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Majority Rule and the Future of Judicial Selection

Richard W. Painter

University of Minnesota Law School, rpainter@umn.edu

Michael J. Gerhardt

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MAJORITY RULE AND THE FUTURE OF JUDICIAL SELECTION

MICHAEL J. GERHARDT* & RICHARD W. PAINTER**

Introduction	263
I. The Rising Power of the Executive Branch.....	268
II. The Rise of Majoritarian and Other Obstruction.....	270
III. A Modest Proposal for Reform.....	275
IV. Restoring Confidence in the Judicial Appointments Process.....	280
Conclusion.....	283

INTRODUCTION

2016 and 2017 were historic years for judicial selection. It began on February 12, 2016 with the unexpected death of the Supreme Court’s most senior justice and most impassioned conservative, Justice Antonin Scalia.¹ In response, Senate Majority Leader Mitch McConnell (R-KY) announced for the first time ever the refusal not to consider a nomination made by the president before it was even made.² To many people’s surprise, Senator McConnell then successfully coordinated the longest delay of a Supreme Court nomination in history, blocking any Senate action on President Barack Obama’s nomination of Judge Merrick Garland of the United States Court of Appeals for the District of Columbia to take the vacated Supreme Court seat.³ By the end of 2016, Senator McConnell and other Republican leaders in the Senate blocked fifty-nine of President Obama’s nominees to the federal bench from receiving a confirmation vote in the Senate, thirty of whom had

*Samuel Ashe Distinguished Professor of Constitutional Law at the University of North Carolina in Chapel Hill.

**S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

1. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0 [https://perma.cc/9T8S-SJBN].

2. Carl Hulse & Mark Landler, *After Antonin Scalia’s Death, Fierce Battle Lines Emerge*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-death-cuts-fierce-battle-lines-in-washington.html> [https://perma.cc/BHT2-MNB4].

3. Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html> [https://perma.cc/DG9P-KXNK].

cleared the Senate Judiciary Committee.⁴ As a result of this obstruction, President Donald J. Trump, who won the presidential election in November 2016, had the prospect upon entering office of being able to fill more than 100 lower court nominations, as well as at least one Supreme Court nomination.⁵ President Obama left office with a lower rate of confirmation success for his judicial nominations than either Presidents Bill Clinton or George W. Bush had, and was prevented from securing, for the first time since the late 1960s, a majority of Democratic-appointed justices on the Supreme Court. A little less than a year after Justice Scalia's death, President Trump nominated Tenth Circuit Judge Neil Gorsuch to the Supreme Court, fulfilling his campaign pledge to appoint someone "in the mold of Justice Scalia" to the late justice's seat.⁶ Indeed, Judge Gorsuch was one of the twenty-one people whom President Trump, as a candidate, had told the public whom he would consider for Justice Scalia's seat.⁷ Democratic Senators responded with a filibuster,⁸ which under longstanding Senate rules would have blocked a floor vote on the nomination unless sixty Senators were to vote to invoke cloture.⁹ Fifty-two Republican senators voted to change the Senate's understanding of its rules to disallow filibusters of Supreme Court nominees (the so-called "nuclear option"), a step which in turn reduced the required vote to a simple majority.¹⁰ Judge Gorsuch was then confirmed and took his seat on the Court.¹¹

4. Michael Collins, *Trump Victory is the End of the Line for Obama Judicial Nominees*, USA TODAY (Nov. 11, 2016, 11:00 AM), <https://www.usatoday.com/story/news/politics/2016/11/11/trump-victory-end-line-obama-judicial-nominees/93615006/> [https://perma.cc/6PTA-6YDZ].

5. Phillip Rucker & Robert Barnes, *Trump to Inherit More than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html?utm_term=.8fa073ddc800 [https://perma.cc/GG79-EEAK].

6. Matt Ford, *Trump Nominates Neil Gorsuch for the U.S. Supreme Court*, ATLANTIC (Jan. 31, 2017), <https://www.theatlantic.com/politics/archive/2017/01/gorsuch-trump-supreme-court/515232/> [https://perma.cc/UZY4-S2XE].

7. Press Release, Donald J. Trump for President, Inc., Donald J. Trump Finalizes List of Potential Supreme Court Justice Picks (Sept. 23, 2016), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks> [https://perma.cc/2K6S-T3Ct].

8. Tessa Berenson, *Senator Jeff Merkley Protests Neil Gorsuch with 15-Hour Speech*, TIME (Apr. 5, 2017, 2:10 PM), <http://time.com/4726435/jeff-merkley-filibuster-neil-gorsuch/> [https://perma.cc/UM8R-YM7T].

9. Charlie Savage, *The Senate Filibuster, Explained*, N.Y. TIMES (Apr. 3, 2017), <https://www.nytimes.com/2017/04/03/us/politics/filibuster-supreme-court-neil-gorsuch.html> [https://perma.cc/Q28Z-8EGR].

10. Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017),

The pattern in the judicial confirmation process over the last few decades has been clear: the Senate, including the minority party in the Senate, aggressively exercises its “[a]dvice and [c]onsent” function provided in Article II of the Constitution.¹² Majoritarian obstruction is only a part of the story. Consistent with the Senate’s design, rules, and traditions,—at least before the “nuclear option” was deployed in 2017—it has remained much easier to defeat a nomination rather than to approve it. In fact, judges without the support of more than sixty senators rarely are confirmed anymore. That has been the status quo for over twenty-five years, and the direction, even with Republicans controlling both ends of Pennsylvania Avenue, is toward a more aggressive Senate finding fault and generally refusing to defer to the president’s choice of judicial nominees, especially those for the Supreme Court. How much the new understanding of the Senate rules—and the possibility of confirming a judge or justice with a simple majority vote—will change this remains to be seen.

To be sure, the most obvious—but not only form of—obstruction is a function of majority rule. None of the mechanisms adopted within the Senate, more than a decade ago, to prevent a minority within the body, even a substantial one, from stifling the judicial confirmation process, address this newest form of obstruction. In 2005, the Gang of 14¹³—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 “extreme circumstances.”¹⁴ Unfortunately, within a few years, several of the brokers of the deal left the Senate (and the Gang), the definition of what constitutes “extreme 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

<https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [<https://perma.cc/EJ3Z-CPLM>].

11. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/KZ6D-D7HJ>].

12. U.S. CONST. art. II, § 2, cl. 2.

13. 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). Ken Rudin, *Judging Alito: The Gang of 14 Factor*, NAT’L PUB. RADIO (Jan. 4, 2016, 10:57 AM), <http://www.npr.org/templates/story/story.php?storyId=5080836> [<https://perma.cc/J7JU-GPCU>].

14. *Id.*

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 sixty to a simple majority within the Senate.¹⁵ It was that step that set the stage for the Republicans to go even further in 2017 and extend the simple majority rule to Supreme Court nominees (the “nuclear option”).

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 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. Coupling this majoritarian power with some mechanisms—such as the blue slip process, allowing single senators to block judicial nominations—has helped to produce historically high numbers of failed judicial nominations and unfilled judicial vacancies, at least thirty-five of which are considered emergencies based upon, among other things, extremely high caseloads.¹⁶ With Senate Republican’s unprecedented refusal to act on Judge Garland’s nomination, the Supreme Court was understaffed for over a year, with only eight justices, and thus was prone to avoid taking—or being able to resolve in any clear, enduring way—significant constitutional disputes over whose resolution the justices might have had 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 disastrous consequences for the federal judiciary including the Supreme Court, the Constitution, and the nation.

Indeed, blocking Judge Garland’s nomination to the Court broke the patterns of more than 100 years in which the Senate held confirmation hearings for all but two Supreme Court nominees (who had withdrawn their nominations prior to their hearings) and of the Senate’s approving every Supreme Court nominee who had strong

15. Paul Kane, *Reid, Democrats Trigger ‘Nuclear Option;’ Eliminate Filibusters on Most Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?utm_term=.0e4b399841b0 [https://perma.cc/R3ZM-YEBA].

16. *Administrative Office of the U.S. Courts, Judicial Vacancies—Judicial Emergencies*, U.S. CTS. (Feb. 19, 2017), <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> [https://perma.cc/T22M-DCVH].

professional credentials and a judicial ideology within the mainstream of American constitutional law.¹⁷ The successful obstruction of perfectly qualified—and much needed—judicial nominees will become a dangerous precedent, breaching long-standing norms in the confirmation process¹⁸ and opening an era in which payback will likely become the new normal in the judicial selection process.

In 2017, this payback scenario is exactly what came to pass. It started with the unprecedented way in which President Trump introduced Judge Gorsuch as being “in the mold” of Justice Scalia and Judge Gorsuch’s praise of Justice Scalia on the evening of his nomination to the Court, deliberately making the late Justice the metric of the appointment to the Court. This in turn energized the Democratic filibuster of the Gorsuch nomination, which then led the Republicans to exercise the “nuclear option” to get him confirmed with a simple majority. Now, with President Trump sinking precipitously in the polls in his first months in office,¹⁹ Democrats are contemplating future gains in the Senate and then the White House. It remains to be seen whether the post-nuclear-option rule of confirming judges and justices by a simple majority will streamline the process. In some instances, newly emboldened majorities will use their power to ram through nominees, as they did with Judge Gorsuch. In other instances, they will use their majority power and control over the Senate Judiciary Committee to refuse to even give a nominee a hearing and a chance for a vote, as Senate Republicans did with Judge Garland. Given the tenor of what happened in 2016 and 2017, the atmosphere will likely be yet more partisan and bitter. If the victor in this latest round of the battle in the Senate over the Court—Justice Gorsuch—veers to the far right of the ideological spectrum to replicate the late Justice Scalia, these sharp political divisions in the Senate confirmation process will very likely spill over to the Court itself.

