The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent

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THE SOLUTION TO THE FILIBUSTER PROBLEM:
PUTTING THE ADVICE BACK IN ADVICE AND CONSENT

INTRODUCTION

Today, hostility reigns in Washington. This is so, less than three years after a period of virtually unparalleled national unity following the terrorist attacks on September 11, 2001. Now, with Congress and the nation almost evenly divided politically, relations between the Republicans and Democrats in Washington are as discordant as ever. As one pundit put it, "[c]ynicism is back in full force. Extraordinary political partisanship and acrimony are back." This "extraordinary political partisanship and acrimony" is best evidenced by the recent wranglings over several nominees for prestigious and powerful federal courts of appeals appointments. In the past year, Democrats successfully filibustered six of President Bush's nominees and the Republicans responded with an all-night "talkathon" meant to publicly condemn the Democrats' filibusters. Refusing to be intimidated, the Democrats successfully filibustered three more nominations and Democrat Senator Tom Harkin, from Iowa, mocked the talkathon by holding up a sign to reporters and Republicans that read "I'll be home watching 'The Bachelor.'"
Additionally, Republican staff members reportedly hacked into Democratic staff members’ computers, stealing confidential information regarding Democratic strategies for fighting the confirmation of certain Bush nominees.\(^6\) These acts, whether silly, potentially illegal, or sanctioned by the Constitution,\(^7\) have fueled the flame of discord and the Democratic minority in the Senate will likely answer by blocking more nominees when the Senate reconvenes.\(^8\)

This Comment proposes a much needed solution to the filibuster problem. Part I lays a foundation by explaining the process used by the Democrats to filibuster the six nominees and provides an overview of the filibuster problem. Part II examines three proposals to change the Senate Rules: (1) the “Bush Plan,” which is an ostensibly simple time limit for votes on nominees;\(^9\) (2) the “Frist Plan,” a gradual lowering of the number of Senators needed to support cloture to end a filibuster;\(^10\) and (3) the “nuclear option,” a stealthy change of Senate Rules by Republican Senators and Vice President Dick Cheney.\(^11\) The section concludes that none of these changes are both politically and legally feasible. Part III then examines claims that filibusters violate the Constitution’s Appointments Clause and establishes that all three court challenges to the filibusters fail on the merits. Finally, Part IV argues that the Republican proposals do not address the underlying cause of the filibuster problem: the communication breakdown between the President and the Senators opposed to his nominees. The only way to reverse the escalating political discord is to put

\(^6\) Computer Hackers in the Senate, N.Y. TIMES, Feb. 9, 2004, at A20; see also Eric Lichtblau, Politically Charged Case to Get Special Prosecutor, N.Y. TIMES, Apr. 27, 2004, at A22.

\(^7\) See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”). Though the purpose of this clause was to keep the government functioning while Senators were away from the Capitol during Congressional recesses, which could last up to nine months, presidents often use the power to make recess appointments to thwart the confirmation process and install nominees whose confirmation the Senate would likely otherwise defeat. See Michael A. Carrier, Note, When Is the Senate in Recess for Purposes of the Recess Appointments Clause?, 92 MICH. L. REV. 2204, 2206 (1994). Frustrated by the filibusters in 2003, President Bush used his recess appointment power to elevate William H. Pryor and Charles W. Pickering, Sr., to spots on the Eleventh and Fifth Circuit Courts of Appeals respectively. See Richard Simon, Bush Frustrated by Democrats, Again Bypasses Senate, L.A. TIMES, Feb. 21, 2004, at A1.


the advice back in "advice and consent" by allowing Senators who oppose nominees to exercise their constitutional role as prenomination advisors.

I. THE FILIBUSTERS OF 2003

A. The Process

The Constitution requires that the Senate advise and consent to the appointment of a president's nominee to a position on the federal bench. Generally, the Senate exercises its consent to the appointment of a nominee via a two-step process. First, the Senate Judiciary Committee collectively considers the merits of a candidate and then votes on whether to allow a floor vote, where the entire Senate considers that nominee. Second, if the Judiciary Committee elects to allow a floor vote, the Senate reviews the candidate's merits and votes on the appointment. Under normal circumstances appointment requires fifty-one votes.

A filibuster is a parliamentary technique that allows a minority of the Senate to block a floor vote indefinitely, so that the full Senate never considers a piece of legislation or the confirmation of a president's nominee. The Standing Rules of the Senate, the rules that the Senate has formulated to dictate its procedures, allow unlimited debate (a filibuster), unless sixty Senators vote to end the debate (cloture). Because cloture requires sixty votes, many characterize a filibuster as a supermajority requirement for confirming a nominee over the usual fifty-one-vote requirement.

The Democrats conducted filibusters against the six Bush nominees last year under the relatively new tracking system. The
tracking system allows the Senate “to have more than one bill [or nomination] pending on the floor as unfinished business . . . . With a two- (or more) track system, the Senate simply puts aside the filibustered measure and moves on to other legislation.”21 The Senators who filibustered votes on President Bush’s nominees might have done so without ever speaking on the Senate floor.22 Indeed, “[a] credible threat that 41 senators will refuse to vote for cloture on a bill is enough to keep that bill off the floor.”23 The tracking-system “eliminates the distinction between a filibuster and a threat to filibuster; any credible threat to filibuster is a filibuster because the majority leader must regard it as such.”24 The Senate Democrats’ filibusters were simply commitments by at least forty-one Senators that they would not vote to allow cloture. Thus, the political cost to the Democrats imposed by the filibuster is relatively low and there is very little incentive for them to choose not to filibuster the nominees.25

B. The Filibuster Problem

Senate Democrats characterize the filibusters as necessary in light of President Bush’s refusal to work with them to find successful nominees and his insistence on nominating whom they perceive as right-wing extremists.26 Harry M. Reid, Democratic Senator from Nevada and Senate Minority Whip, put it this way: “It’s [Bush’s] way or no way . . . . I’ve never served with anyone more uncooperative.”27 On the other hand, Republicans argue that the six filibustered nominees are fully undeserving of their characterization by the Democrats28 and that the Democrats, by using filibusters against Bush’s judicial nominees, have “dispensed

(Columbia Pictures 1939).

