ADVICE, CONSENT, AND SENATE INACTION—IS JUDICIAL RESOLUTION POSSIBLE?

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INTRODUCTION

Michael Schattman is a former Texas state judge who was nominated by President Clinton to fill one of two vacant federal judgeships on the fourteen-seat Northern District of Texas.[1] Despite the growing backlog of cases in the district, the United States Senate has refused to hold hearings or a vote on Schattman's nomination.[2] Senator Phil Gramm, one of the two Texas Republican Senators who oppose Schattman's confirmation, is concerned about Schattman's activities as a conscientious objector during the Vietnam War.[3] Senator Gramm believes Schattman's participation in the antiwar movement renders him unable to rule fairly on cases involving employees of the many military contractors in the district.[4] In response, Schattman cites his extensive experience on the state bench, where he adjudicated a number of cases involving the same population of military employees.[5]

Schattman also has been criticized for his active participation in local Democratic politics.[6] As a state judge who holds an elected position, however, Schattman argues that some participation in politics is inevitable.[7] Schattman simply wants his nomination to go before the Senate, so that he may defend himself in a confirmation hearing and have the Senate vote on his nomination.[8]

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1 See Neil A. Lewis, Jilted Texas Judge Takes on His Foes in Partisan Congress, N.Y. Times, Nov. 16, 1997, at A1.

2 See id.

3 See id.

4 See id.

5 See id.

6 See id.

7 See id.

8 See id. As of August 1, 1998, Schattman's nomination still had not been voted on by the Senate. See Administrative Office of U.S. Courts, Vacancies in the Federal Judiciary (visited Aug. 1, 1998) <http://www.uscourts.gov/vacancies/judgevacancy.htm#fifth>.

If Michael Schattman's plight were an isolated incident, his picture would not be on the front page of the New York Times. Instead, his story is just one example of the recent failure of the President and the Senate to fill vacancies in the federal judiciary. That failure, many say, began in 1994.[9] In light of the current stalemate in the appointment of federal judges, this Note will explore the possibility of a judicial remedy for the Senate's failure to act on presidential nominees for the federal judiciary.[10]

Understandably, the possibility of a judicial remedy may appear unlikely. A federal judge willing to review and reform the Senate's handling of its judicial confirmation responsibilities would certainly open herself up to an enormous flood of criticism, both academic and political. However, the potential for abuse in the appointment process—which, as this Note will argue, has now come to bear—merits serious consideration of the constitutional limits of Senate discretion. This Note will seek to define those limits by proposing several principled constitutional theories that argue for judicial review of Senate inaction. Through an examination of the three procedural obstacles most likely to stand in the way of such judicial action, this Note also will test the ability of a federal court to enforce those boundaries.

Part I of this Note explores the problem of judicial vacancies. By demonstrating the extent to which such vacancies are effecting the federal judiciary, Part I seeks to show why judicial intervention is warranted. This Part also discusses the remedies that would be available to a federal court should an action be brought. In Part II, this Note analyzes possible theories under which a claim may be brought. It first looks at the history and meaning of the Advice and Consent Clause of the Constitution, arguing that the Senate's failure to fulfill its advice and consent role is a violation of the doctrine of separation of powers. Part II then explores the possibility that the Senate's confirmation role should be judicially enforced under a theory of legislative due process. Finally, Part II shows that Senate inaction may rise

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[9] See, e.g., Senate and Judges (NPR radio broadcast, Sept. 24, 1997), available in LEXIS, News Library, NPR File. The Senate confirmed only 17 judges in 1996 and 36 in 1997, compared with 101 in 1994. See John H. Cushman, Jr., Senate Imperils Judicial System, Rehnquist Says, N.Y. Times, Jan. 1, 1998, at A1.

[10] Potential plaintiffs include nominees, senators wishing to exercise their duty to vote, litigants whose access to federal court has been unduly delayed, and federal judges who are unable to carry out their responsibilities adequately because of an excessive workload. See infra Part III.A (discussing standing).

Theoretically, a suit against the President for failing to nominate candidates in a timely manner should be considered as well. See Trent Lott (R-Miss.), Rehnquist's Rush to Judgment, Wash. Post, Feb. 2, 1998, at A19 (pointing out that President Clinton has not submitted nominations for all of these emergency vacancies). Full treatment of this issue, however, would require a lengthy analysis, and therefore is beyond the scope of this Note.

to the level of a de facto repeal of legislation establishing the size of the federal court system, thus violating the constitutional requirements of bicameralism and presentment. Part III discusses several procedural obstacles that such an action would face, and suggests the theory of "underenforcement" as an alternative should a judicial remedy not be feasible. More specifically, Part III argues that the standing requirement, the Speech or Debate Clause of the Constitution, and the political question doctrine should not preclude judicial action in this situation.

I
THE CURRENT CRISIS AND THE AVAILABLE REMEDIES

This Part describes the current confirmation backlog in the federal judiciary. It argues that judicial intervention is warranted and could be effective, given available judicial remedies. The current state of affairs in the federal judiciary is set forth in Part I.A. Part I.B looks at the role of the Senate in that backlog. Finally, Part I.C sets forth a survey of potential remedies, focusing in particular on two options—declaratory relief and the writ of mandamus.

A. Crisis in the Judiciary

When a vacancy in the Federal Judiciary arises, the President must submit a nomination to the Senate, which then must confirm or deny the appointment.[11] As of the Senate recess in November, 1997, there were eighty-two vacancies (out of a total of approximately 843 judgeships) in the federal court system.[12] The number of

[11] See infra note 65 and accompanying text (describing constitutional appointment procedure); see also infra note 86 (discussing role of Senate Judiciary Committee). For a more detailed description of the appointment process, see generally Henry J. Abraham, The Judicial Process 21-31 (7th ed. 1998); Sheldon Goldman, Picking Federal Judges (1997). A thorough explanation of the Senate's role in the process—including the custom of "senatorial courtesy," whereby the Senate will almost invariably vote down a nominee who does not have the support of his or her home-state senator—is set forth in Abraham, supra, at 22-25, 80-90.

[12] See Excerpts from Report on Judiciary, N.Y. Times, Jan. 1, 1998, at A14. The number of judgeships is determined by Congress pursuant to U.S. Const. art. I, § 8, cl. 9. Of the 814 federal district and appellate judgeships, see 28 U.S.C. § 44 (1994) (providing for 179 positions on the Courts of Appeals) and § 133 (providing for 632 positions on the District Courts), there were 78 vacancies. See Help Wanted: Federal Judgeships, N.Y. Times, Jan. 2, 1998, at A14. An additional 18 Article III judgeships exist, comprised of nine seats each on the Supreme Court, see 28 U.S.C. § 1 (1994), and the Court of International Trade, see 28 U.S.C. § 251 (1994).

I use "approximately" because there is a discrepancy regarding the actual number of district court judgeships. While the United States Code provides for 632 district judgeships, see 28 U.S.C. § 133 (1994), the Administrative Office of the U.S. Courts lists the number at 646, see Administrative Office of U.S. Courts, Judicial Vacancies (visited Aug. 1,

vacant judgeships,[13] combined with the length of time they have remained vacant,[14] is highly disturbing and unprecedented in recent

1998) <http://www.uscourts.gov/cgi-bin/vacancy-index.pl>. One possible source of confusion is the treatment of district judgeships for the Virgin Islands, the Northern Mariana Islands, and Guam; they are included in some counts but not in others.

As of August 1, 1998, the number of vacancies had decreased to 72 (17 on the Courts of Appeals, 54 on the District Courts, and one on the Court of International Trade). See Administrative Office of U.S. Courts, Vacancy Summary (visited Aug. 1, 1998) <http://www.uscourts.gov/vacancies/summary.html>. At the end of 1997, 32 vacancies were designated "official judicial emergencies" because they had been vacant for over 18 months. See Alliance for Justice, Judicial Selection Project: Annual Report 11 (1997) [hereinafter Alliance for Justice 1997] (Alliance for Justice is a liberal monitoring group which has been relied upon in this Note primarily as a statistical source). By August 1, 1998, that number increased to 33. See Administrative Office of U.S. Courts, Judicial Emergencies (visited Aug. 1, 1998) <http://www.uscourts.gov/vacancies/emergencies.html>. In the Second Circuit, where a judicial emergency has been declared by Chief Judge Ralph Winter, see Editorial, Emergency in the Courts, N.Y. Times, Apr. 6, 1998, at A22, three-judge panels may now be composed of only one Second Circuit judge and two visiting judges. See id.