In this Article, we analyze the dual developments and consequences of the rising power of the executive branch and unprecedented Senate obstruction of judicial nominations. We suggest a modest proposal for facilitating a process that would give nominees the hearings they deserve and increase the likelihood that each level of the

17. See Geoffrey R. Stone, *The Supreme Court Vacancy and the Constitutional Responsibilities of the Senate*, HUFFINGTON POST (Feb. 24, 2016, 4:43 PM), http://www.huffingtonpost.com/geoffrey-r-stone/the-supreme-court-vacancy_b_9310498.html [https://perma.cc/UAS5-XYW6].

18. See *infra* note 25 and accompanying text.

19. *Base Erodes As Trump Drops To New Low Scores, Quinnipiac University National Poll Finds; Voters Say 60 - 35 Percent President Is Not Honest*, QUINNIPIAC U. (Mar. 22, 2017), <https://poll.qu.edu/national/release-detail?ReleaseID=2442> [https://perma.cc/A724-8MN7].

federal judiciary will function at full strength. Most important is the imperative that each nominee receive a prompt hearing and an up-or-down vote so, if the majority chooses to reject the nominee, the president can nominate someone else to fill the vacancy. In the first Part, we briefly analyze the presidency's expanding power and corresponding need for an independent judiciary as a check against its expansion at the expense of the powers of the other branches. In Part II, we analyze the different mechanisms within the Senate that have effectively produced a higher threshold than mere majority rule on judicial nominations, recognizing that the 2017 use of the "nuclear option" to derail filibusters of Supreme Court nominees has shifted the balance of power toward the party with majority control of the Senate. In Part III, we propose a standard for the Senate to follow in its consideration of judicial nominations, namely, for all 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 RISING POWER OF THE EXECUTIVE BRANCH

The obstruction of President Obama's judicial nominations was in part a response to another growing trend—the rise of a powerful executive branch, with the President as its singular leader, that increasingly seeks to go its own way without the consent of Congress and often testing or pushing the boundaries of the Constitution.

Over the past twenty-five years or more, several developments have led the executive branch—and particularly the presidency—to consolidate if not to extend its power, including constitutional indeterminacy, historical practices (in which presidents tend to build upon the authorities of their office), institutional design (which enables the presidency to move more energetically and expeditiously than Congress), and the constitutional design facilitating legislative inaction.²⁰ The more aggressive executive needs to be checked by

20. On these other developments helping to spur the presidency into perpetually trying to expand its powers or stretch constitutional boundaries, often at the

Congress, the courts, and the public. Otherwise, there could be a serious threat to the separation of powers set forth in the Constitution and individual liberty. Without weighing in on the merits of one side or the other of this debate, we can identify some of the hot points of contention in recent history—for example, President George W. Bush’s preemptive use of military force in Iraq, increased domestic surveillance, aggressive interrogation techniques (such as waterboarding), and executive orders in response to the terrorists attacks against the United States on September 11, 2001; and President Obama’s executive actions on immigration and environmental regulation, aggressive use of recess appointments, increased domestic surveillance, shifting Justice Department priorities on drug enforcement, and refusal to defend the constitutionality of the Defense of Marriage Act—which President Bill Clinton had signed into law.²¹ As President Trump entered the White House in January 2017, many people expressed concerns that some of his most prominent campaign pledges—such as banning or profiling Muslim immigrants—might be unconstitutional²² and that his administration might not handle conflicts of interests appropriately.²³ President Trump’s first few months in the White House—including an immigration ban that was substantially revised after having been rejected in the courts and that still faces legal hurdles²⁴—have shown that executive power is as big a concern now as ever before.

expense of other branches, see Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649 (2016).

21. On the extent to which the Constitution has facilitated these and other aggressive exercises of power by the executive, see WILLIAM G. HOWELL & TERRY MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY* (2016). See also DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION’S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015).

22. Richard Primus, *Is Trump’s New Travel Ban Unconstitutional?*, *POLITICO MAG.* (Mar. 6, 2017), <http://www.politico.com/magazine/story/2017/03/is-trumps-new-travel-ban-constitutional-214881> [<http://perma.cc/H2DX-TKJV>].

23. Jeremy Venook, *The Trump Administration’s Conflicts of Interest: A Crib Sheet*, *ATLANTIC* (Jan. 18, 2017), <https://www.theatlantic.com/business/archive/2017/01/trumps-appointees-conflicts-of-interest-a-crib-sheet/512711/> [<https://perma.cc/5NWU-T7CV>]; *Trump’s Conflicts of Interest*, *SUNLIGHT FOUND.*, <https://sunlightfoundation.com/tracking-trumps-conflicts-of-interest/> [<https://perma.cc/GCK6-MW4P>] (last visited Apr. 19, 2017).

24. Milton J. Valencia, *Healey, 15 Other State AGs, Join Lawsuit Against Trump Ban*, *BOS. GLOBE* (Feb. 16, 2016), <https://www.bostonglobe.com/metro/2017/02/06/healey-other-state-ags-join-washington-lawsuit-challenging-trump-immigration-ban/17xYS2jGycNpi87tUYZAtM/story.html> [<https://perma.cc/7RP4-VVKC>].

