

Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process

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The Constitution places the authority for confirming federal judicial nominations with the U.S. Senate. For centuries this responsibility was undertaken with a sense of duty and purpose. Today, it seems as though many senators see the constitutional command that the Senate “advise and consent” to judicial nominations as an opportunity to delay and obstruct in the name of partisan, ideological, or electoral advantage. Indeed, this is the new norm of the judicial confirmation process, resulting in a judicial vacancy crisis and a fractured Senate. Past suggested reforms, however, do not go far enough. To free the judicial confirmation process from the current destructive dynamics requires significant changes. Drawing on past legislative efforts to address institutional gridlock, the Article provides new insights into the judicial confirmation problem, suggests dramatic reforms in the form of a Confirmation Commission, and offers a historic, constitutional, and political justification for the proposal.

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I. INTRODUCTION

A nation of laws requires judges. A nation of judges requires Senate action.¹ Unfortunately, today, Senate action is exceedingly rare,² resulting in a depleted federal judiciary.³ Moreover, those judges who made it to the bench likely were forced to endure months, if not years, of uncertainty as they awaited Senate confirmation.⁴ Their nominations were part of a larger partisan and ideological battle—true pawns in a conflict that did not involve, but did envelope, them. And for many other unsuccessful nominees, the only thing the process confirmed was that change is needed.

¹ U.S. CONST. art. II, § 2, cl. 2.

² George Packer, *The Empty Chamber: Just How Broken Is the Senate?*, NEW YORKER, Aug. 9, 2010, at 38.

³ See Admin. Office of the U.S. Courts, *Current Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx> (last updated Feb. 1, 2012) (showing that approximately 10% of the federal judiciary is vacant).

⁴ Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 253, 254 (2003).

The “confirmation mess”⁵ draws the attention of presidents, legislators, scholars, and judges—including the two most recent Chief Justices.⁶ The problem includes delays, obstruction, a focus on concerns unrelated to the nominee’s qualifications, and a judicial vacancy rate that has left many circuit courts in a perpetual state of crisis. Critiques of the judicial appointment process almost all center on how the Senate fulfills its advice and consent responsibilities. Suggested solutions abound—from increasing the Senate’s advisory role to eliminating the filibuster for judicial nominations. All of these proposals, however, remain unheeded. To some, that may suggest that the problem is intractable, that we should simply accept a broken confirmation process. That response, though, is hardly satisfying. Nor is it accurate.

The causes of the judicial confirmation mess find their origins in constitutional structures, institutional dynamics, and electoral constraints of the U.S. Senate. Identifying and examining those factors reveal that while the problem is deeply rooted, it is not unresolvable. But the solution requires a concrete and comprehensive approach—one that works to disrupt the current judicial confirmation patterns while operating within the confines of political realities. Moreover, Congress has faced such difficulties before and found ways to upend legislative stalemate and take action.⁷ Nothing about today’s confirmation problems makes this situation any more impossible to address.

The path to a new confirmation process begins with a recognition of the problem and its causes; it then builds from existing approaches to resolving gridlock to find an answer to the delay and obstruction that mark judicial appointments today; and finally it makes the case for the reforms on several fronts.

This Article takes the same route. It begins by explaining the current judicial confirmation problem, first by defining it and then discussing its causes and consequences. Part III then presents the proposal. As noted above, the urged reforms borrow from existing structures and practices to create a new mechanism for Senate consideration of judicial nominations. In short, the proposal includes creating selection panels to assist the Senate in advising the President on the selection of lower court judicial nominations. Ideally, this alone would ensure a more efficient and effective confirmation process, as the Senate would move more quickly on nominations that it had a voice in selecting. In reality, though, an expanded role for the Senate in selecting nominees does not necessarily translate into a smoother confirmation process. This Article, therefore, goes further by proposing a Senate-appointed Confirmation Commission, modeled on the military base closure commissions,

⁵ The term “confirmation mess” originates with Professor Stephen Carter’s law review article and follow-up book of the same name. STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994); Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

⁶ See *infra* notes 59–80 and accompanying text.

⁷ Michael J. Teter, *Recusal Legislating: Congress’s Answer to Institutional Stalemate*, 48 HARV. J. ON LEGIS. 1, 3 (2011).

to handle stalled judicial nominations. The Commission would make recommendations regarding confirmation or rejection of nominees, and those suggestions would take effect absent Senate action to the contrary. Through this approach, Senate delay and obstruction would be recalibrated to result in action, as opposed to inaction.

Such a proposal—even though it builds off of existing structures—requires a strong defense. Parts IV, V, and VI provide the historical, constitutional, and political justifications for such reforms to the judicial confirmation process. Finally, the Article ends by discussing the benefits the proposed changes would entail and responds to the anticipated critiques of the plan.

The flaws of the current judicial confirmation process require a response. The Senate's role in ensuring a full, vibrant, and qualified federal judiciary is a responsibility that the chamber is constitutionally obligated to meet. It is a duty, though, that is too often going unfulfilled. The case for change, then, is clear. The case for dramatic reform follows.

II. UNDERSTANDING THE CURRENT JUDICIAL CONFIRMATION PROBLEM

There is no uniform understanding of the confirmation mess. For this reason, before providing the details of the confirmation reform proposal, it is important to define the problem. It is only then that it is possible to judge the merits of the proposal. Moreover, a complete assessment also requires an understanding of the causes and consequences of the problems. This Part addresses these three issues: What does it mean to speak of a “confirmation mess”? What are the origins of the problem? And what are the effects? Once a picture emerges of the current confirmation process, Part III will lay out the proposed reforms in detail.

A. *Defining the Problem*

1. *Obstruction*

Not too long ago, being nominated for a federal judgeship practically assured one's place on the bench.⁸ No longer.⁹ Judicial nominees often face a perilous path to confirmation, one that prevents many of them from ever taking office. Indeed, a comparison of the success rates for judicial nominees over the past three decades tells the tale. For district court nominees, the confirmation rate has fallen from 93% during President Carter's term to 78% for President

⁸NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 2 (2005) (showing confirmation rates approaching 100% from 1933 to 1974).

⁹*Id.*; see also SARAH A. BINDER & FORREST MALTZMAN, ADVICE & DISSENT: THE STRUGGLE TO SHAPE THE FEDERAL JUDICIARY 80 tbl.4-1 (2009) (showing that the Court of Appeals confirmation rate dropped from 100% in 1960 to 48% during President George W. Bush's terms).

George W. Bush's.¹⁰ During President Obama's first two years, the Senate confirmed only 56% of his district court nominations¹¹—all the more remarkable because for much of that period, the Democrats enjoyed a filibuster-proof majority. Circuit court nomination statistics are even starker. Again, the Senate confirmed 93% of President Carter's selections.¹² That percentage dropped to 88% for President Reagan, 76% for President George H.W. Bush, 61% for President Clinton, and 52% for President George W. Bush.¹³

Lower confirmation rates are not per se a problem. Perhaps President Carter simply selected better nominees for the bench. Perhaps the Senate adopted additional procedures for more accurately assessing nominees' qualifications. Or perhaps the differences can all be attributed to the political context—whether the president faced a friendly or hostile Senate, whether the president enjoyed high public approval, or whether the president consulted senators frequently in making the selections. Undoubtedly, these political considerations do affect some confirmation outcomes.¹⁴ And there is little that can, or necessarily should, be done about that. But these factors alone do not account for the remarkable decline in confirmation rates, and there is no indication that Presidents Clinton and George W. Bush nominated less qualified candidates or that the Senate has adopted new standards for ensuring meritorious selections.¹⁵ Instead, “the data support the notion that the Senate confirmation process has markedly changed” over the past twenty years, leading to fewer judicial confirmations.¹⁶

¹⁰ Sheldon Goldman et al., *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 JUDICATURE 262, 293 (2011).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* The Senate has confirmed twenty-five out of forty of President Obama's circuit court nominations, or approximately 63%. See Am. Constitution Soc'y, *Federal Judicial Nomination Statistics*, JUDICIALNOMINATIONS.ORG, <http://www.acslaw.org/sites/default/files/pdf/Judicial%20Nominations%20Stats%2001%2025%2012.pdf> (last visited Feb. 1, 2012). There is some minor variation in the reported confirmation rates among scholars for each president because of differences in how one treated nominees who were re-nominated after failing to win confirmation during a congressional session.

¹⁴ Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 514–19 (1998); see also BINDER & MALTZMAN, *supra* note 9, at 81–91 (discussing forces shaping advice and consent).

¹⁵ Indeed, nearly every Clinton and George W. Bush appointee received a qualified or well-qualified rating from the American Bar Association. See Sheldon Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 279, 284 (2009).

¹⁶ Sarah A. Binder & Forrest Maltzman, *Congress and the Politics of Judicial Appointments*, in CONGRESS RECONSIDERED 297, 300 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005); see also *supra* notes 10–13 and accompanying text.

2. *Delays*

A vast majority of unsuccessful nominations are not defeated by the Senate as much as by time, further belying the idea that the Senate has simply established a higher standard for nominees to meet before confirmation. Senate Rule XXXI provides, in part:

Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.¹⁷

¹⁷STANDING RULES OF THE SENATE R. XXXI, *in* COMM. ON RULES & ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 112-1, at 58 (2011). Rule XXXI reads in full:

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS

1. When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered, be referred to appropriate committees; and the final question on every nomination shall be, “Will the Senate advise and consent to this nomination?” which question shall not be put on the same day on which the nomination is received, nor on the day on which it may be reported by a committee, unless by unanimous consent.

2. All business in the Senate shall be transacted in open session, unless the Senate as provided in rule XXI by a majority vote shall determine that a particular nomination, treaty, or other matter shall be considered in closed executive session, in which case all subsequent proceedings with respect to said nomination, treaty, or other matter shall be kept secret: Provided, That the injunction of secrecy as to the whole or any part of proceedings in closed executive session may be removed on motion adopted by a majority vote of the Senate in closed executive session: Provided further, That any Senator may make public his vote in closed executive session.

3. When a nomination is confirmed or rejected, any Senator voting in the majority may move for a reconsideration on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate; but if a notification of the confirmation or rejection of a nomination shall have been sent to the President before the expiration of the time within which a motion to reconsider may be made, the motion to reconsider shall be accompanied by a motion to request the President to return such notification to the Senate. Any motion to reconsider the vote on a nomination may be laid on the table without prejudice to the nomination, and shall be a final disposition of such motion.

4. Nominations confirmed or rejected by the Senate shall not be returned by the Secretary to the President until the expiration of the time limited for making a motion to reconsider the same, or while a motion to reconsider is pending unless otherwise ordered by the Senate.

Thus, senators know that if they can delay a nomination, they can defeat it. And, of course, senators enjoy a vast array of tools to stall judicial nominations, including failing to agree to hearings, refusing to return blue slips, filing motions to recommit, demanding floor debate and recorded votes, placing holds, and threatening filibusters.¹⁸ The effects of these tactics can again be seen through a comparative look at the time it used to take to complete the confirmation process versus today.

The statistics show that a judicial nominee today is less likely even to receive a hearing before the Senate Judiciary Committee, and this is especially true for circuit court selections. During President Carter's term, over 96% of his district court nominees and over 98% of his circuit court selections received a Judiciary Committee hearing.¹⁹ Those numbers declined to the point that during President Clinton's two terms, only 85% of district court nominees and 70% of circuit court nominees received a hearing.²⁰ Moreover, for those who did receive a hearing, the average wait from nomination to the hearing grew dramatically. By President W. Bush's term, district court nominees waited over one hundred days before a hearing,²¹ while circuit court nominees averaged over 230 days from nomination to the date of the hearing.²² The number of days

5. When the Senate shall adjourn or take a recess for more than thirty days, all motions to reconsider a vote upon a nomination which has been confirmed or rejected by the Senate, which shall be pending at the time of taking such adjournment or recess, shall fall; and the Secretary shall return all such nominations to the President as confirmed or rejected by the Senate, as the case may be.

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

7. (a) The Official Reporters shall be furnished with a list of nominations to office after the proceedings of the day on which they are received, and a like list of all confirmations and rejections.

(b) All nominations to office shall be prepared for the printer by the Official Reporter, and printed in the Congressional Record, after the proceedings of the day in which they are received, also nominations recalled, and confirmed.

(c) The Secretary shall furnish to the press, and to the public upon request, the names of nominees confirmed or rejected on the day on which a final vote shall be had, except when otherwise ordered by the Senate.

Id. at 57–59.

¹⁸ MITCHEL A. SOLLENBERGER, *JUDICIAL APPOINTMENTS AND DEMOCRATIC CONTROLS* 129–55 (2011) (discussing the process nominations must go through on the Senate floor and the opportunities for delay and obstruction).

¹⁹ Goldman, *supra* note 4, at 253–54.

²⁰ *Id.*

²¹ *Id.* at 253.

²² *Id.* at 254.

from the hearing to being reported to the Senate and then the amount of time nominations spent lingering on the Senate floor also increased significantly.²³ And these figures are for those nominees who actually receive a hearing. Unsuccessful appellate court nominees now often languish for a year and a half before seeing their nominations die as time runs out.²⁴

In the end, as scholars of the judicial confirmations have noted, “Numerous indicators suggest that something has gone awry in the process of advice and consent for selecting federal judges.”²⁵ As the statistics show, delays and obstructionism are now standard features of the judicial confirmation process.

3. *Focus on Non-Merits*

It seems axiomatic, but necessary, to declare that the Senate judicial confirmation process should focus on the nominee. The question before the Senate is whether to “advise and consent” to that individual’s assuming a position on the federal bench.²⁶ It seems further self-evident that when focusing on the nominee, the question should be about qualifications. Admittedly, the issue of what it means to be “qualified” to serve on the federal bench is open for debate. Some senators and commentators would limit that term to easily assessed qualifications such as educational background, work experience, and professionalism and work quality.²⁷ Others include the nominee’s judicial temperament and ideology.²⁸ There is no reason to enter that fray because, no matter what one’s definition of qualifications, the Senate is often only minimally focused on the nominee’s merits, no matter what the standard.

²³ *Id.* at 253–54.

²⁴ Sarah Binder & Forrest Maltzman, *Advice and Consent During the Bush Years: The Politics of Confirming Federal Judges*, 92 JUDICATURE 320, 323 (2009).

²⁵ *Id.* at 322.

²⁶ See STANDING RULES OF THE SENATE R. XXXI, in COMM. ON RULES & ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 112-1, at 57 (2011) (“[A]nd the final question on every nomination shall be, ‘Will the Senate advise and consent to this nomination?’”).

²⁷ See, e.g., *Judicial Nominations 2001: Should Ideology Matter?: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 107th Cong. 13–14 (2001) [hereinafter *Should Ideology Matter?*] (statement of Sen. Jon Kyl, Member, S. Comm. on the Judiciary); *id.* at 22–26 (statement of Lloyd N. Cutler, Co-Chair, Constitution Project’s Courts Initiative); *id.* at 29–39 (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary); DAVID M. O’BRIEN, JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 49 (1988).

²⁸ *Should Ideology Matter?*, *supra* note 27, at 1–3 (statement of Sen. Charles Schumer, Member, S. Comm. on the Judiciary); *id.* at 39–49 (statement of Laurence Tribe, Professor, Harvard Law School); *id.* at 57–67 (statement of Cass Sunstein, Professor, University of Chicago Law School).

Instead, the Senate has increasingly used its role in the judicial appointments process as a powerful political tool.²⁹ Senators will delay nominations as a means of forcing the Senate or president to acquiesce to some other, unrelated demand.³⁰ Or the Senate Judiciary chairman from a different party than the president's may slow down the entire process for all judicial nominees in hopes that the next president will share the same party as the chairman.³¹ The other party then responds in kind in an exasperating game of tit-for-tat.³² Additionally, the confirmation process itself is now treated as a "venue for facilitating or impeding a president's realization of his broader agenda."³³ It should come as no surprise, then, when scholars study the current confirmation process they find "little evidence" showing that the quality of the nominee has much effect on the appointment's fate.³⁴

B. *Ascertaining the Causes of the Problem*

What has caused these problems? There is, of course, no one answer, and it is also difficult to determine the extent to which the contributing causes affect the process. That said, it is possible to trace many of the roots of the growing dysfunction to three broad trends.

First, the federal judiciary enjoys ever-growing influence over public policy in the United States.³⁵ Judges on even the most "inferior" courts therefore play an important role in interpreting and shaping federal law. As the two dominant political parties become more ideologically opposed,³⁶ judges are dealing with more contentious laws and legal matters.³⁷ The growing importance of the federal judiciary, then, has sparked an ideological "war"³⁸ over judicial selection, contributing to the delays and obstruction discussed above.

