LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

VOLUME 9 FALL 2021 ISSUE 1

POLITICIZING IMPARTIALITY:
REDEFINING THE ROLE OF THE SENATE IN FEDERAL JUDICIAL SELECTION

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I. INTRODUCTION

The federal judicial system in the United States of America has long been criticized for being an archaic structure that is largely inflexible, self-serving, and underperforming. Much of these criticisms comes from the fact that the judicial system in and of itself seems to be a slow-moving, overly politicized, and bureaucratized arena that is incapable of substantial change even under dire circumstances. Although many experts would contend that

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this kind of unchanging or inflexible system is in fact how the U.S. government was meant to operate, we have seen in recent years a precipitous towards the federal judicial system and those nominated for judicial roles within it from the very body that many argue is meant to safeguard the structure itself—the Senate.

Bearing in mind that the U.S. is a country of laws through which Americans rely on courts within the local, state, and federal governments to ultimately protect them from overreaching legislatures, it becomes ironic that the Senate is allowed to play politics with a system set up to select individuals qualified to impartially uphold and interpret federal statutes and the Constitution. The rules for selecting federal judges are constantly changing because the Senate is a political body that changes with each election. The U.S. needs a system in place that will provide a stable means to select and confirm all federal judges so that the federal judiciary can begin to function adequately.

II. ARE CHANGES REALLY NECESSARY IN THIS PROCESS?

In the United States, each state has its own judicial selection process to select the men and women relied upon to make these decisions as judges, either by election, appointment, or a hybrid system.[3] In contrast, the U.S. government uses an appointment system for the federal judicial selection process, selecting and appointing all federal judges for life.[4] Federal judges cannot be removed from the bench unless the judge is impeached for and convicted of "Treason, Bribery, or other high Crimes and Misdemeanors."[5] While the federal judicial selection process may not allow the judges to be held accountable by the people, like many state systems, it does isolate the federal judicial branch from the ebb and flow of politics and allows

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[3] *See* A.B.A. COAL. FOR JUST., JUDICIAL SELECTION: THE PROCESS OF CHOOSING JUDGES 5 (2008), https://monsieurdevillefort.files.wordpress.com/2014/12/judicial_selection_roadmap-authcheckdam.pdf.

[4] USHISTORY.ORG, *How Judges and Justices Are Chosen*, AM. GOV'T ONLINE TEXTBOOK, http://www.ushistory.org/gov/9d.asp (last visited Sept. 10, 2021).

[5] U.S. CONST. art. II, § 4. *See* ELIZABETH BAZAN, CONG. RESEARCH SERV., RL32935, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES, 11-12 (2005), https://sgp.fas.org/crs/misc/RL32935.pdf.

the federal judiciary to act as a buffer to policy lightning.[6] However, there is contention concerning the nomination of federal judges within the realm of partisan political choice rather than suitability for such a prestigious and honorable position, one that should be afforded to those that are most suited for impartiality and fairness rather than political astuteness.

We must bear in mind that there are ninety-four district courts, thirteen circuit courts of appeals, and the Supreme Court that make up the federal judiciary system.[7] These courts handle many different cases, including cases that state courts may not have the authority to remedy or decide.[8] To function adequately, each court requires multiple judges due to the intense caseload put upon the federal judiciary every year. Bottlenecks are quite common with many decisions taking years to be finalized. However, the bottleneck does not begin when a case is filed but with the Senate and the process by which federal judges are chosen.

The judicial selection process has been criticized by scholars for many decades.[9] Every federal judge is selected by the President and confirmed by the Senate.[10] The federal

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[6] Policy lightning is the over-reactive response generated whenever the public reacts to a perceived crisis, such as the perceived notion that all Muslims are terrorists and should be banned from the United States.

[7] ADMIN. OFFICE OF THE U.S. COURTS, UNDERSTANDING THE FEDERAL JUDICIARY 4, http://www.uscourts.gov/file/understanding-federal-courtspdf.

[8] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Types of Cases*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/types-cases (last visited Sept. 10, 2021) (explaining that federal court handle many different types of cases, such as civil cases between people or organizations from different states; cases that impact multiple states; bankruptcy cases; federal criminal cases; appeals from state cases; and cases that raise an issue, or "federal question," involving a federal statute, the United States Constitution, or the United States Government itself).

[9] *See generally* Burke Shartel, *Federal Judges – Appointment, Supervision, and Removal – Some Possibilities Under the Constitution*, 15 J. AM. JUD. SOC. 21 (1932); Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays From 1981 to 2014*, 64 DUKE L. REV. 1645 (2015); Steven I. Friedland, *"Advice And Consent" in the Appointments Clause: From Another Historical Perspective*, 64 DUKE L.J. ONLINE 173 (2015); Stephanie K. Seymour, *The Judicial Appointment Process: How Broken is It?*, 39 TULSA L. REV. 691 (2004); Michael Teter, *Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process*, 73 OHIO ST. L.J. 287 (2012).

[10] *See* U.S. CONST. art. II, § 2.

appointment process set up in the U.S. Constitution requires that the President choose whom he believes would be qualified to fill an office, and then the Senate confirms that the nominee is qualified to fulfill the requirements of the office.[11] However, the Constitution does not specify the exact role of the Senate, nor the process of how the Senate fulfills its duty under the Appointment Clause.[12] Although in many instances there are long-standing traditions that the Senate falls back on for judicial selection and appointment, the lack of instruction regarding the role of the Senate has created many problems, and the last several decades have been a prime example of the issues surrounding the judicial selection process.

