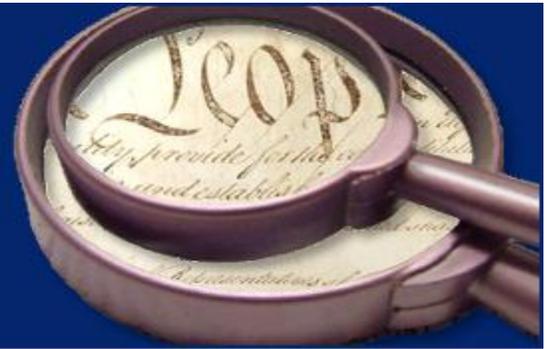




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Issue Brief

**“EXTRAORDINARY CIRCUMSTANCES:”
The Legacy of the Gang of 14 and
a Proposal for Judicial Nominations Reform**

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Michael Gerhardt* & Richard Painter**

On May 23, 2005, seven Republican and seven Democratic senators banded together to block a movement that would have changed the Senate forever. Because the Senate at that moment was otherwise almost evenly divided over a radical plan to revise the rules of the Senate to bar judicial filibusters without following the Senate’s rules for making such a revision, the Gang of 14,¹ as the senators became known, controlled the future of judicial filibusters. They each agreed not to support a filibuster of a judicial nomination unless there were “extraordinary circumstances.” For the remainder of George W. Bush’s presidency, the agreement held, and there were no filibusters of judicial nominations. But, in the past two and a half years, several developments have threatened the continued viability of the agreement of the Gang of 14: Five members of the Gang are no longer in the Senate;² Democrats took control of both the House and the Senate in 2006 and managed to hold onto a majority of seats in the Senate, albeit by a thinner margin, in 2010; and delays and obstruction of judicial nominations re-intensified after President Obama came into office. Perhaps most importantly, the remaining Republican members of the Gang of 14 have each found “extraordinary circumstances” justifying their support of some judicial filibusters.

Of these developments, the most confounding has been the uncertainty over the “extraordinary circumstances” that should justify judicial filibusters. At the time of their initial agreement, the Gang of 14 recognized that “each signatory must use his or her own discretion and judgment in determining whether [extraordinary] circumstances exist.”³ Shortly thereafter, the members discussed their understanding of the standard in the midst of the confirmation hearings on John Roberts’ nomination to be Chief Justice of the United States. Echoing the sentiments of their colleagues, both Senators DeWine and Lieberman declared that the standard was that “We’ll know it when we see it,”⁴ while Senator Graham said he believed that “ideological attacks are not an ‘extraordinary circumstance.’ To me, it would have to be a character problem, an ethics problem, some allegation about the qualifications of a person, not an

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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).

² Mike DeWine and Lincoln Chafee lost their reelection bids; John Warner retired from the Senate; President Obama appointed Ken Salazar as Secretary of the Interior; and Senator Byrd died in office.

³ Memorandum of Understanding on Judicial Nominations, United States Senate, (May 23, 2005), *available at* <http://www.c-span.org/pdf/senatecompromise.pdf>.

⁴ Sheryl Gay Stolberg, *Senators Who Averted Showdown Face New Test in Court Fight*, N.Y. TIMES, July 14, 2005, at A16, *available at* <http://nytimes.com/2005/07/14/politics/14gang.html>.

ideological bent.”⁵ However, in President Obama’s first two and a half years in office, his judicial nominations have been subjected to various delays and obstruction, including a successful filibuster upheld by each of the remaining Republican members of the Gang of 14. Almost 50 of the President’s judicial nominations are still pending before the Senate, including 12 to the federal courts of appeal, while 84 judicial vacancies remain, 31 of which are considered emergencies based upon, among other things, extremely high caseloads.⁶ We cannot square this state of affairs with what the Gang of 14 had originally wanted or with any credible, neutral standard of “extraordinary circumstances.” The Gang of 14 had hoped that their bipartisan compromise would facilitate judicial appointments and remove ideological differences as a ground of objection to a nomination as long as the nominee’s views were within the mainstream of American jurisprudence and he or she had sound character and no serious ethical lapses. Instead, judicial filibusters, among other means of obstruction within the Senate, have been persistently directed at judicial nominees on the basis of speculation and distortion. These tactics have prevented the federal judiciary from operating at full strength, and have made the process of judicial selection unpredictable for everyone concerned, including the White House, the Senate, and the nominees.