Second, the judicial confirmation process has become part of the partisan-, electoral-, and interest group-driven politics that we typically associate with the

²⁹ Charles W. Pickering, Sr. & Bradley S. Clanton, *A Proposal: Codification by Statute of the Judicial Confirmation Process*, 14 WM. & MARY BILL RTS. J. 807, 811 (2006).

³⁰ See AMY STEIGERWALT, *BATTLE OVER THE BENCH: SENATORS, INTEREST GROUPS, AND LOWER COURT CONFIRMATIONS* 87 (2010) ("Judicial nominations have become a key bargaining tool in the modern Senate . . .").

³¹ LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 90 (2005); see also Binder & Maltzman, *supra* note 16, at 308.

³² Goldman et al., *supra* note 15, at 288.

³³ Gerhardt, *supra* note 14, at 473.

³⁴ Binder & Maltzman, *supra* note 16, at 309.

³⁵ BINDER & MALTZMAN, *supra* note 9, at 1.

³⁶ Binder & Maltzman, *supra* note 16, at 313.

³⁷ BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 11–13 (2006); Nancy Scherer, *The Judicial Confirmation Process: Mobilizing Elites, Mobilizing Masses*, 86 JUDICATURE 240, 243 (2003).

³⁸ See generally Michael J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003).

legislative process.³⁹ Studies show that delays and obstruction are greatest during times of divided government,⁴⁰ helping to prove the importance of partisanship in the process. But as recent experience shows, unified government does not significantly reduce the ability of the oppositional party to seek to delay the confirmation process. Indeed, obstructing judicial appointments has been an important part of Senate Republican Leader Mitch McConnell's overall strategy to thwart President Obama's agenda.⁴¹ Electoral considerations also play a significant role. For example, statistics show that during presidential election years, the confirmation process slows dramatically.⁴² This phenomenon is well recognized and even considered by some to be a "natural" occurrence.⁴³ More troubling, though, is the electoral benefit senators see in obstructing the judicial appointment process. Senators use their opposition to nominees as a way to raise campaign contributions and rouse their base.⁴⁴ Increasing interest group involvement in the judicial confirmation process also surfaces as one of the chief causes of the problems discussed above. Senators turn to like-minded interest groups for information on nominees and for signals as to which nominees deserve increased scrutiny.⁴⁵ And interest groups are more often entering the fray by directly opposing or supporting nominees, with designs to further agitate base voters and push senators toward extremes.⁴⁶

Finally, institutional rules that allow senators to promote individual interests over those of the chamber are a chief cause of the delays and obstructionism detailed above. First, as Michael Gerhardt has stated, "The aggrandizement of Senate committees has made it easier for smaller blocs . . . or even individual[s] . . . to thwart nominations."⁴⁷ Moreover, whether a senator serves on the Judiciary Committee or not, she enjoys a wide range of tools that she can employ to obstruct the judicial confirmations.⁴⁸ This alone, though, is not new. What is more recent, and what contributes to the "confirmation mess" is the changing norm that encourages this practice. Senators can now engage in

³⁹ See, e.g., C. Lawrence Evans, *How Senators Decide: An Exploration*, in U.S. SENATE EXCEPTIONALISM 262, 271–76 (Bruce I. Oppenheimer ed., 2002) (explaining the importance of constituents, party leaders, and interest groups in how senators make legislative decisions).

⁴⁰ Binder & Maltzman, *supra* note 16, at 307–08. Here, divided government means opposing parties controlling the White House and the Senate.

⁴¹ See Jonathan Bernstein, *Empty Bench Syndrome*, N.Y. TIMES, Feb. 9, 2011, at A27 ("Senator McConnell made clear his party would filibuster every item on President Obama's agenda, including judicial nominations.").

⁴² BINDER & MALTZMAN, *supra* note 9, at 89.

⁴³ Binder & Maltzman, *supra* note 24, at 326.

⁴⁴ *Id.* at 328 ("Both parties . . . have made the plight of potential judges central to their campaigns for the White House and Congress.").

⁴⁵ STEIGERWALT, *supra* note 30, at 160–62.

⁴⁶ Nancy Scherer et al., *Sounding the Fire Alarm: The Role of Interest Groups in the Lower Federal Court Confirmation Process*, 70 J. POL. 1026, 1029 (2008).

⁴⁷ Gerhardt, *supra* note 14, at 491.

⁴⁸ Scherer et al., *supra* note 46, at 1027.

“stealth filibusters” and silent holds that can tie up nominations indefinitely.⁴⁹ For example, during the 101st Congress (1989–1990), no holds were placed on a circuit court nomination.⁵⁰ During the 108th Congress (2003–2004), senators placed twenty holds.⁵¹ These holds are often unrelated to the merits of the nomination itself and are instead a way for the individual senator to promote her own political, ideological, or idiosyncratic agenda.⁵² The result, no matter what the motivation, is delay and obstruction.

Thus, senators from the opposing party of the president now have the *power* and *incentive* to block judicial nominations with impunity. The combination of those two realities has contributed significantly to the current confirmation problem.

C. Consequences of the Current System

It is important to understand the consequences of the current confirmation system. The most obvious outcome is a high vacancy rate among the federal judiciary. There are currently eighty-five vacancies on the federal bench, representing just under 10% of the entire federal judiciary.⁵³ Of those, thirty-seven have been declared “judicial emergencies” by the Administrative Office of the U.S. Courts.⁵⁴ While some of these continued vacancies are attributable to the slow pace at which the Obama Administration has sent nominations to the Senate,⁵⁵ during the last session of Congress the Senate failed to confirm over forty judicial nominees.⁵⁶ Moreover, the sluggishness of the Obama Administration is at least partly attributable to the fact that there is little point in flooding the Senate with more nominations when it appears the chamber is unwilling or unable to deal with even a modest volume.⁵⁷ Additionally, the vacancy rate would be considerably lower had the Senate acted on many of the

⁴⁹ David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 493 (2005).

⁵⁰ STEIGERWALT, *supra* note 30, at 84–88.

⁵¹ *Id.*

⁵² *Id.* at 75–94 (discussing the use of holds by senators).

⁵³ Admin. Office of the U.S. Courts, *supra* note 3. This number does not include twenty “future vacancies,” in which a judge has announced her plans to retire. Admin. Office of the U.S. Courts, *Future Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/FutureJudicialVacancies.aspx> (last updated Feb. 1, 2012).

⁵⁴ Admin. Office of the U.S. Courts, *Judicial Emergencies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Feb. 1, 2012).

⁵⁵ See Am. Constitution Soc’y, *supra* note 13 (comparing the number of nominations made by Presidents Obama, W. Bush, and Clinton at the same points in their presidencies).

⁵⁶ Goldman et al., *supra* note 10, at 293.

⁵⁷ Evidence suggests that when presidents overload the Senate Judiciary Committee with nominations, it slows down the entire process. See Carl W. Tobias, *Postpartisan Federal Judicial Selection*, 51 B.C. L. REV. 769, 773 (2010).

nominations President W. Bush made during his final two years in office.⁵⁸ One consequence of the confirmation wars is a federal judiciary operating dangerously under capacity.

Relatedly, then, the administration of justice suffers. Both Chief Justice Rehnquist and Chief Justice Roberts warned the Senate that failing to address the high vacancy rate would “erod[e] the quality of justice.”⁵⁹ Courts have had to cancel oral arguments, postpone cases for several months, and dramatically increase the amount of time it takes to dispose of a matter.⁶⁰ Additionally, Sarah Binder and Forrest Maltzman examined the effect that confirmation battles have on the legitimacy and perceived independence of the judiciary. They found that people were more distrustful of the decisions by judges who faced difficult confirmation proceedings as the boundary between the law and politics was eroded.⁶¹ Binder and Maltzman concluded that “[n]ominees that engender pitched battles—rightly or wrongly—ultimately may put the legitimacy of the unelected bench at risk.”⁶²

There is also the likely consequence that fewer qualified individuals will show a willingness to subject themselves and their families to the uncertainty and personal scrutiny that accompanies nomination. And those people who are nominated often end up embittered or contemptuous of the process—even if they ultimately are confirmed.⁶³

Finally, the Senate itself suffers under the current system. The perpetual fights over judicial nominations “take[s] a toll,”⁶⁴ as senators accuse each other of misrepresenting facts, dealing unfairly with nominees, and abusing Senate rules.⁶⁵ For a chamber that operates through unanimous consent agreements⁶⁶ and the norm of senatorial courtesy and reciprocity,⁶⁷ constant battles over

⁵⁸ In July 2006, there were only forty-five vacancies. See Admin. Office of the U.S. Courts, *Archive of Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last updated Feb. 1, 2012).

⁵⁹ William H. Rehnquist, *1997 Year-End Report of the Federal Judiciary*, THIRD BRANCH, Jan. 1998, at 1, 2. Chief Justice Roberts noted in his 2010 year-end report that the current judicial confirmation process “has created acute difficulties for some judicial districts.” John G. Roberts, Jr., *2010 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2011, at 1, 3, available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

⁶⁰ BINDER & MALTZMAN, *supra* note 9, at 128–30.

⁶¹ *Id.* at 136–42.

⁶² *Id.* at 142.

⁶³ Pickering & Clanton, *supra* note 29, at 808.

⁶⁴ Binder & Maltzman, *supra* note 16, at 315.

⁶⁵ See generally E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341 (2006) (chronicling the complaints and frustrations senators express with the confirmation process).

⁶⁶ WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 232–42 (8th ed. 2011) (discussing the use of unanimous consent agreements in the Senate legislative process).

⁶⁷ Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 223 (1997).

judicial nominees may ultimately wreak havoc on the institution's ability to function.

This, then, is what I mean by the "confirmation mess." The next Part takes up explaining the proposed reforms.

III. CLEANING UP THE CONFIRMATION MESS: A PROPOSAL

As the previous Part shows, the judicial confirmation process is marked by tactical partisanship, electoral considerations, ideological battles, logrolling, interest group politics, and retribution⁶⁸—all leading to increasing delays or deadlock. It is no wonder, then, that every few years legal scholars and political leaders focus on this confirmation "mess" and offer prescriptions for the ailing system.⁶⁹ These proposals run the gamut, from changes in Senate norms,⁷⁰ to rules reform,⁷¹ to binding statutes,⁷² and even judicial intervention.⁷³ Some

⁶⁸ See *supra* Part II.A.

⁶⁹ See, e.g., S. Res. 327, 108th Cong. (2004) (proposal by Senator Arlen Specter to create timetables for Senate consideration of judicial nominations); President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-6.html>. See generally Carter, *supra* note 5; John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181 (2004); Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despite and Resent" with "Advice and Consent"*, 53 ADMIN. L. REV. 1 (2001); Laura T. Gorjanc, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435 (2004); Douglas W. Kmiec & Elliot Minberg, *The Role of the Senate in Judicial Confirmations*, 7 TEX. REV. L. & POL. 235 (2003); Pickering & Clanton, *supra* note 29; Lee Renzin, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739 (1998); Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992); Karl A. Schweitzer, *Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process*, 12 U. PA. J. CONST. L. 909 (2010); Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691 (2004).

⁷⁰ See, e.g., CARTER, *supra* note 5, at 159 (proposing a shift away from a presumption in favor of confirmation to one that requires the nominee to prove her qualifications); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1514–20 (1992) (urging a more independent role for the Senate in the advising and consenting to judicial nominations).

⁷¹ See, e.g., S. Res. 327, 108th Cong. (2004); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 407 (1998); Cornyn, *supra* note 69, at 206 (proposing eliminating the filibuster for judicial nominations); Denning, *supra* note 69, at 31–38 (suggesting amending Senate rules to limit the use of the hold, lower the threshold for cloture on nominations, and curb the power of the Judiciary Committee chair); Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 14–16 (1991); Reynolds, *supra* note 69, at 1580 (encouraging expedited consideration of Supreme Court nominees if the President selects from a Senate-created list); Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 923–25 (2005)

scholars promote an increased role for the Senate in judicial selection,⁷⁴ while others suggest greater deference to presidential selection.⁷⁵ Despite the many differences among these ideas, they all treat the confirmation process as a different beast than the legislative process. In other words, commentators offering these suggestions look for answers to the “confirmation mess” in the ways in which judicial confirmation is different from the typical legislative process. That makes sense because the confirmation process does offer significant differences from the mechanisms through which a bill becomes a law.⁷⁶

In actuality, the problems afflicting the confirmation process—delays, partisanship, institutional norms, and electoral politics—are the same ones that congressional processes suffer from more broadly. Moreover, many of the same “vetogates”⁷⁷ that complicate the legislative process are also implicated in the confirmation process—the committee system, holds, unanimous consent agreements, and the filibuster, to name a few.⁷⁸ It follows, then, that past efforts to address congressional stalemate more generally might serve as a model for resolving the delays and difficulties associated with judicial nominations. Of course, few would claim that Congress has adequately dealt with the stalemate that reigns. Indeed, inaction, partisanship, and politics still dominate Congress. Congress has, however, developed a form of lawmaking, referred to elsewhere as “recusal legislating,”⁷⁹ that occasionally allows it to overcome those features when the moment is right.⁸⁰ And though the moment is rarely right, and there are therefore only a few examples of recusal legislating, one such instance serves as a useful model for resolving the stalemate now associated with judicial nominations.

(calling for supermajority requirements for judicial confirmation); Judith Resnik, *Supermajority Rule*, N.Y. TIMES, June 11, 2003, at A31.

⁷² See, e.g., Pickering & Clanton, *supra* note 29, at 816–19.

⁷³ See, e.g., Renzin, *supra* note 69, at 1751–72; Schweitzer, *supra* note 69, at 922–25.

⁷⁴ See, e.g., Gorjanc, *supra* note 69, at 1457–63; Reynolds, *supra* note 69, at 1578–80; Strauss & Sunstein, *supra* note 70, at 1517–20.

⁷⁵ See, e.g., John C. Eastman, *The Limited Nature of the Senate’s Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 646–48 (2003); Pickering & Clanton, *supra* note 29, at 819.

⁷⁶ For example, there is no need for bicameral action: the President initiates the process by forwarding a nomination to the Senate, and the Presentment and Veto Clauses are inapplicable.

⁷⁷ William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008). “Vetogates” are procedural doors through which a bill must pass to become law. Each of these “gates” presents an opportunity for opponents of the measure to kill the bill rather than allowing it to move along to the next stage of the process. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 66–68 (4th ed. 2007).

⁷⁸ See ESKRIDGE ET AL., *supra* note 77, at 66–68.

⁷⁹ Teter, *supra* note 7, at 3.

⁸⁰ *Id.* at 4.

A. Military Base Closures as a Model for Resolving the Judicial Confirmation Problem

The Defense Authorization Amendments and Base Closure and Realignment Act (BRAC),⁸¹ first enacted in 1988, solved the decade-long problem Congress faced in closing the U.S. military bases.⁸² Until 1976, the executive branch, through the Department of Defense, enjoyed nearly unbridled discretion in determining which bases to close or consolidate, and from 1961 to 1977, the Pentagon closed ninety-four bases.⁸³ While these closures made sense from a practical and financial standpoint, they infuriated those members of Congress who represented a military district, more so because of the unilateral nature of the determination and the belief that many closure decisions were made with politics in mind.⁸⁴

In 1976, Congress enacted a military construction bill that, in essence, required congressional approval for any base realignment or closure.⁸⁵ The result was that from 1977 until passage of the BRAC legislation in 1988, the Pentagon did not close a single major base, despite a manifest desire to do so and the broadly held opinion that such closures were necessary.⁸⁶ Committee chairs who had military bases in their districts, interest groups, and electoral considerations proved to be the most notable obstacles to base closures.⁸⁷ Moreover, legislators who supported base closures saw little electoral benefit to pushing closures, especially if it meant alienating powerful colleagues.⁸⁸

The BRAC law allowed Congress to overcome this stalemate by creating the Base Closure and Realignment Commission and delegating to it the responsibility for determining which military bases should be closed.⁸⁹ Nine members, appointed by the President but requiring the input of congressional leaders, comprise the Commission.⁹⁰ The Commission operates for a period of

⁸¹ Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988) (current version at 10 U.S.C. § 2687 note (2006)). Although the correct acronym would seem to be “BRCA,” the Pentagon apparently preferred “BRAC.” See 2005 *BRAC Definitions*, U.S. DEP’T OF DEF., http://www.defense.gov/brac/definitions_brac2005.html (last visited Jan. 6, 2012).

⁸² Teter, *supra* note 7, at 8–12.

⁸³ DAVID SORENSON, *MILITARY BASE CLOSURE: A REFERENCE HANDBOOK* 14–19 (2007).

⁸⁴ Teter, *supra* note 7, at 9–11.

⁸⁵ Military Construction and Guard and Reserve Forces Facilities Authorization Acts, Pub. L. No. 94-431, 90 Stat. 1349 (1976).