For example, throughout the Obama Administration, a large number of vacancies plagued the federal judiciary.[13] Many of these vacancies are open for years, causing huge backlogs in the federal courts that left many cases waiting to be heard.[14] However, in his eight-year term, President Obama nominated 320 judges during his tenure as president.[15] George W. Bush before him had 322, and Bill Clinton ended his presidency with 367.[16] Strikingly, President Trump, who worked closely with Majority Leader Mitch McConnell along with other Senate Republicans over his four-year presidency, was able to nominate and confirm 226 individuals, largely reshaping the federal courts of appeals.[17] President Trump's appointments currently account for one-fourth of all active federal judges.[18] He was able to do so with the quick and deliberate backing of politically motivated Senators.[19]

Further, during this time, we saw the problem within the federal judiciary and Senate appointment process be

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[11] *Id.*
[12] *Id.*
[13] *See* O'Connell, *supra note 7*, at 1646-53.
[14] ADMIN. OFFICE OF THE U.S. COURTS, *Current Judicial Vacancies*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies (last visited July. 28,2021).
[15] John Gramlich, *How Trump Compares with Other Recent President in Appointing Federal Judges*, PEW RESEARCH CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

pushed to the forefront of public scrutiny by the death of Associate Justice Antonin Scalia, and more recently upon the death of Associate Justice Ruth Bader Ginsburg. Upon Justice Scalia's death, Senate Republicans vowed that President Obama would not be allowed to choose his successor,[20] essentially crippling the Supreme Court for an entire year. By taking this course of action, the Supreme Court was hampered in its ability to make decisions since any opinions that did not include at least five justices could be ignored or interpreted narrowly, as is always the case within the Supreme Court.[21] This caused confidence to wain among the American people in our judicial process.[22]

Many Republican Senators used the excuse that President Obama was in the last year of his term of office to justify refusing to allow any hearings or votes regarding President Obama's nominee, Chief Judge Merrick Garland.[23] Justice Scalia died on Feb. 13, 2016, almost seven months before the election and almost 11 months before President Obama left office.[24] Chief Judge Merrick Garland was nominated on Mar. 16, 2016.[25] Republican Senators actively ignored Judge Garland's nomination and created a precedent that Supreme Court vacancies could not be filled by a president during an election year.[26] However, this precedent was ignored following the death of Justice Ginsburg in 2020, when President Trump nominated and the Republican

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[20] *See* Mike DeBonis & Paul Kane, *Republicans Vow No Hearings and No Votes for Obama's Supreme Court Pick*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/news/powerpost/wp/2016/02/23/key-senate-republicans-say-no-hearings-for-supreme-court-nominee/.
[21] *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 520 (2011).
[22] *Id*.
[23] Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.
[24] Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.
[25] Barrack Obama, Remarks by the President Announcing Judge Merrick Garland as His Nominee to the Supreme Court (March 16, 2016) (transcript available at https://obamawhitehouse.archives.gov/the-press-office/2016/03/16/remarks-president-announcing-judge-merrick-garland-his-nominee-supreme).
[26] Elving, *supra* note 21.

Senate confirmed a then federal appeals court judge, Amy Coney Barrett.[27] Justice Ruth Bader Ginsburg died on September 18, 2020, and by October 27, 2020, Barrett was sworn in as the new justice on the Supreme Court only seven days before the presidential election was to take place, thus breaking their own precedent regarding Supreme Court appointments set forth during an election year in 2016.[28]

The appointment process for the federal judiciary has been criticized repeatedly throughout the history of the United States, but problems with Supreme Court nominations have gone largely unnoticed because both political parties have been able to contribute to the system in a manner that seemed fairer and more impartial.[29] However, the hypocrisy regarding the Senate's behavior during the nomination of Merrick Garland in 2016 versus the nomination of Amy Coney Barrett in 2020 has shown the issues surrounding the appointment of Supreme Court Justices whenever the Senate is allowed to delay or expedite judicial appointments for political reasons.[30]

Delays and issues, as mentioned above, are attributable to the political nature of the Senate and the current rules (or lack thereof) the Senate has in place regarding the judicial selection process; politics has been a part of the process since the very establishment of the United States, beginning with the nomination of a Naval Officer in Savanna, Georgia by President George Washington.[31] However, we are seeing more turmoil and, in turn, a breach of confidence in a system that is already highly criticized for being unequal and inequitable.[32] To solve the issues with the

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[27] Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.

[28] *Id*.

[29] *See generally* Shartel, *supra* note 7; O'Connell, *supra* note 7 Friedland, *supra* note 7; Seymour, *supra* note 7; Teter, *supra* note 7.

[30] *See* Fandos, *supra* note 25; *see also* Elving, *supra* note 21.

[31] *See* Charlene Bickford, *Setting Precedent: The First Senate and President Washington Struggle to Define "Advice and Consent,"* 7 FED. HIST. 1, 6-12 (2015) (discussing the nomination of Benjamin Fishbourn and the creation of "senatorial courtesy").

[32] *See* Joanna Shepherd & Michael S. Kang, *Partisan Justice: How Campaign Money Politicizes Judicial Decisionmaking in Election Cases*, AM. CONST. SOC'Y, https://www.acslaw.org/analysis/reports/partisan-justice/ (last visited July 12, 2021) (explaining how elected judges usually

federal judicial selection process quickly, we must determine if the Constitution allows the Senate to change how judicial nominees are approved without a constitutional amendment.