[13] The Senate confirmed 101 federal judges in 1994; only 111 were confirmed in the following three years. See Alliance for Justice 1997, supra note 12, at 12. In 1997, the Senate Judiciary Committee held only nine confirmation hearings on 46 nominees. See id. at 17. The Senate does appear to be picking up the pace somewhat: As of July 30, 39 Article III judges have been confirmed in 1998 (9 on the Courts of Appeals, 28 on the District Courts, and 2 on the Court of International Trade). See U.S. Senate Homepage, Nominations Confirmed (Civilian) (visited Aug. 1, 1998) <http://www.senate.gov/activities/nomconfc.html>.

[14] The length of time that these positions have remained vacant is alarming. Ten of the 36 judges confirmed in 1997 waited at least nine months between nomination and confirmation; five waited 16 months or longer. See Alliance for Justice 1997, supra note 12, at 14. An extreme case is that of Professor William Fletcher, who has not received a hearing on his nomination for over three years. See Anthony Lewis, Moving the Judges, N.Y. Times, Apr. 27, 1998, at A15. By comparison, President Bush nominated 195 people for judgeships; only three of those had to wait nine months to be confirmed, and none had to wait for over a year. See Alliance for Justice 1997, supra note 12, at 14. From 1979 to 1996, the average wait between nomination and confirmation was 78 days; in 1997, it was 192 days. See id.

The Alliance for Justice's Judicial Selection Project Annual Report for 1997 explains that "[i]n the past, the Senate routinely confirmed lower court judicial nominees by unanimous consent. In 1997, however, there was little bipartisan cooperation. Senate leaders held roll call votes for many judgeships and kept nominees waiting for unprecedented periods of time." Alliance for Justice 1997, supra note 12, at 14-15.

There have been instances where the Senate has refused to act on a particular presidential nominee. See Laurence H. Tribe, God Save This Honorable Court 81-82 (1985) (providing examples). The use of such a broad-based slowdown, however, has never before been undertaken by the Senate, as evidenced by Professor Tribe's now ironic expression of confidence in the appointment system a decade ago:

> Presidents and Senators . . . recognize the ultimate futility of stalemates and the danger they pose to the integrity of both of the political branches and of the Supreme Court. History records that—in the vast majority of cases—respect for the other branch, the need to get on with the practical business of running a great nation, and the Constitution's own system of checks and balances have been sufficient to keep the appointment process on track. The executive and legislative branches, while not always thrilled with the prospect, manage to live with each other because they have to . . . .

history.[15] Statistics from prior administrations show that the current backlog is an anomaly rather than an expected result of the confirmation process or election-year politics.[16]

Defenders of the Senate's slowdown allege that the current status of the federal judiciary is far from a crisis.[17] Nothing has changed since the Democrats controlled the Senate in the early 1990s, it is argued; in 1991, there were 108 vacancies, and in 1992, 114.[18] This argu-

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Id. at 130.

15 See Alliance for Justice, Judicial Selection Project: Annual Report 12 (1996) [hereinafter Alliance for Justice 1996] (reporting that Senate's failure to act on 28 nominees in 1996 was "an unprecedented number for any year"). In 1996, only 17 judges were confirmed during the Second Session of the 104th Congress, fewer than in any other year in two decades. See id. at 3. This occurred despite Congress's expansion of the judiciary in 1990. See infra note 19 and accompanying text (detailing creation of new federal judgeships).

16 During the early part of President Reagan's administration, the Republican-controlled Senate maintained an extremely low vacancy rate and quickly filled judicial positions. See Pro & Con Government Relations Forum: Improving the Process of Appointing Federal Judges, Fed. Law., Nov.-Dec. 1997, at 51, 54 (1997) (statement of Assistant Attorney General Eleanor Acheson). The shift in control of the Senate in 1987 did not have a significant effect on the process; the Democrat-controlled Senate confirmed 96 judges in its 100th term, bringing the vacancy level down to 23 seats at the end of 1988. See id. at 54. During President Bush's administration, the Democrat-controlled Senate confirmed 195 nominations. See id. Assistant Attorney General Acheson concluded:

> [I]t has been said repeatedly and erroneously that there were comparable vacancy spikes during the Reagan and Bush presidencies, that Democrats essentially did much the same as Republicans are now doing . . . . None of these things is really true. The comparable vacancy spikes offered up are those caused by the 1984 and then the 1990 legislation creating 162 new judicial positions. These situations are simply not comparable to allowing the vacancy rate to rise to over 100 seats . . . .

Id. at 56.

Many attributed the low number of confirmations in 1996 to the fact that it was an election year. See Sheldon Goldman, Bush's Judicial Legacy: The Final Imprint, 76 Judicature 282, 284 (1993) (remarking that typically, minimal confirmation activity occurs during presidential election years, especially when White House and Senate are controlled by different parties); see also Michael J. Gerhardt, Putting Presidential Performance in the Federal Appointments Process in Perspective, 47 Case W. Res. L. Rev. 1359, 1394 (1997) (providing examples of confirmation slowdowns during past election years). Statistics, however, show this to be a debatable contention. See Alliance for Justice 1996, supra note 15, at 3 (reporting that Democratic Senate confirmed 66 of President Bush's 75 nominations in 1992, 42 of President Reagan's nominees in 1988, and 43 of President Reagan's nominees in 1984); Goldman, supra, at 284 (noting that 1992 produced record numbers of both confirmations and "no-actions" for an election year).

17 See, e.g., Pro & Con Government Relations Forum, supra note 16, at 51 (statement of Manus Cooney, staff director of Senate Judiciary Committee) (affirming that "[t]here is no judicial vacancy crisis"). Cooney defends the Senate position in part by highlighting the fact that there are more sitting federal judges now than there were during most of the administrations of Presidents Reagan and Bush. See id. However, Cooney fails to mention the new federal judgeships that were created in 1990. See infra note 19 and accompanying text.

18 See Steve Forbes, Fact and Comment, Forbes, Feb. 9, 1998, at 28.

ment fails to recognize the fact that many of those vacancies were in fact the eighty-five new federal judgeships created by Congress in December 1990.[19]

The high vacancy rate—combined with Congress's decision to broaden the jurisdiction of federal district courts, especially in criminal matters, such as drug cases[20]—has resulted in a marked strain on the federal judiciary.[21] That strain has reached such levels, in fact, that the normally reserved Chief Justice of the United States has taken the uncharacteristic step of publicly rebuking the Senate for its failure to move more quickly on nominations.[22] In his annual report on the state of the federal judiciary, Chief Justice Rehnquist warned that "vacancies cannot remain at such high levels indefinitely without eroding the quality of justice."[23]

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19 See The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended in scattered sections of 28 U.S.C.); see also Alliance for Justice 1997, supra note 12, at 11 n.11 (explaining that newly created judgeships were systematically being filled).

20 See Lewis, supra note 1, at A1; see also Remarks of Chief Justice William H. Rehnquist, May 11, 1998 (visited July 15, 1998) <http://www.uscourts.gov/ALI.html> (citing examples of Congressional expansion of federal court jurisdiction). But see Katharine Q. Seelye, House Approves Weakened Bill on Judges, N.Y. Times, Apr. 24, 1998, at A18 (describing bill as intended to limit federal court power); Tampering with the Judiciary, Editorial, N.Y. Times, Apr. 23, 1998, at A24 (criticizing congressional attempts to reduce federal court power).