21 Binder & Smith, supra note 20, at 15.
22 Fisk & Chemerinsky, supra note 19, at 201.
23 Id. at 203.
24 Id.
25 See Binder & Smith, supra note 20, at 15 (explaining that the tracking system minimizes the political cost of filibustering).
26 Id. Democrats argue, for example, that Carolyn Kuhl advocated for granting Bob Jones University tax-exempt status, despite its ardent racist policies. According to the filibusterers, Janet Rogers Brown was not much better. They cite to a statement she made that referred to the New Deal as “the triumph of our socialist revolution.” Albert R. Hunt, Showtime in the Senate, WALL ST. J., Nov. 13, 2003, at A19. Moreover, Democrats cite William Pryor’s strong opposition to abortion rights, and his “attack [on] Federal laws and programs designed to guarantee civil rights.” 149 Cong. Rec. S10,243, S10,230 (daily ed. July 30, 2003) (statements of Sen. Hatch and Sen. Leahy).
28 Some Republicans have charged that the Democrats’ motives behind the filibusters are based on anti-Catholic, anti-Baptist, anti-Latino, and anti-African-American bias. See Hunt, supra note 26.
with procedures that allow senators to exercise their constitutional ‘advice and consent’ function,” leaving the President no option but to exercise his power to make recess appointments and bypass the Senate altogether.29

Not only is this political infighting inefficient, but the delay in appointing judges to the federal bench has serious consequences for our system of justice. President Bush recently summed up the problems with filibusters against judicial nominees:

Dockets are overcrowded, judges are overworked, and citizens are waiting too long for their cases to be heard. The regional appeals courts have a 12 percent vacancy rate. And filings in those courts have reached an all-time high, again last year. The Sixth Circuit, which covers Ohio and Michigan and Kentucky and Tennessee has four vacancies on a 16-judge court. The D.C. Circuit has three vacancies on a 12-judge court. . . . The American Bar Association has called this an emergency situation. And the Chief Justice recently said that these vacancies and rising caseloads threaten the proper functioning of federal courts . . . .30

In addition, the filibusters deflect public attention from other serious issues and decrease the sense of political efficacy among American citizens. These negative consequences of the filibusters against judicial nominees are the filibuster problem.

II. THE SENATE RULES: ARE PROPOSED CHANGES TO THE SENATE RULES A SOLUTION TO THE FILIBUSTER PROBLEM?

Republicans have suggested several alternatives to the current Senate Rules, which allow a Senate minority to filibuster nominees

29 Adam Cohen, For Partisan Gain, Republicans Decide Rules Were Meant to Be Broken, N.Y. TIMES, May 27, 2003, at A24. An exchange between President Bush and Charles Schumer, the Democratic Senator from New York who led the charge to filibuster the six nominees, that occurred shortly after the President exercised his recess appointment power and appointed William Pryor to the Eleventh Circuit, further illustrates the way both sides spin the facts. President Bush argued that “[a] minority of Democratic Senators has been using unprecedented obstructionist tactics to prevent [Pryor] and other qualified nominees from receiving up-or-down votes . . . [and] [their] tactics are inconsistent with the Senate’s constitutional responsibility and are hurting our judicial system.” Neil A. Lewis, Bypassing Senate for the 2nd Time, BushSeats Judge, N.Y. TIMES, Feb. 20, 2004, at A1. Schumer responded, arguing that “[t]he President is on shaky ground with the hard right and is using this unquestionably legal and politically shabby technique to bolster himself.” Id. Schumer went on to argue that “[r]egularly circumventing the advice-and-consent process is not the way to change the tone in Washington. It’s shabby and the motivation is political more than anything else.” Id.

for positions on the federal bench: the "Bush Plan," whereby the Senate would have to vote on the President's nominees within 180 days of nomination;31 (2) the "Frist Plan," which gradually lowers the amount of votes needed to achieve cloture;32 and (3) the "nuclear option," which, as the most radical of the plans, calls for the Vice President33 to hand down a parliamentary rule declaring that Senate Rule XXII does not apply to judicial confirmations.34 The following analysis demonstrates that none of these plans is either politically or legally feasible.

A. The "Bush Plan": The 180-Day Voting Limit

In response to the first two successful filibusters against his nominations, President Bush demanded that the Senate vote within 180 days after the nomination of a candidate for the federal bench.35 Bush argues his plan will ensure that vacancies are filled within one year36 because his plan also would require that the President choose a nominee 180 days after a vacancy is announced. Bush's plan, however, is not legally or politically feasible.

First, President Bush's plan involves changing the rules of the Senate. Legally, the President has no legal authority to change or demand changes to the Senate Rules. The Constitution gives this authority exclusively to the Senate.37 Second, however sensible the plan may seem, it lacks the necessary Senate support for implementation.38 Not only will this plan not receive the support of the filibustering Democrats (between forty-eight and forty-six Senators), but also it will not receive support from some Senate Republicans who recognize the possibility that in the future, they too might want to stall a president's nominees.39

Another problem with Bush's plan is that it might override Rule XXII and disallow filibusters against judicial nominees altogether. If adopted, the plan would require a full Senate vote within

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31 Politi, supra note 9.
32 Savage, supra note 10.
33 See U.S. CONST. art. I, § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate.").
36 Id.
37 See U.S. CONST. art. I, § 5, cl. 2.
38 The Senate Rules require that three-fifths of the Senate, at least sixty-seven Senators, approve any changes to the rules. See Senate Rule V.
39 In fact, the Republicans stalled on many Clinton nominees during his two terms in office.
180 days of nomination. Since filibusters are parliamentary devices that block floor votes, filibusters against nominees would violate the Senate Rules under Bush’s plan. This would effectively deprive the minority from voicing its concerns about a nominee and would likely turn both Republican and Democratic Senators against the plan. For these reasons, Bush’s plan is not politically feasible.

B. The “Frist Plan”: Changing Senate Rules XXII and V

Senate Majority Leader, Republican Bill Frist, proposed his own solution to the filibuster problem, but, like the Bush Plan, the Frist Plan is neither politically nor legally feasible. Frist’s plan calls for a change to Senate Rule XXII by reducing the number of votes required for cloture. Senate Rule V dictates that to change a Senate Rule, 67 Senators must approve it. Frist will almost certainly not be able to receive that much support for his proposal. So, some of Frist’s supporters challenge the constitutionality of Senate Rule V’s three-fifths supermajority requirement. As this section demonstrates, such a legal challenge will fail.

1. Rule XXII—Votes Necessary for Cloture

Senator Frist proposed a rule change that would lower the amount of votes needed for cloture from 60 to a simple majority of 51 when a filibuster is waged against a judicial nominee. Under his proposal, the required number of votes needed for cloture decreases after each vote. The first vote requires 60 votes for cloture, the second 57 votes, the third 54 votes, and finally the fourth vote would require 51 votes for cloture. Frist and his supporters argue that this proposal allows the minority a voice and satisfies the constitutional requirements of an up or down vote on a president’s nominee to the federal bench and simple-majority rule.

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41 Senate Rule V.
43 Frist, supra note 40.
44 Stephen Calabresi, Pirates We Be, WALL ST. J., May 14, 2003, at A14. While this section deals simply with the feasibility of changing Senate rules, it is important to note that implied within Senator Frist’s plan are the notions that the Appointments Clause requires an actual vote on each and every nominee and that supermajority requirements are inconsistent with “advice and consent.” These ideas are discussed infra Part III.B.3 and Part III.B.2, respectively.
Filibustering Democrats are unlikely to embrace the Frist Plan. Arguably, Frist’s proposal strips a minority’s power to block a nominee.\textsuperscript{46} Even Republicans may fear that when a Democrat next holds the White House, there may be a Republican minority in the Senate, which may be powerless to block federal bench nominees. Senate Minority Leader Tom Daschle cautioned that Frist’s plan, if adopted, would “mute characteristics that make the Senate uniquely consultative.”\textsuperscript{47} Perhaps more illustrative of the situation, Daschle further commented, “There’s an old saying . . . that ‘if it ain’t broke don’t fix it.’ It ain’t broke.”\textsuperscript{48} As a result, Frist’s plan to change Rule XXII would not have the overwhelming bipartisan support necessary to pass.

