

## Appointing Justices to the Supreme Court

In his December 12, 2004 op-ed entitled "Appointing Justices to the Supreme Court," attorney John Armor claims that Associated Press writer Jim Abrams must be "ignorant" because he failed to see that "every Congress since [the First Congress] to the present day, has recognized that Advise and Consent requires only a majority vote in the Senate, and no more," in order to confirm a judicial nominee. However, Mr. Armor should get his facts straight before he calls someone else "ignorant."

In 1968, Republicans in the Senate filibustered the nomination of Abe Fortas to be Chief Justice of the United States. More recently, in the year 2000, Senate Republicans--including Senator Frist, who is now the Republican leader--joined the filibuster of the nominations of Marsha Berzon and Richard Paez, President Clinton's nominees to the Ninth Circuit Court of Appeals in San Francisco. Now that they are in the majority in the Senate, many of those same Republicans are "shocked, shocked!" to see that Democrats in the Senate have used the same long-standing rule to block 10 of President Bush's judicial nominees, while allowing more than 200 to be confirmed. During Clinton's presidency, Republicans used "secret holds" and other tactics to block more than 60 of Clinton's judicial nominees.

The legal argument that Mr. Armor uses to support his view that filibusters are unconstitutional is one that any first-year law student could debunk: according to Mr. Armor, whereas the Constitution is silent on the number of votes it takes to confirm a nominee, it specifies that certain measures, like ratifications of treaties, require a two-thirds vote. Thus, by inference, the Founding Fathers must have meant for the confirmation of nominees to require only a majority vote. But if one is going to extract inferences on the meaning of the Constitution, why not infer a unanimous vote? An argument can be made that such a requirement would ensure that only non-controversial, consensus nominees would be confirmed, resulting in a far more mainstream judiciary.

The point is, according to both the literal text of the Constitution, and the interpretation that Congress has operated under since its inception, "Each House [of Congress] shall determine the Rules of its Proceedings." The courts have refused to get involved in disputes pertaining to "political questions" that involve the internal workings of Congress. Thus, both the filibuster rule and the "simple majority" rule are clearly within the Senate's powers to adopt under the Constitution, as would be a rule requiring unanimity.

It is curious to note that Mr. Armor--who clearly prepared his opinion piece using GOP talking points that have been circulated in anticipation of the nomination of one of President Bush's "strict constructionists" to the Supreme Court--is using a *non*-strict-constructionist argument to pave the way. Strict constructionists believe that the Constitution's meaning should be derived from its plain language, not through inferences; and yet Mr. Armor uses a huge extrapolation of the Constitution's language to come up with a meaning that suits his purposes.

Because it demands greater consensus, the ability to filibuster judicial nominees is a moderating tool that prevents extreme ideologues from both sides of the aisle from being confirmed to lifetime seats on the courts. Like other Senate practices--including committee practices and the power to create the Senate schedule--it sometimes allows the perceived will of the majority of senators to be thwarted. But a minority of senators can represent a majority of the population of our nation, as is often the case, and is the case now on the issue of judicial nominations. And on the issue of lifetime nominees to our federal courts--where senators are not able to go back and correct their mistakes--few other issues have more at stake.

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