⁸⁶ See, e.g., 134 CONG. REC. 17,060 (1988) (statement of Rep. Kyl) (noting that since 1977, Congress had not authorized closing any bases; *id.* at 10,196 (statement of Sen. Dixon)).

⁸⁷ See *id.* at 17,056–87.

⁸⁸ Teter, *supra* note 7, at 12.

⁸⁹ *Id.*

⁹⁰ National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 3001, 115 Stat. 1012, 1344 (adding § 2912(d)(3) to 10 U.S.C. § 2687 note (2006));

one year, during which time it holds public hearings and gathers information to assess the current structural needs of the Pentagon.⁹¹ The Commission then creates a set of recommendations, which it submits, along with a report containing its findings and conclusions, to the President and Congress.⁹² The President must then decide whether to approve the list, which he can do only as a package.⁹³ If the President accepts the Commission's proposal, he transmits a certification to Congress.⁹⁴ The law then requires the Defense Secretary to follow the Commission's recommendations unless Congress passes a joint resolution disapproving the Commission's proposal within forty-five days.⁹⁵

The BRAC law established strict, fast-track procedures through which Congress can pass a joint disapproval resolution. First, the law provides the precise text of the resolution and requires the resolution be introduced within ten days after the President transmits the certification to Congress.⁹⁶ The resolution must then be referred to the House and Senate Committees on Armed Services.⁹⁷ If either Committee fails to report the resolution out to the full chamber, the resolution is automatically discharged from the Committee twenty days after the President's transmittal.⁹⁸ On the floor of the chamber the resolution enjoys streamlined consideration with procedural mechanisms, such as points of order, amendments, and motions to postpone consideration, that are often used to delay or kill legislation disallowed.⁹⁹ Only a single quorum call may be held, but then "the vote on final passage of the resolution shall occur."¹⁰⁰

With the BRAC law, Congress sought to overcome the institutional structures, practices, rules, and norms that had frustrated military base policy. In fact, more than surmount those obstacles, the BRAC procedure reversed the

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2902(a), (c), 104 Stat. 1808, 1808 (current version at 10 U.S.C. § 2687 note (2006)).

⁹¹ National Defense Authorization Act for Fiscal Year 2002, § 3001, 115 Stat. at 1344 (adding § 2912(d)(4) to 10 U.S.C. § 2687 note (2006)).

⁹² Defense Base Closure and Realignment Act § 2903(d)(2)–(3), 104 Stat. at 1811–12.

⁹³ *Id.* § 2903(e)(2), 104 Stat. at 1812; National Defense Authorization Act for Fiscal Year 2002, § 3003, 115 Stat. at 1347 (adding § 2914(e)(1) to 10 U.S.C. § 2687 note (2006)). However, the President may disapprove some of the recommended closures and send those back to the Commission for reconsideration. Defense Base Closure and Realignment Act § 2903(e)(3), 104 Stat. at 1812. The Commission can then prepare a revised list. National Defense Authorization Act for Fiscal Year 2002, § 3003, 115 Stat. at 1347 (adding § 2914(e)(1) to 10 U.S.C. § 2687 note (2006)). The President then must act (or decline to act) on the list as a package. Defense Base Closure and Realignment Act § 2903(e)(4)–(5), 104 Stat. at 1812. No option exists for the President to disapprove some closures and forward the remaining recommendations to Congress. *See id.*

⁹⁴ Defense Base Closure and Realignment Act § 2903(e)(2), 104 Stat. at 1812.

⁹⁵ *Id.* § 2904, 104 Stat. at 1812–13.

⁹⁶ *Id.* § 2908(a), 104 Stat. at 1816–17.

⁹⁷ *Id.* § 2908(b), 104 Stat. at 1817.

⁹⁸ *Id.* § 2908(c), 104 Stat. at 1817.

⁹⁹ *Id.* § 2908(d)(2), 104 Stat. at 1817.

¹⁰⁰ Defense Base Closure and Realignment Act § 2908(d)(3), 104 Stat. at 1817.

legislative “vetogates” to make it nearly impossible for Congress to prevent the Commission’s proposals from taking effect. In short, Congress designed the BRAC law to rise above the “small group of dedicated Members of Congress,” who, “applying all of the tricks of the trade, have been very effective in being able to block any base closure for the past 12 years.”¹⁰¹

The BRAC approach to military base closures has proven very successful, with Congress authorizing five rounds of the BRAC Commission, resulting in over one hundred major base closures and saving billions of dollars.¹⁰² Military base closures are, admittedly, quite different than confirming federal judges. Why, then, does the BRAC law serve as a model for judicial confirmations? The decade long stalemate associated with military base closures is not materially unlike the delays and standoffs facing nominees and the problems associated with base closures and judicial confirmation situations share many of the same causes. Thus, if the BRAC law was able to successfully solve the base closure dilemma, it could serve as a valuable template for addressing judicial confirmations.

It is easy to see the key features of the BRAC law that made it work: (1) creating an independent commission that would hold hearings and research the matter of base closures; (2) imposing restrictions on how the Commission staffed itself to ensure that its judgment remained independent of the Pentagon’s and Congress’s; (3) establishing an expedited, or “fast-track,” means for Congress to consider the Commission’s proposal; and (4) writing into the law a presumption that the Commission’s proposal would become effective absent congressional action to the contrary.

B. The Judicial Confirmation Reform Proposal

With the BRAC approach laid out, it is possible to construct a more detailed proposal for addressing the problems associated with judicial confirmations. The Senate should amend its rules to create a BRAC-like solution to the confirmation problem. The rule would require senators to establish state-based and circuit-based Selection Panels to assist in identifying and recommending candidates for judicial appointment. Additionally, the rule would create a Confirmation Commission, to which delayed or obstructed judicial nominations would be referred. And, finally, the rule would establish a presumption of validity for the Confirmation Commission’s recommendations and a fast-track procedure for the Senate to act.

Let me quickly review the proposed process. For each vacancy on a lower federal court, a Selection Panel in the district or circuit would put together a list of suggested nominees that senators representing the relevant area will then

¹⁰¹ 134 CONG. REC. 17,057 (1988) (statement of Rep. Dickinson).

¹⁰² Kenneth Mayer, *The Base Realignment and Closure Process: Is It Possible to Make Rational Policy?*, JOHN BRANDEMAS CENTER FOR STUDY OF CONGRESS, 1 (Dec. 2007), <http://www.nyu.edu/brademas/pdf/Mayer--Defense%20FINAL.pdf>.

forward, in whole or in part, to the President. If the President nominates an individual from the list, the new procedures would take effect. Once the President forwards a nomination to the Senate, it would be immediately referred to the Senate Judiciary Committee, as is the current practice. The Judiciary Committee would be instructed to conduct a hearing within thirty days (for district court nominees) or sixty days (for circuit court nominees). If the Judiciary Committee fails to complete a hearing within the requisite period, the nomination would be referred to the Confirmation Commission. If the Judiciary Committee conducts a hearing but fails to vote on the nomination within thirty days of completing the hearing, the nomination would be referred to the Commission. Finally, if the nomination makes it out of Committee, but the full Senate fails to take up the matter within thirty days, that, too, would trigger the Commission mechanism.

The Commission would be composed of a fixed number of members, with the Senate majority leader and Judiciary Committee chair appointing a majority. The rule would impose restrictions on who may serve on, or staff, the panel to promote familiarity with the law and judging. Once a nominee has been referred to the Commission, it will interview the candidate, review the candidate's record, and conduct hearings. The Commission will be expected to then make a recommendation as to whether or not the Senate should confirm the nominee. The Commission would need to transmit its recommendation to the Senate within sixty days or at least thirty-five days before the close of the Senate session, whichever is earlier. The Senate would then have thirty days to pass a resolution disapproving the Commission's recommendation. The resolution would be entitled to the fast-track procedures similar to those used for the BRAC law.¹⁰³ If the Senate fails to pass the resolution within the required period, the Commission's recommendation would take effect. Put simply, if the Commission approves a nominee and the Senate does not act, the Senate will be deemed as having consented to the nomination. The Secretary of the Senate will forward a certification of confirmation to the President.

That is the basic outline of the proposal. The next several sections will explain why this approach works from a historical, constitutional, and political perspective. But before getting to that, let me break down the component parts of the package to explain the thinking behind them and to show that, individually, each of the components is built around other proposals or mechanisms already used by Congress in other settings.

1. *Statute Versus Rule?*

The starting point, of course, was to determine what form the proposal should take. The two best options would be through a statute, enacted by Congress and signed by the President or by the Senate, amending its rules related to judicial confirmations. The statutory approach to confirmation

¹⁰³ See *supra* notes 96–100 and accompanying text.

process reforms has been proposed at various points in the past,¹⁰⁴ and was required for the BRAC law because of the need for bicameral enactment. But judicial confirmations are different in this respect. Unlike the process for enacting a law, which is spelled out specifically in the Constitution,¹⁰⁵ the Framers did not elaborate on how the Senate should fulfill its responsibility to advise and consent to judicial nominations. As things currently stand, nominations are governed by Senate Rules.¹⁰⁶ A rule change has the advantage of not requiring passage in the House of Representatives, nor signing by the President, thereby avoiding several roadblocks to reform. Moreover, for those concerned that a rule would carry less weight than a statute, the precedent actually suggests the reverse is true.¹⁰⁷ Congress has expressed unease about the constitutionality of statutized rules¹⁰⁸ that seek to bind future congresses. Indeed, most statutized rules now contain explicit disclaimers that either chamber can disregard the rule as it sees fit.¹⁰⁹ On the other hand, the Senate has shown remarkable fealty to its rules, even when a majority of its members express a desire to change them.¹¹⁰ As such, a rule might actually do a better job of “binding” the Senate to the new confirmation mechanism than a statute.

I will discuss at length in Part V whether a rule could, legally and practically, establish the proposed Selection Panels and Confirmation Commission. In short, though, the answer is yes. Both chambers have used the Constitution’s Rules of Proceedings Clause to create a number of independent

¹⁰⁴ See, e.g., Sarah A. Binder & Thomas E. Mann, *Slaying the Dinosaur: The Case for Reforming the Senate Filibuster*, BROOKINGS REV., Summer 1995, at 42, 42; Denning, *supra* note 69; Massey, *supra* note 71, at 14–16; Pickering & Clanton, *supra* note 29, at 817–18; Reynolds, *supra* note 69, at 1580.

¹⁰⁵ U.S. CONST. art. I, § 7.

¹⁰⁶ STANDING RULES OF THE SENATE R. XXXI, in COMM. ON RULES & ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 112-1, at 57–59 (2011).

¹⁰⁷ See Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 365 (2003) (“[T]he bulk of our laws about lawmaking include provisions that render their special statutory procedures no different, and no more legally durable, than any other rule of proceeding.”).

¹⁰⁸ *Id.* at 365–66.

¹⁰⁹ *Id.* at 365.

¹¹⁰ Compare Dan Friedman, *Senate’s Returning Democrats Unanimously Favor Filibuster Reform*, NAT’L J. (Dec. 22, 2010, 3:12 PM), <http://www.nationaljournal.com/congress/senate-s-returning-democrats-unanimously-favor-filibuster-reform-20101222> (stating that every Democratic senator, constituting a majority of the chamber, urged Majority Leader Harry Reid to move forward with reforming filibuster rules), with Carl Hulse, *Senate Democrats Drop Campaign to Limit Filibuster*, N.Y. TIMES, Jan. 27, 2011, at A20 (stating that Democrats “abandoned” efforts to overhaul the Senate rules to curb filibusters).

panels and commissions,¹¹¹ and there is nothing to suggest that the Senate could not similarly establish the Selection Panels and Confirmation Commission through a simple, unicameral resolution.

2. Selection Panels

The Selection Panels are modeled after similar advisory groups already used by some senators in suggesting judicial nominations to the President.¹¹² For example, Florida's senators established the first selection panel in 1974.¹¹³ Today, the Florida "nominating commission" consists of fifty-six members who interview candidates for vacancies in the state's federal district courts and then forward a list of six finalists to the state's two U.S. senators.¹¹⁴ The senators then select one finalist to recommend to the President.¹¹⁵

Wisconsin has an eleven-member "nominating commission" that its senators activate when a vacancy occurs in the state's federal district courts.¹¹⁶ A charter spells out the commission's membership and procedures in detail.¹¹⁷ The State Bar of Wisconsin appoints two members, and one member is the dean of one of the state's law schools.¹¹⁸ Then, when both senators and the President are from the same party, each senator appoints four members.¹¹⁹ When just one senator is of the same party as the President, that senator appoints five members, with the other senator appointing three.¹²⁰ If both senators are of a different political party than the President, each senator appoints two members of the commission, and the most senior elected official of the President's party appoints four members.¹²¹

Senators in at least eighteen other states use some form of an advisory group to assist in recommending candidates for nomination to the federal bench.¹²² Thus, the proposed Selection Panels formalize what is currently employed informally and expands their use to circuit court appointments. The

¹¹¹ MATTHEW E. GLASSMAN & JACOB R. STRAUSS, CONG. RESEARCH SERV., R40076, CONGRESSIONAL COMMISSIONS: OVERVIEW, STRUCTURE, AND LEGISLATIVE CONSIDERATIONS 1 (2011) (discussing congressional creation of independent commissions and advisory panels).

¹¹² See, e.g., Carl Tobias, *Judge Thompson and the Appellate Court Confirmation Process*, 91 B.U. L. REV. 727, 729 (2011).

¹¹³ *Federal Judicial Selection: Federal Judicial Nominating Commissions*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/federal_judicial_selection/federal_judicial_nominating_commissions.cfm?state=FD (last visited Jan. 7, 2012).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Federal Judicial Selection*, *supra* note 113.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

primary purpose of including the Selection Panels in the proposal is that they offer a valuable means of aiding in the nomination of qualified judicial candidates. But, almost equally important as I will discuss later, the panels also elevate the Senate's role in advising on judicial appointments. This helps to balance the somewhat diminished consenting role the Senate would play for nominations that proceed through the Confirmation Commission.

3. *Confirmation Commission*

The Confirmation Commission would be created at the start of each new session of Congress, serving for the two-year term. It would be tasked with conducting a thorough investigation of the nominee, reporting its findings to the Senate, and making a recommendation as to whether the Senate should approve or disapprove of the nomination.

As with the BRAC Commission, the Confirmation Commission's recommendation would enjoy a presumption that the Senate agrees with the Commission's report unless the Senate acts within a specified timeframe to disapprove it. The presumption, undoubtedly the most striking element of the proposal, is a necessary component of a plan aiming to remove the obstructionism associated with judicial nominations and to return the focus to the candidate's professional qualifications. The table must be turned so that inaction by the Senate equals action. Moreover, just instituting fast-track consideration of the nomination is insufficient. If each individual nomination is still subjected to an up-or-down vote by the full chamber, the same electoral, partisan, and ideological considerations will pervade the process.

4. *Internal Restraints in the Proposal*

There are several restraints built into the proposal. It does not apply to Supreme Court nominations—for two key reasons. First, the proposal is intended to overcome the delays and obstructionism of the judicial confirmation process. With Supreme Court nominations, the Senate acts.¹²³ Indeed, there are mechanisms in place to ensure that a Supreme Court nomination receives full consideration from the Senate.¹²⁴ Moreover, the attention associated with such a nomination means that Senate inaction would be scrutinized just as publicly as Senate action. Put simply, the facts do not support the idea that there is a problem that requires the same type of fix as lower court confirmation processes. Second, the nature and importance of Supreme Court nominations make it impossible to imagine the Senate adopting a Commission-like proposal for the confirmation of a justice. The Senate's advice and consent responsibility is at its greatest when dealing with a nomination to the nation's highest court. As such, even if there are flaws in the current approach to confirming Supreme

¹²³ Kmiec & Minckberg, *supra* note 69, at 242.

¹²⁴ *Id.*

Court justices, the fact remains that it is a process that should be completed in its entirety by senators.

The Confirmation Commission also only kicks in when the President nominates an individual from the Selection Panel list and when the Senate Judiciary Committee or full Senate fails to act in a timely fashion. Why these limits? In the former instance, as mentioned above, the Selection Panel requirement exists to balance out the Senate's reduced consenting role. The fact that the Confirmation Commission mechanism only takes effect when the Senate fails to act is a tacit acknowledgement that the preferred confirmation process is through the normal procedures of Judiciary Committee consideration and full Senate action. There is no reason to turn to the Confirmation Commission if the Senate is functioning and fulfilling its advice and consent responsibilities. Only in the face of delays and obstruction should an alternative route to confirmation be available. Additionally, both limits on the use of the Confirmation Commission serve as additional protections against a president exploiting the Confirmation Commission mechanism to show favoritism or promote ideological extremists to the judiciary. The Selection Panels will be tasked with identifying only the most qualified candidates for appointment, and their use in over a dozen states suggests that they can live up to that expectation. Moreover, the Senate can always act within the requisite time frame to reject a nominee that it opposes.