2. Rule V—Votes Necessary for Senate Rule Change

Realizing there is little chance the Senate will change Rule XXII through the political process, Frist’s allies have called for legal challenges to the Senate Rules.\textsuperscript{49} The most likely legal challenge is to Senate Rule V, which requires a vote of three-fifths of the Senate for any rule change.\textsuperscript{50} Of course, under the current Senate Rules, changing Rule V also requires the consent of at least sixty-seven Senators.\textsuperscript{51} Consequently, changing this Rule through the Senate would be politically infeasible due to staunch opposition from the filibustering Democrats.

Challenging Rule V in federal court will likely be unsuccessful because the doctrine of justiciability precludes federal courts from considering claims that are political questions.\textsuperscript{52} The Supreme Court, in \textit{Baker v. Carr},\textsuperscript{53} articulated several circumstances where a political question exists, two of which pertain here: a textually demonstrable commitment of the issue to coordinate political department, or the impossibility of a court’s undertaking inde-

\textsuperscript{46} Frist suggests that under his plan, it would take approximately thirteen days to reach the fourth cloture vote, when only a simple majority of Senators would need to support ending the filibuster. \textit{Id}. Thus, after thirteen days, the minority would no longer have the power to block a vote on the nominee.

\textsuperscript{47} Anne Q. Hoy & Ken Fireman, \textit{Angry GOP Wants to Change the Rules}, \textit{NEWSDAY}, May 10, 2003, at A04.

\textsuperscript{48} \textit{Id}.

\textsuperscript{49} See Jim Abrams, \textit{The Talk Goes on and on as Senate Has Another Sleepless Night}, \textit{MILWAUKEE J. & SENTINAL}, Nov. 14, 2003, at 10A (quoting Senator Lindsey Graham, a Republican from South Carolina, as threatening “to sue to change the Senate rules if Republicans can’t break the filibusters”).

\textsuperscript{50} Senate Rule V.

\textsuperscript{51} \textit{Id}.


\textsuperscript{53} 369 U.S. 186 (1962).
pendent resolution without expressing lack of the respect due co-
ordinate branches of government.\textsuperscript{54}

As demonstrated below, the Constitution textually commits
the Senate's Rules to the Senate and not to the courts, and by con-
sidering the constitutionality of a Senate Rule, a court would not
show the requisite respect due to the Senate.\textsuperscript{55} The Rules of Pro-
ceedings Clause of the Constitution states, "Each House may de-
termine the Rules of its Proceedings."\textsuperscript{56} The Constitution assigns
the Senate alone the power to make its own procedural rules.

In the case of a Rule V challenge, the Senate's enactment of
Rule V is within the scope of the Senate's rule-making authority.\textsuperscript{57}
As long as the Senate is making rules for its own procedure, that
rule making is within the constitutional scope of Senate power and
any challenge to such rule making is a political question not re-
viewable by a federal court.\textsuperscript{58} Additionally, the Constitution
grants broad discretion to the Senate to determine its rules of pro-
cedure. The procedural rule-making grant of power in Article I is
permissive. Under this permissive grant, the Senate may establish
a set of formal rules if it wants to, but it is not required to do so.
Thus, the Rules of Proceedings Clause allows the Senate to adopt
no rules, informal rules, or formal rules.

When the Senate enacted Rule V, it did not transgress constitu-
tional limits imposed on the Senate's power. Some argue that
the Constitution precludes either House of Congress from enacting
supermajority requirements other than where enumerated in the
Constitution.\textsuperscript{59} However, constitutional supermajority require-
ments do not necessarily indicate that the Constitution prohibits all
other supermajority requirements.\textsuperscript{60} The constitutional text also
does not preclude the Senate from establishing rules requiring su-

\textsuperscript{54} Id. at 217.
\textsuperscript{55} See Fisk & Chemerinsky, supra note 19, at 226 (explaining that there are two primary
arguments as to why a challenge to Senate Rule XXII poses a political question: "One is that
such a challenge to congressional self-governance would express a lack of respect due to a
coordinate branch of government [and] [t]he other is that there is a textually demonstrable con-
stitutional commitment to Congress to make its own rules.").
\textsuperscript{56} U.S. CONST. art. I, § 5, cl. 2.
\textsuperscript{57} Id.
\textsuperscript{58} Conversely, challenges arising under Article I, Section five to the following rules would
be justiciable: Senate procedural rules imposed by the President, House of Representative pro-
cedural rules imposed by the Senate, or substantive rules created by the Senate alone.
\textsuperscript{59} See, e.g., Lloyd Cutler, The Way to Kill Senate Rule XXII, WASH. POST, Apr. 19, 1993,
at A17.
\textsuperscript{60} Fisk & Chemerinsky, supra note 19, at 241; see also John O. McGinnis & Michael B.
Rappaport, The Constitutionality of Legislative Supermajority Requirements: A Defense, 105
YALE L.J. 483, 484 (1995) ("[T]he Constitution's silence on the proportion of legislators neces-
sary to pass bills is not the result of inattention to the issue. Rather, it reflects the Framers'
intent to permit the houses of the legislature to decide the question.").
permajority votes; they do not run afoul of the Vice President’s tie breaking role, Senate quorum requirements, or the veto override requirements. Supermajority requirements are also supported by the Constitution’s broad grant of procedural rule-making power to the Senate. Since the enactment of Senate Rule V does not deviate from the bounds of the grant of procedural rule-making power and does not violate other constitutional limits on Senate authority, federal courts may not review a case challenging Rule V.

Even if a federal court held that a case challenging Rule V was justiciable, the plaintiff would lose on the merits. Rule V is constitutional because the Constitution grants broad discretion to the Senate to determine its own rules of procedure, and Rule V does not violate any constitutional limits on the Senate’s power. For these reasons, if Frist and his supporters attempt to change the cloture voting requirements with a simple majority by challenging the constitutionality of Rule V in federal court, they will fail.

C. The “Nuclear Option”

Some Senate Republicans have indicated that if Frist’s plan does not work, Republicans might exercise the “nuclear option.” Under this proposal, during the next filibuster of a judicial nominee, the Chair of the Senate would make a ruling on a point of order, namely, that Rule XXII can be modified by a simple majority in order to thwart filibusters against judicial nominees. The Sen-

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61 Fisk & Chemerinsky, supra note 19, at 241-43.
62 See McGinnis & Rappaport, supra note 60, at 484 (“Under the Rule of Proceedings Clause, the House may enact a rule governing its internal operations so long as the rule does not violate another provision of the Constitution.”); see also infra Part III.B.2. The Supreme Court has interpreted the Rules of Proceedings Clause as granting Congress broad discretion in formulating rules of procedure:

The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of procedure are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

United States v. Ballin, 144 U.S. 1, 5 (1892).
ate has previously allowed the Chair to make such a ruling, consequently, such a ruling likely is not a violation of Senate Rules.

