmative action, and the death penalty, virtually all cases about individual liberties and civil rights are a product of who is on the bench. Criminal procedure cases often require balancing the government’s interests in law enforcement against the rights of individuals; this balancing will reflect the individual Justice’s views. Decisions in statutory cases, too, are a result of the ideology of the Justices. Frequently, in statutory civil rights cases, the Court is split exactly along ideological lines.\(^\text{41}\)

Nor, of course, is this ideological divide limited to the Supreme Court. Every case before the Supreme Court was first decided by the lower federal courts and ideology matters there just as much. There are more cases in the lower courts where ideology does not matter in determining outcomes—that is, where any judge, regardless of ideology, would come to the same conclusion. But, this fact does not marginalize the large number of cases where a judge’s view may shift the outcome of the litigation. When we talk to a lawyer who is about to have an argument before a federal court of appeals, the first question we always ask is: who is on your panel? That is because ideology matters so much in determining the result in so many cases.

Second, the Senate should use ideology precisely because the President uses ideology. Presidents, of course, always have done so. Every President has appointed primarily, if not almost exclusively,


\(^{41}\) See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001) (stating that there is no private cause of action under Title VI of 1964 Civil Rights Act against recipients of federal funds for practices that have discriminatory impact in violation of regulations promulgated under that provision); Circuit City Stores v. Adams, 532 U.S. 105 (2001) (stating that the Federal Arbitration Act requires arbitration of state law employment discrimination claims); Buckhannon Bd. v. West Virginia Dep’t. of Health and Human Servs., 532 U.S. 598 (2001) (holding that to be a “prevailing party” under attorney’s fee’s statute, it is not sufficient that the plaintiff in the lawsuit is a catalyst for legislative action—there must be court ordered relief, via judgment or consent decree).
individuals from the President's political party. Ever since George Washington, Presidents have looked to ideology in making judicial picks. Some Presidents are more ideological than others; not surprisingly, these Presidents focus more on ideology in their judicial nominations. President Franklin Roosevelt, for example, wanted judges who would uphold his New Deal programs and President Ronald Reagan emphasized conservatism on matters of government power, economic philosophy, and civil rights in selecting jurists.

Republicans, who today argue for the Senate to approve nominations without regard to their views, are utterly disingenuous to assert that ideology should be irrelevant when the President also bases his picks primarily on ideology. Under the Constitution, the Senate should not be a rubber-stamp and should not treat judicial selection as a presidential prerogative. The Senate owes no duty of deference to the President and, as explained above, never has shown such deference throughout American history.

Finally, ideology should be considered because the judicial selection process represents the key majoritarian check on an anti-majoritarian institution. Once confirmed, federal judges possess life tenure. A crucial democratic check is the process of determining who will hold these appointments. A great deal of constitutional scholarship in the last quarter of a century has focused on what Professor Alexander Bickel termed the "counter-majoritarian difficulty"—the exercise of substantial power by unelected judges who can invalidate the decisions of elected officials.42 The most significant majoritarian check occurs at the nomination and confirmation stage. Selection by the President and confirmation by the Senate properly exists to have majoritarian control over the composition of the federal courts.

III. AGAINST THE NUCLEAR OPTION: IF THE SENATE RULES REGARDING CLOTURE ARE TO BE CHANGED, IT SHOULD BE THROUGH PROPER PROCEDURE

The Senate's rules require that there be a two-thirds vote to approve a change in Senate rules. The reason for the two-thirds requirement is the Senate's longstanding institutional commitment to minority rights and its preference for stability in its procedures. Obviously, two-thirds of the Senators are not going to agree to eliminate the filibuster for judicial nominations. Democrats surely are not about to eliminate the one check that they have in the process. Thus, an

alternative is being suggested: the so-called "nuclear option," which would enable a majority of the Senate, through a ruling by the President of the Senate, Vice President Cheney, to alter the Senate rules. We believe that this is an illegitimate means for altering the Senate's rules. Indeed, never in American history has the Senate changed its rules except in accordance with its rules. After explaining the proposals, in this section we show why they are ill-advised as a matter of Senate policy.