21 The federal appellate court docket has increased by 21%, and the district court docket by 24%, since 1990. See Cushman, supra note 9. The federal criminal caseload is at its highest level in 60 years. See id.

The United States Judicial Conference, the policymaking body of the federal judiciary, has recommended the creation of 55 new federal judgeships, in part to deal with new drug and immigration laws. See Federal Judge Shortage (NPR radio broadcast, Sept. 25, 1997), available in LEXIS, News Library, NPR File; see also Alliance for Justice 1996, supra note 15, at 7-8 (documenting call for more judgeships by Chief Justice Rehnquist and Administrative Office of United States Courts). But see J. Harvie Wilkinson III, We Don't Need More Federal Judges, Wall St. J., Feb. 9, 1998, at A19 (arguing that federal judiciary has already grown too large).

22 See Cushman, supra note 9, at A1.

23 Id. The Chief Judge of the Second Circuit expressed similar concerns during Senate hearings held in September 1997. See id. For an additional comment (albeit dicta) from the federal bench, see Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1304 (8th Cir. 1997) (attributing delay in filling judicial vacancies to "the political process and the refusal to expedite judicial appointments" and noting that "[t]he ultimate victims of this delayed process are the American people").

Echoing these concerns, judicial appointment expert Sheldon Goldman concludes that the failure of the Senate to act promptly on nominees "seriously jeopardize[s] the independence and integrity of the judicial branch of government." Judicial Intimidation (NPR radio broadcast, Sept. 26, 1997), available in LEXIS, News Library, NPR File; see also Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308, 308 (1997) ("The increasing political attacks on the judiciary by both major polit-

With almost ten percent of district and circuit judgeships vacant,[24] it is difficult to argue that the judicial system can operate adequately. For example, in the Southern District of California, one of the nation's most understaffed districts, Chief Judge Judith Keep has had to rely heavily on the volunteer efforts of retired senior judges. She laments that the system is "not able to do anything well. Even with the criminal cases, you have to have such an assembly line to get them through. You cannot give them the attention that they deserve. And you know that you're making a lot of mistakes . . . because of the speed."[25] The Courts of Appeals are also feeling the effects of the confirmation slowdown. On the twenty-eight seat Ninth Circuit, where there has been a call for an additional seven judges, there were ten vacant positions in 1997.[26] That year, oral arguments were canceled in over 600 cases.[27] Chief Judge Proctor Hug fears that the system is nearing a breakdown:

> There are three constitutional branches of government. The judicial branch is dependent upon the other two to provide the resources that are necessary in order for the judicial branch to do its constitutional duty. And what we are really doing is calling upon the other two branches to give us the resources, to give us the judges, get them nominated, get them voted on, so that we can do the quality job that we want to do.[28]

B. The Senate Slowdown

Part of the fault for the situation described above undoubtedly lies with President Clinton, whose responsibility it is to send nominations to the Senate.[29] The potential for a judicial remedy in response

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ical parties and by candidates for judicial office are diminishing the independence of the judiciary and, equally important, the public's confidence in it.").

24 See supra note 12.

25 Federal Judge Shortage (NPR radio broadcast, Sept. 23, 1997), available in LEXIS, News Library, NPR File. Alan Bersin, the United States Attorney for the Southern District of California, agrees with Chief Judge Keep:

> What is a political battle in the Beltway . . . has real life consequences. Without judges, we cannot bring these prosecutions. Without the prosecutions, we can't support the agencies in their enforcement efforts . . . . If we don't have judges, [the] law ends up having no teeth . . . .

Id.

26 See id.

27 See id.

28 Id.

29 One study found that it now takes 620 days to nominate a judge. See President's Message: Federal Judicial Vacancies and the FBA Issues Agenda, Fed. Law., July 1997, at 2, 2-3 (detailing findings of 1997 study by Administrative Office of United States Courts); see also Alliance for Justice 1997, supra note 12, at 25-26 (discussing lack of concerted effort on part of President Clinton to make nominations and push for their confirmation).

to his failure to nominate candidates merits examination.[30] However, by not holding hearings or full votes on nominees, it has been the Senate that has provoked the most criticism; even Chief Justice Rehnquist places the majority of the blame on the Senate.[31]

Members of the Senate active in the judicial nomination process often defend their position on the grounds that President Clinton's nominees are far too liberal and activist. If the President would send more qualified nominees, the argument goes, then the confirmation problem would subside. Senate Judiciary Chairman Orrin Hatch (R-Utah) asserts that "[w]e have liberal activists who ignore what the law is, don't care what the law is."[32] However, while the outbreak of "liberal activism" has become the central justification for many Senators, it becomes a less persuasive argument once Clinton's nominees are closely examined. Indeed, "[e]very major independent study of the Clinton appointees . . . concludes that they are quite centrist—to the left of President Reagan's and to the right of President Carter's. In fact, most like President Gerald Ford's."[33]

President Clinton did, however, nominate a total of 79 people in 1997. See Too Many Missing Judges, Editorial, N.Y. Times, Jan. 29, 1998, at A22. As of August 1, 1998, there were 41 nominees pending for 72 federal court vacancies. See Administrative Office of U.S. Courts, Vacancy Summary (visited Aug. 1, 1998) <http://www.uscourts.gov/vacancies/summary.html>. To a certain extent, President Clinton's reticence in sending nominees to the Senate can be attributed to the Senate's refusal to evaluate thoroughly and vote on those nominees he does submit.

30 As indicated earlier, see supra note 10 and accompanying text, such a discussion is beyond the scope of this Note.

31 See Cushman, supra note 9, at A1; see also supra notes 12, 20, and 29, and infra note 38 (providing examples of criticism of Senate).

32 Federal Judge Shortage (NPR radio broadcast, Sept. 22, 1997), available in LEXIS, News Library, NPR File. Tom Jipping, director of the conservative Judicial Selection Monitoring Foundation, is outspoken in his attack on the federal judiciary, stating that "[the] system is out of balance. It's the judiciary that's been virtually unchecked for most of this century." Id.; see also Bright, supra note 23, at 311-12 & n.18 (describing Senator Robert Dole's campaign against what he perceived to be a liberal, activist federal judiciary).

33 Federal Judge Shortage (NPR radio broadcast, Sept. 25, 1997), available in LEXIS, News Library, NPR File. Professor Goldman has found that "[t]he large majority of the Clinton nominees are very solid, mainstream people." Federal Judge Shortage (NPR radio broadcast, Sept. 22, 1997), available in LEXIS, News Library, NPR File.

Bruce Fein, a former official in the Department of Justice who played a significant role in evaluating judicial nominees for President Reagan, agrees that the Senate slowdown is really rooted in its biased concern about the problem of activist judges. "It's transparent that this is partisanship when you just look at all the cases they cite that arouse their ire. They all happen to be cases they disagree with. And the cases that are equally activist that they agree with, they say nothing about." Id.; see also Bright, supra note 23, at 311 (stating that "most observers found Clinton's nominees to be moderate to conservative"); Alliance for Justice 1997, supra note 12, at 10 (pointing out that President Clinton's nominees have received higher ABA ratings than those of Presidents Bush, Reagan, and Carter).

Many alternative explanations for the slowdown have been offered.[34] Some posit that the stalling is part of a deliberate effort to intimidate the federal judiciary;[35] others allege that the confirmation issue is being used as a vehicle for energizing the Republican Party and raising money for conservative causes.[36] While the actual motives of the Senate may not be clear, it is certain that, for the most part, the confirmation fight is not being conducted in the public arena.[37] Without a floor vote, or even public hearings, the Senate is waging its battle over appointments to the federal judiciary in almost complete anonymity.[38] Unlike the President, who either makes nominations or does not, Senators act behind the scenes to affect the confirmation process. The American public has little way of knowing what role their individual representatives in the Senate are taking in the process.