Legal as it may be, the nuclear option, if exercised, admittedly would run roughshod over the present rules and the minority Democrats. Many Republicans are wary of the political consequences of this plan, and the political fall-out would be extraordinary. Charles Schumer, Democratic Senator from New York, and the leader in the filibusters, said about the nuclear option, "It reminds me of a spoiled child throwing a temper tantrum . . . [the nuclear option would] vaporize every bridge in sight—bipartisan or otherwise." Schumer also vowed that if, and when, the Republicans exercise the option, "Democrats would take very strong action." This means that Democrats will resort to any means to stall all Republican supported legislation.

Arguably, if the Republicans exercise the nuclear option, they will forever change the characteristics of the Senate for the worse. The Framers considered the Senate a higher-minded institution, the political institution least affected by fickleness and public whim:

James Madison explained that the Constitution's framers considered the Senate to be the great "anchor" of the government . . . [T]he Senate would be a "necessary fence" against the "fickleness and passion" that tended to influence the attitudes of the general public and members of the House of Representatives.

The filibuster tempers majority rule by necessitating debate and attention to minority view points. By removing this check,
which the nuclear option ultimately would do, Senate Republicans would strip the Senate of its title as the "world's greatest debating society," and render it nothing more than a House of Representatives whose members hold six-year terms. This effect, coupled with the inevitable political fall-out from such a move, renders the nuclear option a plan with disastrous consequences. In conclusion, all three proposals to the Senate Rules fail to adequately solve the filibuster problem.

III. CHALLENGING THE FILIBUSTERS IN FEDERAL COURT: WILL CHALLENGING THE CONSTITUTIONALITY OF THE FILIBUSTERS IN FEDERAL COURT SOLVE THE FILIBUSTER PROBLEM?

Other than changing Senate Rules, the President, Senate Republicans, and supporters of their position have proposed challenging the constitutionality of filibusters in the judicial appointments process. These proposals focus on filibusters as they relate to the Senate's advice and consent powers, articulated within the Appointments Clause of the Constitution. Some focus on the division of the appointment power between the President and the Senate, arguing that the Constitution allows the Senate to disapprove of the President's judicial nominee only if the President has transgressed his authority in making the nomination. Others focus on the requirements of advice and consent, arguing that the filibusters unconstitutionally impose a supermajority requirement on judicial confirmations or that the Appointments Clause requires a vote on every nominee.

This section considers the merits of such claims and concludes that the filibusters are constitutional. In the

may use to further minority rights are all the more important to "ensure not only representative government but good government, responsible government." Id. at 46; see also BURDETT, supra note 16, at 9 ("The existence of filibustering in America today is evidence of a compromise between the authority of the many and the rights of the few.").

71 Keep the Filibuster, Unlimited Debate Guards Against Unruly Passions, HOUSTON CHRON., Nov. 28, 1994, at 16. Ironically, the reason the Framers initially involved the Senate in the appointments power was their prediction that the Senate would have a tendency to consider the merits of a nominee and be less swayed by public opinion. See THE FEDERALIST NO. 76 (Alexander Hamilton).

72 See Robert J. McKeever, The United States Supreme Court 116 (1997) (explaining that some scholars argue that "the President is the senior partner in the appointments process" and that the Senate's "task in confirming or rejecting the President's nominee is limited to ensuring that he or she is technically and temperamentally qualified to be a Supreme Court Justice").


74 A challenge to the filibusters themselves must be justiciable in federal court. The two requirements of justiciability that could be raised are the standing and political question doctrines. Under the doctrine of standing, a plaintiff must demonstrate an injury in fact. Allen v. Wright, 468 U.S. 737, 751 (1984). In a case challenging filibusters, there are at least two possible plaintiffs that would meet the standing requirements: the President or a rejected nominee. The President could argue that the Senate's transgression of its Appointments Clause power
end, such claims will fail to provide a solution to the filibuster problem.

A. The Balance of Power—Does the Appointments Clause Require the Senate to Defer to the President's Choice of Nominees?

As the recent debate over the Senate's filibusters against President Bush's nominees demonstrates, the Senate wields great power in the appointment of federal judges. However, some argue that the Constitution really limits the Senate's ability to refuse to confirm a president's nominee to only when the President abuses his nominating power.75 A careful examination of the text and the Framers' intent yields a different conclusion. The text and the history of ratification demonstrate that any size differential in share of the appointment power between the President and the Senate is incident to their respective functions—nominating versus advice and consent—and not such that one party must defer to the other in the appointment process. Consequently, the Constitution bestows an important and significant share of the appointment power to the Senate.76

1. The Text

The content of the Appointments Clause demonstrates that the Framers gave neither the President nor the Senate a greater share of the appointment power:

He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of

interfered with the exercise of his Appointments Clause power, depriving him of his full constitutional authority. The rejected nominee could argue that by transgressing its Appointments Clause power, the Senate deprived her of her rightful appointment to the federal bench. See Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 138 (1803) (reviewing a nominee's challenge to James Madison's refusal to allow him to take his seat as justice of the peace in the District of Columbia). It can be argued that such a case does not raise a political question because the federal court would be considering whether the Senate acted within the bounds established by the Constitution, rather than questioning the Senate's exercise of its constitutionally granted discretion to act. See supra note 58 and accompanying text.

75 For instance, after one of his nominations was rejected by the Senate, President Nixon complained that the Senate was overreaching and not acting like the rubber stamp that they had for his Democratic predecessors. Letter from Richard M. Nixon to William Saxbe (March 31, 1970), reprinted in 116 CONG. REC. 10,158 (1970).

76 See ROBERT A. KATZMANN, COURTS & CONGRESS 12-13 (1997) (arguing that strong Senate participation in the judicial appointment process is necessary to maintain the rights of citizens).
Comparing the language in the Treaty Clause\(^7\) with the language in the Appointments Clause is illuminative. The word “power” included in the Treaty Clause is noticeably absent from the Appointments Clause. The President has the power to make treaties and this power is subject to the advice and consent of the Senate. However, the President does not have the power to make appointments. Instead, the text requires that both the President and the Senate act to make appointments. The structure of the text is such that the President and the Senate each act and these acts together are the exercise of the appointment power. Moreover, unlike the Treaty Clause, which requires a vote of two-thirds of the present Senators, the Senate’s advice and consent role in appointing judges is not specifically articulated. Thus, the text of the Constitution leaves the Senate greater discretion in its advice and consent duties to appoint than in its advice and consent duties to make treaties.