III. FEDERAL JUDICIAL SELECTION PROCESS

The federal government uses an appointment judicial selection process to appoint federal judges; the basic process itself is outlined under Article II, Section 2 of the U.S. Constitution, commonly referred to as the Appointments Clause:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[33]

As seen above, the federal judicial appointment process is currently broken into two parts: the nomination process and the confirmation process, both of which we will expand on further below. Since neither the Constitution itself nor the drafters of the Constitution explain exactly how the Senate is supposed to provide "advice and consent," the Senate has established "traditions" that help them decide their role in

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vote for litigates from their own party when deciding cases, and while appointed judges are less likely to do so, partisan decisionmaking is getting worse). S*ee also* Rachel Shelden, *The Supreme Court Used to Be Openly Political. It Traded Partisanship for Power.*, WASHINGTON POST, (Sept. 25, 2020), https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/ 09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html (discusses how the Supreme Court is viewed more favorably and is considered more legitimate whenever the Justices act apolitical; also discusses how many Americans what the Supreme Court removed from politics).

[33] U.S. CONST. art. II, § 2.

the judicial selection process.[34] Below, we will explain the 'traditions' and tools used by the Senate during the judicial appointment process to illustrate why the current system needs to be changed.

A. NOMINATION PROCESS

According to the Constitution, the power to nominate a candidate for a vacancy in the federal judiciary belongs to the President alone.[35] As a result, the President theoretically does not have to obtain the advice of the Senate before a nomination is made and can set up any process the President wishes to choose nominees.[36] Presidents can consult anyone they wish when making nominations.[37] However, the Senate has set up processes that, while technically used after a nomination has been made, impact the nomination process itself.

The practice set up by the Senate that can impact the nomination process has been around since the first Congress and is called "senatorial courtesy."[38] Senatorial courtesy is the practice of requiring the President to discuss a potential nominee with the Senators of the state the nominee is from or the office is located, known as a home-state Senator.[39] Originally, home-state Senators had to stand on the Senate floor and declare that a nominee was "personally obnoxious" to him to alert the other Senators that he had not been consulted or was against the nominee.[40] Today, however, the Judicial Selection Committee uses a "blue slip," or a letter on light blue paper, to inquire if the home-state Senators were consulted and whether they approve of the nominee.[41]

While each Committee chair handles the blue slip process differently, the disapproval of a home-state Senator

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[34] BETSY PALMER, CONG. RESEARCH SERV., RL31948, EVOLUTION OF THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY 1 (2009), https://sgp.fas.org/crs/misc/RL31948.pdf.
[35] *See* U.S. CONST. art. II, § 2; Hanah Metchis Volokh, *The Two Appointment Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 752 (2008).
[36] PALMER, *supra* note 32.
[37] *See* Seymour, *supra* note 7.
[38] Bickford, *supra* note 29.
[39] *Id.*
[40] PALMER, *supra* note 32, at 6.
[41] *Id.* at 7-9.

frequently prevents nominees from ever coming out of the Committee.[42] If either Senator refuses to return the blue slip, then this is usually treated as disapproval.[43] Some Senators have used the threat of not returning a blue slip as a means of leverage against the President during bargaining sessions regarding legislation.[44] Senators do not have to give any reasons for their disapproval of a nominee.[45] Thus, although the President is supposed to be able to make nominations without the interference of the Senate, the President usually must confirm a potential nominee with the home-state Senators before the nomination is submitted.

B. CONFIRMATION PROCESS

After the President forwards a nominee to the Senate Judiciary Committee, the Senate Judiciary Committee discusses the qualifications of the nominee through questionnaires, records, interviews, and hearings.[46] If the Senate Judiciary Committee agrees that the candidate is qualified to fulfill the duties of a federal judge, then a report is issued to the Senate, and a vote is cast, confirming or denying the nominee.[47] If the nominee is confirmed, then the President may appoint the nominee to the judgeship at his discretion.[48] However, if the nomination is denied consent by the Senate, then the President must choose a new nominee and restart the entire process.[49]

While the process seems to be straightforward on paper, the actual process is riddled with traps and pitfalls. The Appointments Clause lacks a clear definition as to the role of the Senate in providing "advice and consent" concerning presidential nominations for federal judgeships.[50]

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[42] *Id.*
[43] *Id.* at 8.
[44] *Id.* at 9.
[45] PALMER, *supra* note 32, at 8-9.
[46] *See* Orrin Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each is Entitled to His Own Opinion, but Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 473 (2003).
[47] *Id.*
[48] *Id.*
[49] *Id.* (quoting Alexander Hamilton).
[50] *See* 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, 201-02 (1987).

As a result, the Senate has established procedures that help them in the judicial selection process.[51] As discussed above, the Committee can simply ignore the nominee, essentially killing the nomination before the confirmation process is even started.[52] If a nominee does get noticed, "Senatorial courtesy" and the "blue slip" process discussed above can kill a nominee before he or she leaves the Committee, but other dangers await a nominee that survives the "blue slip."

