



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

Issue Brief

October 2016

The New Normal: Unprecedented Judicial Obstruction and a Proposal for Change

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As President Barack Obama enters the last few months of his second term, his judicial nominees have been facing unprecedented obstruction. Although he has had more judges confirmed than President George W. Bush—329 to 327—including two Supreme Court appointments, President Obama is on track, because of Senate obstruction, to have the lowest rate of judicial confirmations for a president in the latter two years of his term since the early 1950s. The obstruction has gone further, denying any confirmation hearings whatsoever for President Obama’s nomination of D.C. Circuit Chief Judge Merrick Garland to fill the Supreme Court seat vacated as a result of Justice Antonin Scalia’s death in mid-February 2016. The delay in getting any Senate action on the Garland nomination, which was made in March, is now the longest in history for a Supreme Court nomination.

None of the mechanisms adopted within the Senate to prevent a minority within the body, even a substantial one, from stifling the process, address the newest form of obstruction. More than a decade ago, in 2005, the Gang of 14¹—a group of seven Republicans and seven Democrats—forged a deal to prevent a change in the Senate rules on filibusters and to ensure Senate action on pending judicial nominations unless there were “extraordinary circumstances.” Unfortunately, within a few years, several of the brokers of the deal left the Senate (and the Gang), the definition of what constitutes “extraordinary circumstances” was easily manipulated, and obstruction increased. Indeed, it increased to the point at which a majority of the Senate in 2013, then under Democratic control, took the extreme step of approving an understanding of the Senate that lowered the number of votes needed to overcome filibusters of lower court and executive branch nominations from a super majority of 60 to a simple majority within the Senate. The virtual dismantling of judicial filibusters strengthened majority control over the judicial confirmation process, but it left open exactly the circumstances undermining the judicial confirmation process today—a majority’s

¹ The members of the Gang of 14 were Senators Robert Byrd (D-WV); Lincoln Chafee (R-RI); Susan Collins (R-ME); Mike DeWine (R-OH); Lindsey Graham (R-SC); Daniel Inouye (D-HI); Mary Landrieu (D-LA); Joseph Lieberman (D-CT); John McCain (R-AZ); Ben Nelson (D-NE); Mark Pryor (D-AR); Ken Salazar (D-CO); Olympia Snowe (R-ME); and John Warner (R-VA). See Michael Gerhardt & Richard Painter, “Extraordinary Circumstances:” *The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform*, AM. CONST. SOC’Y 1 n.1 (Nov. 2011), www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf.

determination to shut down entirely the judicial confirmation process, even for the Supreme Court, for what can only be called purely partisan reasons and indisputably at the expense of a strong, independent federal judiciary.

In fact, there are 54 of President Obama’s judicial nominations pending before the Senate, including one to the U.S. Supreme Court and seven to the federal courts of appeal, while 108 total current and known future vacancies judicial vacancies remain, 35 of which are considered emergencies based upon, among other things, extremely high caseloads.² With the unprecedented lack of action on Judge Garland’s pending nomination, the Supreme Court is also understaffed, with only eight justices, and thus prone to avoid taking—or being able to resolve in any clear, enduring way—significant constitutional disputes over whose resolution the justices might have differing views. A Court with eight justices is paralyzed or ineffective in close cases, and the precedent created by this unprecedented obstruction, which has nothing to do with the nominee’s qualifications, but rather simply aims to bar a president of the opposite party from ever filling the vacancy, is likely to have only disastrous consequences for the Court, the Constitution, and the nation. It ushers in an era in which payback will become the new normal in the judicial selection process.

In this Issue Brief, we analyze the institutional obstruction of judicial nominations by a majority in the Senate, particularly in the form of doing nothing, and offer a modest proposal for facilitating a process that would give nominees the hearings they deserve and increase the likelihood that each level of the federal judiciary is at full strength. Most important is the imperative that each nominee receives a prompt hearing and an up-or-down vote so either the vacancy is filled or, if the majority chooses to reject the nominee, the president can nominate someone else to fill the vacancy. In the first part, we briefly examine the origins and consequences of the current obstruction of judicial nominations. In Part II, we propose a standard for the Senate to follow in its consideration of judicial nominations, namely, for senators to commit themselves to ensuring a fair process for every nominee, including giving a hearing to every qualified nominee and to stating openly their reasons for or against confirmation. In the final part, we argue that this standard not only fits within the finest traditions of the Senate but also ensures that the federal judiciary does not become a hostage in the partisan warfare that unfortunately characterizes far too much of the legislative process. We challenge senators to forego inaction as an option on judicial nominations and instead to commit themselves openly to a fully staffed judiciary and to go on the record to explain the reasons for their support—or opposition to—particular nominations, including those to the United States Supreme Court.