Some scholars argue that the text proves the Framers intended the President to have the primary role in appointments and that the Senate’s role is merely a check to prevent the President from irresponsibly exercising his power.\(^7\) One scholar argues:

> As the text of the [Appointments Clause] makes explicitly clear, the power to choose nominees—to “nominate”—is vested solely in the President. The President also has the primary role to “appoint,” albeit with the advice and consent of the Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one than is currently claimed.\(^8\)

No meaningful explanation is provided for the conclusion that the text of the Appointments Clause explicitly grants the President the “primary role to ‘appoint.’” However, there are at least two possible arguments. First, the text refers to the President before the Senate and, thus, the President has the greater share of the appointment power than the Senate. Mentioning one party before another, however, does not necessarily mean that that party wields more power or is more important than the other party. In a sen-

\(^7\) U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

\(^8\) The Treaty Clause states, “He shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.” Id.
tence with two subjects that perform the same act, one subject must be mentioned before the other, even where the subjects share equal value within that sentence.

The second argument is that the Appointments Clause appears in Article II of the Constitution, the article in which the Constitution establishes the Executive Branch and its powers. This argument fails. The Framers split the power between two branches of the government. There is one article of the Constitution devoted to each of these two branches. The Framers wanted a concise and efficient document. The Framers had three choices for placement of the appointment power: repeat the Appointments Clause in both Articles I and II; split up the Appointments Clause and put the Senate's role in Article I and the President's in Article II; or choose to put the entire clause in either Article I or Article II. Surely, the Framers had their reasons for placing the Appointments Clause in Article II other than mere efficiency, but efficiency is certainly why the clause does not also appear in Article I and why the mere fact that the Appointments Clause is in Article II does not mean that it is primarily an executive power. Moreover, there are other circumstances in which the Constitution gives power to one branch in the article of another. For instance, no one would argue that the President's veto power is diminished, other than as textually limited, merely because it appears in Article I rather than Article II.

For these reasons, the text supports the conclusion that the President and the Senate are both charged with exercising the power to appoint federal judges and that the Constitution does not grant either party a greater share in that power. Nevertheless, it must be said that the President or the Senate may have a greater share of the appointment power simply incident to the nature of their respective roles in the appointment process. That is, the

81 See McKeever, supra note 72, at 116; see also U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

82 See George Mason, To James Monroe, in 3 The Papers of George Mason 1254, 1255 (Robert A. Rutland ed., 1970) ("[A]nd it is a well known Rule of Construction, that no Clause or Expression shall be deemed superfluous, or nugatory, which is capable of a fair and rational Meaning.").

83 One plausible reason is that the major criticism of the Appointments Clause was that it gave too much power to the Senate. Michael J. Gerhardt, The Federal Appointments Process 28 (2000). By placing the clause in Article II, this might have assuaged some of those concerns.

84 Pursuant to Article I:
Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that house in which it shall have originated.

U.S. Const. art. I, § 7, cl. 2.
power to nominate may be greater than the power to advise and consent or vice versa. Again, this difference in potency, if there is one, is due to the nature of the role, and by no means warrants a conclusion that the Senate has no substantive power and is merely to serve as a check on the President’s nominating power. This conclusion is further supported by the Framers’ intent, as shown in the following section.

2. Framers’ Intent

Prior to the Constitution’s ratification, the issue of how to allocate the power to appoint the judiciary divided the Framers. There were two sides to the debate. One side argued for the executive branch to hold the power of appointment, while the other side argued for the legislative branch to hold that power. James Wilson, for instance, adopted the position that favored the executive branch, over the legislature, as the selector of federal judges. Wilson argued that a “single, responsible person” choosing federal judges is preferred to the legislature because the consequences of appointments by the “numerous bodies” of the legislature would likely be “[i]ntrigue, partiality, and concealment.” Edward Rutledge, on the other hand, argued against establishing the appointment power in the President alone because if one person possesses that power alone, the threat of abuse is extremely high.

James Madison recognized both viewpoints and sought a compromise. He agreed with Wilson, that giving the power to many would not produce the best judiciary. However, Madison also agreed with Rutledge that the power was too great to give to one man. Preliminarily, he proposed that the Senate would be the best body to select the judiciary because it is not too small to easily abuse the authority, and not too large to be hampered by politics. Roger Sherman and William Pinckney agreed and adopted the position that the Senate should have the sole power to

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85 See Records of the Federal Convention (June 5, 1787), in 1 The Records of the Federal Convention of 1787, at 119 (Max Farrand ed., 1966). Probably the most interesting viewpoint was expressed by Benjamin Franklin, who argued that the power to select federal judges should be given to the lawyers because they would likely select the best among their peers in order to reduce competition with them. Id.

86 Joseph P. Harris, The Advice and Consent of the Senate 17-18 (1953).

87 Records of the Federal Convention, supra note 85, at 119.

88 Id.

89 Id.

90 Id. at 120.

91 Id.

92 Id.

93 Id.
appoint the judiciary. Disagreeing, Nathaniel Gorham argued that because the Senate was composed of multiple members, it would not be as accountable for substandard appointments as would a single president. For this reason, Gorham suggested that the President appoint federal judges with the advice and consent of the Senate.

The Convention ultimately adopted Gorham’s proposal in the language of the Appointments Clause. Thus, the Framers compromised by establishing an appointments procedure requiring the cooperation of the President and the Senate. They considered the Appointments Clause to divide the appointment power between the President and the Senate, giving both parties a significant role in the process of selecting federal judges. Even Alexander Hamilton, who famously advocated for a strong executive, believed that the Appointments Clause gave the Senate more power than a mere rubber stamp to the President:

To what purpose then require the co-operation of the Senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

Hamilton argued that the Appointments Clause limits the Senate insofar as the President always has the power to choose a nominee. According to Hamilton, even though the Senate may reject that nominee, the President always has the power to choose another nominee. Thus, the fact that the Senate has the advice and consent power does not diminish the President’s power to nomi-
nate. Yet, as Hamilton observed, the possibility of the Senate rejecting a nominee should affect the President’s choice. 102

James Madison also agreed with this characterization. In 1813, long after ratification, Madison, while speaking before Congress in regard to the appointment of an ambassador to Sweden, made it clear that the Appointments Clause bestowed considerable power to the Senate: “[T]he Executive & Senate in the cases of appointments to Office . . . are to be considered as independent of and co-ordinate with each other. If they agree the appointments . . . are made. If the Senate disagrees they fail.” 103 Thus, the Framers intended their compromise to divide the appointment power between the President and the Senate, with neither taking a greater slice of the appointment power pie. Consequently, a claim arguing that filibusters against judicial nominees violate the Appointments Clause, under a theory that the Appointments Clause requires the Senate’s acquiescence to the President’s nominees unless the President abuses his discretion, must fail.