Having laid out the concept and the purposes it serves, it is time to defend the proposal more directly. The next three Parts do just that. First, I explain why the history of the Appointments Clause and the confirmation process support the recommended changes. I then turn to the question of whether the Senate can, constitutionally, adopt such an approach in fulfilling its advice and consent role. Finally, I discuss why the political context of judicial confirmations would not prevent—and may even encourage—the Senate's adopting the proposed changes. In short, the confirmation process reform proposal is historically, legally, and politically justified.

IV. WHY THE REFORM PROPOSAL WORKS: HISTORICALLY

With the suggested reforms now fully spelled out, it is time to anticipate, and respond to, the chief complaints the proposal will provoke.

The first critique to contend with is that the proposal does not comport with the historical understanding of the Senate's advice and consent role. Or, put simply, the Framers would disapprove. Many scholars argue that the Senate was supposed to have a powerful, active role in the judicial appointments process.¹²⁵ Those holding this opinion will undoubtedly object to the diminished role that the Confirmation Commission would mean for the upper chamber. Others,

¹²⁵ See, e.g., Reynolds, *supra* note 69, at 1580; Strauss & Sunstein, *supra* note 70, at 1493–94.

however, contend just the opposite.¹²⁶ They believe that the Framers intended the Senate to serve only a limited function and to defer to the President except in the most unwarranted of appointments.¹²⁷ A look at the Constitutional Convention's adoption of the Appointments Clause helps answer the question as to the intended role of the Senate. What that history reveals is that, like most questions before the Convention, the delegates were split over the Senate's role, but not over the ultimate purposes behind the Clause, which was to ensure that the federal judiciary would be filled with qualified, meritorious judges. Therefore, even though the Appointments Clause's history at the Convention is a bit muddled, a thorough look at it reveals that the proposed reforms to the confirmation process actually help meet the Framers' objectives.

There is a second history-related critique that also requires a response. It is that the proposal represents a radical departure from the way in which the Senate has gone about its advice and consent role for over two centuries. As will be discussed later in this Part, there is truth to this critique, but it is nonetheless misleading. It is accurate that the Senate has never taken the approach to confirming judicial nominees that this Article proposes, but the history of the Senate confirmation process shows that the notion of what constitutes "advice and consent" and the manner in which the Senate has fulfilled this function has changed repeatedly over the past 230 years. History, then, is on the side of the proposal.

A. *Advice and Consent at the Constitutional Convention*

The reason commentators offer starkly different assessments of the Senate's proper role in the judicial appointments process is attributable to the fact that the historical record is ambiguous. Over the course of the Constitutional Convention, the delegates proposed, debated, and voted on a variety of appointment schemes.¹²⁸ The starting position, as proposed in the Virginia Plan, was for the legislature to select the national judiciary.¹²⁹ Of course, when the delegates adopted the Virginia Plan as the framework from which to build, it was unclear what the legislature would look like, too.¹³⁰ The delegates began

¹²⁶ See, e.g., JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 376 (1968); Eastman, *supra* note 75, at 646–47; Pickering & Clanton, *supra* note 29, at 810–11; James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 338 (1989) (quoting several senators who themselves believed the chamber should play a limited role in judicial appointments).

¹²⁷ Eastman, *supra* note 75, at 640–47.

¹²⁸ Gauch, *supra* note 126, at 341 (“Any analysis of the intent behind ‘advice and consent’ is complicated by the divergent appointment schemes considered by the delegates to the Constitutional Convention of 1787.”).

¹²⁹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter RECORDS].

¹³⁰ *Id.* at 20. The Virginia Plan called for a bicameral legislature, but did not specify the details for the two chambers. *Id.*

paying attention to the question of the judiciary on June 5, 1787, with a series of conflicting proposals.¹³¹ James Madison proposed that the Senate, not the legislature as a whole, appoint judges.¹³² Other delegates disliked the idea of legislative involvement in the appointment of judges, instead proposing that the executive appoint members of the judiciary.¹³³ In response, Alexander Hamilton “suggested the idea of the Executive’s appointing or nominating the Judges to the Senate which should have the right of rejecting or approving.”¹³⁴ A month later, Nathaniel Gorham formally proposed the Senate’s “advice and consent” role, though the motion failed on a tie vote.¹³⁵

As the Philadelphia summer grew hotter, so did tempers at the Convention as the delegates focused on the most divisive question: how to apportion representation in the Senate.¹³⁶ Only after bitter debates¹³⁷ and significant acquiescence on the part of large state delegates resulted in the Connecticut Compromise would the Convention return to the issue of how federal judges should be selected. But, of course, the Connecticut Compromise resulted in a Senate equally represented by states, thereby changing the landscape when deciding how to appoint judges. Thus, the delegates largely began debating the matter anew.

Those debates, taking place generally between July 18 and September 7, reveal three key considerations that lay at the heart of the appointments question. Who best to assess the qualifications of judges?¹³⁸ How to avoid corruption and intrigue in the selection process?¹³⁹ And lingering—always lingering—was the concern for protecting states’ interests.¹⁴⁰

As to the first matter—who best to assess the merits of a judicial candidate—the delegates were squarely split into two camps. Many voiced the

¹³¹ *Id.* at 119–25.

¹³² *Id.* at 120.

¹³³ *See, e.g., id.* at 119, 126, 244.

¹³⁴ *Id.* at 128.

¹³⁵ 2 RECORDS, *supra* note 129, at 44.

¹³⁶ MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 94 (1913); 1 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 5 (1938).

¹³⁷ *See* 1 RECORDS, *supra* note 129, at 492 (quoting Madison’s notes of the statement by Gunning Bedford of Delaware that if the small States did not receive equal representation in the Senate, they would find “some foreign ally of more honor and good faith, who will take them by the hand and do them justice”). John Dickinson, also of Delaware, agreed, stating that “we would sooner submit to a foreign power, than be deprived of an equality of suffrage, in both branches of the legislature.” *Id.* at 242. Gouverneur Morris of Pennsylvania responded, “If persuasion does not unite [the country], the sword will.” *Id.* at 530. Other scholars have also noted that the disagreement over the composition of the Senate “was so violent that it threatened to break up the Convention.” ROY SWANSTROM, THE UNITED STATES SENATE 1787–1801: A DISSERTATION ON THE FIRST FOURTEEN YEARS OF THE UPPER LEGISLATIVE BODY, S. DOC. NO. 87-64, at 14 (1961).

¹³⁸ Gauch, *supra* note 126, at 342–43.

¹³⁹ *Id.* at 343–46.

¹⁴⁰ *Id.* at 346–47.

view that the Senate, as newly constituted, was best able to weigh the qualifications of potential judges. Roger Sherman, for example, stated that the Senate would have “more wisdom” than the Executive and would “bring into their deliberations a more diffusive knowledge of characters.”¹⁴¹ Many delegates concurred with that assessment.¹⁴² Others, however, remained unconvinced.¹⁴³ James Madison said that many legislators would be “incompetent Judges of the requisite qualifications” for members of the judiciary.¹⁴⁴

There was also no consensus among the delegates as to whether the President or the Senate would be better suited to guard against the corrupting influence often associated with the power to appoint. Of course, those who favored the Senate appointing judges thought that the chamber was the more secure choice. Sherman argued, “It would be less easy for candidates to intrigue with [Senators], than with the Executive Magistrate.”¹⁴⁵ Those preferring executive appointment suggested just the opposite. Nathaniel Gorham said that placing the appointment power with the Senate would “give full play to intrigue [and] cabal,”¹⁴⁶ while James Wilson suggested Senate appointments of judges would lead to “[i]ntrigue, partiality, and concealment.”¹⁴⁷ Further driving the debates were the delegates’ views on how to construct an appointment system that would protect state interests¹⁴⁸ and that would offer some form of accountability in the choices made for filling the judiciary.¹⁴⁹

Ultimately, with these concerns in mind, the delegates adopted the mechanism we know today: the President shall appoint judges with the advice and consent of the Senate.¹⁵⁰ The provision that became the Appointments Clause was proposed by the Committee of Eleven on September 4 and finally adopted on September 7.¹⁵¹

Unfortunately, the compromises that brought about the Appointments Clause are “not preserved in the record of the Federal Convention.”¹⁵² Some have labeled the Convention debates over the appointments power as nothing

¹⁴¹ 2 RECORDS, *supra* note 129, at 43.

¹⁴² *See, e.g., id.* at 81 (statement of Pinkney); *id.* at 82 (statement of Elbridge Gerry).

¹⁴³ *See, e.g., id.* at 82 (statement of Gouverneur Morris).

¹⁴⁴ 1 *id.* at 232.

¹⁴⁵ 2 *id.* at 43; *see also id.* (statement of Gunning Bedford).

¹⁴⁶ *Id.* at 42.

¹⁴⁷ 1 RECORDS, *supra* note 129, at 119.

¹⁴⁸ 2 *id.* at 82 (statement of Elbridge Gerry).

¹⁴⁹ THE FEDERALIST NO. 77, at 443 (Alexander Hamilton) (Am. Bar Ass’n 2009) (discussing the public’s ability to hold the President accountable for a bad nomination and the Senate accountable for rejecting a good nomination).

¹⁵⁰ U.S. CONST. art. II, § 2.

¹⁵¹ 2 RECORDS, *supra* note 129, at 494–95, 539. The Convention established the Committee of Eleven to address issues tabled or not yet acted on by the delegates. *Id.* at 473. The Committee was composed of one delegate from each state at the Convention. *Id.*

¹⁵² Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1069 (1987).

more than “an unprincipled struggle over the proper allocation of powers” and as motivated by “partisan politics and unguided practical necessity.”¹⁵³ It is also easy to see how scholars can take the Convention history of the Appointments Clause and construct two diametrically opposed views of the Senate’s appropriate role in the confirmation process. Those who support a more involved role for the chamber point out that for most of the Convention the legislature alone would appoint judges.¹⁵⁴ Commentators who seek a more deferential, hands-off approach by the Senate when considering judicial nominations believe that the Framers only included the chamber in the process to prevent the appointment of “political hacks.”¹⁵⁵

But in many ways, this scholarly debate is missing the substance that gives the inquiry meaning. The key consideration is not what the Framers intended the Senate’s role to be in the appointments process vis-à-vis the President. The Convention history cannot answer that question satisfactorily for two reasons. First, as noted above, the debates are inconclusive precisely because there was no consensus. Second, and more importantly, what does exist of the historical record is misleading. For much of the Convention the delegates did not know what the national legislature would look like, how it would be constructed, and what powers it would hold. Therefore, simply noting that the Framers originally placed the responsibility of appointing judges with the legislature is less meaningful than it might otherwise appear.

Additionally, as the delegates debated the question of giving the appointment power to the Senate or the President, their discussion evidences a governing worldview vastly different than our reality today. The Framers worked under the assumption that the operating dynamic between the Executive and the Senate would be one of institutional competition¹⁵⁶—each serving as a check on the other—with the Framers giving little consideration to political parties and ideological loyalties.¹⁵⁷ Today, this hardly holds true. More important than an officeholder’s station in government is her party affiliation. A Republican-controlled Senate is generally unwilling to serve as a strong institutional check on a Republican President, and the same is true for Democratic Senates and Democratic Presidents.¹⁵⁸ This reality dramatically

¹⁵³ *Id.* at 1078.

¹⁵⁴ See, e.g., Strauss & Sunstein, *supra* note 70, at 1496–98.

¹⁵⁵ John S. Baker, Jr., *Ideology and the Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 187 (2001).

¹⁵⁶ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312 (2006) (“American political institutions were founded upon the Madisonian assumption of vigorous, self-sustaining political competition between the legislative and executive branches.”).

¹⁵⁷ *Id.* at 2312–13.

¹⁵⁸ See *id.* at 2233–34; see also HENRY WAXMAN WITH JOSHUA GREEN, THE WAXMAN REPORT: HOW CONGRESS REALLY WORKS 151–52 (2009) (explaining that Republicans were uninterested in serving as a check against executive power during President George W. Bush’s terms).

affects the advice and consent calculus as the Senate no longer necessarily operates as the “security”¹⁵⁹ against a President’s appointment power. Finally, of course, with the Seventeenth Amendment’s¹⁶⁰ ratification and the country’s growth, the Senate that the delegates created is materially different than that today. State legislatures no longer appoint senators and the chamber has grown from twenty-six members to one hundred.

Given all this, what can we make of the Convention history surrounding the Appointments Clause as it relates to the proposed reforms discussed in Part II? In examining the debates, it is easy to focus on the delegates’ disagreements. But behind the dissension rested a common understanding of the goals for whatever appointment process the Convention adopted. The delegates wanted judges whose merits, rather than political considerations, qualified them for service.¹⁶¹ It was with that objective always in mind that the Framers struggled with the appropriate roles that the President and Senate should play. Therefore, the proper means of assessing the proposed reforms against the historical record is not to consider whether the proposal improperly dilutes the Senate’s role in the confirmation process.¹⁶² Instead, the most meaningful question is whether the proposal promotes the objective the Framers had for giving the Senate its advice and consent responsibility. That goal, in a nutshell, was to prevent the appointment of unqualified judges.¹⁶³

The Senate could be relied upon to do this because of its small size,¹⁶⁴ its interest in promoting the national good,¹⁶⁵ its indirect attachment to popular opinion,¹⁶⁶ and the fact that senators would still feel a sense of accountability because the “censure of rejecting a good [nominee] would lie entirely at the door of the Senate.”¹⁶⁷

¹⁵⁹ 2 RECORDS, *supra* note 129, at 42–43 (statement of James Madison).

¹⁶⁰ U.S. CONST. amend. XVII.

¹⁶¹ See *supra* notes 137–39 and accompanying text.

¹⁶² I will later explain why the proposal should not be viewed as diminishing the Senate’s role in the confirmation process. See *infra* notes 267–68 and accompanying text.

¹⁶³ THE FEDERALIST NO. 76, at 437 (Alexander Hamilton) (Am. Bar Ass’n 2009) (“It is not easy to conceive a plan better calculated than this to produce a judicious choice of men for filling the offices of the Union . . .”).

¹⁶⁴ *Id.* (discussing the value of “concurrence” by an “assembly of a moderate number”); 1 RECORDS, *supra* note 129, at 233 (statement of James Madison).

¹⁶⁵ See, e.g., 2 RECORDS, *supra* note 129, at 292 (“The Senate was to represent & manage the affairs of the whole, and not to be the advocates of State interests.” (quoting Daniel Carrol)); 2 THE FOUNDERS’ CONSTITUTION 229 (Phillip B. Kurland & Ralph Lerner eds., 1987) (speaking before the New York ratifying convention, Alexander Hamilton said that a senator “is an agent for the Union, and . . . is bound to perform services necessary to the good of the whole”).

¹⁶⁶ U.S. CONST. art. I, § 3; see also THE FEDERALIST NO. 63, at 362–63 (James Madison) (Am. Bar Ass’n 2009) (discussing the importance of the indirect election of senators); 1 RECORDS, *supra* note 129, at 421.

¹⁶⁷ THE FEDERALIST NO. 77, *supra* note 149, at 444.

As discussed in Part II, the current approach to judicial confirmations hardly meets these objectives. Senators are not motivated by institutional considerations, but are instead driven by partisan, electoral, and ideological concerns.¹⁶⁸ With judicial vacancy rates alarmingly high,¹⁶⁹ it is not clear that national interests weigh heavily on senators' minds when considering judicial nominees. Finally, because there is not material benefit to confirming judicial nominees but often electoral advantages to delaying or obstructing confirmation, the system has been perverted to incentivize stalemate in the advice and consent process.

The proposal, therefore, meets the objectives of the Framers by returning the focus to ensuring the confirmation of meritorious judicial nominees. The Commission would thoroughly investigate a nominee's qualifications—against standards designed by the Senate—and then base its decision on those factors that help assess judicial merit rather than on the political considerations that senators focus on today. While the proposal cannot change the incentives that exist for a senator to seek to delay or block a judicial nomination for political gain, the proposal reverses the vetogates of the legislative process so that once a nominee has been found to be objectively qualified for the position, it will be nearly impossible for a senator to prevent the Senate's consent. Finally, as others have noted, implicit in the Appointments Clause rests the idea that the "Senate will be proficient at making confirmation decisions."¹⁷⁰ The proposal helps make this assumption a reality.

B. *Advice and Consent's Mutability*

The second anticipated historical critique of the proposal is that it does not comport with how the Senate has traditionally fulfilled its advice and consent role. This concern is inaccurate, accurate, and irrelevant all at the same time.