Aside from the Senate majority leader refusing to discuss a nominee, another procedure used to halt a nominee is the "hold," or a request by a Senator to the leader of the party to keep a nominee from being considered by the Committee or the Senate.[53] While holds are supposed to be in writing today, unofficial holds can be made by threatening to filibuster a nominee before the nominee is presented on the Senate floor.[54] Holds are used by Senators to gain political leverage over the President or another Senator ('I will release the hold on your judges if you will support my tax cut bill').[55]

Until 1929, there was no evidence to show that a filibuster, another well-known tactic to slow down or even block a nominee, was ever used on a nomination.[56] However, until that time, nomination discussions were held in a closed session.[57] A filibuster takes place whenever a discussion becomes so overwhelmingly long that a vote must be taken to stop the discussion, also known as cloture.[58] For cloture to stop a filibuster, 60% of the Senate must vote to stop the discussion, thus requiring a supermajority to confirm a filibustered nomination.[59] The Senate did exempt nominations of lower court judges from the filibuster in 2013 and Supreme Court nominees from the filibuster in 2017, but

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[51] *See* PALMER, *supra* note 32.
[52] *See* Teter, *supra* note 7. at 292.
[53] *See* PALMER, *supra* note 32, at 9.
[54] *Id*. at 9 n.44.
[55] *Id*. at 9.
[56] *Id*. at 10.
[57] *Id*. at 11.
[58] PALMER, *supra* note 32, at 12.
[59] United States Senate, *About Filibusters and Cloture*, https://www.senate.gov/about/powers-procedures/filibusters-cloture.htm (last visited July 12, 2021).

the Senate can remove this exemption in the future.[60] This exemption also means that any party that controls 51% of the Senate can effectively confirm anyone they wish without any input from the minority party.[61]

IV. ISSUES CAUSED BY THE CURRENT JUDICIAL SELECTION PROCESS

The result of the current judicial selection process has been an understaffed, overworked, and highly politicized federal judiciary that is swamped with cases and controversy. Lending to the case log backup in the system is the fact that the federal judiciary uses a complex system to judge the complexity of a case and measures the workload on the federal judiciary by the amount of new "weighted" cases each judgeship is responsible for.[62] The time and resources a court must devote to a case determine the "weight" of a case.[63] Once a case reaches a certain "weight" it is considered weighted, or difficult.[64] As can be seen in Table 1 below, there were a large number of new weighted cases per judgeship filed in the U.S. District Courts in 2020, and the number of cases increases almost every year.

TABLE 1: AVERAGE WEIGHTED CASES PER JUDGESHIP IN 2020[65]	
Number of Judgeships	673
Average number of weighted cases per judgeship	681
Number of vacant judgeships	70

[60] Jane C. Timm, *McConnell went 'Nuclear' to Confirm Gorsuch. But Democrats Changed Senate Filibuster Rules First.*, NBCNEWS (June 28, 2018, 3:15 PM), https://www.nbcnews.com/politics/donald-trump/mcconnell-went-nuclear-confirm-gorsuch-democrats-changed-senate-filibuster-rules-n887271.

[61] *Id.*

[62] PATRICIA LOMBARD & CAROL KRAFKA, FED. JUD. CTR., 2003-2004 DISTRICT COURT CASE-WEIGHTING STUDY 1-2 (2005).

[63] *Id.*

[64] *Id.*

[65] ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Facts and Figures 2020*, U.S. COURTS (Sept. 30, 2020), Table 6.2. https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2020. (The figures in Table 1 do not include unweighted cases, which are usually resolved without much time or effort, or cases transferred from previous years),

Number of filled judgeships	603
Weighted cases per filled judgeship	760

Every case, including unweighted, or easy cases, increases the burden upon the federal courts. When these small cases combine with higher aggregates of weighted filings, they create a greater problem for districts, this is compounded when judgeships remain vacant for long periods.[66] For example, Texas federal courts have seen a dramatic increase in the number of cases filed in several districts with very few judges being added to the courtrooms.[67] One of the most drastic instances can be found in the Southern District of Texas where filings for criminal litigation climbed sixty-eight percent in 2020, after growing thirty-one percent in 2019.[68] These statistics are not unlike many other areas throughout the U.S. where the number of cases has increased but judgeships have not.

There are currently eighty-two vacancies in the federal judiciary, and as of July 28, 2021, twenty-two vacancies have nominees pending.[69] Out of these eighty-two vacancies, thirty-seven of them are judicial emergencies.[70] One vacancy listed for the Eastern District of North Carolina

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[66] ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Emergencies*, U.S. COURTS (Sept. 3, 2021), http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies.

[67] ADMIN. OFFICE OF THE U.S. COURTS, *Federal Judicial Caseload Statistics 2020*, U.S. COURTS (Mar. 31, 2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020.

[68] *Id*.

[69] ADMIN. OFFICE OF THE U.S. COURTS, *Current Judicial Vacancies*, *supra* note 12.

[70] ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Emergencies*, *supra* note 64. *Also see* ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Emergency Definition*, U.S. COURTS, http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition (last visited July 28, 2021) (For District Courts, a judicial emergency is defined as a vacancy where weighted filings are in excess of 600 per judgeship; or a vacancy that has been open for more than 18 months where weighted filings are between 430 and 600 per judgeship; or any vacancy where weighted filings exceed 800 per active judge; or any court that has only one sitting judge and multiple vacancies. For a Circuit Court, a judicial emergency is defined as a vacancy in a court with more than 700 adjusted filings per panel; or a vacancy that has been open for 18+ months with 500 to 700 adjusted filings per panel).

was open from 2005 and was filled in 2017 – a fourteen-year gap.[71] The current oldest vacancy has been open since 2013.[72]

The fact that these vacancies are allowed to continue is a cause for concern. So why are there so many vacancies and why are they being left unfilled for so long? One possibility is that there is a problem with locating qualified individuals willing to subject themselves to the dysfunctional judicial selection process currently used by the federal government.[73] Another explanation, and one that seems highly plausible, is that the President, whether Republican or Democrat, is reluctant to make nominations due to the political hostility and polarization affecting Washington, particularly when it comes to the Senate judicial process.[74] Once again, we can point to the highly contentious Supreme Court nominations as a demonstration of the hostility surrounding federal appointments of judges.