When there are concerns about the legality of executive action or overreach and the even-handed and proper enforcement of the law (in addition to aggressive lawmaking on the part of Congress), the courts must be open for business. The courts must decide whether what the president does is consistent with duly enacted laws passed by Congress and with the Constitution. Giving the president too much influence over the composition of the courts puts the “fox in charge of the hen house,” and, if there were an authoritarian president, could seriously endanger the rule of law. Recognizing this, the Senate has increased its assertiveness in the confirmation process accordingly—advising the president against certain nominations and withholding its consent in protest. The Senate also has recognized that senators of the president’s political party are often loath to oppose him or her (we do not know whether that will change with President Trump) and thus has built into the confirmation process a robust role for both parties and an arguably de facto supermajority requirement for confirmation in almost all cases.

II. THE RISE OF MAJORITARIAN AND OTHER OBSTRUCTION

While a majority vote of the Senate is the only way for a judicial nomination to be confirmed,²⁵ there are many ways to defeat one.²⁶ First, the full Senate could vote to reject the nomination. In fact, the Senate has rejected nearly one in five Supreme Court nominations,²⁷ and the Senate has rejected many other judicial nominations. The most recent instance in which the Senate voted to reject a lower court nomination was the Senate’s 1997 rejection of President Clinton’s nomination of Ronnie White to a United States District Court judgeship in Missouri.²⁸ Second, the full Senate could not take any action or table

25. Presidents, beginning with George Washington, have also made recess appointments of judges, including several to the Supreme Court. LOUIS FISHER, CONG. RESEARCH SERV., RL31112, RECESS APPOINTMENTS OF FEDERAL JUDGES 14 (2001). These appointments lapse at the end of the next legislative session. *See* U.S. CONST. art. I, § 2.

26. On these different mechanisms for delay, see generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000).

27. *Supreme Court Nominations: Present-1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> [https://perma.cc/QK2S-TJ5Z] (last visited Apr. 19, 2017).

28. Sarah Binder, *Ronnie White Has Been Renominated: Third Time’s a Charm?*, WASH. POST (Nov. 19, 2013), https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/19/ronnie-white-has-been-renominated-third-times-a-charm/?utm_term=.735e16a5c187 [https://perma.cc/5MPK-4J3H].

a nomination.²⁹ However, until the Garland nomination in 2016, with respect to the Senate's doing this regarding 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 Andrew Jackson's nomination of Roger Taney as an Associate Justice of the Supreme Court. (President Jackson later successfully nominated Taney to be Chief Justice of the United States.³⁰)

Moreover, up until the 2017 action by Senate Republicans to exercise the "nuclear option," a minority in the Senate had the ability to filibuster a Supreme Court nomination, which, in fact, had been formally done only once—to prevent then-Justice Abe Fortas from becoming Chief Justice,³¹ an action that, at the time, 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 or her caucus, to allow any action—in a committee or otherwise—on a nomination.

Besides making Judge Garland the only Supreme Court nominee, since 1900, who had not withdrawn and was denied confirmation hearings,³² the ramifications of the strategy will likely be costly for both

29. GERHARDT, *supra* note 26, at 141.

30. *Id.* at 10. 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.

31. Ben Jacobs et al., *Senate Invokes Historic 'Nuclear Option' Rules Change to Confirm Gorsuch*, *GUARDIAN* (Apr. 6, 2017, 12:54 PM), <https://www.theguardian.com/us-news/2017/apr/06/senate-nuclear-option-neil-gorsuch-supreme-court> [https://perma.cc/7J9H-JGBL].

32. See Geoffrey R. Stone, *The Republican Assault on the Integrity of the Supreme Court*, *HUFFINGTON POST* (Nov. 28, 2016, 11:54 PM), http://www.huffingtonpost.com/entry/the-republican-assault-on-the-integrity-of-the-supreme_us_583bb36ce4b0a79f7433b82e [https://perma.cc/N6EE-FC8M]; Geoffrey R. Stone, *The Senate Republicans, Merrick Garland, and the Lessons of History*,

the short- and long-terms. First, the inaction was not grounded in a defensible principle and does not do the Senate credit. The only other two Supreme Court nominees not to have had hearings on their nominations within the last 100 years withdrew from further consideration because of questions about their integrity or qualifications. In Judge Garland's case, no one questioned his credentials or qualifications, and his defeat undoubtedly will go down as not only a transparently political act on the part of the majority but also as a precedent upholding a majority's entitlement to paralyze the Supreme Court selection process until or unless a president to its liking comes into office.

Second, the Senate leadership's and President Trump's emphasis that Justice Scalia's successor had to be "in his mold" was a deliberately transparent attempt to make Justice Scalia the metric for the appointment. The question, after Justice Gorsuch's confirmation, is whether the Senate leadership will attempt to make Justice Scalia the metric not only for Judge Gorsuch's nomination and confirmation but also any subsequent nomination to the Court. Any such effort runs into the problem that the Constitution does not reserve seats only for the nominees of one political party. It does not reserve seats based any particular ideological commitments, including to original meaning.