B. Advice and Consent—Are Filibusters Inconsistent with the Senate’s Role in the Judicial Appointment Process?

In considering the merits of suits brought against the Senate alleging that filibusters are unconstitutional, this section first explores the constitutional scope of the Senate’s advice and consent powers, and then determines whether supermajority requirements or failure to vote on a nominee are outside of this scope.

I. The Constitutional Scope of Advice and Consent

When the Constitution establishes power in an actor, it generally defines the outer limits of that power, rather than the precise rules of the power’s execution. That is, the actor exercising constitutional power may exercise a lesser power than that articulated by the Constitution. But if the actor transgresses the constitutional limits of his power, that actor has violated the Constitution. This is true of the Appointments Clause—it establishes the outer limits of the Senate’s role in the appointments context. As long as the Senate acts within the scope of the Appointments Clause, the exercise of its advice and consent power is constitutional.

On its face, the Appointments Clause only restricts the Senate insofar as the President may nominate and the Senate may advise and consent. For this reason, the text apparently grants the Presi—

102 Id.
103 8 THE WRITINGS OF JAMES MADISON 250-51 (Gaillard Hunter ed., 1900-1910).
dent and the Senate broad discretion in their capacities. Indeed, one scholar argues that "the Constitution allows . . . the Senate to base [its] decisions or actions regarding appointments on whatever grounds [it] deem[s] appropriate." The text of the Constitution does not simply preclude either party from appointing judges without input from the other. It also articulates specific roles for each party to play in the appointment process.

The text of the Constitution conditions judicial appointments on the advice and consent of the Senate. Attributing the plain meaning to the words "advice" and "consent" yields the conclusions that the Constitution allows the members of the Senate to articulate to the President the characteristics that they would prefer in his judicial nominees and that the Constitution requires that the Senate approve of a nominee before he or she may be appointed to the federal bench. The text of the Constitution defines advice as "[o]pinion given or offered as to action; counsel." The President is not bound by the Senate’s advice, but at maximum, the Appointments Clause allows the Senate to give the President advice on whom to nominate. The same dictionary defines consent as "[t]o agree together, or with another, in opinion or statement; to be of the same mind." The Constitution also requires Senate approval of the President’s nominee. The Constitution does not say what form that approval must take; just that the Senate, as a collective body, must consent to the appointment of a particular nominee. Since the Rules of Proceedings Clause grants the Senate broad discretion to make rules of its own procedure, it logically follows that the Senate has broad discretion in determining the procedure for consent in the appointments context.

The purpose of the advice and consent requirement "serves both to curb executive abuses of appointment power, and to promote judicious choice of persons for filling offices of the un-

104 GERHARDT, supra note 83, at 38.
105 OXFORD ENGLISH DICTIONARY 191 (2d ed. 1989). This definition is essentially the same today as it was at the time of ratification. See Roger J. Miner, Advice and Consent in Theory and Practice, 41 AM. U. L. REV. 1075, 1078 (1992) (explaining that "a dictionary almost 175 years old [in 1992] . . . defines 'advice' as 'counsel' and 'instruction'").
106 This is discussed in greater depth infra Part IV.
107 OXFORD ENGLISH DICTIONARY, supra note 105, at 760.
108 This interpretation is supported by Alexander Hamilton. See THE FEDERALIST No. 76 (Alexander Hamilton).
109 In United States v. Ballin, 144 U.S. 6 (1892), the Supreme Court stated: The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole. Id. at 7.
110 See supra notes 57-58 and accompanying text.
It only makes sense that the discretion of the Senate should be confined to furthering this purpose. This, of course, does not mean that Senators violate the Constitution when they act in ways that objectively appear to contradict this goal. The standard should be good faith: as long as Senators believe they are furthering the goals of the Appointments Clause, the constitutional requirements are satisfied. Granted, this limitation only prohibits the absurd and most egregious attempts to thwart the appointments process. Consequently, furthering the purpose of requiring advice and consent is a minor limitation on the Senate’s discretion in determining how to manifest its consent to an appointment. Therefore, it has very broad discretion to determine how to manifest its consent to the appointment of the President’s judicial nominees.

2. Are Supermajority Requirements Within the Constitutional Scope of Advice and Consent?

In May of 2003, Judicial Watch, Inc., a self-described non-profit educational foundation, sued the United States Senate in federal court, claiming that “[t]he application of Rule XXII to [the nominations of Estrada and Owen] . . . imposes an additional, unconstitutional requirement that judicial nominees be confirmed by a supermajority of 60 votes rather than the simple majority of 51 votes required by Article II, Section 2 of the United States Constitution.” Essential to Judicial Watch’s argument is the assumption that the Appointments Clause implicitly requires that the Senate manifest its consent by a simple-majority, up-or-down vote.
on the fitness of a judicial nominee. However, such a requirement does not exist.

Under the Appointments Clause, the body of the Senate must consent to a president’s nominee. The Rules of Proceedings Clause grants the Senate the authority to decide how to express its consent to a nominee. There is nothing in the Constitution limiting the Senate to a simple-majority requirement to express consent. The Senate’s method of consent is constitutional as long as it furthers the purpose of the constitutional requirement of consent and does not violate some other constitutional limitation on the Senate.

Some argue that filibusters against judicial nominees violate constitutional limits on Senate power. They contend that the Constitution implicitly requires a simple majority to pass legislation, change a rule of proceeding, or confirm a nominee. This argument is based on the notion that majority rule is a “fundamental principle” of democracy. This may be true, but the Framers also recognized that majoritarianism often leads to unacceptable results, such as the deprivation of fundamental rights. In Federalist No. 10, Madison explained the potential problems associated with majoritarianism: “When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both for the public good and the rights of other citizens.” Madison further explained the evils of a democracy based solely on simple-majority rule:

A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies

119 See supra note 56 and accompanying text.
120 Under Ballin, the Senate is probably prohibited from requiring less than a simple majority for consent. See United States v. Ballin, 144 U.S. 6, 6 (1892) (“[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body.”).
121 See supra notes 111-115 and accompanying text.
124 THE FEDERALIST NO. 10 (James Madison).
have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.\footnote{Id.}

As a consequence of this foresight, the Constitution is replete with mechanisms intended to temper "the tyranny of the majority."\footnote{Id. note 123, at 365 ("[W]hile popular sovereignty was to be the moral foundation of the new government, its Constitutional architecture was replete with arrangements designed to counter the 'tyranny of the majority' problem.").} The Framers sought to carefully balance majoritarianism and protection of minority interests. Thus, it does not follow that for every constitutional silence exists an implicit simple-majority requirement.