In what respect is the critique inaccurate? As noted in Part III's detailed description of the proposal, the advice feature of the proposal builds on formal and informal mechanisms through which senators advise the President in the judicial selection process.¹⁷¹ Indeed, senators have used selection panels for decades to offer slates of candidates from which the President nominates district court appointees.¹⁷² Moreover, when the President does select from recommendations made by home state senators, it reduces the likelihood of obstruction and delay.¹⁷³ While it is true that the proposal includes creating

¹⁶⁸ Binder & Maltzman, *supra* note 16, at 306–10.

¹⁶⁹ See Admin. Office of the U.S. Courts, *supra* note 3.

¹⁷⁰ Gerhardt, *supra* note 14, at 478.

¹⁷¹ See *supra* notes 112–22 and accompanying text.

¹⁷² *Id.*

¹⁷³ See DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 34405, ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 47–50 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34405.pdf> (discussing the consequences of

selection panels for circuit court vacancies and formalizes the fast-track approach for nominees selected from the submitted list, this is not a serious departure from past experience.

It is, however, accurate to point to the creation of a Confirmation Commission and the binding feature of the fast-track provision as an entirely new way for the Senate to fulfill its consent function.¹⁷⁴ But this, then, gets to the point about irrelevance. While it is true that the proposal represents a different way for the Senate to confirm judicial nominees, the fact is that the Senate has often developed new approaches to advising and consenting. Indeed, the understanding of the Advice and Consent Clause has been quite mutable, evolving over time.¹⁷⁵ For example, over the years, the norms of senatorial courtesy in the judicial nomination process have been formalized through blue slips.¹⁷⁶ Beginning in 1917, blue slips were sent to home state senators for all judicial nominations.¹⁷⁷ For the first forty years, if a senator withheld a blue slip, the “committee would report the nominee adversely to the Senate, where the contesting Senator would have the option of stating his/her objections to the nominee before the Senate would vote on confirmation.”¹⁷⁸ Between 1956 and 1978, that power extended even further so that one Senator “could stop all committee action on a judicial nominee by either returning a negative blue slip or failing to return a blue slip to the committee.”¹⁷⁹ Since 1979, the importance of blue slips has been left to the Judiciary Committee Chair to decide.¹⁸⁰

More specifically, Senate Judiciary Committee procedures for considering nominations have changed over time. Of course, the Committee itself was not established until 1816¹⁸¹ and it was not until 1868 that the Senate began requiring all judicial nominations to be referred to the Committee.¹⁸² Confirmation hearings did not occur regularly until the twentieth century, and only then for Supreme Court nominations.¹⁸³ No nominee was called to testify at a hearing until 1925, when Harlan Fiske Stone was invited to appear in person to respond to questions about his role as Attorney General during the

nominating judicial candidates against the advice of, or without consulting, a home state senator).

¹⁷⁴ Though it is not a new mechanism for dealing with stalemate. See Teter, *supra* note 7, at 3.

¹⁷⁵ Denning, *supra* note 69, at 27.

¹⁷⁶ MITCHELL A. SOLLENBERGER, CONG. RESEARCH SERV., RL 32013, THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917–PRESENT, at 1–2 (2003).

¹⁷⁷ *Id.* at 5.

¹⁷⁸ *Id.* at ii.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 10–21 (describing the blue slip practices of Judiciary Committee chairs).

¹⁸¹ *History of the Senate Committee on the Judiciary*, U.S. SENATE COMM. ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/history/index.cfm> (last visited Feb. 1, 2012).

¹⁸² *Id.*

¹⁸³ *Id.*

Teapot Dome Scandal.¹⁸⁴ Finally, until 1929, the Senate's deliberations on judicial nominations were closed to the public and largely unrecorded.¹⁸⁵

These examples help make two important points. First, rather than static, the process for the Senate to consent to judicial nominees is often changing. Second, this history shows that the Senate has the unbridled authority to give constitutional meaning to "advice and consent." In other words, the Senate has always determined what it means to "consent" to a judicial nominee and the proposal is only a new step in the evolving practices through which the Senate fulfills that responsibility.

One final point deserves attention. The critique that the proposal distorts some common historical understanding of how the Senate should consent to judicial nominations is undermined by the fact that there is no uniform standard by which individual senators decide how or why to consent. Some senators express deference to presidential selections¹⁸⁶ while others do not.¹⁸⁷ Some wait until after the Senate Judiciary Committee completes its hearings to make a decision¹⁸⁸ while others announce support or opposition well before any confirmation hearing.¹⁸⁹ Some senators (claim to) base their decision on professional qualifications alone and eschew considerations of ideology.¹⁹⁰ Others gladly acknowledge the role that ideology plays in their decisions.¹⁹¹ Indeed, the Senate Judiciary Committee has held hearings on the question of what factors the Senate should consider when weighing judicial nominations.¹⁹² These hearings show that there has never been consensus on that subject. In

¹⁸⁴ *Id.*

¹⁸⁵ BETSY PALMER, CONG. RESEARCH SERV., RL 31948, EVOLUTION OF THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY 10 (2009).

¹⁸⁶ See, e.g., Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035, 1040 (2009).

¹⁸⁷ See, e.g., *Should Ideology Matter?*, *supra* note 27, at 11–13 (statement of Sen. Russell D. Feingold).

¹⁸⁸ See, e.g., Thomas Ferraro, *Early Critic of Sotomayor Says Will Back Her*, REUTERS, July 22, 2009, available at <http://www.reuters.com/article/2009/07/22/us-usa-court-sotomayor-idUSTRE56L65G20090722>.

¹⁸⁹ See, e.g., Bob Egelko, *Feinstein Blasts GOP Foes of Obama's Choice for Judge*, S.F. CHRON., Apr. 16, 2010, at A12 (describing opposition to Ninth Circuit nominee Goodwin Liu). Senators sometimes even announce opposition moments after the nomination is made. See, e.g., ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 84–85 (1989) (quoting Senator Edward M. Kennedy's speech opposing Robert Bork's confirmation given moments after President Reagan announced Bork's nomination).

¹⁹⁰ See, e.g., *Should Ideology Matter?*, *supra* note 27 at 13–14 (statements of Sen. Jon Kyl); *id.* at 29–39 (statement of Sen. Orrin Hatch).

¹⁹¹ See, e.g., *id.* at 1–3 (statement of Sen. Charles E. Schumer); *id.* at 11–13 (statement of Sen. Russell D. Feingold). One former senator has said that he sometimes asked judicial nominees about which charities they donated to over the past ten years and that, "if [he] were still a member of the Senate [he] might use that more often." *Selecting Federal Judges: The Role and Responsibilities of the Legislative Branch*, 86 JUDICATURE 28, 29 (2002) (statement of Sen. Howard M. Metzenbaum).

¹⁹² See, e.g., *Should Ideology Matter?*, *supra* note 27.

other words, the Senate lacks any standard for deciding when a nominee deserves confirmation.

The history makes clear, then, that there has never been a single, uniform method for *how* or *why* the Senate consents to judicial nominations. It is therefore irrelevant in assessing the proposal's merits that it does not comport entirely with any past way the Senate has fulfilled that function.

The two history-based critiques of the proposal—that it violates the Framers' intended role for the Senate and that it does not square with historical practices—fail. Indeed, the Constitutional Convention history of the Advice and Consent Clause reveals that the proposal actually bolsters the Framers' objectives for the Appointments Clause by returning the judicial confirmation process's focus to the qualifications of the nominee.

V. WHY THE REFORM PROPOSAL WORKS: CONSTITUTIONALLY

The confirmation reform proposal works from a historical perspective, as the previous Part shows. That is an important consideration, of course, but it is not the most significant critique the Senate would face in implementing the proposal. The Senate would also need to overcome questions about the mechanism's constitutionality. In this realm, two concerns arise. First, may the Senate rely on rulemaking power to affect such a change in the judicial process? Then, more substantively, does the use of a Confirmation Commission and Selection Panels fulfill the chamber's responsibility under Article II to give "advice and consent" to judicial appointments? This second concern breaks down into two distinct considerations: whether Article II permits the Senate to consent to nominees through the proposed method and also whether the use of a Confirmation Commission violates any other implied constitutional standards, such as the nondelegation doctrine or separation of powers. This Part will explain why the proposal overcomes each of these concerns. Moreover, as I will discuss, the political question doctrine further shields the suggested changes from judicial scrutiny.

A. *Can the Senate Use Its Rulemaking Authority to Enact the Reform?*

Would a Senate rule reforming the confirmation process violate the Constitution? To answer that, it is important to understand from where the Senate derives its power to create any rule and how the Court has interpreted that power.

Article I, Section 5 provides that "[e]ach House may determine the Rules of its Proceedings."¹⁹³ This broad provision, inserted by the Committee of Detail on August 6, 1787,¹⁹⁴ is "an unmistakable delegation by the Constitution to the

¹⁹³ U.S. CONST. art. I, § 5, cl. 2.

¹⁹⁴ 2 RECORDS, *supra* note 129, at 180.

House and Senate to devise their own enactment processes.”¹⁹⁵ The Constitution establishes no specific limits to this general rulemaking authority, thereby granting the Senate “vast power” to adopt rules that it sees fit.¹⁹⁶ For example, under the Rules of Proceedings prerogative of each chamber, the Senate has created the Senate Special Committee on Aging¹⁹⁷ and established procedures governing the transition of staff who worked for a senator who resigned or died in office,¹⁹⁸ while the House has created the House Democracy Partnership to work with emerging democracies throughout the world.¹⁹⁹ More notably, of course, the Senate has adopted rules relating to its advice and consent responsibilities.²⁰⁰ Indeed, just recently, the Senate adopted a resolution²⁰¹ designed to “curb its own power” and to make the Senate “more efficient” in its consideration of certain executive branch nominations.²⁰²

The expansive power the Senate has historically exercised under its rulemaking authority supports the fast-tracking element of the suggested reforms. That said, the proposal takes things one step further by establishing a Confirmation Commission to review stalled judicial nominations and by authorizing the creation of circuit-based judicial selection panels. The question remains, therefore, could the Senate create these independent panels through a simple, unicameral resolution?

Admittedly, there are no examples of such an important commission being established exclusively by one chamber of Congress.²⁰³ That said, the idea of creating policy commissions to tackle entrenched problems is not new.²⁰⁴ Moreover, senators have created their own versions of nominating commissions to assist in the selection of federal judges²⁰⁵ and have formed other advisory groups as they have seen fit.²⁰⁶ Additionally, the Senate regularly passes

¹⁹⁵ John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 527 (2001).

¹⁹⁶ Bruhl, *supra* note 107, at 345.

¹⁹⁷ See S. Res. 4, 104, 95th Cong. (1977). The Special Committee on Aging has no legislative authority, but studies issues, conducts oversight, and investigates reports of fraud and abuse. *Id.*

¹⁹⁸ S. Res. 458, 98th Cong. (1984).

¹⁹⁹ H.R. Res. 5, 112th Cong. (2011); H.R. Res. 135, 109th Cong. (2005).

²⁰⁰ STANDING RULES OF THE SENATE R. XXXI, in COMM. ON RULES & ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 112-1, at 57–59 (2011).

²⁰¹ S. Res. 116, 112th Cong. (2011).

²⁰² Chuck Schumer, *Nominations Reform Will Change the Senate for the Good*, THE HILL’S CONGRESS BLOG (June 29, 2011, 10:11 AM), <http://thehill.com/blogs/congress-blog/politics/168997-nominations-reform-will-change-the-senate-for-the-good>.

²⁰³ Telephone Interview with Robert B. Dove, Former Parliamentarian, U.S. Senate (1981–1987, 1995–2001) (June 29, 2011).

²⁰⁴ See GLASSMAN & STRAUS, *supra* note 111, at 1.

²⁰⁵ See *supra* notes 112–22 and accompanying text.

²⁰⁶ See GLASSMAN & STRAUS, *supra* note 111, at 1.

resolutions related to the hiring of Senate staff, the organization of the Senate, and other administrative matters. These precedents, especially taken together, affirm the idea that the Senate could create a Confirmation Commission and Selection Panels to help it complete its advice and consent responsibilities.²⁰⁷

Supreme Court precedent provides further legitimacy to the proposal. Few Supreme Court cases directly address the Rules of Proceedings Clause and those that do generally focus not on the breadth of the rulemaking power, but instead on interpreting an existing rule. The Court decided perhaps the most important of these cases in 1892. In *United States v. Ballin*, petitioners challenged a House of Representatives rule that allowed the presiding officer to count toward a quorum those members physically present but who did not vote.²⁰⁸ Specifically, petitioners questioned the legality of a tariff statute that passed by a vote of 138 in favor, 3 opposed, and 189 present but not voting.²⁰⁹ In framing the issue, the Court stated, “The action taken was in direct compliance with [the] rule. The question, therefore, is as to the validity of this rule”²¹⁰ The Court then went on to articulate a strong presumption in support of Congress’s rulemaking authority. The Court held:

The Constitution empowers each house to determine its rules of proceedings . . . [i]t is no impeachment of the rule to say that some other way would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time.²¹¹

The Court did place some limits on the power, stating that Congress “may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.”²¹² But the rulemaking power, within these limits, is “absolute and beyond the challenge of any other body or tribunal.”²¹³

I will explain below why the proposal does not implicate any of the articulated restraints on the Senate’s rulemaking power, but it is enough at this point to say that the Court articulated in *Ballin* an expansive authority for Congress in adopting rules. Since *Ballin*, there have been only a few instances

²⁰⁷ Indeed, former Senate Parliamentarian Robert Dove confirmed that such a Commission would be “well within” the Senate’s rulemaking power. See Telephone Interview with Robert B. Dove, *supra* note 203.

²⁰⁸ 144 U.S. 1, 4–5 (1892).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 5.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

of the Court weighing a challenge to a congressional rule.²¹⁴ In most of these instances, moreover, the case focused on congressional interpretation of, or failure to abide by, a rule—not on the legitimacy of the rule itself.²¹⁵

One such case, *United States v. Smith*, deserves special attention as it deals specifically with a Senate rule relating to its advice and consent role.²¹⁶ In 1930, President Hoover nominated George Otis Smith to join the Federal Power Commission.²¹⁷ Less than three weeks later, on December 20, the Senate advised and consented to the nomination by a vote of thirty-eight to twenty-two, with thirty-five senators not voting.²¹⁸ That same day, the Senate ordered that the resolution confirming Smith be forwarded to the President and then the chamber adjourned to January 5, 1931.²¹⁹ On December 22, 1930, the Secretary of the Senate forwarded the confirmation resolution, whereupon the President signed it and it was delivered to Smith.²²⁰ That same day, Smith took the oath of office, seemingly completing the nomination and appointment process.²²¹ From the Senate's standpoint, however, nothing was final. Under Senate rules, a "Senator voting in the majority [could] move for a reconsideration of [the nomination] on the same day on which the vote was taken, or on either of the next two days of actual executive session of the Senate."²²² If the reconsideration resulted in the rejection of an otherwise approved nomination, and the confirmation had not yet been forwarded to the President, then the reconsideration would take effect, and the appropriate notice would be sent to the President.²²³ But if the Senate had already forwarded the confirmation notification, then the Senate would send the President a copy of the reconsideration resolution along with a request that the President return the confirmation notification to the Senate.²²⁴

On January 5, 1931, sixteen days after initially consenting to Smith's nomination and two weeks after Smith formally joined the Federal Power Commission—but still the next day of the Senate's executive session because of

²¹⁴ See Roberts, *supra* note 195, at 530 (stating that "[f]ederal courts have only infrequently had the opportunity to interpret the Rulemaking Clause of Article I, Section 5" and providing a summary of the relevant case law).

²¹⁵ See, e.g., Yellin v. United States, 374 U.S. 109, 114 (1963) ("It is against this background that the Committee's failure to comply with its own rules must be judged."); Christoffel v. United States, 338 U.S. 84, 88–89 (1949) ("The question is neither what rules Congress may establish for its own governance, nor whether presumptions of continuity may protect the validity of its legislative conduct. The question is rather what rules the House has established and whether they have been followed.").

²¹⁶ 286 U.S. 6, 8 (1932).

²¹⁷ *Id.* at 27.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 27–28.

²²¹ *Id.* at 28.

²²² *Smith*, 286 U.S. at 30–31.

²²³ *Id.* at 31.

²²⁴ *Id.*

the adjournment—the Senate adopted a motion to reconsider Smith’s nomination and notified President Hoover accordingly.²²⁵ Five days later, President Hoover responded by informing the Senate that because he had already appointed Smith to the Commission he would not return the notification.²²⁶ The Senate nevertheless proceeded to reconsider Smith’s nomination and rejected it.²²⁷ The Senate then instituted legal proceedings to test Smith’s claim on his office.²²⁸

In deciding the matter, the Court never questioned the legitimacy of the rule itself. Indeed, the Court went out of its way to make clear that the issue “relate[d] to the construction of the applicable rules, not to their constitutionality.”²²⁹ The Court then held that the Senate had incorrectly construed the rule to require the President to return a nomination, even though the rule only permitted the Senate to request the return.²³⁰ But even as the Court construed the rule differently than the Senate, the Court reiterated the *Ballin* deference, and stated: “The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.”²³¹ With regards to the specific responsibility relating to nominations, the Court concluded, “A rule designed to ensure due deliberation in the performance of the vital function of advising and consenting to nominations for public office, moreover, should receive from the Court the most sympathetic consideration.”²³²

These cases, together, establish the prevailing principle that each chamber of Congress has almost complete authority under the Rules of Proceedings Clause to adopt any rule that it thinks is useful in carrying out its constitutional functions.