Regardless of what considerations the Senate chooses to use when evaluating nominees,[39] the Senate in some way must be held

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34 For example, Professor Robert Gordon sees the refusal to hold hearings and vote on judicial nominees as "continuing payback for the Democratic defeat of the Bork nomination to the Supreme Court. . . . [I]n the Reagan years . . . the conservative movement identified the judiciary as one of the places where it was likely to be able to carry out its program." Federal Judge Shortage (NPR radio broadcast, Sept. 22, 1997), available in LEXIS, News Library, NPR File.

35 See Judicial Intimidation (NPR radio broadcast, Sept. 26, 1997), available in LEXIS, News Library, NPR File (quoting Senator Tom Daschle (D-SD) as claiming that "Republicans are holding up judgeships . . . in order to intimidate the judiciary"). For a review of the enormous increase in criticism of the decisions of both federal and state judges, see generally Bright, supra note 23.

36 See Neil A. Lewis, Hatch Defends Senate Action on Judgeships, N.Y. Times, Jan. 2, 1998, at A1. An additional factor that has grown increasingly relevant in the judicial confirmation process is the role of private monitoring groups on both ends of the political spectrum. For a discussion of how these groups play into the selection and confirmation of federal judges, see Mark Silverstein & William Haltom, You Can't Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations, 12 J.L. & Pol. 459, 464-66 (1996).

37 See Senate and Judges (NPR radio broadcast, Sept. 24, 1997), available in LEXIS, News Library, NPR File (describing use of delay to kill judicial confirmations without public hearing).

38 An especially alarming trend in the confirmation process is the increased use of the "secret hold"—an informal procedure not provided for in the Senate Standing Rules—in which a single Senator (potentially anonymously) requests that consideration of a particular matter be delayed. See Alliance for Justice 1997, supra note 12, at 15 (describing secret holds); see also Editorial, Needless Senate Secrecy, N.Y. Times, Feb. 18, 1998, at A20:

> Congress is a public institution, and members who use their power to prevent action on legislation or nominations should have to do so in the open. That basic principle of accountability seems to have been lost on the Senate, which allows individual lawmakers to impose a secret "hold" on items they object to . . . .

A measure to force Senators to reveal their identity before placing a hold on a matter was unsuccessful. See Alliance for Justice 1997, supra note 12, at 16.

39 See infra note 67 (listing articles discussing what criteria Senate should use to evaluate judicial nominees).

accountable for its final decision to accept or reject. Without an actual vote, constituents are incapable of knowing how their *individual* Senators judged a particular nominee, and thus are unable to exercise their electoral check on those Senators.[40] The lack of accountability that is fostered by the Senate slowdown is especially dangerous as the slowdown is a significant, if not the primary, cause of the current crisis faced by the federal judiciary.

C. *Prospective Remedies*

Discussion of judicial intervention is moot unless methods are available for a federal court to remedy the problem. There are two main forms of relief that may be granted: a declaratory judgment or a writ of mandamus. The more likely of the two to be granted in this case would be a declaratory judgment[41] holding that the Senate is in violation of its constitutionally mandated advice and consent duties.[42] The use of declaratory judgments in situations involving a coequal branch of government is not unprecedented. In *National Treasury Employees Union v. Nixon*,[43] for example, the District of Columbia Circuit declared that the President had a constitutional duty to comply with an act of Congress providing for a federal pay increase.[44] Furthermore, federal courts have demonstrated a willingness to use declaratory judgments in reviewing legislative procedure.[45] A federal court could, after finding that the Constitution imposes upon the Sen-

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[40] There may be Senators who have campaigned on (or identified themselves with) the premise that they will block President Clinton's judicial nominees. See Alliance for Justice 1997, supra note 12, at 3 (identifying handful of especially outspoken Senators). In so far as this is the case, the need for additional accountability may be reduced. However, the fact remains that for the majority of Americans—those who are not members of those Senators' constituencies—oversight of the confirmation process is not possible.

[41] See 28 U.S.C. § 2201 (1994) (providing federal courts with power to issue declaratory relief).

[42] See infra Part II.A (arguing that voting is implied part of Senate's constitutionally-mandated advice and consent duties).

[43] 492 F.2d 587 (D.C. Cir. 1974).

[44] See id. at 616; see also State Highway Comm'n v. Volpe, 347 F. Supp. 950, 954 (W.D. Mo. 1972) (issuing declaratory judgment stating that actions of Secretary of Transportation were "unauthorized by law, illegal, in excess of lawful discretion and in violation of the Federal-Aid Highway Act"), aff'd as modified, 479 F.2d 1099 (8th Cir. 1973). The *Nixon* court saw declaratory relief as a way to provide a needed remedy without substantially disrupting the balance of powers. See *Nixon*, 492 F.2d at 616.

[45] For example, in Powell v. McCormack, 395 U.S. 486, 517-18, 550 (1969), where the Court, after first holding that a federal court may issue a declaratory judgment against Congress, issued one declaring that the House of Representatives was without power to exclude the plaintiff from membership. See generally Hans A. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 248 (1976) (discussing Supreme Court's increased use of declaratory relief where congressional action is under review); Terrance Sandalow, Comments on *Powell v. McCormack*, 17 U.C.L.A. L. Rev. 1, 164, 169-71 (1969) (same).

ate an obligation to vote on nominees,[46] declare that the Senate currently is acting in violation of that duty.

Alternatively, a court could issue a writ of mandamus,[47] despite the prevailing view that the writ does not apply to Congress.[48] Mandamus is used by federal courts when a government official has refused to act in accordance with a clear and nondiscretionary legal obligation.[49] For example, in *Nixon*, the court ruled that despite separation of powers concerns, a writ of mandamus could be issued against the President.[50] The court found that the particular duty in question—complying with legislation ordering a federal employee pay raise—"is one which is clearly prescribed and which, under traditional criteria, is a proper subject for mandamus relief in the face of nonperformance of such duty."[51] Were advice and consent to be seen as a constitutional mandate requiring a vote, then mandamus could be a plausible method of enforcing that obligation.[52]

The likelihood of a federal court issuing a writ of mandamus against Congress is low. Several courts have held that the writ was not designed to apply to the legislature.[53] This restriction is rooted in a concern for separation of powers; federal courts should not use mandamus to interfere with responsibilities designated to the legislature.[54] However, the same separation of powers concerns that ordinarily

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46 See infra Part II.A (discussing Senate's duty to hold vote).

47 See 28 U.S.C. § 1361 (1994) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

48 See infra note 53 and accompanying text.

49 See, e.g., United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931) (explaining that mandamus "will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined"); Smith v. Grimm, 534 F.2d 1346, 1352 (9th Cir. 1976) (noting that mandamus is "traditionally proper only to command an official to perform an act which is a positive command and so plainly prescribed as to be free from doubt").

50 See Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974) (applying constitutional principle of judicial review to President).

51 Id. at 603; see also Swan v. Clinton, 100 F.3d 973, 976-79 (D.C. Cir. 1996) (discussing factors that counsel for and against issuance of writ of mandamus against President).

52 A less controversial idea would be to use mandamus to set a reasonable time limit for considering nominees; upon expiration of that time period, a vote would be required.

53 In Liberation News Service v. Eastland, 426 F.2d 1379, 1384 (2d Cir. 1970), the court, in an opinion by Judge Henry Friendly, held that 28 U.S.C. § 1361 was designed to apply to members of the Executive Branch only and not to Congress; see also Trimble v. Johnston, 173 F. Supp. 651, 653 (D.D.C. 1959) ("[T]he Federal courts may not issue an injunction or a writ of mandamus against the Congress.").

54 See, e.g., Colegrove v. Green, 328 U.S. 549, 554-55 (1946) (determining that need to enforce separation of powers counseled against issuing writ of mandamus compelling Congress to perform its mandatory duty to apportion); cf. *Nixon*, 492 F.2d at 606 (explaining that mandamus raises unique separation of powers concerns when sought against President rather than lower official).

counsel against the use of mandamus are raised here by the current actions of the Senate.[55] The use of mandamus to bolster the separation of powers may not be so threatening to our delicate balance of powers as to preclude the remedy altogether.