In fact, the stronger argument is that where there is a serious threat from a reckless majority, a supermajority requirement should be imposed to protect strong minority interests. Selecting the judiciary is an area in which a majority may "sacrifice to its ruling passion or interest both for the public good and the rights of other citizens" by recklessly installing an extremist judiciary.\footnote{See Records of the Federal Convention (July 18, 1787), \textit{in} 2 The Records of the Federal Convention of 1787, 42 (Max Farrand ed., 1966).} This is exactly what the Framers feared would happen if the task of selecting the judiciary were left entirely to the President.\footnote{The Federalist No. 10 (James Madison).} By including the Senate in the process, the Framers intended to temper the inevitable "spirit of favoritism in the President"\footnote{The Federalist No. 76 (Alexander Hamilton).} and to "cool" the political heat underlying his nominations.\footnote{See supra note 69 and accompanying text.} Consequently, not only is a supermajority requirement for consent sanctioned by the Constitution, but a supermajority requirement also tempers the "tyranny of the majority" and, therefore, is more likely to produce an independent judiciary. For these reasons, a challenge to the filibusters based on the theory that a supermajority requirement for consent violates the Appointments Clause must fail.

3. \textit{Under the Appointments Clause, Must the Senate Actually Vote on Every Judicial Nominee?}

Some argue that the filibustering Senators have violated the Appointments Clause by depriving judicial nominees of an up-or-down vote.\footnote{See supra note 69 and accompanying text.} Those who make this claim rely on the assumption
that the Appointments Clause requires an up-or-down vote on every one of the President's nominees. However, the Appointments Clause contains no such requirement. Nothing in the Appointments Clause requires that the Senate do anything. Rather, the Appointments Clause conditions the appointment of a nominee on the Senate's advice and consent and, thus, only requires the Senate to act if a nominee is to be appointed to the federal bench. If the Senate does not act on the nomination, then the Senate simply has not consented. Under the Appointments Clause the Senate has the discretion to vote or not vote. Just like a claim charging that the filibusters against judicial nominees violate the Appointments Clause by requiring a supermajority Senate approval for consent should fail on the merits, so should a claim charging that filibusters violate the Appointments Clause by depriving a nominee of an up-or-down vote.

IV. THE BETTER SOLUTION TO THE FILIBUSTER PROBLEM: THE REESTABLISHMENT OF THE SENATE'S CONSTITUTIONAL PRENOMINATION ADVICE ROLE

Aside from being either politically or legally infeasible to implement, the previous proposals have something else in common: they focus on the postnomination consent aspect of the Senate's role and seek to remove the filibuster from the repertoire of the disgruntled minority in the advice and consent context. Even if those opposed to filibusters against judicial nominations were successful in implementing one of these proposed solutions, the opposition to the nominee still has a strong incentive to use other means to block confirmation, such as filibustering legislation to either delay a vote on the contentious nomination or as a means of leverage to force the President to withdraw the nomination. Thus, these proposals will do nothing more than intensify the confirmation battles. More importantly, none of these proposals goes to the root of the problem: the communication breakdown between the President and the Senate, particularly between the President and those Senators most likely to oppose his nominees. This section explains the nature of this communication breakdown and argues that the real solution to the filibuster problem is to reintroduce the Senate's prenomination advice function.
A. Communication Breakdown: The Underlying Cause of the Filibuster Problem

The filibuster problem has not occurred in a vacuum. The root cause of the filibuster problem is the absence of prenomination communication between the President and Senators who oppose his nominees. In general, filibusters and other heated battles between the parties are more likely to occur when the government is closely divided between parties and ideologies. Moreover, filibusters against judicial nominees are more likely to occur when the two political parties do not work together, whether between Republicans and Democrats within the Senate or between Senators of one party and the President of another. It merely takes common sense to realize that if one party unilaterally backs a nominee that the other party staunchly opposes, trouble will ensue. To make matters worse, when there is an extreme ideological divide in Washington, the parties are less likely to work together for a smooth confirmation process. This is the cycle of communication breakdown. To overcome the escalation of the confirmation battles, and to end the filibusters against nominees, both parties must work together to select judges, and this cooperation must start before the selection of a nominee.

B. Importance of the Senate's Prenomination Advice Role

The Constitution provides that the Senate may condition the confirmation of a president's nominee on the President providing an opportunity for the Senate to offer prenomination advice. To be sure, this idea does not enjoy unanimous support. Some argue that the Constitution does not allow a prenomination advice role for the Senate. They argue that the word "advice" in advice and consent means either consumed by the notion of consent and is essentially meaningless on its own, or that it merely means that the Senate may advise the President as to whether the position needs to be

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132 See Binder & Smith, supra note 20, at 16 (explaining that extreme partisanship within the Senate is a major factor for the increase in filibusters in recent years).

133 This does not mean that the President loses his nomination power. The President ultimately has the power to pick the nominee; it just may not be his first choice. Moreover, this does not mean that the President must pick the nominee favored by the Senators of the opposing political party. Because the opposition generally approves the vast majority of a president's nominees, the President must simply temper his choice to one that is more palatable to the opposing Senators. See 149 Cong. Rec. S10,230 (daily ed. July 30, 2003) (statement of Sen. Leahy citing the fact that only 3.4% of President George W. Bush's nominees have been blocked by the Senate Democrats).

134 See, e.g., Eastman, supra note 79, at 645.

135 See id. at 646.
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filled at all. However, an examination of the text and history shows that the Constitution conditions the appointment of nominees on both the prenomination advice of the Senate as well as its confirmation of that nominee.

1. The Constitutional Significance of Advice

The text offers important clues about the significance of the Senate's power to advise. The very fact that the word "advice" appears in the Appointments Clause is itself significant. The Framers were attempting to draft a concise and efficient document, and they went to great pains to draft an Appointments Clause that contained just the right checks and balances to ensure a competent and independent judiciary. Surely, they did not go through such a tedious process only to sloppily draft the Appointments Clause. Logically, then, the fact that the Framers included "advice" and "consent" is evidence that the Framers intended the Senate to perform two functions. That is, the document does not merely allow or require that the Senate approve or disapprove of a president's nominee, but also allows or requires some senatorial involvement in the nomination process.

George Mason was the only Framer to address the role of advice in the Appointments Clause. His writing supports the notion that the Senate enjoys the privilege of offering prenomination advice to the President regarding nominations. In 1792, Mason wrote:

The Word "Advice" here clearly relates in the Judgment of the Senate on the Expediency or Inexpediency of the Measure, or Appointment; and the Word "Consent" to their Approbation or Disapprobation of the Person nominated; otherwise the word Advice has no Meaning at all—and it is a well known Rule of Construction, that no Clause or Expression shall be deemed superfluous, or nugatory, which is capable of a fair and rational Meaning.

Thus, according to Mason, advice is a separate power from the power to consent and "the Senate is constitutionally entitled to

138 See generally 1-4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966) (detailing the records of the constitutional convention, which show the painstaking process used by the Framers to develop just the right checks and balances).
139 Mason, supra note 82, at 1255.
give [nonbinding] advice to a president on whom as well as what kinds of persons he should nominate to certain posts. 140

Other critics of prenomination advice argue that it would strip the President of his power to nominate. 141 To construe the Appointments Clause as conditioning appointments on prenomination advice does not lead to Senate infringement on a power solely reserved to the President. The power to advise is not the power to control whom the President nominates. Advice does not mean force. 142 Advice to the President regarding whom to nominate, in the true sense of the word, means that the Senate may tell the President whom it is likely to confirm or not confirm, or what qualities—professional, political, demographic, or otherwise—a nominee should possess to ensure confirmation, but the President need not heed this advice. 143 Thus, even if the Senate has a prenomination role in the judicial appointment process, the President still maintains his sole discretion as to whom to nominate. 144 The advantage is that if the President consults with the Senate before making his choice, he can gauge ahead of time whether his nominee will survive the Senate’s consent process.