Third, the Senate's obstruction undoubtedly weakened the courts as a third, independent branch, for it left the Court with only eight justices for over a year and thus prone to four-to-four decisions that have had no legal significance. If subsequent obstruction goes further to block other Supreme Court vacancies from being filled, the Court will again become under-staffed and incapable of performing the unique functions that the Constitution had vested in "one" Supreme Court. Furthermore, if, at a time when there is an unfilled vacancy on the Court, one of the remaining justices has to be recused 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 four-three 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.

Fourth, well-qualified, well-meaning judicial nominees at every level are subject to distortions of their records and their characters.

HUFFINGTON POST (June 2, 2016, 9:53 AM), http://www.huffingtonpost.com/geoffrey-r-stone/the-senate-republicans-merrick-garland_b_10258520.html [<https://perma.cc/74UT-Y38T>]; Geoffrey R. Stone, *The Supreme Court and the Republican Coup D'etat*, HUFFINGTON POST (March 19, 2016, 6:19 PM), http://www.huffingtonpost.com/geoffrey-r-stone/the-supreme-court-and-the_b_9508068.html [<https://perma.cc/3LYH-FN88>].

President Obama—like Presidents Bill Clinton and George W. Bush before him—in all or almost all instances took care to nominate to judgeships people whose qualifications and views of the law were within the mainstream of American jurisprudence. The American Bar Association, among other organizations, gave the highest possible ratings for virtually all of the Obama nominations that were obstructed, including that of Merrick Garland to the Supreme Court.³³ None of these judicial nominees threatened the basic doctrine of American law or showed 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. Hopefully, President Trump will continue this pattern of selecting mainstream nominees for the courts.

Fifth, the obstruction of President Obama’s judicial nominees, including Judge Garland for the Supreme Court, established 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 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.

The successful obstructions of Judge Garland’s Supreme Court nomination and dozens of President Obama’s lower court nominations eviscerated the long-standing norms of the Senate’s providing hearings on—and, indeed, confirming—Supreme Court nominees, even in presidential election years, regardless of whether the same party controlled the White House and the Senate.³⁴ The breaches of these

33. Nolan D. McCaskill, *American Bar Association: Garland ‘Well Qualified’ for Supreme Court*, POLITICO (June 21, 2016), <http://www.politico.com/story/2016/06/merrick-garland-american-bar-association-224593> [<https://perma.cc/43HU-LA5L>].

34. See, e.g., Steven Livinsky & Daniel Ziblatt, *Is Donald Trump a Threat to Democracy?*, NEWS & OBSERVER (Dec. 23, 2016, 5:57 PM), <http://www.newsobserver.com/opinion/op-ed/article122752969.html> [<https://perma.cc/4GTH-F9DX>] (“Yet norms of partisan restraint have eroded in recent decades . . . Republicans’ 2011 refusal to raise the debt ceiling, which put America’s

norms did more damage than did blocking the particular nominations made by President Obama. They provide an incentive for another Senate majority to do the same thing—or worse—in the future. If, for example, the Senate should shut down for any business on a pending Supreme Court vacancy or nomination during a presidential election year, the problem is there is always another such election around the corner. In 2016, President Obama nominated Judge Garland nearly seven months before the presidential election, but it is not hard to imagine a different—or maybe the same—majority in the Senate declaring the exact same intention years ahead of a mid-term or presidential election. Indeed, we do not have to imagine this: several senators in 2016 threatened that, if Hillary Clinton were elected president, they would not vote to confirm any Supreme Court nominations she would have made.³⁵ President Trump may now face similar opposition from Senate Democrats, particularly if he goes out of his way to provoke them by saying that his nominees have to fit the mold of the Court's most extreme conservative justices.

A norm only matters if its violation is penalized, but there has been no penalty apparent here. To the contrary, Republican leaders' obstructionist tactics were rewarded with the opportunities for a Republican president and a Republican Senate to fill the judgeships President Obama was not allowed to fill, including a seat on the Supreme Court. As a result, Republicans might be incentivized to do the same thing again or Democrats might, once they regain control of the Senate, retaliate against President Trump or any other Republican president and use the same precedent to justify their obstruction. Both parties now have strong incentives to treat judgeships as nothing more than political spoils, a new and disturbing prospect with no apparent limit in sight.

A final but troubling development arising from the obstruction of both the Garland nomination and dozens of other judicial nominees is the altered bar it establishes for judicial confirmations in the future. Instead of having an express supermajority requirement for confirmation of judges or some other well-articulated check on a president's ramming through a nominee only with the support of a bare

credit rating at risk for partisan gain, and the Senate's refusal this year to consider President Obama's Supreme Court nominee – in essence, allowing the Republicans to steal a Supreme Court seat – offer an alarming glimpse at political life in the absence of partisan restraint.”).