It must be stated unequivocally that a court may not order the Senate to confirm a particular candidate; if the Senate were to vote down every presidential nominee, there would be little that a court could do in response.[56] However, by forcing the Senate to hold a vote, a significant achievement will have been realized: The ultimate check on the confirmation process will be returned to the people, via a procedure that assures individual senatorial accountability.[57] If, at that point, the people decide that their Senators are correct in re-

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[55] See infra Part II.A (discussing separation of powers implications of Senate slowdown).

[56] Such a situation might, however, be considered a de facto one-house repeal of the legislation establishing the size of the federal judiciary. See infra Part II.C.

An additional concern is raised by the ability of the Senate to hold a filibuster in order to block confirmation votes. See Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181, 182-83 (1997) (providing examples of Senate filibusters); Silverstein & Haltom, supra note 36, at 467-68 (describing role of filibusters in selection and confirmation of judicial nominees). In order to overcome a filibuster, 60 senators must vote to end debate and bring the matter to a vote. See Standing Rules of the Senate XXII.2 (visited July 25, 1998) <http://www.senate.gov/~rules/srtext.htm> (setting forth procedure for breaking filibuster). While a complete examination of the filibuster is beyond the scope of this Note, two possible responses to the "filibuster retort" should be briefly mentioned.

First, a court considering the argument set forth in Part II.A (that a confirmation vote is a unique constitutional obligation) could order the Senate to vote on whether to break the filibuster. When a filibuster is used to block the passage of legislation, no constitutional obligation is violated, for there exists no congressional duty to pass specific laws. However, an advice and consent vote is arguably different, see infra Part II.A, and therefore may merit different treatment by a court.

Alternatively, the filibuster itself may be unconstitutional, either absolutely or in the limited context of judicial confirmations. The recent evolution of the "stealth" filibuster, see Fisk & Chemerinsky, supra, at 200-09 (discussing development of modern filibuster procedure), "has all but eliminated public accountability for senators who filibuster." Id. at 206. Professors Fisk and Chemerinsky provide a fascinating analysis of the potential for a judicial declaration that the filibuster itself is unconstitutional. See id. at [PIN]; see also Robert S. Leach, Comment, House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress, 44 U.C.L.A. L. Rev. 1253, 1268 n.70 (1997) (providing examples of commentators who maintain that filibusters are unconstitutional); Benjamin Lieber & Patrick Brown, Note, On Supermajorities and the Constitution, 83 Geo. L.J. 2347, 2381-84 (1995) (questioning constitutional validity of filibusters).

[57] Additionally, it is likely that the opposition leveled against individual nominees will subside once actual hearings and votes are held. Illustrative is the case of Margaret Morrow, who was confirmed by the Senate on February 11, 1998. See Neil A. Lewis, Nominee Is Confirmed After Retreat in War on 'Activist Judges,' N.Y. Times, Feb. 12, 1998, at A21. Judge Morrow—who was first nominated 21 months earlier—had been singled out by conservative Senators as a prime example of the type of nominees who should not be confirmed; however, once the Senate held an actual vote, she was confirmed by a vote of 67 to 28. See id.

jecting nominees, the political system will have operated as designed.[58]

II
POSSIBLE GROUNDS FOR AN ACTION

This Part will consider several theories under which a judicial action could be brought. Part II.A seeks to locate within the Advice and Consent Clause an implied constitutional mandate to vote on nominees, and maintains that the failure to comply with that mandate raises serious separation of powers concerns. Part II.B revives the once-vibrant theory of legislative due process, suggesting that the Senate's failure to vote on nominees may rise to the level of a violation of the Due Process Clause of the Fifth Amendment. Finally, Part II.C asks whether the Senate's rejection of nominees en masse might work a de facto repeal of legislation establishing the current size of the judiciary,[59] in violation of the constitutional requirements of bicameralism and presentment.

A. The Advice and Consent Clause and the Doctrine of Separation of Powers

This section will argue that the constitutional obligation to provide advice and consent[60] in the judicial appointment process should be seen as a nondiscretionary duty constitutionally imposed upon the Senate and enforceable by the judiciary. When the Senate fails to fulfill that duty, the balance among the three branches is threatened. Federal courts should have the power to intervene and restore that balance.

1. The Doctrine of Separation of Powers

A trifurcated government structure is arguably the most remarkable creation of the Framers. It was designed both to enhance the functioning of each branch and to prevent the aggrandizement of power by one branch. When, throughout the course of the nation's existence,

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[58] Cf. Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("[U]ltimately, there is the political check that the people will replace those in the political branches . . . who are guilty of abuse.").

In addition to a formal judicial remedy, filing an action in itself may be seen as a substantial step in bringing this issue into the forefront of public consciousness. The publicity generated by such an action would serve to bring attention to the problem and perhaps encourage the public to investigate the roles that their individual Senators may be playing in the confirmation slowdown.

[59] See supra note 19 and accompanying text.

[60] See U.S. Const. art. II, § 2; see also infra Part II.A.2 (discussing Clause).

breakdowns in that system have arisen, the Supreme Court has intervened to restore the system to its proper balance.[61]

There are two types of separation of powers violations. In *Mistretta v. United States*,[62] the Supreme Court explained that the separation of powers doctrine can be violated by "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[63] This Note posits that both types of violations arise as a result of the Senate slowdown. The Senate's failure to carry out its advice and consent duties inhibits the coordinated involvement of the two branches—the Executive and the Legislative—which was designed to safeguard the appointment process. This failure excessively enlarges the scope of the Senate's power to evaluate judicial nominees. Furthermore, the Senate slowdown undermines the authority and independence of both the Judiciary and the Executive.

2. *Advice and Consent—Its Meaning and Function Within a System of Separation of Powers*

In order to evaluate whether the Senate is in fact violating the separation of powers by abusing its advice and consent duties, an examination of those duties is necessary. The federal judiciary is comprised of approximately 843 Article III judgeships.[64] These positions are filled pursuant to Article II, Section 2 of the Constitution, which provides that the President:

> [S]hall 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, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .[65]

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61 See, e.g., Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276-77 (1991) (holding that elements of legislation dealing with operation of Washington, D.C., airports violated separation of powers); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding that congressional delegation of certain powers to Comptroller General violated doctrine of separation of powers); INS v. Chadha, 462 U.S. 919, 928 (1983) (holding that one-house veto did not comport with constitutional allotment of power to Congress); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (holding that President acted outside constitutional power in issuing order to seize steel mills).

62 488 U.S. 361 (1989).

63 Id. at 382.

64 See supra note 12 and accompanying text.

65 U.S. Const. art. II, § 2.

There is little evidence indicating the exact meaning of "advice and consent" intended by the Framers.[66] This lack of clarity, in turn, has spawned much debate over what criteria the Senate should consider when evaluating nominees.[67] Records of the constitutional debates reveal that the Framers, after lengthy discussions, settled on a judicial selection process that would involve both the Senate and the President.[68] This important governmental function, like many others,

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[66] See Tribe, supra note 14, at 125 (writing that Constitution cannot be strictly construed to ascertain precise role of Senate). Professor Matteson concludes that there is nothing in the debates of the 1787 convention to suggest that "advice and consent" had any meaning other than that generally attached to the words. See David M. Matteson, The Organization of the Government Under the Constitution 253 (1970).

To a certain extent, the fact that a confirmation breakdown of this magnitude is highly unusual (if not unprecedented) in American history, see supra notes 14-16 and accompanying text, helps to give meaning to the term. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 610 (Frankfurter, J., concurring) ("[T]he way the [Constitution's] framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government . . . give meaning to the words of a text . . . .").

Importantly, since this ambiguity is one regarding the interpretation of a clause of the Constitution, it is well within the bounds of the federal courts to resolve. See, e.g., City of Boerne v. Flores, 117 S. Ct. 2157, 2166 (1997) ("The power to interpret the Constitution in a case or controversy remains in the Judiciary."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

A general history and interpretation of the Advice and Consent Clause is provided in James E. Gauch, Comment, The Intended Role of the Senate in Supreme Court Appointments, 56 U. Chi. L. Rev. 337 (1989). For a thorough analysis of the Senate's other advice and consent obligation—in the context of the making of treaties—see generally Howard R. Sklamberg, The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treatymaking, 18 Mich. J. Int'l L. 445 (1997).