In this issue brief, we analyze how the standard of “extraordinary circumstances” should work in the United States Senate’s consideration of judicial nominations. In the first part, we briefly examine the origins and consequences of the Gang of 14’s agreement and the ensuing degradation of the judicial confirmation process. In Part II, we propose a standard that individual senators should consider following in assessing and voting on judicial nominations. In the final part, we show how the proposed understanding of “extraordinary circumstances” fits within the finest traditions of the Senate. While we understand the temptation to politicize judicial nominations can sometimes be strong, we hope that our proposed understanding of “extraordinary circumstances” is in the same spirit as the initial agreement of the Gang of 14 as well as the recent bipartisan agreement to abandon anonymous holds of nominations.⁷ We believe the proposal gives senators a useful, principled, neutral framework for discharging their constitutional responsibility of Advice and Consent and for preventing any further damage to the federal judiciary and the Constitution.

I. The Gang of 14 and Extraordinary Circumstances

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 nomination was the Senate’s 1997 rejection of President Clinton’s nomination of Ronnie White to a U.S. District Court judgeship in Missouri. Second, the full Senate could not take any action or table a nomination. For instance, the Senate tabled, or took

⁵ Charles Babington & Susan Schmidt, *Filibuster Deal Puts Democrats in a Bind*, WASH. POST, July 4, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/03/AR2005070301146.html>.

⁶ Administrative Office of the U.S. Courts, *Judicial Vacancies—Judicial Emergencies*, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>.

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

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. Third, the Senate Judiciary Committee could vote to reject a nomination or fail to take a final vote – or, for that matter, any other action, including holding a hearing – on a nomination. Indeed, this is what happened to two well-publicized nominations in the past: President George H.W. Bush's nomination of John Roberts to the U.S. Court of Appeals for the District of Columbia and President Clinton's nomination of Elena Kagan to that same court. Fourth, individual senators could exercise a temporary hold on a nomination either in committee or on the floor of the Senate. A hold might prove to be fatal to a nomination if it is done late in a legislative session or if various senators tag team or ask for a hold seriatim. For example, Senator Ron Johnson (R-WI) has recently exercised this prerogative to block two of President Obama's judicial nominations – Louis Butler to a U.S. District Court in Wisconsin and Victoria Nourse to the U.S. Court of Appeals for the Seventh Circuit. Last but not least, senators might filibuster a judicial nomination. The latter has been the least employed but most controversial method of obstruction.

The process of filibustering a judicial nomination – or any other matter – is relatively straightforward. The Senate Rules, in fact, provide for extended, protracted, and even endless debate over a disputed legislative matter. In particular, Senate Rule XXII provides, in pertinent part, that a debate on the Senate floor may only be stopped voluntarily or if at least 60 senators vote for cloture, i.e., to end debate.⁸ The rule does not specify which matters may be filibustered.

While filibusters of judicial nominations have been relatively rare, they have not been unprecedented. Perhaps the best known is the filibuster that effectively killed President Lyndon Johnson's nomination of Abe Fortas to be Chief Justice of the United States. More recently, Democrats in the Senate filibustered – and therefore blocked cloture on – almost a dozen of President George W. Bush's federal courts of appeal nominations.