35. See David A. Graham, *What Happens If Republicans Refuse to Replace Justice Scalia? Senators Ted Cruz and Richard Burr Are Arguing that if a Democrat Wins the Election, the Senate Should Refuse to Confirm Anyone*, ATLANTIC (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/> [https://perma.cc/XG9F-XPYM].

majority in the Senate, senators have achieved this same objective by resorting to tactics that bring chaos, unpredictability, and delay to the process—including such means as filibusters (which have been effectively precluded by a majority vote after Senate Republicans exercised the “nuclear option” in 2017), blue slips, protracted hearings, delayed hearings or committee votes, holds, delayed floor action, and other tactics aimed at slowing if not stymying the process. The result is that the White House often will not have the information it needs (for example, how many senators the president must actually win over) to secure a confirmation, the support the White House envisioned or on which it evaporated eroded or fell apart, or the White House will become indecisive or uncertain about which judicial nominations are likeliest to succeed (or which will fail and why). Also, numerous judicial nominees end up waiting in limbo for months or much longer, even years, for final actions on their nominations; vacancies go on indefinitely and are unfilled in spite of the merits of the president’s nominees.

While politics has always been a significant element in the confirmation process for judges, the process has become increasingly infused with partisan politics, and public confidence in government—particularly in the Congress—falters and erodes. More conflict is not the answer. The White House will sometimes be tempted to nominate persons outside of the mainstream of constitutional or legal thought in order to provoke a fight with the Senate (or some senators). This is particularly tempting because the senators themselves look bad when they are blocking nominations for reasons that lack credibility. But, picking fights not only extends the obstruction of judicial nominations and weakening of the third branch but also lowers further the low esteem with which people view the authorities which the Constitution vests with the responsibility of providing advise and consent on judicial nominations—in good faith. The critical question is whether, or to what extent, it is possible to restore confidence in a process that virtually every commentator and numerous participants regard as broken.

III. A MODEST 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 in 2013 and of Supreme Court nominations in 2017 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 (R-TX) 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.³⁶

Unfortunately, Senator Cornyn changed course and, in 2011, voted to support a filibuster of Goodwin Liu's nomination to the Ninth Circuit.³⁷ He also later supported the Senate's inaction on President Obama's nomination of Judge Garland to the Supreme Court³⁸ as well as on joined with Texas' other senator, Ted Cruz (R-TX), in delaying the overwhelming majority of President Obama's nominations to judgeships in the State of Texas.³⁹ In fact, most of the objections made to stall the Garland nomination—and almost all lower court nominations—seem to be variations on the kind of “old grudges” to which we thought that Senator Cornyn had objected more than a decade ago.

To be sure, neither political party has perfectly clean hands when it has come to judicial selection. Democratic senators, including Joseph Biden when he was the Chair of the Senate Judiciary Committee,

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

37. Sean Lenggell, *Republican Filibuster Blocks Liu for Appeals Court*, WASH. TIMES (May 19, 2011), <http://www.washingtontimes.com/news/2011/may/19/obama-judicial-nominee-goodwin-fails-clear-senate/> [<https://perma.cc/SD6Z-7DK3>].

38. Katie Leslie, *Cornyn Stands Ground, Vows Fight on Supreme Court Nominee*, DALLAS NEWS (Mar. 16, 2016), <https://www.dallasnews.com/news/politics/2016/03/16/sen-cornyn-responds-to-scotus-announcement> [<https://perma.cc/R8VP-FA6K>].

39. *John Cornyn and Ted Cruz's Texas: A State of Judicial Emergency*, ALLIANCE FOR JUST. (Sept. 6, 2016), <http://www.afj.org/our-work/issues/judicial-selection/texas-epicenter-of-the-judicial-vacancy-crisis> [<https://perma.cc/C3Kx-4ZWZ>].

blocked a number of lower court nominations in an election year,⁴⁰ perhaps most notably President George H.W. Bush's nomination of then-Deputy Solicitor General John Roberts to a seat on the United States Court of Appeals for the District of Columbia.⁴¹ Fast forward eight years from that, the Judiciary Committee, then led by Republican Senator Orrin Hatch, shut down hearings on President Clinton's nomination of Elena Kagan to the same lower court to which President George H.W. Bush had nominated Judge Roberts. Merit was not the issue in either of these cases, but political gamesmanship was, and these are just two of the dozens of qualified judicial nominees who never received hearings or votes in past decades.

Some senators undoubtedly would have defended blocking Judge Garland and many other of President Obama's judicial nominees on the ground that these nominees lacked the proper judicial ideology. Other senators may now do the same with respect to judicial nominees of President Trump. While our concern is not with developing (or defending) a particular judicial ideology in this Article, we hasten to observe that, for many senators, there is, in effect, only one way to function like a judge and they can recognize it in the reasoning and outcomes of a lower court judge's decisions, rulings, and speeches. We are less sure that this is anything other than a smokescreen to enable presidents or senators to appoint judges who will reach the results they like.