[67] The recurring debate over the extent to which the Senate should look into such criteria as legal philosophy, judicial record, and predictions of future rulings in evaluating judicial nominees is beyond the scope of this Note. This Note is concerned primarily with the *process* by which the Senate engages in its appointment role, rather than the appropriate bounds of substantive inquiry. For arguments about the relevant criteria by which the Senate should judge nominees, compare Henry Paul Monaghan, The Confirmation Process: Law or Politics?, 101 Harv. L. Rev. 1202, 1206-08 (1988) (arguing that Senate is entitled to significant latitude in determining confirmation criteria); Gary J. Simson, Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent, 78 Cornell L. Rev. 619, 648-49 (1993) (arguing that Constitution requires Senate to play strong role in appointment process); and David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale L.J. 1491, 1517-20 (1992) (calling for more active and independent Senate role), with The Federalist No. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (surmising that Senate role would be simply to guard against personal attachment, nepotism, and other forms of bias); and Bruce Fein, A Circumscribed Senate Confirmation Role, 102 Harv. L. Rev. 672, 687 (1989) (predicting that serious scrutiny by Senate based on philosophy and predicted opinions would turn process into political battlefield, harming quality of federal judiciary). Most of these authors have dealt only with the confirmation of nominees to the Supreme Court.

[68] This decision was reached after some debate as to whether the power should be lodged in either the Executive or the Legislative branch, and if in the latter, whether in one

was divided among coequal branches to protect against the concentration of power in one branch.[69] In the oft-quoted words of Gouverneur Morris, "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[70]

Central to the Framers' design of the appointment process was the underlying premise that the Senate's evaluation would be open, thereby adding a needed measure of review.[71] Alexander Hamilton envisioned a process that would require the President's nominees to be approved by an entire branch of the legislature, thus subjecting the selections to a heightened level of scrutiny.[72] This in turn would force the President to avoid choosing unmeritorious candidates.[73] Hamilton

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or both houses. See generally 3 Jonathan Elliot's Debates In the Several State Conventions on the Adoption of the Federal Constitution: Debates in the Federal Convention of 1787 as Reported by James Madison (James McClellan & M.E. Bradford eds., 1989) [hereinafter Elliot's Debates].

69 See Edmond v. United States, 117 S. Ct. 1573, 1579 (1997) (stating that Advice and Consent Clause "is among the significant structural safeguards of the constitutional scheme"); United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 758 (9th Cir. 1993) (stating that Clause is rooted in an "interest in preventing the exercise of unchecked or unbalanced government power"); see also Stephen Carter, The Confirmation Mess, 101 Harv. L. Rev. 1185, 1187 (1988) (asserting that Senate role in appointment process was designed to check presidential power).

In addition to serving as a check on the President, the power of advice and consent is arguably the most important legislative check on the judiciary. John Hart Ely argues that, in reality, Congress has very little practical control over federal courts. See John Hart Ely, Democracy and Distrust 46 (1980). He explains that the power of the purse is "an instrument too blunt to be of any real control potential"; impeachment is not an oft-used tactic; the power to withdraw jurisdiction is "fraught with constitutional doubt" and has not been used for over 100 years; court packing is not an effective nor a politically viable option; and amending the Constitution is an extremely difficult task. Id. However, the importance of advice and consent as a check on the judiciary does not justify the abuse of that check.

70 3 Elliot's Debates, supra note 68, at 566; see also *Edmond*, 117 S. Ct. at 1579 (stating that by requiring joint participation of President and Senate, Advice and Consent Clause "was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one").

71 It must be acknowledged that the Framers could not have intended Senate participation to serve as a method for providing direct accountability to the people, for Senators were originally elected by state legislatures. However, this does not detract from the basic argument that the Framers intended the Senate to be checked, whether by the state legislatures or by the people through direct elections.

Courts have on occasion recognized that the confirmation process serves as a valuable tool for ensuring accountability. In Washington Legal Foundation v. Department of Justice, 691 F. Supp. 483, 492 (D.D.C. 1988), the court explained that "[t]hrough the confirmation process, the public, individuals, and interested organizations alike have an opportunity to inform the decisionmaking process and scrutinize the President's nominee." The court rejected a claim that the Department of Justice's use of ABA evaluations of prospective judicial nominees violated the Federal Advisory Committee Act, relying in part on the notion that "the public and Congress have a full opportunity to evaluate the actual nominee and to probe more deeply through the Senate confirmation hearings." Id. at 495.

72 See The Federalist No. 76, supra note 67, at 457-58.

73 See id. at 458.

conditioned his approval of the process on the presumption that this check would consist of a review by the *full* Senate, as illustrated by his explanation of why the President would not be able to influence votes for his nominees unduly: "Though it might therefore be allowable to suppose that the executive might occasionally influence some individuals in the Senate, yet the supposition that he could in general purchase the integrity of the whole body would be forced and improbable."[74]

For the first several years of the Republic, the Senate used secret ballots to vote on presidential nominations for all offices, including the judiciary.[75] This highly unaccountable procedure was widely criticized,[76] and the Senate quickly amended its methods for confirming nominees. In a 1789 resolution, the Senate adopted a highly formalistic and open procedure:

> *Resolved*, That when nominations shall be made in writing by the President of the United States to the Senate, a future day shall be assigned, unless the Senate unanimously direct otherwise, for taking them into consideration. . . . [A]ll questions shall be put by the President of the Senate, either in the presence or absence of the President of the United States; and the Senators shall signify their assent or dissent by answering, viva voce, ay or no.[77]

In order to provide an added measure of public scrutiny, the Senate realized that its advice and consent activities must be afforded some modicum of public review. To the extent that the Senate could direct otherwise, it was required to do so unanimously. Absent more explicit textual guidance from the Framers themselves, this resolution so early on in the Senate's existence serves as support for the proposition that Senate confirmation responsibilities should be carried out by the full body via an open vote.

Even those who urge that advice and consent gives the Senate broad discretion to engage in a vigorous and broad-based inquiry into the fitness of nominees realize the necessity of procedures sufficient to

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74 Id. While Hamilton was, in this quotation, concerned with the aggrandizement of power by the President, his words nonetheless serve to support the contention that participation by the entire Senate was the envisioned method of advice and consent.

75 See Matteson, supra note 66, at 254, 259.

76 Illustrative of this criticism is a speech by Representative John Vining of Delaware on the floor of the House: "What we fear has actually happened . . . the Senate declare their concurrence in appointments, by ballot. In this secret mode, through cabals, through intrigue, they will be able to defeat every salutary agency of the Executive, in seeing his instruments perform their duty." Speech by Representative Vining in the House on June 19, 1789 (quoted in Matteson, supra note 66, at 255).

77 Matteson supra note 66, at 259 (quoting 1 Exec. J. 19).

ensure accountability.[78] As Hamilton wrote, if the Senate is unable to persuade the public that its reasons for rejection are compelling, then the "censure of rejecting a good [nomination] would lie entirely at the door of the Senate."[79]

Those who call for the Senate to be strong, critical, and discerning when judging nominees for the judiciary must find in the Senate qualities that enhance the appointment process and lead to a greater likelihood that the men and women chosen for the federal bench are highly competent.[80] The involvement of the popularly elected Senate is seen by these scholars as a way to provide an added level of political accountability to a process that, in the end, seeks to install nonpolitically accountable judges into lifetime positions.[81] For these reasons, accountability is at the core of the Senate's advice and consent responsibilities.