Frustration over the inability to end the filibusters of Bush nominees, particularly the filibuster of the nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia, prompted the Senate Majority Leader at the time, Bill Frist (R-TN), to seriously consider deploying the so-called “nuclear option” to end such filibusters. The proponents of the “nuclear option” (or, as they called it, the “constitutional option”) maintained that filibustering judicial nominations was based on a misreading of Senate Rule XXII.⁹ They believed that this rule was never designed to allow for the filibustering of a judicial nomination and that the appropriate method for curbing such abuse was to get a formal Senate ruling on its propriety. To do this, they devised the following plan: First, after an unsuccessful effort to vote cloture on a judicial nomination, the Senate Majority Leader would ask the Parliamentarian of the Senate to rule on whether filibustering a judicial nomination was consistent with a proper reading of Rule XXII. Second, if anyone disagreed with the Parliamentarian's determination that such filibusters

⁸ See Rule XXII, “Precedence of Motions” included in *Standing Rules of the Senate*, as reprinted in S. Doc. No. 106-15, at 15-17 (2000).

⁹ For a detailed explanation and defense of the plan, see Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205 (2004).

were inconsistent with the Senate rules, it could be appealed to the Presiding Officer of the Senate, the Vice President of the United States. Third, the Vice President, who was, at the time, Dick Cheney, was expected to uphold interpreting Rule XXII not to allow a filibuster of a judicial nomination. The Vice President's ruling could in turn be appealed to the full Senate, which could affirm or overrule it by a majority vote. Since Republicans held a majority of the seats in the Senate in 2005, the expectation was that, as long as the vote followed party lines, Republicans would affirm the ruling of the Vice President. The plan was called the "nuclear option," because if a majority vote could be used to change the rule (as opposed to following the requirements spelled out in the rule itself), then a majority vote could be used to change any other rule or procedure in the Senate that a majority did not like. The only recourse that would have been left to Democrats would simply have been to walk out in protest or attempt in vain to use other Senate traditions to get their way, such as unanimous consent to schedule floor votes, which could just as easily be cast aside as the filibustering of judicial nominations. The upshot would have been that the Senate would have ceased to be the place it had always been – a place in which collegiality was the order of the day and each senator had as much power as any other to dictate the flow of events within the institution. Both sides would have blamed each other for the meltdown.

To prevent the meltdown, the Gang of 14 agreed to preserve Rule XXII, but the agreement turned on each member's understanding of when it might be appropriate to filibuster a judicial nomination in the future. Initially, the members all seemed to agree that ideological differences would not constitute extraordinary circumstances, though, in the confirmation proceedings for both Chief Justice Roberts and Justice Alito, signs of disagreement among the members on the meaning of the standard became apparent.

Since President Obama took office, there have been four cloture votes on filibusters of judicial nominations. Two cloture petitions were withdrawn after agreement was reached on the nominations,¹⁰ while three other cloture votes succeeded.¹¹ The single, unsuccessful cloture vote pertained to President Obama's nomination of Goodwin Liu to the U.S. Court of Appeals for the Ninth Circuit. Each member of the Gang of 14 that voted against the cloture motion explained his or her reasoning in a formal statement. For instance, Senator Graham explained that Liu's "outrageous attack on Justice Alito" in his testimony on Alito's nomination "convinced me that Goodwin Liu is an ideologue. His statement showed he has nothing but disdain for those who disagree with him."¹² Graham added that "Liu should run for elected office, not serve as a judge. Ideologues have their place, just not on the bench."¹³ Senator Collins explained that, "There is much to respect, admire, and like about Goodwin Liu, but his activist judicial philosophy precludes me from supporting him for a lifetime appointment on the Ninth Circuit Court of

¹⁰ Cloture petitions were withdrawn regarding the nominations of Thomas Vanaskie and Denny Chin.

¹¹ The Senate voted for cloture on the nominations of David Hamilton to the Seventh Circuit, Barbara Kennan to the Fourth Circuit, and John McConnell to the U.S. District Court in Rhode Island. Subsequently, the Senate confirmed each of these judges by wide margins.

¹² Meredith Shiner, *Senate GOP Filibusters Goodwin Liu*, POLITICO, May 19, 2011, available at <http://www.politico.com/news/stories/0511/55320.html>.

¹³ Press Release, Senator Lindsey Graham, Graham Opposes Cloture on Nomination of Goodwin Liu (May 19, 2011), available at http://lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=089a1186-802a-23ad-4a43-b18fb45c0956&Region_id=&Issue_id.