In addition, the role of the Senate when advising the President seems to largely be misunderstood by the Senate. Many Senators seem to believe that the President is supposed to be advised by the Senate before a nomination is made, as demonstrated through the use of "senatorial courtesy" and blue slips by the Senate.[75] However, the Constitution clearly states that the Senate is only supposed to give advice and consent on which nominee should be appointed, not on who should be nominated.[76] The Senate does not have to give any reasons for the denial of a nominee and is free to deny for even frivolous reasons.[77] However, there is a way to correct all of these issues. Since the Constitution does not adequately define the role of the Senate and even the drafters of the Constitution were confused about the exact role the Senate was supposed to play, the role of the Senate can be fulfilled in multiple ways.[78]

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[71] The Associated Press, *After 14 Years, Eastern North Carolina Judgeship Gets Filled*, N.C. LAWYERS WEEKLY (Dec. 6, 2019), https://nclawyersweekly.com/2019/12/06/after-14-years-eastern-north-carolina-judgeship-gets-filled.
[72] ADMIN. OFFICE OF THE U.S. COURTS, *Current Judicial Vacancies*, *supra* note 12.
[73] *See* Friedland, *supra* note 7, at 186.
[74] *Id*.
[75] *See* PALMER, *supra* note 32, at 5-7.
[76] *See* U.S. CONST. art. II, § 2.
[77] *See* PALMER, *supra* note 32, at 7-9.
[78] *Id*. at 1-2.

V. PROPOSED SOLUTIONS: JUDICIAL SELECTION PROCESS

To correct the issues discussed earlier, changes need to be made to the current federal judicial selection process by redefining the role of the Senate. The process needs to be streamlined and removed from the politics of Washington by either amending the Constitution, as many scholars advocate, or by reinterpreting the Appointments Clause of the Constitution.[79] However, the former of these solutions, amending the Constitution, is fraught with even more politically charged issues and would be extremely difficult to accomplish, only having been done twenty-seven times in the history of the United States.[80] The second and easier way would be to reinterpret how the judicial selection process is supposed to operate, by closely examining the current Appointments Clause to determine if changes could be made under the current language.

The language of the current Appointment Clause is ambiguous, and thus open to interpretation.[81] The President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law.[82]

Even the drafters of the Constitution were unsure about what the exact role of the Senate was in the Appointment Clause as is evidenced in the obscured wording

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[79] *See generally* Shartel, *supra* note 7; O'Connell, *supra* note 7; Friedland, *supra* note 7; Seymour, *supra* note 7; Teter, *supra* note 7.
[80] *See* U.S. CONST. amends. I-XXVII; Thomas Baker, *Towards a "More Perfect Union": Amending the Constitution is a Difficult Process – and That's as it Should Be*, 1.1 INSIGHTS OF L. & SOC'Y 4.
[81] John O. McGinnis and Peter M. Shane, *Article II, Section 2: Treaty Power and Appointments*, INTERACTIVE CONSTITUTION, https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/346 (last visited July 28, 2021).
[82] U.S. CONST. art. II, § 2.

above.[83] Alexander Hamilton made clear through his various writings that the Senate would play a minor role, essentially only providing a yes or no vote on whether a nomination should be allowed to proceed.[84] Conversely, John Adams was convinced that the Senate should be a major player, using politics to force the President to choose the nominees the Senate wanted.[85] However, while the drafters did not agree on the exact procedure to use, they did all agree that the purpose of the Appointments Clause was to ensure that only qualified individuals were appointed to vacant offices in an efficient, responsible, and accountable manner.[86]

The Appointments Clause was carefully structured to provide responsibility and accountability in the selection of officers, including federal judges, by creating a check on unlimited executive authority while balancing the need to quickly fill vacant offices.[87] Whenever a judgeship is vacant, other judges must make up the shortfall and address the gaps which oftentimes come at the expense of the taxpayers and the litigants waiting for their cases to be resolved.[88] The overloaded system then causes these already burdened federal judges to push cases far into the future or spend significantly less time on cases that should be given significant time and attention. This also leads to judges failing to make key rulings on cases.[89] As a result, their performance and judgment may suffer; this is a recipe for disaster.[90] For instance, one federal judge from Manhattan had 273 cases awaiting key findings.[91] The judge cited the "complexity of case[s]," "heavy criminal and civil caseload," and "voluminous brief/transcripts to be read" as reasons for the lack of findings within his docket.[92]

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[83] *See* Teter, *supra* note 7, at 308.
[84] *See* PALMER, *supra* note 32, at 1-2.
[85] *Id*.
[86] *See* Teter, *supra* note 7, at 308.
[87] *See* Volokh, *supra* note 33. at 766-69; Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527, 530 (1998) (quoting Alexander Hamilton).
[88] *See* Seymour, *supra* note 7, at 708.
[89] *Id*.
[90] *Id*.
[91] Benjamin Weiser, *Judge's Decisions Are Conspicuously Late*, N.Y. TIMES (Dec. 6, 2004), https://www.nytimes.com/2004/12/06/nyregion/judges-decisions-are-conspicuously-late.html.
[92] *Id*.

The drafters understood that the seats would be filled by nepotism if no one felt tremendous responsibility for nominating quality people.[93] They also grasped that large groups would dilute responsibility, and thus did not want Congress, or even the Senate, as a whole filling the vacancies.[94] The drafters decided that one person, the President of the United States, would be the best choice to be responsible for nominating qualified individuals.[95] However, the drafters also wanted someone to be accountable for ensuring that the President did not abuse his appointing power, so the drafters wanted the Senate to act as a check on the President's ability to have unending power over federal judiciary appointments.[96]

While the text of the Appointment Clause appears to be one solid whole, close examination, according to Hanah Volokh in her seminal work, *The Two Appointment Clauses: Statutory Qualifications for Federal Officers*, reveals that there are two Appointment Clauses in the Constitution: (1) the Confirmation Clause and (2) the Vested Appointment Clause.[97] Volokh demonstrates a breaking down of the Clause is necessary to fully understand how and why some government officials are chosen by department heads and why others are nominated by the President and confirmed by the Senate.