Consider, for instance, two different candidates for a Supreme Court seat, each with outstanding law school records, prestigious clerkships, and significant practice and judicial experience, but they have different statistics in employment discrimination cases. Assume one had ruled against employers in roughly half the employment discrimination cases that came before her and the other had ruled for employers in over sixty percent of the cases that came before him. It is unfortunate, we think, that much would likely be made of these statistical differences, especially since many non-ideological factors could easily explain them—for instance, the candidates were not faced with the same claims (indeed, as appellate judges their focus should have been solely on the law in these cases), the judges might have been

40. Mike DeBoins, *Joe Biden in 1992: No Nominations to the Supreme Court in an Election Year*, WASH. POST (Feb. 22, 2016), https://www.washingtonpost.com/politics/joe-biden-in-1992-no-nominations-to-the-supreme-court-in-an-election-year/2016/02/22/ea8cde5a-d9b1-11e5-925f-1d10062cc82d_story.html?utm_term=.11dec45bd406 [https://perma.cc/693P-DCA2].

41. Marc A. Thiessen, *How Biden Killed John Roberts's Nomination in 1992*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/opinions/how-biden-killed-john-robertss-nomination-in-92/2016/02/25/c17841be-dbd1-11e5-81ae-7491b9b9e7df_story.html?utm_term=.f5f60a1efcbc [https://perma.cc/AT9N-BSEA].

applying or following different Supreme Court precedent (depending on the timing and nature of the claims involved), and the law of their different circuits (presuming they were circuit judges) might have been different or settled in different ways. Neither of us would take seriously the overheated rhetoric directed at one or the other of these candidates based on the statistical differences in the outcomes of employment discrimination cases, the preoccupation with ideology among our national leaders leads to disturbing distortions, or over-simplifications, of judicial records all the time.

In suggesting a proposal to restore confidence in the judicial selection process, we emphasize two things. First, we are not trying to change the status quo by reducing the role of the Senate, including the minority, in the confirmation process. Changing the status quo by reducing the robust “advise and consent” role would be a threat to the intricate system of checks and balances established in the Constitution and also would not be supported in the Senate, which already has grave concerns about executive over-reaching.

For example, reducing the “advise and consent” role—or concentrating it solely in the hands of a bare majority of senators—would shift power from the Senate to the presidency at a time when many people are concerned about an overly powerful or imperial presidency vis-à-vis the Senate. The Senate needs to have a meaningful role in determining who serves on the courts that will police the boundaries between legislative and executive power.

Similarly, reducing the “advise and consent” role—or reducing the number of senators required to confirm—increases the president’s control over the composition of the courts, which in turn decide disputes regarding presidential power. This was a concern under Presidents George W. Bush and Obama, and it is a concern expressed about newly-elected President Trump. In this respect, the “nuclear option” of reducing the required number to fifty-one votes (or fifty senators plus the vice president) has now substantially weakened the Senate vis-à-vis the White House in determining the composition of the courts.

Allowing a president to get judges confirmed by eking out only a bare majority vote encourages presidents to nominate judges who are outside the mainstream. We believe that just about all of the Bush and Obama nominees were well within the legal mainstream, but this was because the Senate often insisted on broad support for a nominee to get through. Changing this—as might very well happen now that a bare majority will suffice for confirmation—could lead to more extreme nominees and judges than we have had in the recent past, more polarization in the courts, and more controversial and unstable law.

Second, we hope to get the Senate to go about exerting its “advise and consent” power in a more constructive and predictable way. Toward that end, Senate majority and minority leaders should adopt at least four structural improvements to the judicial confirmation process. The first is to treat nominations with a presumption that it should receive full committee process and final vote within the committee and on the floor of the Senate. This presumption can be rebutted not through innuendo or insinuation but rather concrete indicia of a lack of qualifications, integrity, or mainstream jurisprudence. Second, we suggest that senators should be required to state and defend their justifications for obstruction or delay.

Third, the Senate Judiciary Committee should set a hearing date, within sixty days, on a nomination and the date for a final committee vote, within 120 days after the nomination was made. This ensures the same process for all judicial nominees.

Fourth, there should be a supermajority requirement for Senate confirmation, but it should not be done through the unsavory method of filibuster. Sixty senators is a sensible threshold, as it would likely require at least some bipartisan support but does not allow a tiny minority within the Senate to impede the entire process. A variation, which might win some support within the Senate, is to allow a lower threshold (such as fifty-five senators) for a second vote on the nomination if it fails to satisfy the higher threshold on the first vote.

This approach has several advantages over the filibuster-prone system that preceded the use of the use of the “nuclear option” for lower court nominations in 2013 and for the Supreme Court in 2017. It lets the White House know what the rules of the game are prior to making any judicial nominations. It encourages the White House to get more “advice” up front, or earlier in the process, from the requisite number of senators and avoiding a fight later. This approach also lets the president know quickly (no more than 120 days) if his or her nomination has failed and he or she needs to make another nomination for the same judgeship. This approach will hopefully increase the chances for the courts to be fully staffed. Finally, this approach should help to restore public confidence in the Senate as it performs its vitally important role of providing advise and consent on judicial nominations.