Appeals.”¹⁴ Similarly, Senator Snowe said that, “While the nominee is obviously exceptionally talented with a keen legal mind, after an exhaustive examination, regrettably I find that the nominee’s record reveals a depth and breadth of writings and statements – including testimony before the Judiciary Committee nomination hearing for Justice Samuel Alito – that, for me, raise serious and insurmountable concerns about the nominee’s ability to transition to a judicial appointment that requires objectivity.”¹⁵ Liu has since been unanimously confirmed to the California Supreme Court.

In the aftermath of the vote to deny cloture on the filibuster of the Liu nomination, the costs of the absence of any bipartisan agreement on the standard of “exceptional circumstances” have been obvious to everyone. First, President Obama has been left with no way of knowing or being able to predict what kinds of issues will be treated as “extraordinary circumstances” justifying judicial filibusters in the future. Though the President has tried to find consensus nominations, there are no impartial benchmarks for him to follow in avoiding “extraordinary circumstances,” and the temptation to obstruct may be too strong for many senators to resist, particularly as the year of the next presidential election nears. Second, well-qualified, well-meaning judicial nominees are subject to distortions of their records and their characters. President Obama has taken care to nominate to judgeships people whose qualifications and views of the law are well within the mainstream of American jurisprudence. The American Bar Association, among other organizations, has given the highest possible ratings for almost all of the nominations that have been obstructed, including that of Goodwin Liu. None of the President’s judicial nominees have threatened the basic doctrine of American law or shown resistance to following Supreme Court precedent, much less any serious ethical breaches. President Obama’s nominees have been widely admired by people from both parties, and all of them have come from the mainstream of practice, judicial service, or teaching. There is nothing “extraordinary” about the President’s judicial nominees except for their qualifications. Third, senators are at a loss to find critical common ground in the confirmation process. If a nominee’s philosophy is not extreme and poses no threat to basic doctrine or the proper functioning of American courts, and if a nominee has committed no serious ethical breaches, no other appropriate basis for objection to a nomination exists. Last but not least, the absence of an appropriate framework or standard for evaluating nominees hurts the federal judiciary. The under-staffing of many federal courts creates many judicial emergencies – over 30 of which persist, and the losers, in every instance, are the parties expecting their day in court but instead feeling the sting of the denial of justice.

¹⁴ Press Release, Senator Susan Collins, Senator Collins’ Statement on Goodwin Liu Nomination (May 19, 2011), available at http://collins.senate.gov/public/continue.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=09efbb1c-fa8a-2a7c-dc44-2a982debbaff&Region_id=&Issue_id=&CFID=95270487&CFTOKEN=91885486.

¹⁵ Press Release, Senator Olympia Snowe, Snowe Statement on Appellate Court Nominee (May 19, 2011), available at http://snowe.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=d8240ce6-5ae4-41c7-bb3c-814cef985c05&ContentType_id=ae7a6475-a01f-4da5-aa94-0a98973de620&Group_id=2643ccf9-0d03-4d09-9082-3807031cb84a.

II. A Proposal for Reform

Leading Members of the Senate, particularly Republican Members, have long called for reform of the process for confirmation of judicial nominees and an end to the filibuster. For example, in 2003 Senator John Cornyn (R-TX) published an article in the *Harvard Journal of Law and Public Policy* that clearly stated the case against filibusters. He discussed the history of filibusters, the weak justifications senators give for filibusters and the need for reform. He concluded:

“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.”¹⁶

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 on the floor to Liu’s nomination seem to be the kind of “old grudges” to which we thought Senator Cornyn had objected in his 2003 law review article.

We suggest a proposal that will realize Senator Cornyn’s stated objective of putting an end to the filibuster in all but the most exceptional circumstances:

First, 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, the Senate should continue to adhere to its agreement earlier this year to bar the use of anonymous holds – and to forego similar mechanisms – to delay any nomination.¹⁷ “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. In 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 consider the most appropriate reason for

¹⁶ John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 227 (2003).