I. The Rise and Consequences of Majoritarian Obstruction

While a majority vote of the Senate is the only way for a judicial nomination to be confirmed, there are many ways to defeat one. First, the full Senate could vote to reject the nomination. In fact, the Senate has rejected nearly one in five Supreme Court nominations, and the Senate has rejected many other judicial nominations. The most recent instance in which the Senate rejected a lower court

² *Judicial Emergencies*, U.S. COURTS ADMIN. OFF., <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>.

nomination was the Senate's 1999 rejection of President Clinton's nomination of Ronnie White to a U.S. District Court judgeship in Missouri.³ Second, the full Senate could not take any action or table a nomination. However, with respect to the Senate's doing this with respect to the Supreme Court one would have to go as far back as the 1800s, when the Senate tabled or took no action and therefore effectively nullified, several Supreme Court nominations, including President Jackson's nomination of Roger Taney as an Associate Justice of the Supreme Court.⁴ Moreover, the Senate may still filibuster a Supreme Court nomination, which, in fact, has been done only once: to prevent then-Justice Abe Fortas from becoming Chief Justice, an action that had no impact on the number of voting justices on the Court. Third, the Senate Judiciary Committee could vote to reject a nomination or the Committee Chair could fail to take a final vote—or, for that matter, any other action, including holding a hearing—on a nomination. Indeed, any individual senator within the majority, particularly any on the Judiciary Committee, may place a hold on a nomination or take advantage of the blue slip process, which allows a senator within the majority to defeat any nomination to a judgeship within his or her own state by simply choosing not to return the blue slip form. And, of course, the Senate Majority Leader controls the flow of business onto the Senate floor and in committees and therefore may refuse at any time, on behalf of his caucus, to allow any action, in a committee or otherwise, on a nomination.

Within the last year, the most troubling instance of this latter form of obstruction is the current Majority Leader Mitch McConnell's decision not to hold any confirmation proceeding for anyone nominated by President Obama to the Supreme Court. Indeed, Senator McConnell announced this obstruction within hours of Justice Scalia's death in February, weeks before President Obama nominated Chief Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia. Though several Republican senators had encouraged the President to consider Judge Garland for the vacancy, and the nominee has won the highest possible ratings from the American Bar Association and praise from other judges (including the Chief Justice of the United States), the Senate Judiciary Committee, led by Senator Chuck Grassley, scheduled no hearings on the nomination and none is now possible until after the election. The stated reason for the opposition is to give the American people the opportunity to choose which president they want to make the nomination, and many senators who support the obstruction maintain that it is unusual in a presidential election year for the Senate to hold hearings, much less confirm, a Supreme Court nominee.

To be sure, there is no good precedent for the Senate to delay a Supreme Court nomination until the outcome of the next presidential election. In American history, 19 presidents have made Supreme Court appointments during presidential election years or in the lame duck sessions after the election. Among the most famous of these is President John Adams' appointment of John Marshall as Chief

³ Judge White was subsequently renominated by President Obama and confirmed in 2014.

⁴ President Jackson later successfully nominated Taney to be Chief Justice of the United States. Such obstructionist conduct by the Senate can be a symptom of—or the cause of—political crisis and instability. The 1830s through 1860s are an example of a response to a growing political crisis. But our Country's political stability is undermined if every time a political faction does not get what it wants it claims that the country is in a constitutional crisis and that each branch of government should hunker down to protect itself from the other two.

Justice a few months after he had been defeated for reelection in 1800. In the 20th century, five presidents have made Supreme Court appointments during presidential election years, including 1916 (during which President Wilson made two Supreme Court nominations, including Louis Brandeis) and 1988 (during which the Senate confirmed President Reagan's nomination of Anthony Kennedy to the Supreme Court). In the last 100 years, every Supreme Court nominee, except for two, has received a hearing before the Senate Judiciary Committee, and the two exceptions—Douglas Ginsburg and Harriet Miers—withdrawed their nominations prior to any hearings.