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[78] Professors Strauss and Sunstein call for a more aggressive Senate role, criticizing the lack of Senate control over lower court appointments. See Strauss & Sunstein, supra note 67, at 1507-08. They accept that the process may become more political, but cabin their advocacy in the assurance that such a role would make the appointment process more open to public review. See id. at 1513 & n.102. Professor Simson, another advocate of a strong Senate confirmation role, believes that closing Senate confirmation hearings to the public would be politically unthinkable, if not unconstitutional. See Gary J. Simson, Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees, 7 Const. Commentary 283, 321 n.137 (1990).

[79] The Federalist No. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also John O. McGinnis, The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein, 71 Tex. L. Rev. 633, 653-54 (1993) (discussing Hamilton's statement).

[80] Professor Tribe, who maintains that "what matters most [regarding the role of the Senate] is that one hundred Senators, of diverse backgrounds and philosophies, individually take a good, hard look" at the nominees, Tribe, supra note 14, at 131, points to the structure and makeup of the Senate as justification for its deserving of an equal role in the appointment process. He contends that because of the evolution of the electoral process, the Senate, as compared to the President, "is more diverse, more representative, more accountable." Id. at 132. Because the Senate is a body made up of many individuals, by definition it will always have a broader perspective than will the President, especially considering geographic and socioeconomic characteristics. See id. at 133.

Professor Tribe posits that the need for diverse participation (in terms of political views, religion, ethnicity, gender, etc.) in the appointment process leads to the conclusion that the Senate's role must be a powerful one. See id. Additionally, Professor Tribe suggests that the Senate is more accountable than the President, especially a second term President, because Senators must always be cognizant of the need to satisfy their constituents. See id. at 136. Along the same lines, John Hart Ely sees politicians' desire for reelection as the people's "insurance policy" against government misbehavior. See Ely, supra note 69, at 78.

[81] See Simson, supra note 78, at 314-15.

3. *The Senate Slowdown as an Actionable Separation of Powers Violation*

The characteristics of the Senate that ostensibly enable it to make a vital contribution to the appointment process are rendered moot when the full Senate does not vote on nominees. This phenomenon does not comport with the Framers' desire that "advice and consent"—an integral component of the system of separation of powers[82]—be implemented in a manner that would foster that balance. The Senate slowdown undermines the balance not only by reducing the significance of the President's role as nominator, but more importantly by causing severe disruption to the judiciary.[83] In addition, the prospect of the Senate having the unilateral ability to dismantle the federal judiciary without a "check"—either by the people, through procedures designed to ensure accountability,[84] or by the full Congress and the President, via bicameralism and presentment—is one which raises serious separation of powers concerns. Simply put, Senators not only are infringing on the power of the other two branches, but they are doing so in a manner that robs the public of an opportunity to determine how their particular Senator feels about the nominees that reach the Senate.

The importance of the Senate's role in the confirmation process is indisputable.[85] Moreover, we must accept the residual loss of accountability that results from the delegation of a large portion of the confirmation duties to the Senate Judiciary Committee.[86] The further

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[82] See supra Part II.A.2 (establishing advice and consent as tool of separation of powers).

[83] In evaluating the process of selecting special prosecutors, the Supreme Court in Morrison v. Olson, 487 U.S. 654 (1988), warned that separation of powers concerns "would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches." Id. at 675-76. Similar separation of powers concerns arise in this situation. The Senate's tactics are more than "potentially" disruptive; they are preventing the judiciary from functioning properly.

[84] See Gauch, supra note 66, at 364 (noting that voting by public could serve as check against Senate acting too politically in its advice and consent responsibilities); see also supra notes 78-81 and accompanying text.

[85] Senator Mathias claims that there is no duty of a Senator more important than participation in the judicial selection process. See 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, 200 (1987); see also Wm. Bradford Reynolds, Adjudication as Politics by Other Means: The Corruption of the Senate's Advice and Consent Function in Judicial Confirmations, in Judicial Selection: Merit, Ideology, and Politics 15, 19 (1990) (writing that individual Senators have taken oaths to "support" the Constitution, and that one of their most important constitutional responsibilities is exercise of advice and consent).

[86] Rule XXXI of the Standing Rules of the Senate prescribes the manner in which judicial nominations are handled:

> 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

loss of accountability that has resulted from the failure of the Senate to hold hearings and votes on nominees, however, should not be tolerated.[87]

By allowing the judiciary to shrink significantly without establishing adequate procedures to ensure legislative accountability, the Senate is violating the very essence of the doctrine of separation of powers.[88] In *Freytag v. Commissioner*,[89] the Supreme Court stated that "[t]he roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political. Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."[90] In this case, that other branch is the judiciary.[91]

Where, as here, one branch of government is acting in violation of the separation of powers, it is the job of the federal courts to remedy the situation. In *Public Citizen v. United States Department of Justice*,[92] Justice Kennedy reaffirmed the role of the federal courts to patrol the balance of powers: "It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when, as is the case here, no immediate threat

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committees; and the final question on every nomination shall be, "Will the Senate advise and consent to this nomination?"

Standing Rules of the Senate, supra note 56, Rule XXXI.

For an analysis of the legislative committee system, see generally Jesse H. Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev. 810, 824, 829 (1974) (stating that congressional committees are neither very majoritarian nor very representative, helping to move national lawmaking farther away from popular will); Michael Foley & John E. Owens, Congress and the Presidency: Institutional Politics in a Separated System 30-31 (1996) (contending that legislative committee system diminishes "democratic accountability and responsibility," accountability that is weakened further by "the invisibility of committee activities to the American public").

87 The Supreme Court has intervened in other spheres of legislative activity in order to ensure a sufficient level of accountability. See Laurence H. Tribe, American Constitutional Law §17-2, at 1678 n.7 (2d ed. 1988) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (holding that Congress went too far in delegation of power to administrative agency)).

88 See Harold J. Krent, Separating the Strands in Separation of Powers Controversies, 74 Va. L. Rev. 1253, 1274 (1988) (stating that "the principal purposes of the separation of powers doctrine are to enhance responsibility to the public interest and to preserve a balance among the branches").

89 501 U.S. 868 (1991).

90 Id. at 878; see also Buckley v. Valeo, 424 U.S. 1, 122 (1976) (stating that Framers viewed separation of powers as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

91 An argument can also be made that the Senate is encroaching on the President's power to play, at the minimum, a coequal role in the appointment of federal judges.

92 491 U.S. 440 (1989).

to liberty is apparent. When structure fails, liberty is always in peril."[93]

This situation is no different than others in which federal courts have intervened to enforce constitutional obligations with which a branch of government has failed to comply.[94] While Congress may decide when to pass legislation, when to conduct investigations, and even when to initiate impeachment proceedings, the role designated to the Senate by the Framers in the confirmation process is, arguably, not a discretionary one. When the President nominates, the Senate must either vote yes or vote no.[95]

B. Legislative Due Process

The Senate may be acting in contravention of not only the doctrine of separation of powers, but also the constitutional requirement of due process of law.[96] The Senate's duty to hold hearings and, at a minimum, a full vote on judicial nominees could be construed as part of a larger set of procedural obligations imposed on the legislature by the Constitution and enforceable via the Due Process Clause. This section will examine the extent to which elements of the legislative due process theory, much acclaimed in the 1970s but less discussed as of late, may be used as a basis for judicial action.

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93 Id. at 468 (Kennedy, J., concurring); see also Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587, 612 (D.C. Cir. 1974) (reaffirming duty of judiciary to prevent concentration of power in Executive Branch or Congress). When it comes to safeguarding the balance of powers, federal courts arguably have heightened power to review legislative actions. See Morrison v. Olson, 487 U.S. 654, 704-05 (1988) (Scalia, J., dissenting) (maintaining that in context of separation of powers challenge to congressional action, Supreme Court does not owe Congress same level of deference that it does when reviewing legislation).

94 For example, in *The Impoundment Cases*, discussed infra notes 157-58 and accompanying text, federal courts held that the Executive Branch's refusal to spend congressionally appropriated funds for certain programs was a violation of the Article II, section 3 duty to take care that the laws are faithfully executed. See, e.g., *Nixon*, 492 F.2d at 604 (holding that Article II, section 3 "does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary"). The judiciary has also imposed unwaivable constitutional obligations upon itself. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (ruling that federal courts may not refuse to hear cases that properly fall within their jurisdiction). But cf. Ankenbrandt v. Richards, 504 U.S. 689, 704-06 (1992) (discussing various grounds for federal court abstention).