¹⁷ See Kane, *supra* note 5.

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, 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 or down vote we expect would be the end of the process for almost all nominees.

Occasionally, some senators will believe that there are “extraordinary circumstances” that justify blocking a judicial nominee. One approach – and we believe a legitimate one – would be for those senators to agree to a procedure in which they could simply vote “no” and still allow the nominee to be confirmed if the majority of the Senate is likely to vote “yes.” Another legitimate approach would be for the objecting senators to be permitted to introduce a resolution stating with specificity their objections to the nomination, and if the resolution received a certain number of affirmative votes (at least 45) from other senators, it would delay a confirmation vote on the nominee for a period of time, perhaps until the next Congress is seated, after which there would be an up or down vote and no further delay if the President has resubmitted the same nomination. This delay would ensue even if a majority of senators voted against the delaying resolution, but there would be an end in sight as a similar resolution could not be introduced to further delay the same nominee in the next Congress. This procedure furthermore would force the objecting minority of senators to clearly state their objections to the nomination and to convince at least a substantial minority of their colleagues to vote in support of the same objections. Senators opposing the nomination for other reasons, but unwilling to vote in favor of the stated objections, would not be counted toward the number of votes required for delay unless these senators were to introduce their own resolution and convince the requisite number of senators to vote in favor of it. We believe the best mechanism for implementing our suggested standard is through an agreement between the majority and minority leaders of the Senate. This is the same mechanism that was recently used in fixing the problem with anonymous holds over judicial nominations.

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.¹⁸ A debate over their constitutionality misses the point, perhaps deliberately so. The future of delay turns instead 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.

More specifically, we believe that our proposal has several advantages compared with the present situation. First, we contemplate that more than 40 Senators be required to delay a nominee. We have to choose a somewhat arbitrary number, but any number that departs from a

¹⁸ For a recent 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. 245 (2010), available at <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf>.

majority vote is an arbitrary number, particularly when the Constitution specifically contemplated supermajority votes in the Senate in some situations but not in this situation (e.g., conviction after impeachment and ratification of a treaty require a 2/3 vote). The more a number falls below 50%, the more arbitrary the number is for defining the size of a minority that will be empowered to block the will of the majority (and the will of the President). Forty-five Senators, at least, should be required, and perhaps more. Second, when the minority frustrates the will of the majority, each member of the minority should be required to state openly his or her reasons for doing so. Ideally, the minority 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. Third, our proposal only envisions delay, not permanent blockage of a nominee as is now the case with the filibuster. As England recognized when it reformed the House of Lords in the Parliament Act of 1911, delay by a minority is perhaps an appropriate tool to slow the momentum 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.¹⁹

This proposal we believe is more than enough to prevent “extreme” nominees from being confirmed to the federal judiciary. 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. The President will pay a political penalty for nominating left-wing or right-wing ideologues to the courts, not only at the polls, but in the much greater scrutiny that the Senate and the public is likely to give to his other nominees. Senators who vote to confirm extreme nominees 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. In sum, the checks and balances of the political process are sufficient to keep extremists off the courts without any minority blockage power in the Senate, and certainly without a filibuster supported by as few as 41 Senators.

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 recent 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 only asks senators to explain the principles and justifications motivating their votes to each other, the President, and judicial nominees.

¹⁹ 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.

IV. Conclusion

We probably will have to wait until January 2013 for any reform of the confirmation process to be implemented, and only then if its basic outline can be agreed upon before it becomes clear who will win the 2012 presidential election. Until then, we can expect the Senate to continue to do what it has been doing: confirming some of the President's nominees but refusing to hold a hearing on or filibustering others. As the presidential election approaches, we should expect such strategic behavior to increase as Republicans hope to regain the White House, though we hope Senate leaders could reach accord in the meantime to forego filibusters of well-qualified nominees who do not threaten well-settled doctrine and have the requisite integrity.

There is, however, a price for these political games, which are played by both parties' often switching sides as their relative positions change. Voters will 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. The proposal we have outlined here is our attempt to change that.