The costs of a majority's refusing to act—indeed, refusing to take action of any kind—on judicial nominations are high, particularly when the obstruction is, as it plainly is now, not based on a nominee's credentials or merit. First, it leaves federal courts understaffed, as the Supreme Court has been since the middle of February 2016. Unfortunately, it is unlikely the Senate will take action on the Garland nomination—or any other nomination to the Supreme Court—before early next spring. The Senate Majority Leader has dismissed any chance for the Senate to consider Garland after the election, though some senators from within his party have raised the possibility. Even so, confirmation hearings take time to plan, the Committee would need time to vote and issue its report, and there would have to be a debate and a vote on the floor of the Senate. All that takes time, though there is enough time after the presidential election to hold a hearing on Judge Garland's nomination, given his strong support across the political spectrum and unquestionable qualifications.

Second, the inaction is not grounded in a defensible principle and does not do the Senate credit. Even if senators agree not to allow a vote on a judicial nomination until after the election, they do not question the nominee's credentials or qualifications. While some senators defend their opposition by contending that the American people should choose which president will make the next Supreme Court nomination(s), it is unclear how many, if any, of them would actually defer to the voters' choice of placing that responsibility in the hands of their chosen president. Some senators have insisted on the need to ensure the next nominee is like Justice Scalia in his approach to interpreting the Constitution, but depending upon who wins the next election, this prospect could be remote. Come the first week in November, some of these senators may wish they had not rolled the obstruction dice and instead had given Judge Garland a fair hearing and a vote. Furthermore, if voters are angry with the obstruction, it could affect the outcome of the November elections, including to the Senate itself.

The prospect of the Senate's approving no one is not out of the question, but the failure of the Senate to confirm anyone to fill a Supreme Court vacancy is ultimately an attack on the Court itself. That degree of obstruction weakens the courts as a third, independent branch, for it leaves the Court with only eight justices and thus prone to four-to-four decisions that have no legal significance. If the obstruction goes further to block other Supreme Court vacancies from being filled, the Court will become even more under-staffed and incapable of performing the unique functions that the Constitution had vested in "one" Supreme Court. Furthermore, if one of the remaining justices has to recuse from a case because of a conflict involving a party (whether because of stock ownership or some other reason), the Court could decide a case with a 4-3 vote, setting itself up for possible

reversal of its own opinions once the Court is fully staffed with nine justices and there is another case involving different parties but the same legal issue.

Third, well-qualified, well-meaning judicial nominees at every level are subject to distortions of their records and their characters. President Obama—like Presidents Bill Clinton and George W. Bush before him—has in all or almost all instances taken care to nominate to judgeships people whose qualifications and views of the law are within the mainstream of American jurisprudence. The American Bar Association, among other organizations, has given the highest possible ratings for virtually all of the nominations that have been obstructed, including that of Merrick Garland to the Supreme Court. None of the President’s judicial nominees have threatened the basic doctrine of American law or shown resistance to following settled Supreme Court precedent, much less any serious ethical breaches. For the most part, President Obama’s nominees, like the judicial nominations made by Presidents Clinton and Bush, have been widely admired by people from both parties, and all of them have come from the mainstream of practice, judicial service, or teaching.

Fourth, the obstruction of President Obama’s judicial nominees, including Judge Garland for the Supreme Court, is establishing a terrible precedent. If a qualified nominee’s philosophy is not far outside the mainstream and poses no threat to established legal doctrine or the proper functioning of American courts, and if a nominee has committed no serious ethical breaches, an appropriate basis for objecting to a nomination likely does not exist. An appropriate basis for obstructing the nomination so senators will not even have a chance to vote on it clearly does not exist. Obstruction under such circumstances merely damages the federal courts, including the Supreme Court, holding them, in effect, as hostages or collateral damage in ongoing partisan warfare. Under our Constitution, the federal courts are the only branch of the national government that is meant to be above politics not a captive to it.

II. Another Proposal for Reform

Senators and commentators have long called for reform of the judicial confirmation process. While the majority’s dismantling of filibusters of lower court judicial nominations is the most recent successful reform of the process, the Senate has yet to provide a floor vote on every judicial nomination, which has been the express goal of many senators. Indeed, the arguments that Senator John Cornyn made against filibustering lower court nominations are as apt today as they were when he expressed them in 2003:

Instead of fixing the problem [with the judicial confirmation process], we nurse old grudges, debate mind-numbing statistics, and argue about who hurt whom first, the most, and when. It is time to end the blame game, fix the problem, and move on. Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House and no matter which party is the majority party in the Senate. Unnecessary delay has for too long plagued the

Senate’s judicial confirmation process. And filibusters are by far the most virulent form of delay imaginable.⁵

Unfortunately, Senator Cornyn changed course and in 2011 voted to support a filibuster of Goodwin Liu’s nomination to the Ninth Circuit. Most of the objections made to almost entirely stall lower court nominations and the Garland nomination seem to be the kind of “old grudges” to which we thought Senator Cornyn had objected more than a decade ago.