Furthermore, throughout much of the nation’s history, the Senate has indeed advised the President on judicial nominations and presidents have welcomed such advice. For instance:

In 1932, President Hoover let it be known that he would like to choose a noncontroversial western Republican as the successor to Justice Oliver Wendell Holmes. But the chairman of the Senate Judiciary Committee, George W. Norris of Nebraska, made it plain to the President that he and other mem-

140 GERHARDT, supra note 83, at 33; see also David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 YALE L.J. 1491, 1495 (1992) (arguing that Mason’s comments support their view that the Constitution assigns “two distinct roles to the Senate—an advisory role before the nomination has occurred and a reviewing function after the fact”). Some commentators argue that Mason is simply saying that the Senate should first decide whether a position even needs to be filled by an appointment. See, e.g., McGinnis, supra note 136, at 644. However, as one scholar puts it: It makes little sense to think that the term “advice” had to be added to the Appointments Clause to allow the Senate to raise a specific objection to a president’s attempt to fill an office not yet authorized by it, because the Senate could simply refuse to “consent” to any nomination until it had determined whether or not the position should be filled. The need for the Senate to offer such “advice” would be extremely rare, given that the framers fully expected the specific offices to which the nomination and confirmation powers would apply would be left to the discretion of and established by Congress.

GERHARDT, supra note 83, at 32-33.

141 See, e.g., Eastman, supra note 79, at 645.

142 See supra note 105 and accompanying text (defining “advice”).


144 THE FEDERALIST NO. 76 (Alexander Hamilton).
bers of the committee would insist on a distinguished successor in the Holmes mold. And Senator Borah from Idaho, chairman of the Senate Foreign Relations Committee, repeatedly called for the nomination of Benjamin Cardozo [from New York]. After a search of several weeks, Hoover nominated Cardozo.

In addition, in 1869, a majority of the Senate signed a petition requesting that President Grant nominate Edwin Stanton for an appointment to the Supreme Court. Grant obliged and the Senate confirmed Stanton shortly thereafter. Thus, besides the text and the writings of George Mason, the practical history of judicial appointments demonstrates that the Constitution imposed on the Senate the power to offer prenomination advice to the President.

2. Applying Advice to the Filibuster Problem

The Constitution conditions the appointment of judicial nominees on the Senate’s prenomination advice, but how will the reintroduction of this practice solve the filibuster problem? The answer is obvious: the advice function, when exercised, forces the President to cooperate with the Senate. If he ignores its advice and nominates someone whom members of the Senate have vowed to fight, the President has no one to blame but himself if a battle ensues. However, if the President welcomes the advice of the Senate, “[s]uch consultation would . . . work to the advantage of both parties in that it could lead to the development of some consensus (or the reduction of some tension) between the two branches and the opportunity for the President and the Senate to check each other’s judgments in this important area.” The President, by candidly articulating to the Senate and the public what he seeks in a nominee, and by encouraging the Senate to do the same, will almost certainly ensure a smooth confirmation process.

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145 Advice and Consent on Supreme Court Nominations Before the S. Subcomm. on the Separation of Powers, 94th Cong. 2 (1976) (statement of Senator Edward Kennedy). The story is that Hoover had a list of ten nominees, with Cardozo number ten. The Senate saw the list and convinced Hoover to turn his list upside down and nominate Cardozo. See Strauss & Sunstein, supra note 140, at 1501.

146 Advice and Consent on Supreme Court Nominations Before the S. Subcomm. on the Separation of Powers, 94th Cong. 2 (1976) (statement of Senator Edward Kennedy).

147 Id.

148 GERHARDT, supra note 83, at 33.

149 Id. at 34.

150 See HICKOK, supra note 70, at 52 (arguing that presidents can “do something to improve the confirmation process” by telling “the American people and the members of the Senate what he seeks in a judge . . . and encourage candor and honesty on the Senate’s part”).
Does this mean that the burden of taking the first step to ending the filibuster problem falls on the President's shoulders? In a word, yes. If the burden is on the Senate to reintroduce advice, it may only do so forcefully, which will just extend the filibuster problem indefinitely. Specifically, the only way for the Senate to institute the advice process is to demand that the President give it an opportunity to give prenomination advice. If the President refuses, those Senators are justified in blocking the confirmation of that nominee. Consequently, the filibuster problem will rear its ugly head yet again.

Future presidents can easily avoid filibuster problems by articulating their requirements in judges and seeking the input from the Senate, particularly those Senators likely to oppose the nominees. Admittedly, it is difficult to imagine President George W. Bush taking the initiative to engage the Senate Democrats in a prenomination dialogue, and it is hard to imagine Senate Democrats being receptive to such an attempt. Since the Senate has the constitutional authority to demand providing input, and then to deny confirmation if that opportunity to give input is refused or if the President ignores the input, it is up to the President alone to take that leap and reengage the Senate by asking for prenomination advice. Moreover, taking the first step to reengage the filibustering minority in the Senate will reap political rewards for the President. He will be seen as a bridge-builder by the American people, rather than a bridge-burner; he will demonstrate his ability to be a uniter rather than a divider.

CONCLUSION

The filibusters against judicial nominees exacerbate backlogs in federal courts and delay citizens their day in court. They disrupt government business and deflect attention from issues more worthy of attention. Proposed solutions to the filibuster problem that seek to remove filibusters as a tactic in the judicial appointments context are either politically or legally infeasible to implement.

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151 Appointments are conditioned on the Senate giving its advice, so if the Senate insists on its power to give the President prenomination advice and the President refuses, presumably the President's nominee cannot be appointed.

152 See Victory for a Smear, WASH. POST, Sept. 5, 2003, at A20 (explaining that in the context of judicial appointments, President Bush is "mulish[ly] unwilling[] to even listen to reasonable Democratic concerns").

153 See id. (explaining that in the past year, Democrats have been "continually escalating the [confirmation] battle and smearing [some of the nominees]").

154 See Dana Milbank, W. is for Warm and Fuzzy, George Bush Injects His Conservatism with a Liberal Dose of Compassion, WASH. POST, Mar. 20, 2000, at C01 (quoting then candidate George W. Bush as famously claiming he's "a uniter not a divider").
and simply do not address the underlying problem: the communication breakdown between the President and the Senate. The only way to stop the filibusters is to promote communication between the President and the filibustering Senators, which requires the President to take the initiative and allow these Senators to exercise their power to offer prenomination advice.

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