The Confirmation Appointment Clause requires that the President nominate a candidate to fill a vacant office and then obtain the "Advice and Consent of the Senate" before appointing the nominee to the vacant position.[98] However, since the exact means of acquiring the advice and consent of the Senate are not stated, the Senate has largely been left to determine exactly what this phrase means, resulting in disagreements between the Senate and Presidents regarding the Senate's role in the process; for example, President George Washington and the First Senate did not agree on the exact meaning of this phrase, and Washington told the

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[93] *See* James Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 343-46 (1989).
[94] *See Id.* at 350-51; THE FEDERALIST NO. 77 (Alexander Hamilton); Seymour, *supra* note 7, at 692; Hatch, *supra* note 44, at 469-70.
[95] *See* Gauch, *supra* note 91, at 350-51.
[96] *See* Hatch, *supra* note 44, at 469-72.
[97] U.S. CONST. art. II, § 2. *See* Volokh, *supra* note 33, at 748-51; Gauch, *supra* note 91, at 339.
[98] U.S. CONST. art. II, § 2.

Senate that they were merely a council meant to advise the President on which nominee should be appointed, not to actually make a choice.[99]

The Vested Appointment Clause is the other half of the Appointment Clause.[100] However, contrary to Volokh, it is easy to tell that the Vested Appointment Clause is connected with the last part of the Confirmation Appointment Clause.[101] Volokh claims that the Vested Appointment Clause begins at the colon found in the Appointment Clause.[102] However, close examination of the language indicates that the Vested Appointment Clause is connected to the last phrase of the Confirmation Appointment Clause, and should read as follows:

> . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[103]

Exactly what the drafters meant by "such inferior Officers" has been the subject of much debate over the last two centuries.[104] In 1878, the Supreme Court, in *United States v. Germaine*, discusses the Appointment Clause while trying to determine if a civil surgeon accused of embezzling is an officer of the United States and thus protected by statutes at the time limiting fines levied on officers.[105] The

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[99] *See* George Washington, Sentiments Expressed to the Senate Committee at a Second Conference on the Mode of Communications Between the President and the Senate on Treaties and Nominations (August 10, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799 377 (John C. Fitzpatrick ed., 1931-44).

[100] *See* Volokh, *supra* note 33, at 759-60.

[101] *See* United States v. Germaine, 99 U.S. 508, 510 (1878). *But see* Volokh, *supra* note 33, at 759-60.

[102] *See* Volokh, *supra* note 33, at 759-60.

[103] U.S. Const. art. II, § 2.

[104] According to Black's Law Dictionary, an "inferior officer" is "an officer who is subordinate to another officer." *Officer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[105] *See* Germaine, 99 U.S. at 508-12.

Supreme Court held that the Constitution has two different classes of officers: superior and inferior.[106] During the discussion regarding the Appointment Clause, the Supreme Court stated that "officers inferior to those specially mentioned" in the Appointment Clause fall under the Vested Appointment Clause.[107] There are other factors to determine if a government employee is an officer, such as the duties of the position must be continuous and permanent.[108] However, only the President, courts of law, and heads of departments can have the vested authority to appoint someone to be an inferior officer.[109] By attaching the phrase "such inferior Officers" to the last category of the Confirmation Appointment Clause, it becomes clear that the specifically enumerated officers are superior, as also stated by the Supreme Court in *Germaine*, and that "such inferior Officers" refers to the last category of "all other Officers of the United States."[110]

Using this analysis, Supreme Court Justices are superior officers since they are specifically enumerated in the Confirmation Appointment Clause, and thus must be confirmed by the Senate.[111] Lower federal judges are not specifically enumerated in the Confirmation Appointment Clause, so they would fall into the "all other Officers of the United States."[112] Also, all lower court judges are subordinate to and overseen by the Supreme Court, thus making them inferior to the Supreme Court.[113] Since the President currently appoints the lower federal judges to the bench and all federal judges have life tenure, we can safely state that they are Officers of the United States. Also, since lower federal judges are not specifically enumerated in the Appointment Clause, using the reasoning in *Germaine*, lower federal court judges must be inferior officers.

Congress can decide how inferior officers are to be chosen and can allow for others besides the President, courts

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[106] *Id.* at 510.
[107] *Id.*
[108] *Id.* at 511-12.
[109] *Id.* at 510.
[110] *See* Germaine, 99 U.S. at 510.
[111] U.S. CONST. art. II, § 2.
[112] *Id.*
[113] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Court Role and Structure*, U.S. COURTS, http://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Sept. 10, 2021).

of law, or heads of departments to appoint these officers.[114] Once Congress decides to use the Vested Appointment Clause, the Confirmation Appointment Clause no longer applies, and the Senate will no longer have a voice in the process.[115] However, Congress does have the right to specify the qualifications of officers appointed under the Vested Appointment Clause and to revoke the usage of the Vested Appointment Clause at any time.[116]

Our idea to correct the problems with the federal judicial selection process is to reinterpret exactly what is meant by "Advice and Consent of the Senate" and to make use of the Vested Appointment Clause to streamline and improve the selection of federal judges.[117] The Senate currently defines what "Advice and Consent of the Senate" means, but even the Senate is not sure what their actual role in the process is.[118]

Further, to make the system more effective, the role of the Senate must be redefined in a way that eliminates all the issues plaguing the federal judicial selection process. We propose we return to a system that resembles the original process created by the drafters. We will accomplish this goal by changing the Senate's role in the judicial selection process, thereby eliminating many of the obstacles to the process added by the Senate in the last 200 years.