B. Does the Substance of the Proposal Implicate Specific Constitutional Provisions?

Could it be, however, that while the Senate enjoys the right to adopt rules related to its advice and consent responsibilities, that the actual proposal itself still violates the limits placed on Congress by *Ballin*? In other words, would the proposal “ignore constitutional restraints,” “violate fundamental rights,” or lack a “reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained”?²³³

²²⁵ *Id.* at 27–28.

²²⁶ *Id.*

²²⁷ *Id.* at 29.

²²⁸ *Smith*, 286 U.S. at 29–30.

²²⁹ *Id.* at 33.

²³⁰ *Id.* at 43.

²³¹ *Id.* at 48.

²³² *Id.*

²³³ *United States v. Ballin*, 144 U.S. 1, 5 (1892).

To answer this question requires a look at the substance of the proposal, best done by examining the three elements of *Ballin*'s limits in turn. Are there any constitutional restraints on the Senate's advice and consent role that the proposal ignores? As discussed in the previous section, the Framers did not adorn the Appointments Clause with any special instructions, qualifications, or guidance,²³⁴ leaving the Senate "free to develop, to [its] . . . satisfaction, special procedures for appointing different kinds of federal officers."²³⁵ And a review of the Constitution reveals no other clauses that might plausibly be read as a restraint on the Senate's advice and consent role. We are left, then, with scrutinizing Article II, Section 2 itself for possible restraints that the proposal ignores.

The relevant clause of Article II, Section 2 states: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . ." ²³⁶ From this language two possible limits arise. Is *consent* actually being given to those nominees that pass through the proposed Commission mechanism and, perhaps more basically, is it the *Senate* that is giving it? As I'll discuss later, the political question doctrine probably precludes a court from ever attempting to answer these questions,²³⁷ but even if a court were to inquire, it is difficult to imagine it concluding that these two words serve as restraints that the proposal ignores.

After all, in *Ballin*, the issue centered on the House's definition of quorum. The Constitution provides that "a Majority of each [house] shall constitute a Quorum to do Business."²³⁸ This, obviously, placed some restraint on Congress from adopting a rule that formally redefined quorum to be fewer than a majority. But the Court allowed the House to determine the presence of a majority because the Constitution "has prescribed no method of making this determination."²³⁹ Similarly, the Constitution prescribes no particular method for ascertaining the Senate's consent to a nomination. As such, the Senate would not be ignoring any other restraint by adopting the Commission and fast-track mechanism proposed in Part III.

The more recent case of *Nixon v. United States*²⁴⁰ further supports this conclusion. That case features prominently in the later discussion regarding the political question doctrine, but it also offers some insights here. In *Nixon*, the Court weighed a petition by Walter Nixon, a former federal district court judge.²⁴¹ Following his conviction and sentencing to federal prison for making false statements to a federal grand jury, the House of Representatives

²³⁴ Gerhardt, *supra* note 14, at 477.

²³⁵ *Id.*

²³⁶ U.S. CONST. art. II, § 2, cl. 2.

²³⁷ See *infra* notes 271–94 and accompanying text.

²³⁸ U.S. CONST. art I, § 5, cl. 1.

²³⁹ *United States v. Ballin*, 144 U.S. 1, 6 (1892).

²⁴⁰ 506 U.S. 224 (1993).

²⁴¹ *Id.* at 226–28.

impeached Nixon and forwarded the matter to the Senate.²⁴² Under Rule XI,²⁴³ a committee of senators heard evidence in the matter and then presented to the full Senate a “transcript of the proceeding and a Report stating the uncontested facts and summarizing the evidence on the contested facts.”²⁴⁴ “Nixon and the House impeachment managers submitted extensive final briefs to the full Senate and delivered arguments from the Senate floor,” and answered questions posed directly by the senators.²⁴⁵ Nixon was also permitted to offer a personal appeal on the floor of the Senate.²⁴⁶ After three hours of this oral argument, the Senate voted by more than the requisite two-thirds to convict Nixon on two articles of impeachment.²⁴⁷ Nixon then brought suit, contending that Senate Rule XI’s committee procedure for taking evidence violates the Constitution’s requirement that “*the Senate . . . ‘try’ all impeachments.*”²⁴⁸

Article I, Section 3 provides that: “The Senate shall have the sole Power to try all Impeachments.”²⁴⁹ The Clause then goes on to place three requirements on that power: (1) The Senate “shall be on Oath or Affirmation,” (2) a two-thirds vote is required to convict, and (3) “[w]hen the President of the United

²⁴² *Id.*

²⁴³ The rule provides:

That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS R. XI, *in* COMM. ON RULES & ADMIN., U.S. SENATE, SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 112-1, at 218 (2011).

²⁴⁴ *Nixon*, 506 U.S. at 227.

²⁴⁵ *Id.* at 227–28.

²⁴⁶ *Id.* at 228.

²⁴⁷ *Id.*

²⁴⁸ *Id.* (emphasis added).

²⁴⁹ U.S. CONST. art. I, § 3, cl. 6.

States is tried, the Chief Justice shall preside.”²⁵⁰ Nixon argued that the use of the word “try” in Article I, Section 3 imposes an obligation on the Senate to conduct a “judicial trial” and that, either way, the authority granted in Article I, Section 3, Clause 6 is to “the Senate”—meaning the full chamber, not a committee created by it.²⁵¹ The Court dismissed this logic quickly.²⁵² Regarding “try,” the Court established that the word has enjoyed “considerably broader meanings” than just a judicial trial since the founding era.²⁵³ The Court then addressed the second claim that relies on “the Senate” to mean the full body. Chief Justice Rehnquist, writing for the Court, rejected the reading as “possible,” but “not . . . natural,” and asserted that endorsing such an approach “would bring into judicial purview not merely the sort of claim made by petitioner, but other similar claims based on the conclusion that the word ‘Senate’ has imposed by implication limitations on procedures which the Senate might adopt.”²⁵⁴ Based on this, and the political question doctrine, which Chief Justice Rehnquist then discussed in detail, the Court denied Nixon’s challenge to his impeachment conviction.²⁵⁵

Just as the words “Senate” and “try” did not “provide an identifiable textual limit” on the Senate’s impeachment authority, and just as the House of Representatives was free to establish its own preferred method for determining the presence of a quorum in *Ballin*, the Constitution grants the Senate control over determining the process for consenting to judicial nominees and no constitutional restraint is implicated by the proposal.

The other two *Ballin* limits can be dealt with more quickly. First, the proposed method of judicial confirmation cannot be said to “violate fundamental rights.”²⁵⁶ Simply because someone is nominated for a judgeship does not confer on that individual the right to appointment. Nor, as history has shown, does it even confer the right to have the Senate take any action on the nomination. As a practical matter, the proposed system for judicial confirmation would result in one of two possible outcomes, but following different routes. First, the Judiciary Committee and full Senate take up the nomination in a timely manner and confirm or reject the nominee—either way, the new procedure would not be implicated. Second, the nomination passes to the Commission, which either recommends or disapproves confirmation. From there, the Senate either endorses the recommendation or overturns it. In the instances in which the Senate accepts a Commission’s approval or overturns a Commission disapproval and the nominee is confirmed, no injury results. For those rejected by the Commission without contrary Senate action, the new procedure still cannot be said to have resulted in a violation of a fundamental

²⁵⁰ *Id.*; see also *Nixon*, 506 U.S. at 230.

²⁵¹ *Nixon*, 506 U.S. at 229.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 232.

²⁵⁵ *Id.* at 238.

²⁵⁶ *United States v. Ballin*, 144 U.S. 1, 5 (1892).

right for two key reasons: it is still the Senate rejecting the nominee through its adoption of the procedure and its failure to overturn the Commission's recommendation and, moreover, if the individual cannot muster the necessary sixty votes to overturn the Commission's recommendation it is doubtful that the nomination could have secured the sixty votes necessary to move forward with the Senate's consideration of the nomination. In other words, there is still no cognizable injury, without which it is impossible to claim a violation of a fundamental right. Unless a court is willing to recognize a nominee's right to a vote by the full Senate—a right that would implicate the current system of judicial confirmation—no fundamental rights would be violated by the proposed system.

The final *Ballin* restriction requires that the “method of proceeding established by the rule and the result which is sought to be attained” are reasonably related.²⁵⁷ It is important to note that the question is not about the reasonableness of the goal of the rule, but whether the *method* is reasonably related to the end. Here, the end would be a more efficient, less politically charged judicial confirmation process. Part II laid out the problems associated with the current system and there is no need to repeat them.²⁵⁸ It is enough to say that the proposed changes to the Senate's handling of judicial nominations are reasonably related to the purpose of speedier, more efficient, and less politically controlled confirmations.

Thus, it is fair to conclude that the proposal passes muster under the *Ballin* standard.

C. Does the Proposal Offend Other Constitutional Norms?

A final concern remains, though, before turning to the political question doctrine. Does the proposed use of a Confirmation Commission constitute an improper delegation of the Senate's authority or upset in any other way the constitutional separation of powers? The glib answer is that the nondelegation doctrine is too long dead to pay it much concern.²⁵⁹ After all, it has been over seventy years since the Court has struck down a legislative act as an improper delegation.²⁶⁰ Moreover, even if nondelegation remained a vibrant doctrine, the Court has already rejected a similar nondelegation claim. In *Sibbach v. Wilson & Co.*,²⁶¹ the Court upheld Federal Rules of Civil Procedure 35 and 37 and, in

²⁵⁷ *Id.* at 5.

²⁵⁸ See *supra* notes 8–34 and accompanying text.

²⁵⁹ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 328–30 (3d ed. 2006) (discussing the “demise” of the nondelegation doctrine).

²⁶⁰ See *id.* at 328 (citing *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

²⁶¹ 312 U.S. 1 (1941).

so doing, validated the process through which those Rules were promulgated.²⁶² Congress established the relevant mechanism in the Rules Enabling Act of 1934,²⁶³ another example of “recusal legislating.”²⁶⁴ Under that law, Congress delegated to the Supreme Court the power to prescribe rules of civil procedure.²⁶⁵ The Court promulgates these rules through the Judicial Conference, the administrative and policymaking body of the U.S. courts, which in turn passes the rule-developing responsibility onto various advisory committees.²⁶⁶ Once the relevant committees and the Judicial Conference approve a rule, the Supreme Court reviews the proposal.²⁶⁷ The Supreme Court then forwards accepted rules to Congress and the rule becomes effective *unless Congress acts otherwise*.²⁶⁸ Thus, like the proposal, under the Rules Enabling Act, another body’s recommendations take effect in the case of congressional inaction. Faced with this procedural mechanism, the Court in *Sibbach* held that “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules.”²⁶⁹ Similarly, the Senate enjoys the power to advise and consent to judicial nominees and can delegate a portion of that responsibility to a Confirmation Commission.

But, more importantly, it is not clear that the proposal constitutes a delegation of authority. The Senate is still advising and consenting to the nomination by accepting the Confirmation Commission’s recommendation and then taking the additional step of forwarding the certificate of confirmation to the President. While it is true that Senate inaction creates the opportunity for the Commission’s recommendation to take effect, the Senate still formally acts to carry out its consent function. And, of course, it could always act, if it wished, to disapprove the Commission’s recommendation. Moreover, if a delegation exists, it is to a Commission created and administered by the Senate. The proposal does not transfer any duties to the executive or the judiciary, or even to the other chamber of Congress. Thus, if it is a delegation, it is a self-delegation, not materially different than passing authority to Senate committees.

No other separation of powers problem arises, either. Even if it could be said that the Senate’s influence is slightly diminished in its consenting capacity,

²⁶² *Id.* at 15–16 (“That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.”).

²⁶³ Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

²⁶⁴ Teter, *supra* note 7, at 4–5.

²⁶⁵ 28 U.S.C. § 2072.

²⁶⁶ *Id.* § 2073(b); Admin. Office of the U.S. Courts, *Federal Rulemaking: The Rulemaking Process, a Summary for the Bench and Bar*, U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx> (last visited Feb. 1, 2012).

²⁶⁷ Admin. Office of the U.S. Courts, *supra* note 266.

²⁶⁸ 28 U.S.C. § 2074.

²⁶⁹ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941).

that influence is made up for in the increased role the Senate would play in advising on judicial nomination. Moreover, as the Supreme Court has stated, “The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”²⁷⁰ The structural interests of the United States are promoted by an efficient mechanism for securing Senate action on judicial nominations, thereby easing the vacancy crisis of the court system.

D. *The Political Question Doctrine’s Shield*

While each of the constitutional concerns discussed above can be overcome on the merits, were the Senate to adopt the proposal, it would be insulated from legal attack because of the political question doctrine.

The political question doctrine is a Supreme Court-created jurisdiction limit on the federal judiciary’s ability to decide matters that raise questions that should be left to the politically accountable branches to decide.²⁷¹ Though the principle at the doctrine’s heart can be traced as far back as *Marbury v. Madison*,²⁷² the Court gave the idea its present meaning in *Baker v. Carr*, which focused on the justiciability of claims related to malapportioned legislative districts.²⁷³ The Court identified six elements of a political question:

[(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁷⁴

Since *Baker*, the Court has seldom found an issue nonjusticiable under the political question doctrine. Indeed, only in *Nixon v. United States* did the Court rely on the doctrine in reaching an outcome in the case.²⁷⁵ Despite the fact that

²⁷⁰ *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991) (discussing the Appointments Clause as it relates to tax court judges).

²⁷¹ See CHEMERINSKY, *supra* note 259, at 129.

²⁷² 5 U.S. (1 Cranch) 137, 165–70 (1803) (“By the [C]onstitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . Questions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court.”).

²⁷³ 369 U.S. 186, 217 (1962).

²⁷⁴ *Id.*

²⁷⁵ 506 U.S. 224, 226 (1993). The Court has come close to declaring claims of partisan gerrymandering as nonjusticiable under the political question doctrine. See *Vieth v.*

the political question doctrine “cease[s] to function as a meaningful jurisdictional restraint,”²⁷⁶ with the present proposal, the Court would likely follow the precedent established in *Nixon* and decline to exercise jurisdiction.

Two of the factors identified in *Baker* as establishing a political question doctrine are of particular relevance here. First, the Constitution offers a textually demonstrable commitment to the Senate of the issue of advising and consenting to judicial nominations. Second, there is a lack of judicially discoverable and manageable standards for resolving the question as to whether the proposal fails to meet the Constitution’s “advice and consent” command.

In *Nixon*, the Court held that the Constitution committed the issue of impeachment to the Senate.²⁷⁷ The basis for this decision rested primarily with the “language and structure”²⁷⁸ of the Impeachment Clause, which gave the Senate “sole Power of Impeachment.”²⁷⁹ The Court took this to mean that “the Senate alone shall have authority to determine whether an individual should be acquitted or convicted.”²⁸⁰ If the Court were to review the impeachment proceedings the Senate chose to use, the Senate would not enjoy sole authority—“functioning independently and without assistance or interference”—over impeachment trials.²⁸¹

Additionally, the Court concluded that it lacked a judicially discoverable and manageable standard for resolving the question of whether the impeachment proceeding in Nixon’s case met the Framers’ intent.²⁸² The Court noted that the word “try” has “various” and “broader” meanings than simply to conduct a judicial trial.²⁸³ Absent a clear statement at the nation’s founding as to what “try” required, the Court saw no discoverable standard for resolving the matter.²⁸⁴

To buttress its holding, the Court turned to the history of the Impeachment Clause, stating: “The parties do not offer evidence of a single word in the history of the Constitutional Convention . . . that even alludes to the possibility of judicial review in the context of the impeachment powers.”²⁸⁵ Moreover, the Court noted that “[t]he Framers labored over the question of where the

Jubelirer, 541 U.S. 267 (2004) (The four-person plurality held that claims of partisan gerrymandering are nonjusticiable. Justice Kennedy agreed with the plurality’s conclusion in the case before the Court, but refused to rule out the possibility for the judiciary to decide future partisan gerrymandering claims.).

²⁷⁶ Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1167 (2002).

²⁷⁷ 506 U.S. at 237–38.

²⁷⁸ *Id.* at 229.

²⁷⁹ U.S. CONST. art. I, § 2, cl. 5.