Several of the proposals we made in an earlier ACS Issue Brief that we believed would have realized Senator Cornyn’s stated objective of putting an end to the filibuster in all but the most exceptional circumstances, are even more apt today than they were when he made them several years ago.⁶ First, we suggested that, “Senate confirmation hearings should never be delayed provided that the nominee has complied with reasonable requests for information from the Judiciary Committee. Committee rules, or norms, should provide that a hearing must be scheduled for a date within 90 days of when the president sends a nomination to the Senate.”

Second, we urged the Senate to adhere to the agreement it made in 2011 “to bar the use of anonymous holds—and to forego similar mechanisms—to delay any nomination.”⁷ As we explained then, “‘Secret’ holds—where the senator does not reveal a reason for holding up a nomination or sometimes even his or her own identity—have been particularly noxious, but regardless, no single senator should be permitted to delay either a Committee or floor vote on a judicial nomination.” We urged further that, “[i]n keeping with the Senate’s overwhelming agreement to bar anonymous holds of judicial nominations, senators should agree to accommodate brief delays of up to 30 days for a Committee or floor vote if a senator with the support of one other senator states a good reason for the delay, and why his or her concerns could not have been addressed earlier, but otherwise the scheduled vote should proceed as planned.” We continue to believe “the most appropriate reason for delay to be a specified need for more information that is critical to the Committee’s evaluation of a nominee’s integrity and qualifications. Fishing expeditions and delay for delay’s sake are never legitimate.”

Third, we suggested that every judicial nominee should come to the Senate with a presumption that he or she will at least get a prompt hearing before the Senate Judiciary Committee (within 60 days). This presumption should be explicit and will place the burden on any senators who are disposed to oppose the nomination to make their case publicly.

Fourth, as we suggested in our earlier Issue Brief, “once a judicial nominee has been reported out of the Judiciary Committee and the nomination has been sent to the Senate floor, the presumption in the Senate should be that a majority of ‘yes’ votes are needed to confirm the nominee. Such an up

⁵ John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 227 (2003).

⁶ See Gerhardt & Painter, *supra* note 1.

⁷ *Id.* at 6 (citing Paul Kane, *Senate Leaders Agree on Filibuster Changes*, WASH. POST (Jan. 27, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/27/AR2011012703379.html>).

or down vote should occur within less than 120 days “of the nomination and we expect that would be the end of the process for almost all nominees.”

Each of these four suggestions is important for curbing either a minority or majority determined to block judicial nominations for any reasons other than their actual merits. In whatever phase of the process senators wish to oppose a judicial nomination, the least they owe to the American people and to ensuring a strong, independent judiciary is to state their objections publicly. We believe the best mechanism for implementing this requirement, as well as our other suggestions, is through an agreement between the majority and minority leaders of the Senate. This mechanism will require each caucus’ members to abide by the agreement, to consider sanctioning any member who does not abide by it, and to keep their respective members completely committed to the objectives of allowing every judicial nomination the opportunity to receive a hearing and making public the reasons for any opposition. An agreement between the majority and minority is the same mechanism that was used in 2013 to fix the problem with anonymous holds over judicial nominations, and it is the only kind of mechanism that can guarantee that our federal courts, including the Supreme Court, will be fully staffed and capable of exercising their constitutional functions as the third branch of government.

III. The Advantages of Compromise

The future of obstruction of judicial nominations in the Senate does not turn on the constitutionality of the obstructive tactics employed, whether they are in defense of the filibuster,⁸ holds, or inaction by the Senate Judiciary Committee or the Senate as an institution. A debate over their constitutionality misses the point, perhaps deliberately so. The future of delay still turns, as it did when we wrote our first Issue Brief several years ago, on a simple policy question—whether a delay or reaching a final vote on a judicial nomination, whatever it may be, is in the best interests of the country, the president, the Senate, and the federal judiciary. When framed in this manner, we think the answer is obvious and even more compelling than it was when we wrote in 2013.