VI. PROPOSED CHANGES: SUPREME COURT LEVEL

While the Supreme Court does not have the same problems as the rest of the federal judiciary regarding vacancies, the problem is becoming more pronounced, with nominations taking longer amounts of time to pass through the Senate for the entire federal judiciary.[119] Before the nomination of Merrick Garland, most vacancies on the Supreme Court were filled relatively quickly, with less than ten going over 100 days, while the longest vacancy lasted 125

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[114] U.S. CONST. art. II, § 2. *See* Volokh, *supra* note 33, at 759-60.
[115] U.S. CONST. art. II, § 2.
[116] *See* Volokh, *supra* note 33, at 759-62.
[117] U.S. CONST. art. II, § 2.
[118] *See* PALMER, *supra* note 32, at 4-5.
[119] *See* Charles R. Shipan & Megan L. Shannon, *Delaying Justice(s): A Duration Analysis of Supreme Court Confirmations*, 47 AM. J. OF POL. SCI. 654, 655 (2003).

days.[120] However, that changed when Republican Senators succeeded in blocking President Obama's nominee for the seat vacated by the death of Antonin Scalia in early 2016, citing that it should be held off until after the upcoming election.[121] This precedent has opened the door for the Senate in the future to prolong nominees to the Supreme Court.

As has already been discussed, Supreme Court Justices are superior officers of the United States because they are specifically enumerated in the Confirmation Appointment Clause. Therefore, they must be appointed with the consent of the Senate. However, we can reinterpret exactly what "Advice and Consent of the Senate" means.[122] Since the drafters wanted a small body of people confirming nominees for appointments and the Constitution does not say that the entire Senate must vote to confirm a nominee, my recommendation is that we allow the Senate Judiciary Committee to confirm the nominees directly with oversight from the entire Senate.

When the Constitution was written, the Senate was much smaller than today with only thirteen colonies. Since the Constitution only allows two Senators from each state, there was a maximum total of only twenty-six Senators at the time the Constitution was ratified.[123] The Constitution only requires that a quorum, or a majority of Senators elected, be present to conduct business, so the Senate could begin conducting business as soon as the fourteenth Senator arrived.[124] Thus, the drafters of the Constitution were comfortable with the idea of a governmental body consisting of as few as fourteen people deciding whether or not a nominee should be appointed.

We would set the Senate Judiciary Committee as a fourteen-member bipartisan committee consisting of seven Senators from each party.[125] These fourteen members would be presided over by the Vice President, who would not get a

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[120] *See Id.*

[121] Jena McGregor, *The Absurdity of the Debate Over Replacing Scalia*, WASH. POST, (Feb. 16, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/02/16/the-absurdity-of-the-debate-over-replacing-scalia-2/.

[122] U.S. CONST. art. II, § 2.

[123] U.S. CONST. art. I, § 3.

[124] U.S. CONST. art. I, § 5.

[125] This is equal to a quorum needed by the Senate to conduct business when the Constitution was ratified.

vote and would be unable to take part in the discussions. Until a nominee is appointed or denied by the committee, committee members will be required to attend committee meetings for at least eight hours per day with no more than a twelve-hour break between sessions unless the full Senate is in session. Attendance during these sessions would be mandatory. A tie after sixty days of discussion would result in the Vice President casting the deciding vote, thus providing the committee members with an incentive to discuss each nomination and provide legitimate reasons for or against the nominee to swing votes.

The Committee would have sixty days to decide on each nominee and must vote on every nominee. Once the vote is cast, each member must provide a reason for his or her vote. These reasons will be transmitted to the President to advise him or her as to what action should be taken.[126] Doing so would fulfill the "advice" requirement in the Appointment Clause. If a nominee is confirmed by the Committee, then a report will be issued to the Senate as a whole. The Senate will then have ten days to declare a confirmation void by a vote, thus providing the entire Senate with the ability to vote on confirmation. At least sixty Senators must agree to void the confirmation. Senators who vote to void a nominee must provide either an oral or written explanation to the President to fulfill the Senate's duty to "advise" the President. Explanations made privately must be made public after forty-five days. Making explanations public forces Senators to feel accountable for the decisions they make during the confirmation process. Filibusters and holds would not be allowed on nominee confirmations, eliminating these obstacles from the confirmation process. If the Senate has not voided a confirmation after ten days, the President will be free to appoint the individual to the nominated position. Since the Vice President will be heading the committee, nominations will be almost guaranteed to be acted on by the Senate Judiciary Committee.

A. CONSTITUTIONALITY OF PROPOSED ACTION

[126] If the nomination is denied, then the President should consider the advice he or she has been given before selecting another nominee. Presidents would still be able to consult with whomever they choose about potential nominees.