²⁸⁰ *Nixon*, 506 U.S. at 231.

²⁸¹ *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1971)).

²⁸² *Id.* at 230.

²⁸³ *Id.* at 229–30.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 233.

impeachment power should lie,”²⁸⁶ at one point even considering James Madison’s proposal to rest the power with the Supreme Court.²⁸⁷ Ultimately, though, the Framers chose not to assign the judiciary a role in the impeachment because to do otherwise would run the risk of bias by having impeachments presided over by the same people who would oversee criminal trials.²⁸⁸ Additionally, giving the judiciary a role in impeachment would upset the system of checks and balances because impeachment is the legislature’s check on the judiciary branch. As the Court said, allowing the judiciary a role in impeachment “would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.”²⁸⁹ For each of these reasons, as well as concerns about a lack of finality and the difficulty in fashioning relief, the Court relied on the political question doctrine to conclude that the case was nonjusticiable.²⁹⁰

The Court’s reasoning in *Nixon* would control if an action were brought challenging the proposal. Just like in the impeachment process, there can be no doubt that the Senate enjoys sole responsibility for consenting to judicial nominations. As discussed in Part IV, from the very first Congress, the confirmation process has fallen exclusively under the Senate’s domain. Similarly, the lack of any clear constitutional history regarding the meaning of the word “consent” and the subsequent mutable understanding of that term make it impossible to discern a judicially discoverable standard to impose on the Senate as it fulfills its consent responsibilities. Additionally, the ratification history shows that the Advice and Consent Clause was one of the particular provisions for which the Framers did not consider judicial review available.²⁹¹ This makes sense because, like in the impeachment context, there is a specter of a conflict of interest if the judiciary were to involve itself in the judicial nomination process. Moreover, though impeachment may be the legislature’s only check over a judge once the individual is in office, the advice and consent process does serve as a check on the judiciary as a whole. Allowing the judiciary a role in reviewing the confirmation process would erode the checks and balances of the system. Finally, much like the question of where to place the impeachment power, the Framers struggled with the Appointments Clause, until they concluded—in the Convention’s final days—to give the President the exclusive authority to nominate and the Senate the sole power to consent.²⁹²

The political question doctrine is about ensuring compliance with the Constitution’s written limits.²⁹³ The only defining restrictions in the Appointments Clause are that the President “shall nominate” and the Senate

²⁸⁶ *Nixon*, 506 U.S. at 233.

²⁸⁷ *Id.*

²⁸⁸ THE FEDERALIST NO. 65, at 377 (Alexander Hamilton) (Am. Bar Ass’n 2009).

²⁸⁹ *Nixon*, 506 U.S. at 235.

²⁹⁰ *Id.* at 238.

²⁹¹ Pushaw, Jr., *supra* note 276, at 1189–90.

²⁹² See 2 RECORDS, *supra* note 129, at 539–40; see also U.S. CONST. art. II, § 2, cl. 2.

²⁹³ Pushaw, Jr., *supra* note 276, at 1167–68.

shall give “Advice and Consent.”²⁹⁴ Given the textual commitment to the Senate of the responsibility to consent to judicial nominations and the lack of any standards for assessing the merits of the Senate’s determination as to the appropriate process for fulfilling this command, no court is likely to conclude that a challenge to the proposal is justiciable.

For all of these reasons, it is safe to assume that the proposal is constitutionally sound.

VI. WHY THE REFORM PROPOSAL WORKS: POLITICALLY

To consider the question of whether, politically, the proposal enjoys any real chance of enactment, it is helpful to break the discussion down by first explaining why the general politics associated with the confirmation would allow senators to support the proposal. Then, looking at the key elements of the proposal itself, one sees a past willingness on the part of members of Congress to employ many of the same tools to meet similar process-related problems. That is not to say, of course, that there are no political obstacles standing in the way of the proposal. Therefore, after explaining why the politics may encourage the proposal’s adoption, I will discuss the difficulties facing it, too.

A. *Bipartisan Frustrations*

Senators in both parties have expressed frustration with the judicial confirmation process—and for good reason.²⁹⁵ The increase in delays, obstruction, and ideological fights over judicial nominees has afflicted both parties’ Presidents.²⁹⁶ At various points in the recent past, large numbers of senators from both parties have decried the slow pace and unfortunate consequences of Senate delay and inaction on judicial nominations.²⁹⁷

While many of the complaints might be empty rhetoric, much of it stems from deep frustration with the current system. That dissatisfaction may leave senators willing to try to find a suitable answer to the continued problems associated with the confirmation process. Indeed, at the beginning of the most recent Congress, Democratic senators made a push for considerable rules reform that would have addressed, in part, how the Senate deals with its advice

²⁹⁴ U.S. CONST. art. II, § 2, cl. 2.

²⁹⁵ See, e.g., Cornyn, *supra* note 69; Patrick Leahy, *Bipartisanship Needed to Resolve the Vacancy Crisis in the Nation’s Courts*, THE HILL (Jan. 24, 2011, 8:01 PM), <http://thehill.com/special-reports/state-of-the-union-january-2011/139851-bipartisanship-needed-to-resolve-the-vacancy-crisis-in-the-nations-courts>.

²⁹⁶ See *supra* notes 8–24 and accompanying text.

²⁹⁷ See Aaron-Andrew Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 961 (2007) (“Republicans complain about Democratic obstruction of nominations During the Clinton years, of course, Democrats railed against alleged Republican abuses . . .”).

and consent role.²⁹⁸ Then, Majority Leader Harry Reid and Minority Leader Mitch McConnell struck an agreement aimed at reducing the number of filibusters.²⁹⁹ And just recently, the Senate enacted a reform package that streamlined how it consented to many executive branch nominations.³⁰⁰ These are strong indications that senators are growing increasingly frustrated with how the chamber deals with judicial confirmations and that there is real momentum for a change in the process.

B. *Known Knowns*³⁰¹

The growing frustration with the confirmation process adds another element to the mix which makes the proposal more plausible. At some point, a majority in the Senate will grow so fed up with the system that they will take unilateral action to change it, despite the consequences. For example, as President Bush faced fierce Democratic opposition to his judicial nominees, Senate Republicans seriously considered invoking the “nuclear option” as a way to advance his nominees.³⁰² Ultimately, a group of moderate senators, known as the “Gang of Fourteen” reached a compromise that saved the Senate from self-annihilation.³⁰³

As mentioned briefly, the tables have turned once again and now Democrats are the ones decrying the obstructionism and delay that has been increasingly common.³⁰⁴ If President Obama wins reelection in 2012 and the Democrats retain a narrow majority in the Senate, it would not be surprising to hear calls for something analogous to the “nuclear option.”

²⁹⁸ Press Release, Sen. Tom Udall, Democratic Trio Remain Committed to Senate Rules Reform (Jan. 26, 2011), available at http://tomudall.senate.gov/?p=press_release&id=751.

²⁹⁹ See Carl Hulse, *Senate Approves Changes Intended to Ease Gridlock*, N.Y. TIMES, Jan. 28, 2011, at A20.

³⁰⁰ Josiah Ryan, *Senate Clears Bill to Streamline Confirming Executive Nominees*, THE HILL (June 29, 2011, 12:31 PM), <http://thehill.com/homenews/senate/169013-senate-clears-bill-to-streamline-confirming-nominees>.

³⁰¹ “[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know.” Michiko Kakutani, *Rumsfeld’s Defense of Known Decisions*, N.Y. TIMES, Feb. 4, 2011, at C25 (quoting former U.S. Secretary of Defense Donald Rumsfeld).

³⁰² Charles Babington & Dan Balz, *Senate GOP Sets Up Filibuster Showdown*, WASH. POST, Apr. 22, 2005, at A1. The nuclear option would have established a mechanism for invoking cloture on judicial nominations by majority vote. See BETSY PALMER, CONG. RESEARCH SERV., RL 32684, CHANGING SENATE RULES OR PROCEDURES: THE “CONSTITUTIONAL” OR “NUCLEAR” OPTION 2–4 (2005).

³⁰³ Carl Hulse, *Bipartisan Group in Senate Averts Judge Showdown*, N.Y. TIMES, May 24, 2005, at A1.

³⁰⁴ See, e.g., Press Release, Sen. Patrick Leahy, Senate Should Hold Up-or-Down Votes on Noncontroversial Judicial Nominees (Mar. 2, 2010), available at http://www.leahy.senate.gov/press/press_releases/release/?id=947918c9-d78a-4746-831b-f9c9a9a9bc0.

But senators might also seek a better, less destructive way out of the mess—something more akin to nuclear disarmament than warfare. The proposal presents the opportunity for the Senate to work out a process that addresses its confirmation concerns on its own collective terms rather than through a protracted fight that harms the institution. Unlike a rule change that is overtly political and focused on achieving a specific desired partisan goal—as the Republicans’ “nuclear option” plan was in 2005—the proposal would be a more detailed, process-oriented undertaking, one that would present opportunities for compromise and could be written to reflect the concerns of senators across the political spectrum. With a presidential election looming and control of the Senate in question, the timing could be right for the Senate to put in place a “known knowns” rather than wait for the next fierce confirmation battle that could result in even more dramatic and unknown changes.

C. Senatorial Self-Interest

The previous point focused on the collective self-interest of the Senate, but the proposal also offers individual senators incentives. First, it seems likely that an overwhelming majority of senators want to fulfill their constitutional duties responsibly and efficiently.³⁰⁵ But that is only one consideration in a complex set of goals and desires. As David Mayhew famously posited years ago, a senator’s primary objective is reelection.³⁰⁶ Indeed, reelection overwhelms all other considerations.³⁰⁷ Unfortunately, there is little to no perceived electoral benefit to confirming judicial nominees.³⁰⁸ And that is the best-case scenario. In many instances, electoral pressures incentivize delay and obstructionism, as senators use their opposition to judicial nominees to fundraise,³⁰⁹ motivate their base supporters,³¹⁰ and appeal to interest groups.³¹¹ Additionally, judicial nominations have become another bargaining chip for senators interested in logrolling their way to preferred policy outcomes.³¹²

³⁰⁵ After all, the Constitution requires senators to take an oath to fulfill their constitutional obligations. U.S. CONST. art. VI.

³⁰⁶ DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13 (1974).

³⁰⁷ *Id.* at 13, 81; see also BRUCE CAIN ET AL., THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE 77 (1987); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 37 (2d ed. 1989).

³⁰⁸ See, e.g., A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958) (stating that lawmakers are indifferent to the efficient administration of the courts because citizens do not hold them accountable on that issue).

³⁰⁹ See, e.g., 151 CONG. REC. S5578 (daily ed. May 20, 2005) (statement of Sen. Cornyn) (“A leading Democratic senator has [boasted] of their unprecedented [delaying] tactics in his fundraising e-mail to Democratic donors.”).

³¹⁰ See *supra* note 44 and accompanying text.

³¹¹ Pickering & Clanton, *supra* note 29, at 808.

³¹² STEIGERWALT, *supra* note 30, at 79–84 (discussing the use of holds on judicial nominees for reasons other than objections to the affected nomination).

All of this suggests that senators would be loath to give this up by enacting the reform proposal. True enough, but the proposal does not actually require each individual senator to forego these benefits. If a nominee proceeds through the Confirmation Commission process and receives a positive recommendation such that her nomination will be consented to absent Senate action, then a senator is free to lead the charge in passing a disapproval resolution. The senator could fundraise, motivate base supporters, and ingratiate herself with interest groups just as successfully. The key difference is that this self-interested behavior does not lead to the harmful outcome of delayed confirmations and a resulting judicial vacancy crisis. In fact, this very idea was expressed during the BRAC debate as one of the proposal's most attractive features. As the Senate debated the measure, then-Senator Phil Gramm offered the following observation:

The beauty of this proposal is that, if you have a military base in your district—God forbid one should be closed in Texas, but it could happen—under this proposal, I have 60 days. So I come up here and I say, “God have mercy. Don’t close this base in Texas. We can get attacked from the south. The Russians are going to go after our leadership and you know they are going to attack Texas. We need this base.” Then I can go out and lie down in the street and the bulldozers are coming and I have a trusty aide there just as it gets there to drag me out of the way. All the people in Muleshoe, or wherever this base is, will say, “You know, Phil Gramm got whipped, but it was like the Alamo. He was with us until the last second.”³¹³

Few judicial confirmations involve bulldozers, but the same dynamic is at play here—and just as Congress enacted BRAC, thereby giving up much of its control over the specifics of base closures, the Senate might be just as willing to do so in the context of consenting to judicial nominations.

Moreover, while senators would be giving up some power in the consenting side of the judicial appointments process, they would be gaining influence on the advice side of the equation. The Confirmation Commission mechanism only kicks in when the President nominates someone from the list provided by the judicial selection panel created by senators. As such, senators would only see their consenting power wane when their advice was given more due consideration.

Speaking of power, it is important to remember that the Senate Judiciary Committee Chair currently enjoys almost exclusive control over the judicial confirmation process.³¹⁴ The chair decides if and when to take up a nomination,

³¹³ *Base Closures: Hearing Before the Subcomm. on Military Construction of the S. Comm. on Armed Servs.*, 99th Cong. 17 (1985) (statement of Sen. Phil Gramm), reprinted in COLTON C. CAMBELL, *DISCHARGING CONGRESS: GOVERNMENT BY COMMISSION* 118 (2002).

³¹⁴ Denning, *supra* note 69, at 33 (arguing that the Senate Judiciary Committee chair enjoys an “individual veto” over judicial nominations).

whether to hold hearings, and whether to vote on the nomination.³¹⁵ And, with the exception of Supreme Court nominations, the Senate traditionally will not consider any nomination that fails to receive a favorable recommendation from the Committee.³¹⁶ Thus, it has been said in frustration that the Chair of the Senate Judiciary Committee exercises a “*de facto* veto” over all lower court nominations.³¹⁷ The proposal might be an attractive alternative to those senators tired of the near complete control the chair exercises over the confirmation process. Thus, there may be enough individual incentives to push senators to adopt the reform proposal.

D. Past Use of Similar Devices

Beyond the incentives—both to each senator and to the chambers as a whole—that make the proposal’s enactment plausible, the individual components of the proposal also increase the likelihood of its adoption. The judicial selection panels build off of structures that many senators already rely on when seeking to influence judicial selection.³¹⁸ While it is possible that some senators will dislike the idea of working with their home state counterpart in establishing the panels and that there will undoubtedly be some difficulties arising from the circuit court panels, having a strong, successful history of such panels to model the idea on should overcome those concerns.

The other two key elements—the Confirmation Commission and accompanying preferential fast-track procedures—are more controversial. That said, they, too, enjoy solid roots. Congress has turned to commissions to tackle any number of matters.³¹⁹ Additionally, the Senate Judiciary Committee already relies on staff, experts, and outside groups to assist in the judicial confirmation process.³²⁰ Creating a formal commission to conduct the requisite investigations and make recommendations is not unfathomable. The fast-track procedure, too, has a long history.³²¹ There are over thirty statutes containing a fast-track mechanism.³²² This is to say that the individual elements of the proposal are well known—and for the most part, well-used—in other contexts already.

That said, it is much less common for these mechanisms to be combined and joined further with the presumption that the Commission’s recommendations will become effective. Indeed, one sees this recusal

³¹⁵ BETSY PALMER, CONG. RESEARCH SERV., RL 31948, EVOLUTION OF THE SENATE’S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY 4 (2009).

³¹⁶ Kmiec & Minberg, *supra* note 69, at 235–45 (discussing the current power of the Senate Judiciary Committee).

³¹⁷ *Id.* at 236.

³¹⁸ *See supra* Part III.B.2–4.

³¹⁹ *See* GLASSMAN & STRAUS, *supra* note 111.

³²⁰ EPSTEIN & SEGAL, *supra* note 31, at 88.

³²¹ Bruhl, *supra* note 107, at 346 n.9 (providing a list of statutes that include fast-track procedures).

³²² *Id.*

legislating feature in only the rarest circumstances, as discussed in Part III. But the BRAC law,³²³ the Rules Enabling Act,³²⁴ and the congressional pay commissions³²⁵ provide valuable support for the idea that when consensus exists around a specific proposition—here, the need to fill judicial vacancies—but institutional dynamics prevent action, Congress may be willing to take the unusual step proposed here. In fact, quite recently, Minority Leader McConnell proposed such an approach for resolving the stalemate surrounding the nation's debt limit ceiling.³²⁶ As noted above, the Senate certainly recognizes the problems associated with the current confirmation process and, to date, has not found an adequate response. As such, it may prove willing to turn to the features it has used in other contexts to address the confirmation problem.