A. The Proposals

1. The Majority Vote (Nuclear) Option

Under Rule XXII of the Standing Rules of the Senate three-fifths of the Senate (sixty Senators) may end debate by an affirmative vote. Rule XXII also provides that if the measure being debated is to amend the Senate Rules, the necessary affirmative vote shall be two-thirds of the Senators present and voting (i.e., sixty-seven if the entire Senate is present and voting). Finally, because the Senate considers itself a continuing body and, unlike the House, does not adopt new Rules at the beginning of each Congress, the Standing Rules continue in effect and thus there is no opportunity to change a rule by a simple majority vote.

There is a procedure that has come to be known lately as the "nuclear option" by which the current majority could change the Rule. The majority, faced with a cloture vote under Rule XXII, would ask the chair (likely the Vice President) to rule that Rule XXII does not apply. If the chair ruled for the majority, the minority would likely filibuster the vote on whether Rule XXII applied. The chair would then recognize a non-debatable motion to table, and a majority could obtain a vote on the original matter by upholding the motion to table by a simple majority vote.

The majority vote approach has been tried in the past, although on every occasion the attempt was repudiated. On three occasions, a majority has attempted to change the cloture rules. In 1957, Vice President Richard Nixon ruled that the Senate could not be bound by any previous rule which denies the majority of the Senate the right to make its own rules. The Senate never voted on Nixon's opinion. In 1969, Vice President Hubert Humphrey ruled that a majority of the Senate had the right to cut off debate and proceed to change the Senate Rules, but the Senate voted to overturn his ruling. Finally, in 1975, filibuster opponents led by Senator Walter Mondale introduced a motion to amend Rule XXII to authorize cloture by majority vote. Majority Leader Mansfield raised a point of order, arguing that the
motion to close debate violated the two-thirds requirement of Rule XXII (at the time Rule XXII required a two-third vote for cloture). The Senate voted to table the point of order, thereby rejecting Senator Mansfield’s position and allowing a vote. Yet the Senate did not proceed on majority vote, and instead adopted a compromise offered by Senator Russell Long that provided for cloture on a three-fifths vote. In the process, however, the Senate reconsidered the Mansfield point of order and voted to sustain it, thereby establishing that the majority of the Senate at that time favored the supermajority requirement for amending the Senate Rules.43

These three episodes show that the Senate has long had at least the theoretical power to change its rules to allow majority cloture. There are two principal reasons why the Senate has consistently declined to exercise it. First, the majority party—both Democrats and Republicans—recognizes that it will not be in the majority forever. Republicans today might do well to recall their own successful efforts to block Clinton nominees, or the historical use of filibusters to block Johnson nominees, and leave themselves the option of blocking Democratic nominees in four years if the Senate becomes majority Democrat.

Second, the filibuster is not alone among Senate procedures that allow a minority to block legislative action. Most Senate business runs by unanimous consent agreements because the Senate, unlike the House, does not have elaborate rules for the management of all floor business. Thus, it requires unanimous consent to do something as simple and basic as scheduling action on a bill or calling a committee meeting. If the current majority really angered the minority on a matter of procedure, the minority would be able quite easily to grind the entire Senate to a halt simply by withholding consent to routine business. That is why the Democratic majority during the Clinton Administration allowed Jesse Helms to block every single one of Clinton’s non-white judicial nominees to the Fourth Circuit, and many of his nominees to the State Department. Jesse Helms was too powerful a Senator to alienate.

The fear of alienating a powerful and determined colleague is why the majority vote strategy to change the cloture rules is called the Nuclear Option—it might cause complete destruction of the unanimous consent agreement process by which the entire the Senate runs. The fallout could be quite toxic to both parties and to the President.44 One suspects that respect for the Senate rules has always seemed in the long-term interest of both the majority and the minority because only by following the rules can they maintain the system that keeps the entire institution running.