We believe these suggestions will help to restore confidence in the judicial confirmation process by 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 are thinking of opposing 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.

IV. RESTORING CONFIDENCE IN THE JUDICIAL APPOINTMENTS PROCESS

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,⁴² holds, or inaction by the Senate Judiciary Committee, Senate leaders, or the Senate as an institution. A debate over the constitutionality of these different mechanisms misses the point, perhaps deliberately so. The future of delay still turns, as it did when we first wrote on this subject,⁴³ 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 2011.⁴⁴

More specifically, we believe that our proposal has several advantages compared with the Senate's obstruction and delays on judicial nominations. 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

42. 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. PENNNUMBRA 245 (2010), <https://www.pennlawreview.com/debates/index.php?id=36> [<https://perma.cc/C3VM-ZJ84>].

43. MICHAEL GERHARDT & RICHARD PAINTER, "EXTRAORDINARY CIRCUMSTANCES:" THE LEGACY OF THE GANG OF 14 AND A PROPOSAL FOR JUDICIAL NOMINATIONS REFORM, AM. CONST. SOC'Y. (2011), http://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf [<https://perma.cc/PD9U-XXEF>].

44. *Id.*

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.

Having people go on the record with the reasons for their obstruction is important for reasons besides holding them accountable. For years, senators have not been able to agree on—much less articulate fully or candidly—their respective understandings of the critical concept of merit in judicial selection. At the same time, many senators have insisted that they should be able to consider ideology in assessing a Supreme Court nomination if the White House had taken it into consideration as well. Beyond the lack of clarity about whether or to what extent ideology is an element of merit, there are serious questions about which ideology qualifies someone to be a judge and how best to measure it. In our judgment, the focus on ideology is a step in the wrong direction; it should have no place in the assessment of judicial nominations as long as a nominee's views—or ideology to the extent to which it is known—fall within the mainstream of constitutional thought. The only pertinent concern is developing a credible, non-partisan articulation or understanding of the mainstream of constitutional thought.

Second, our current proposal allows delay—but not permanent blockage—of a judicial nominee, as was the case with more than fifty of President Obama's judicial nominees, including his nomination of Judge 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 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.⁴⁵

This proposal will help to protect against “extreme” nominees from being confirmed to the federal judiciary, including the Supreme Court. The most effective way of avoiding extreme appointments—that is, nominee with judicial philosophies or ideological commitments that are outside the mainstream of constitutional law—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

45. 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.

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 nominees with extreme ideological commitments or whose ethics, judgment, and integrity or 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.⁴⁶ 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. Bipartisanship has been sorely absent in the legislative process and particularly the United States Senate for years, and its loss has eroded the public's confidence in the Senate generally and in judicial selection in particular.

We 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, judicial nominees, and the public; 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.

46. In the current climate, no organization commands the respect of the leaders of both political parties as a neutral arbiter of judicial nominees. Beginning in 1948, the American Bar Association appointed a special standing committee charged with assessing the qualifications and temperament of judicial nominees, including nominees to the Supreme Court nominees, but since 2001 Republicans senators and presidents have not given the ABA or its standing committee any special role in the judicial selection process.

CONCLUSION

In 2011, 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.⁴⁷ Since then we have seen a vacancy arise on the Supreme Court, powerful senators refuse to hold a hearing and instead hold the President's nomination of Judge 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 were "politicizing the courts"⁴⁸ when in fact it is the Senate itself that has done so. The successful blocking of the Garland nomination does not bode well for the future of judicial selection. Republicans have secured short-term advantages for themselves by the prospect of filling more than 100 lower court nominations and at least one Supreme Court nomination (the seat now held by Justice Gorsuch), but the price paid for this was an obliteration of bipartisan cooperation in the confirmation process. The precedent set by Republican filibustering of Goodwin Liu and obstruction of other lower court nominees, the obstruction of the Garland nomination in 2016, the Democratic filibuster of the Gorsuch nomination in 2017, and the Republicans' exercise of the "nuclear option" to dismantle the filibuster likely provide an incentive for both parties to engage in yet more scorched earth tactics in the future. 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, just as it is unacceptable to ram through judicial nominations based purely on party-line votes (or power). If the Senate cannot arise above base partisanship in discharging its "advice and consent" function, 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 a 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

47. GERHARDT & PAINTER, *supra* note 43.

48. Tierney Sneed, *GOP Senator Leading SC Blockade Blames Roberts for Politicizing Court*, TALKING POINTS MEMO (Apr. 6, 2016, 6:00 AM), <http://talkingpointsmemo.com/livewire/chuck-grassley-john-roberts> [<https://perma.cc/ER9B-ASTG>].

proposal we have outlined here is our renewed attempt to turn that prospect aside and restore meaningful, bipartisan respect for an independent judiciary.