This is not to say that the Senate's adopting the proposal is assured, or even likely. There remain plenty of obstacles to its enactment, not least of which is the perception that senators would be giving up too much power—even if, as discussed above, that is not the reality. What is real, though, is that interest groups that have long focused on the judicial confirmation process and have become accustomed to wielding influence in the process would object. Additionally, senators who are not interested in the effective administration of the federal courts may not be affected by the incentives I noted above. And, of course, the current powerhouse—the Senate Judiciary Committee chair (and members of the Committee, more generally)—might find the reform hard to accept. So obstacles to enactment remain and quite real.

But the politics of the situation just as easily suggest that the proposal has a legitimate chance. There is a compelling case to be made that the moment is right, that the Senate has grown tired of the “tit for tat”³²⁷ that has marked the last three presidents' judicial nomination efforts, and that enough senators now realize that “payback . . . is hell.”³²⁸ A change in the judicial confirmation process would address these concerns.

³²³ 10 U.S.C. § 2687 note (2006) (originally enacted as Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623 (1988); Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, amended by National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, §§ 3001–3007, 115 Stat. 1012, 1342–52).

³²⁴ Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

³²⁵ Federal Security Act of 1967, Pub. L. No. 90-206, 81 Stat. 613, 642–45 (codified as amended at 2 U.S.C. §§ 351–364 (2006)). The President's Commission on Executive, Legislative, and Judicial Salaries—which became known as the Quadrennial Commission—was similar in operation to the BRAC Commission and was Congress's effort at finding a way of increasing its salary without having to vote itself pay increases. See Teter, *supra* note 7, at 29–33.

³²⁶ Jackie Calmes, *Debt Talk Mired, Leader for G.O.P. Proposes Option*, N.Y. TIMES, July 13, 2011, at A1.

³²⁷ Goldman et al., *supra* note 15, at 288.

³²⁸ Binder & Maltzman, *supra* note 16, at 315 (quoting Sen. Lindsey Graham).

VII. EXPLAINING THE BENEFITS OF THE PROPOSED REFORMS AND ANTICIPATING CRITIQUES

The Article has now laid out the confirmation problem, the proposal for addressing it, and the historical, constitutional, and political justifications for the suggested reforms. It is time, then, to explain some of the key benefits of the proposal, as well as to acknowledge a few of the concerns and critiques it will generate. Here, I hope to move beyond the general formulations that are implicit in the previous discussions. In other words, it is my assumption the confirmation process would become more efficient, more likely to yield an outcome, and would remove some of the bitterness currently associated with the judicial confirmations. But how does that translate into other worthwhile benefits? The purpose of this Part is to shed some light on these advantages and to respond to a few anticipated critiques of the proposal.

A. *Returning the Focus of Judicial Selection to Qualifications*

The current judicial confirmation process “turns on personalities” as much as anything else.³²⁹ According to Michael Gerhardt, the factors most affecting a nomination’s success include the candidate’s personality and political views, the opposition party’s strength, how the administration manages the confirmation, and the degree of interest group involvement.³³⁰ In their study of the judicial confirmation process, Sarah Binder and Forrest Maltzman found that the most significant causes of delays and obstruction were the ideological distance between the President and the opposing party, divided government, and if the nomination occurred in a presidential election year.³³¹ One thing that seems to have little effect on the nominee’s consideration is her qualifications.³³² And yet, the merit of the nomination is what senators say they should focus on³³³ and, as Part IV’s account of the Appointments Clause history showed, was what the Framers wanted the Senate to be concerned with.³³⁴

Through the proposal, the Senate can spell out the criteria for the Selection Panels and Commission to consider as they recommend and investigate nominees. And, perhaps, once the Commission has determined that a nominee deserves appointment, those senators who oppose the individual for reasons other than merit will find it more difficult to bitterly protest the candidate by calling her credentials into question. In any event, the Commission’s decision and report will return the focus to the nominee’s qualifications.

³²⁹ Senator Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 203 (1987).

³³⁰ Gerhardt, *supra* note 14, at 514–19.

³³¹ Binder & Maltzman, *supra* note 16, at 308–14.

³³² *Id.*

³³³ See generally *Should Ideology Matter?*, *supra* note 27.

³³⁴ See *supra* notes 128–51 and accompanying text.

B. Reducing Politics' Influence on the Judiciary

An overly partisan and ideological judicial confirmation process threatens to inject such politics into the judiciary. More concretely, as debates over nominations turn into partisan battles, the consequence is that the legitimacy of the courts is called into question.³³⁵ Confirmation fights over the Sixth Circuit illustrate the problem. In the late 1990s, the Sixth Circuit was fairly evenly split between Democratic and Republican appointees, but also saw a vacancy rate of 25%.³³⁶ To preserve the partisan balance, Michigan's one Republican senator blocked President Clinton's nominees through the use of the blue slip policy followed by then-Senate Judiciary Committee Chairman Orrin Hatch.³³⁷ Then, after the 2000 elections, Michigan's two Democratic senators successfully objected to President Bush's nominations to the Sixth Circuit.³³⁸ The impasse lasted for a decade.³³⁹ Scholars speculate that such "pronounced conflict over potential judges lessens public confidence in the courts."³⁴⁰ Moreover, there is evidence that as the Senate obstructs, the public sees the debate as more about "politics" than "principle."³⁴¹ The blurring of the lines between partisan politics and the federal judiciary may ultimately affect public confidence in judges.

By returning the focus of the judicial confirmation process to the nominees' qualifications and by creating a mechanism that is less likely to lead to as many protracted fights, the proposal may restore some of the faith that Americans place in the judiciary as being above the partisan fray.

C. Improving Overall Senate Functioning

The confirmation mess, with its partisanship, delays, obstructionism, and retribution, has consequences far beyond the Senate's handling of judicial nominations. It has affected the Senate's other business. The nomination fights of 2003–2005, for example, "frayed the Senate's already wafer-thin veneer of comity."³⁴² In a chamber that operates by unanimous consent agreements³⁴³ and, historically at least, through collegiality,³⁴⁴ divisive confirmation battles can create lasting collateral damage.

³³⁵ BINDER & MALTZMAN, *supra* note 9, at 136–42.

³³⁶ Binder & Maltzman, *supra* note 16, at 302.

³³⁷ *Id.* at 308.

³³⁸ *Id.*

³³⁹ Press Release, Sen. Patrick Leahy, Leahy Helps Solve Impasse on Sixth Circuit Nominations (Apr. 15, 2008), available at http://www.leahy.senate.gov/press/press_releases/release/?id=947918c9-d78a-4746-831b-f99c9a9a9bc0.

³⁴⁰ Binder & Maltzman, *supra* note 16, at 315.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ See OLESZEK, *supra* note 66, at 203–12.

³⁴⁴ See Fisk & Chemerinsky, *supra* note 67, at 194.

Additionally, the Senate is already strained with an ever-increasing workload and the need to deal with delays and obstruction in the legislative arena.³⁴⁵ The time devoted to engaging in dilatory tactics or debating which party has been more obstructionist in its treatment of judicial nominees could be better spent on more substantial matters. To make things more difficult, the Senate Judiciary Committee itself is “structured primarily for the consideration of legislation,”³⁴⁶ not for the work associated with conducting detailed judicial confirmation investigations.

The proposal could go a long way in helping the Senate function. Removing one of the primary sources of vitriol is a start, as is removing the task of scrutinizing judicial nominees, as it will mean the Senate can focus on other concerns—whether it chooses to or not is another question.

D. *Aiding Judicial Administration*

Perhaps the most concrete benefit of the proposal is that it will aid judicial functioning. In a 2007 study assessing the performance of the twelve circuit courts of appeal, analysts found that the “longer more judgeships remained vacant on a circuit, the longer it took for the court to act on its docket.”³⁴⁷ Unfortunately, as noted earlier, a well-functioning court system is not a salient electoral issue.³⁴⁸ Senators are not rewarded or punished based on an overcrowded district court docket or the amount of time it takes for a court of appeals to issue an opinion. The lack of political incentive for an efficient federal judiciary means that one of the clearest consequences of the current confirmation system is relatively unimportant to senators.

The proposal’s chief objective is to end the obstructionism and delays associated with the judicial confirmation process and to return the focus to considerations of the nominees’ qualifications. This should help reduce the current vacancy rate. Additionally, there is strong anecdotal evidence to suggest that qualified candidates have been so turned off by the current appointment process that they forego nomination. Judicial functioning will improve, therefore, not only because the judiciary will be operating at higher capacity, but also because the number of qualified candidates interested in appointment will increase.

³⁴⁵ See *Résumé of Congressional Activity*, U.S. SENATE, http://www.senate.gov/page/layout/reference/two_column_table/Resumes.htm (last visited Apr. 10, 2012) (increased number of votes per session); *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Apr. 10, 2012) (increased number of cloture votes per session).

³⁴⁶ Mathias, *supra* note 329, at 205.

³⁴⁷ Binder & Maltzman, *supra* note 16, at 314.

³⁴⁸ See *supra* note 308 and accompanying text.

E. *Greater Comparative Benefits*

As discussed in Part III, the confirmation mess has inspired proposed fixes from presidents,³⁴⁹ legislators,³⁵⁰ scholars,³⁵¹ and even failed nominees.³⁵² The common element of most of those proposals is to create a timeframe by which the Senate must act on a nomination.³⁵³ Some also include an element promoting greater Senate involvement in advising on possible judicial selections,³⁵⁴ while others simply seek to remove the threat of filibusters and holds with judicial nominations.³⁵⁵ Each of these proposals would provide some aid to the cause of a more efficient judicial confirmation process. But, in many respects, the changing dynamics of the Senate would ultimately render them ineffective. The delays and obstructionism associated with judicial nominations are no longer just the work of individual senators exercising their own prerogatives. Instead, as Democrats showed in 2003 to 2005 and Republicans are proving today, blocking judicial nominations is now a part of the partisan strategies of Senate leaders. We have reached the point where modest changes around the periphery will not suffice. Like the military base closure problem in the 1980s, congressional structures, institutional norms, and electoral constraints make it nearly impossible for the Senate to diligently fulfill its advice and consent responsibilities in the way it has in the past. The proposal offers a comprehensive fix—one that allows the Senate to maintain its current role in consenting to judicial nominations when it can, but that creates an alternative path to Senate confirmation for nominees when the system is not functioning as it should.

F. *Responding to Anticipated Critiques*

The proposal will undoubtedly generate criticisms that deserve attention when assessing its viability.

The first critique to contend with is that the proposal would upset the carefully constructed balance of power between the President and the Senate regarding judicial appointments. Those commentators who have suggested that the Senate play a larger role in the advice and consent process will likely be aghast at the notion of relying on a Confirmation Commission to investigate and recommend confirmation. Unlike many other ideas floated to address the confirmation mess, however, this proposal achieves its end by increasing the Senate's role in the advisory stage of the appointment process. Only if the

³⁴⁹ See *supra* note 69 and accompanying text.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² Pickering & Clanton, *supra* note 29.

³⁵³ See, e.g., S. Res. 327, 108th Cong. (2004); Bush, *supra* note 69.

³⁵⁴ See, e.g., Gorjanc, *supra* note 69; Reynolds, *supra* note 69; Strauss & Sunstein, *supra* note 70.

³⁵⁵ See, e.g., Cornyn, *supra* note 69; Denning, *supra* note 69.

President heeds the Senate's advice would the chamber's consent responsibility be reduced. In other words, the only time the President would see an increase in power is when it is balanced by an increase in power for the Senate elsewhere in the appointment process. As such, the criticism that the proposal gives the President too much influence at the expense of the Senate is simply untrue.

A related critique is that the proposal alters the role that the Framers envisioned for the Senate. As Part IV's account of the history of the Appointments Clause shows, however, the Framers never discussed the process through which the Senate should advise and consent to nominations.³⁵⁶ Instead, the delegates at the Constitutional Convention focused on the objectives of the process—ensuring that qualified judges filled the judiciary rather than those appointed for personal or political reasons.³⁵⁷ The Senate was to serve as a check on the President's ability to appoint judges out of personal favoritism or loyalty.³⁵⁸ The proposal still allows the Senate to fulfill this end by having the chamber establish the criteria the Confirmation Commission is to consider when assessing a nominee. Moreover, in those instances where personal favoritism is at its greatest risk—when the President nominates someone not recommended by the Selection Panel—the proposal's Confirmation Commission mechanism is not even implicated. As such, the Senate's intended role is preserved and the Framers' objectives are met.

Of course, like most delegations of authority, the proposal will also raise concerns about the Senate abdicating its responsibility and subverting accountability.³⁵⁹ On the first point, the argument goes that senators have an obligation to advise and consent to nominations, and by creating a presumption that the Confirmation Commission's recommendations will take effect, the Senate is not living up to its duty. This concern loses much of its force, however, for several reasons. As noted above, the chief purpose in including the Senate in the appointments process was to serve as "security" against a President using the nomination power to reward friends.³⁶⁰ The Commission process allows the Senate to continue to fulfill this role—perhaps even better than the current process permits. Additionally, unlike delegations in the legislative context, the Senate is not leaving to an agency in a different branch the responsibility of creating public policy. It is not, in other words, "undermin[ing] the democratic principle of our governing system by taking policymaking out of the hands of democratically elected representatives and placing it in the hands of an unelected few."³⁶¹ Instead, the Senate is creating an advisory board to help it fulfill its advice and consent obligations. But no matter what the Commission recommends, it is still acting on the criteria established

³⁵⁶ See *supra* notes 150–57 and accompanying text.

³⁵⁷ See *supra* notes 138–40 and accompanying text.

³⁵⁸ See *supra* note 139 and accompanying text.

³⁵⁹ See generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATIONS (1993).

³⁶⁰ 2 RECORDS, *supra* note 135, at 43.

³⁶¹ Teter, *supra* note 7, at 43.

by the Senate, the Senate can still act to disapprove the Commission's recommendations, and it is, ultimately, still the Senate consenting to the nomination by forwarding the confirmation to the President. In short, there really is no delegation about which to complain.

Nevertheless, the accountability concern deserves attention, too. After all, one of the benefits of the proposal is that it would help take many of the electoral considerations out of the judicial confirmation process. This is an implicit—maybe even explicit—acknowledgement that citizens will be less able to hold senators accountable for how judicial nominations proceed. Doesn't this allow senators to hide behind unelected members of the Commission, thereby "shortcircuit[ing]"³⁶² accountability? Perhaps, but not likely. First, there is little to suggest that voters seek to hold senators accountable for their votes on lower court nominations.³⁶³ To the extent that electoral considerations lead to obstructionism, it is not as an appeal to the majority of voters in a senator's state as much as it is to incite base supporters, curry favor with interest groups, or raise money.³⁶⁴ Reducing a senator's accountability to these interests is a positive outcome, not a cause for concern. But more to the point, it is not necessarily true that senators should be directly accountable to voters in the realm of judicial confirmations. Indeed, the Framers certainly did not think so. After all, in the original constitutional scheme, senators were appointed by state legislatures, who in turn were directly elected by voters. In other words, the Framers rested the advice and consent function with a small body of individuals who were not themselves directly accountable to the people, but who were appointed by those who were. The proposal, with the creation of a Confirmation Commission whose members are appointed by senators now directly accountable to the people, actually restores the original relationship between citizens and the advice and consent function of the Appointments Clause.

Finally, discussions of accountability too often view the concern through the single lens of holding representatives accountable for action, without any consideration of the difficulty of holding senators responsible for inaction and delay. In the context of judicial confirmations, of course, inaction is the problem—one that is unlikely to receive the voters' attention. The proposal recognizes this and maintains the same level of accountability that voters enjoy over the confirmation process. It simply reverses the direction of the pressures in the system so that senators can be held responsible for inaction as easily as they can for action.

In the end, then, the benefits of the proposal far outweigh the associated costs. Given the real problems caused by the delays and obstructionism endemic to the current confirmation process, it is past time for the Senate to give serious consideration to the reforms proposed here.

³⁶² SCHOENBROD, *supra* note 359, at 14.

³⁶³ See *supra* note 308 and accompanying text.

³⁶⁴ See *supra* notes 309–11 and accompanying text.

VIII. CONCLUSION

Broad consensus exists that the judicial confirmation process is broken. Democrats, Republicans, senators, presidents, judges, legal scholars, journalists, and, of course, nominees have all expressed frustration with the current system. Past proposals to modify the confirmation process, though, have gone nowhere. Does that mean that nothing can be done? Hardly. Sometimes, proposed reforms fail to gain traction because they are not comprehensive—they do not strike at the roots of the problem. They do not reform.

The proposals put forward here do not suffer from that defect—perhaps just the opposite. The notion of the Senate creating a Confirmation Commission and a binding fast-track mechanism for judicial confirmations may seem too radical. But the flaws in the current confirmation process have become so entrenched that they are now part of the Senate's norms. Reshaping those institutional behaviors and expectations requires dramatic changes. The judicial confirmation reforms offered here would get the process moving again so that the Senate can meet its constitutional responsibility to advise *and* consent.