More specifically, we believe that our proposal has several advantages compared with the present inaction in the Senate. First, senators who oppose action of any kind should be required to state openly their reasons for doing so. Ideally, any opposition to Committee or floor action should be able to state its reasons clearly in the form of a resolution on which the full body would vote. This would ensure that everyone’s position on the need for obstruction is on the record and available for the American people to assess. Second, our current proposal, like our last one, only envisions delay, not permanent blockage of a judicial nominee, as is now the case with over 50 of President Obama’s judicial nominees, including his nomination of Merrick Garland to the Supreme Court. As England recognized when it reformed the House of Lords in the Parliament Act of 1911, delay by a minority—or any Senate leader or faction—is perhaps an appropriate tool to slow the momentum

⁸ For a review of the constitutional arguments pertaining to the recent delays of judicial nominations, see Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010), <https://www.pennlawreview.com/online/158-U-Pa-L-Rev-PENNumbra-245.pdf>.

of a majority, but delay of a vote should not be permanent in a government that is supposed to reflect the will of the people.⁹

This proposal we believe is more than enough to prevent “extreme” nominees from being confirmed to the federal judiciary, including the Supreme Court. The most effective way of avoiding extreme appointments to the federal bench is not the filibuster, but the political process itself. Nobody has control over the conduct of judges after they are confirmed to lifetime positions, and yet the president will be held accountable if someone he puts on the bench makes judicial decisions that are outside the mainstream (or whose integrity, temperament, and judgment are seriously in question). The president will pay a political penalty for nominating unqualified or ideologues to the courts, not only at the polls, but in the much greater scrutiny that the Senate, the public, and the judgment of history are likely to give to his nominees, generally. Senators who vote to confirm extreme nominees or nominees whose ethics, judgment, and integrity are demonstrably deficient, and who defend such nominees in Committee and on the floor also will pay a political price if these nominees’ views depart from prevailing public opinion and the general qualifications we expect from judicial nominees from either party. In sum, the checks and balances of the political process are sufficient to keep extremists or otherwise unqualified people off the courts without any minority blockage power in the Senate and without inaction backed by a majority’s leadership.

We believe that a final benefit of this proposal is that it will improve the Senate institutionally. We think that this proposal, or one like it, is in the best traditions of the Senate. Just like the original agreement of the Gang of 14 and the agreement to bar anonymous holds of judicial nominations, our proposal provides a bipartisan solution to a problem that has hurt leaders from both parties and the judicial nominees whom they have supported.

We fully appreciate the tradition among senators to respect each other’s autonomy, and our proposal does not seek to diminish that autonomy. It asks senators to explain the principles and justifications motivating their votes to each other, the president, and judicial nominees; it establishes a presumption of merit to which every judicial nominee is entitled; and it ensures that there will be action on every judicial nomination and the likelihood of a fully staffed and functioning third branch of government.

IV. Conclusion

We will have to wait until after the November elections for any movement on any pending judicial nominations and until after the next presidential inauguration for any further meaningful reform of the confirmation process to be implemented. Until then, we can expect the Senate to continue to do what it has been doing: obstructing virtually all of the President’s judicial nominations, regardless

⁹ The Parliament Act of 1911, which was subsequently amended by the Parliament Act of 1949, allowed the House of Lords to delay, but no longer permanently block, bills from the House of Commons. The Act imposed a maximum delay by the House of Lords of one month on revenue bills and a maximum delay of one year on other bills. The United Kingdom continues to consider proposals for further reform of the House of Lords to bring it closer into alignment with the principle of majority rule.

of their merit and the damage done to the proper functioning of the Supreme Court and the third branch in general.

In 2013, we expressed deep-seated concern over the price to be paid in our constitutional system for the political games senators have been playing for years over judgeships, with both sides playing and often switching sides as their relative positions change. Since then we have seen a vacancy arise on the Supreme Court, powerful senators refuse to even hold a hearing and instead hold the President's nomination of Merrick Garland hostage to the next election, the chairman of the Senate Judiciary Committee excoriate not only President Obama but also Chief Justice John Roberts with the meritless accusation that they are "politicizing the courts" when in fact it is the Senate itself that has done so. The rule of political power drives the executive and legislative branches of our government, but the Constitution does not contemplate those two branches overrunning the third branch, which is supposed to stand for the rule of law.

The present impasse is unacceptable, with the real prospect of the status quo becoming a Senate opposed to fairly processing judicial nominations. If that persists, voters will undoubtedly continue to lose confidence in our republican form of government and increasingly believe that elected leaders are in it for themselves, rather than for the good of the country. Just as bad, the federal courts will become nothing more than spoils of political gamesmanship and will lose their capacity as an independent, fully functioning third branch of government that is above—not captive to—partisan politics. The proposal we have outlined here is our renewed attempt to turn that prospect aside and restore meaningful, bipartisan respect for an independent, fully functioning judiciary.

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