43 This history, with citations to the Congressional Record, is contained in Fisk & Chemerinsky, supra note 15, at 212-13.

2. Changing Rule XXII

Senator Frist and other Republican leaders have proposed another way to reduce filibusters by changing the required number of votes for cloture, starting with the current sixty and gradually reducing the number to fifty-one in successive cloture votes. They label this a bipartisan proposal because it is a variation on a proposal to amend Rule XXII that was made by Senator Harkin among others during the Clinton Administration. Of course, Republicans filibustered the Harkin proposal when he made it.

Under the Frist proposal, cloture would require sixty votes on the first cloture vote on a measure, and each successive cloture vote would require fewer votes, down to a simple majority on the fourth vote. No cloture vote could be held until after twelve hours of debate, and a two-day interval would be required between votes. Frist proposes to amend the cloture rules only for filibusters on judicial nominations. Senator Zell Miller, a conservative Democrat who has voted with Republicans on most issues, has made a similar proposal but would apply it to all filibusters.

But this change, too, will happen only if Republicans use the nuclear option and change the rules without following the Senate’s rules. Democrats obviously are not going to approve a change in the rules that effectively eliminates the filibuster and any check they have over President Bush’s picks for the Supreme Court and the lower federal courts.

B. Why the Nuclear Option is Wrong

The Senate is a unique institution in American government and always has operated under rules which give substantial power to a minority of Senators. These procedures include the Senate scheduling its business with unanimous consent, the power of holds, blue slips for judicial nominations, and the filibuster. As we explained earlier, this is especially appropriate for an institution where Senators representing a

47 Helen Dewar & Mike Allen, Frist Seeks to End Nominees Impasse, WASH. POST, May 9, 2003, at A12.
distinct minority of the population can act.

If the nuclear option is used to change the rules for the filibuster, it can be used to change literally any Senate rule. The Senate, as it has existed for over 200 years, will fundamentally change. No longer will the majority of Senators need to heed the views of the minority. Any Senate rule protecting the Senate’s minority could be changed through the same procedural device used to abolish the filibuster for judicial nominations. This could destabilize the committee system, enabling a majority to bring a bill to the floor without consideration and over the opposition of a large minority. Careful study by legislative committees is a desirable feature of the legislative process. There is no guarantee that the majority would use its new powers only to promote good legislation rather than bad legislation.

Indeed, the Senate rule requiring a super-majority vote to change its rules exists precisely to ensure that the majority of the Senate cannot change the rules in a manner that disempowers the minority. This is a good thing in any institution, but especially one with the unique characteristics and history of the United States Senate. The nuclear option would eliminate this crucial aspect of the Senate.

The Senate has operated under the same rules for changing its rules for many generations, at times when both Democrats and Republicans have been in the majority. Democrats and Republicans can both point to instances in which filibusters thwarted or delayed legislative action or confirmation of a nominee that they supported, and both can point to instances in which filibusters blocked action that they deplored. Those with long memories know that, however painful protecting minority rights is in the short term, respect for minority rights is an essential feature of our constitutional republic. It is wrong to ignore well established rules for changing the rules simply because it suits the wishes of the current majority.

CONCLUSION

The debate over the filibuster for judicial nominations is important because the stakes are so high: the composition of the federal judiciary for decades to come. Judicial nominations are an issue that is generally salient only to the really dedicated, and often least centrist, wings of both parties. The Bush Administration has nominated and confirmed hundreds of judges, and most of them are quite conservative. A tiny fraction of the nominees have been blocked, and we suspect that their views are so extremely conservative that one could not claim that they reflect the views of the majority. If Republicans succeed in eliminating the filibuster for judicial nominations, there will be literally no check on who President Bush can put on the Supreme Court and the lower federal
courts. In a constitutional system based on checks and balances, eliminating the filibuster would exacerbate the current bitterness in the ideological divide. This is a time for reconciliation, and a power grab by the current conservative Republican majority is no way to do that.