The Senate set a precedent that the entire Senate is not required to vote to deny a nomination whenever they allow a nomination to die in the Committee. This should also be true for confirmation. In *Nixon v. United States*, the Supreme Court held that the Senate as a whole does not have to sit for an impeachment proceeding, just so long as the entire Senate is informed and votes at the end.[127] However, unlike the Appointment Clause, the Constitution explicitly states that the Senate as a whole must vote on impeachments since it requires a two-thirds vote to impeach.[128] In *Nixon*, the Supreme Court reasoned that if the drafters of the Constitution wanted any restrictions other than the ones in the Constitution, then they would have been listed in the Constitution.[129] However, this language is conspicuously missing in connection with the consent responsibility of the Senate.[130] Working on the reasoning in *Nixon*, if the drafters of the Constitution wanted the full Senate to have to vote on a nomination, they would have specified that in the Appointment Clause by specifying that a majority of Senators had to consent. Since all the other Senate procedures, such as holds, blue slips, and filibusters, are not actually powers given to the Senate, but simply procedural processes created by the Senate, they can be changed or restricted at any time.

B. HOW OUR PROPOSED METHOD CORRECTS THE PROBLEMS WITH THE JUDICIAL SELECTION PROCESS REGARDING SUPREME COURT NOMINEES

Judicial independence is one of the main reasons why the drafters made the judicial branch equal with the executive and legislative branches in the federal government.[131] The drafters did not want political ideology or gratitude to a particular President or Senator influencing the decisions of federal judges.[132] Instead, the drafters

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[127] 506 U.S. 224, 230 (1993).
[128] U.S. CONST. art. I, § 3.
[129] *See* Nixon, 506 U.S. at 230.
[130] U.S. CONST. art. II, § 2.
[131] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Types of Cases*, *supra* note 6.
[132] *See* Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 711-12 (1995).

wanted the federal judiciary to make decisions based on the laws of the land, not on the whim of politics or the passions of the masses.[133] Also, by lowering the number of people to the original size of a quorum when the Constitution was ratified, each member of the Senate Judiciary Committee will feel more pressure to fulfill the duties given to the Senate under the Appointment Clause while providing the accountability sought by the drafters. Finally, setting a time limit on when a vote must be cast for each nominee would force the Committee to move nominations forward instead of sitting on them for years.

VII. CHANGES FOR THE LOWER FEDERAL COURTS

As for correcting the issues with the lower federal courts, the above method would work. However, we have a much simpler solution. As discussed earlier, inferior judges are not specifically enumerated in the Appointment Clause, have life tenure, and are inferior to Supreme Court Justices, and thus are "inferior officers." As a result, instead of redefining the role of the Senate, we would remove the Senate entirely by using the Vested Appointment Clause to vest the power to appoint inferior judges in the Chief Justice of the Supreme Court with the consent of four of the other eight Supreme Court Justices. Since the Vested Appointment Clause allows Congress to vest the appointing authority in the "Courts of Law" for inferior officers, vesting the authority to appoint District Judges and Court of Appeals Justices to the Supreme Court would be completely constitutional.

Nominating authority would be placed in the hands of each district court and U.S. Court of Appeals to nominate their replacements. The courts themselves would be in a better position to determine the best-qualified candidates since they work with attorneys from their districts daily and would have more of an incentive to nominate a replacement quickly to fill any vacancies. We would again give the Supreme Court a time limit to confirm and appoint lower court judges to ensure that there are no significant delays in filling a vacant judgeship. However, Congress would be able to set qualification standards to ensure that individuals

[133] *See Id.*

nominated were at least minimally qualified to hold the vacant judgeship.

We would also give the Supreme Court the ability to increase judgeships with the consent of the Senate Judiciary Committee. Using the Committee as a check on this ability would ensure that the Supreme Court has legitimate reasons for increasing judgeships. Of course, Congress could also specify by statute what factors must be considered before a new judgeship can be created, and Congress would have to approve any additional funding needed by the judiciary because of the new judgeships. Having both abilities would further insulate the courts from politics by removing the legislature and the executive from the process of selecting and appointing federal judges.

Some people may claim that the Supreme Court would not have the time to appoint individuals to these vacant judgeships. However, the Supreme Court on average hears less than 100 cases a year, which gives them less than one case every three and a half days. Currently, there are only 82 vacancies in the federal judiciary.[134] Out of all the federal judiciary, the Supreme Court has the smallest caseload. Even if the Supreme Court used two days per case, they would have more than enough days left in the year to fill all the outstanding vacancies. Based on these observations, the Supreme Court should have no difficulty finding the time to fill the current vacant judgeships and future vacancies.

VIII. CONCLUSION

As we have discussed, the problems with the federal judicial selection process can be resolved when we examine the actual problems with the process and isolate the causes, most of which stem from how the process has been structured by the Senate and all the procedural means of delaying and killing a nomination possessed by the Senate. The ability of the Senate to use these tools to gain political leverage over the President does not reflect the drafters' original intentions behind the Appointment Clause.

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[134] ADMIN. OFFICE OF THE U.S. COURTS, *Current Judicial Vacancies*, *supra* note 12.

To correct the judicial selection process, the Senate must not be able to ignore or delay nominations. By removing the entire Senate from the federal judicial selection process, thus eliminating many of the various ways a nomination can be killed and placing a time limit on voting to eliminate delay, many of the current vacancies in the federal judiciary would be filled by the end of the year. Allowing the Supreme Court to create new judgeships in overworked courts would also help to bring the overflowing dockets in the federal courts back under control.

The changes we have proposed will correct the current issues found in the federal judicial selection process by once again removing politics from the nomination and confirmation process, while still providing the responsibility and accountability sought by the drafters during the Constitutional Convention. The Senate would be free to focus their time and energy on other matters while still operating as a check on the President's power of appointment. Also, since these changes would not require any amendments to the Constitution, only a change in the Senate's rules, they could be enacted immediately, providing the relief so sorely needed by the federal judiciary.