95 As Chief Justice Rehnquist has noted, "[t]he Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry, it should vote him up or vote him down." Cushman, supra note 9, at A1.

96 See U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

1. *The Theory*

Oregon Supreme Court Justice Hans Linde, writing in response to the United States Supreme Court's reemployment in the early 1970s of the "rational basis" test in its equal protection jurisprudence, championed the position that judicial review of legislative action should be guided by constitutionally imposed legislative procedure requirements.[97] Justice Linde maintains that the essential function of judicial review should not be an inquiry into the substance of laws, but rather an evaluation of the institutions and processes that underlie their passage.[98] It is ironic, he posits, that although nowhere in the Constitution do the Framers require the legislature to set forth a rational basis for the laws that it passes, the Supreme Court has chosen to focus on substantive due process review. At the same time, the Court is reluctant to review legislative processes, despite the fact that the Constitution provides "a blueprint for the due process of deliberative, democratically accountable government."[99] Justice Linde con-

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[97] See Linde, supra note 45, at 251. This theory may be subdivided into two aspects: one, "technical" process, through which courts evaluate the procedural steps taken by the legislature, and two, "democratic" process, through which courts look to see if certain groups have been systematically underincluded in the legislative process. See Frank R. Strong, Toward an Acceptable Function of Judicial Review?, 11 S.D. L. Rev. 1, 17 (1966) ("[Legislative due process] includes not only keeping clear the channels of corrective political action, but as well the protection of minorities to the end that the corrective machinery will work effectively."). For a thorough discussion of the latter concept, see generally Ely, supra note 69. This Note will focus only on the "technical" process aspect of the theory.

[98] See Linde, supra note 45, at 251; see also Raymond Ku, Consensus of the Governed: The Legitimacy of Constitutional Change, 64 Fordham L. Rev. 535, 583 & n.264 (1995) (explaining that Linde saw rationality and deliberation as central procedural requirements imposed by Due Process Clause).

[99] Linde, supra note 45, at 253. Justice Linde points out that the Supreme Court has displayed a greater willingness to engage in procedural review when looking at administrative lawmaking. See id. at 225; see also Groppi v. Leslie, 404 U.S. 496, 499 (1972) (finding that state legislature must comply with due process when conducting contempt proceedings); Watkins v. United States, 354 U.S. 178 (1957) (reviewing investigative procedures of House Committee on Un-American Activities). But see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 (1978) (cautioning that circumstances are rare in which court should overturn agency action because of failure to employ procedures beyond those required by statute).

Justice Linde also cites one case, Christoffel v. United States, 338 U.S. 84 (1949), in which the Court inquired whether a legislative committee complied with House rules on the conduct of investigations. See Linde, supra note 45, at 248 & n.142. Professor Strong remarks that *Christoffel* "suggests a Court willingness, on provocation, to widen greatly the scope of judicial inquiry into conditions attendant upon legislative action." Strong, supra note 97, at 4. Professor Devins, while admitting that "the Court has never come close to suggesting that Congress adopt procedures to ensure due deliberation in lawmaking," does point to cases such as *Christoffel*, United States v. Ballin, 144 U.S. 1, 7-9 (1892) (requiring presence of quorum and vote for congressional action), and Powell v. McCormack, 395 U.S. 486, 547-48 (1969) (forcing Congress to abide by constitutional rules in unseating members), as signs that the Court will in at least certain contexts look at legislative proce-

cludes that this dichotomy has resulted in a schism between the letter of the Constitution and the practice of judicial review.[100]

Much of the Constitution is concerned with how laws are made.[101] The fact that the way in which we make law is highly regulated shows the great importance that the Framers attributed to procedure.[102] Professor Strong writes that the "purpose of such constitutional provisions, express or implied, is to attempt to insure that the legislative product will be a faithful reflection of the will of the requisite majority of representatives."[103]

Since a plain reading of the Constitution precludes the legislature from depriving citizens of life, liberty, or property without a legitimate lawmaking process,[104] Justice Linde believes that judicial review should focus primarily on how laws are made, rather than on their supposed goals and bases.[105] Fair and adequate process is an explicit

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dures. See Neal E. Devins, Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution, 1988 Duke L.J. 389, 404; see also Ely, supra note 69, at 73-75 (discussing Warren Court's "activist" decisions regarding procedures that administrative bodies, courts, and governmental instrumentalities other than legislatures must follow).

100 See Linde, supra note 45, at 242-43. Some state courts have been more willing to engage in judicial review of legislative process. See, e.g., William J. Lloyd, Judicial Control of Legislative Procedure, 4 Syracuse L. Rev. 6, 24-29 (1952) (looking at judicial development of state constitutional restrictions on legislative procedure in New York); see also Strong, supra note 97, at 4-5 (providing brief review of spectrum of state court positions on review of legislative procedures).

Justice Linde offers two possible explanations for why courts have been reluctant to provide relief for legislative process violations: First, courts are willing to tolerate due process violations, and, second, not every breach of process is a constitutional due process violation. See Linde, supra note 45, at 245. According to Linde, the latter is the more likely explanation for it allows courts to decide which processes to deem fundamental. See id. Furthermore, Linde suggests, courts are reluctant to use procedural review because it forces them to substitute technical evaluations for substantive review. See id. at 252-53.

101 See, e.g., infra note 148 and accompanying text (discussing bicameralism and presentment).

102 See Linde, supra note 45, at 240; see also Laurence H. Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269, 291 (1975) (identifying framework for fiscal policymaking and design of process by which we identify and punish criminals as examples of constitutional emphasis on process). Professor Tribe, however, suggests elsewhere that underlying many of these procedural guidelines are substantive values. See Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1067-72 (1980) (comparing ideological bases of criminal and legislative due process).

103 Strong, supra note 97, at 3. Justice Linde acknowledges a general trend toward increased attention to the lawmaking process. He points to heightened public scrutiny of legislative activity, more notice for, and minority participation in, legislative committee hearings, and a broadening of the issues on which votes are required to be cast. See Linde, supra note 45, at 241.

104 See supra note 96.

105 See Linde, supra note 45, at 239; see also Clyde W. Summers, The Sources and Limits of Religious Freedom, 41 Ill. L. Rev. 53, 58 (1946) ("If the process whereby majority will is translated into legislation is adequately protected, then the Court need not rigidly inspect the product of that process.").

constitutional mandate, and as such serves as a more legitimate basis of judicial review.[106] At the heart of Linde's theory is the notion that process leads to accountability, and that, in turn, is the basic standard of legislative legitimacy under a republican form of government.[107]

Justice John Paul Stevens, dissenting from the decision in *Fullilove v. Klutznick*,[108] expressed his approval of Justice Linde's legislative due process theory: "[J]ust as procedural safeguards are necessary to guarantee impartial decisionmaking in the judicial process, so can they play a vital part in preserving the impartial character of the legislative process."[109] Since the legislation at issue in *Fullilove* was significant, as it was the first time that Congress created a broad legislative classification for entitlement to benefits based solely on racial characteristics, Justice Stevens was particularly uncomfortable that Congress engaged in almost no discussion, debate, or taking of testimony.[110] Given the enormity of the subject, Justice Stevens felt Congress gave the matter too "perfunctory" a consideration, and saw "no reason why the character of [Congress's] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law."[111] Citing Linde, Justice Stevens concluded that it would be far less intrusive for courts to engage in procedure analysis than to try to determine whether legislation has a rational basis.[112]

Justice Linde's desire to see courts focus on the process of legislation, rather than its substantive results, is shared by a number of other noted scholars.[113] Advocates of this theory maintain that judicial re-

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106 See Linde, supra note 45, at 239.

107 See id. at 253; see also Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1540, 1584 (1988) (writing that those who believe in "characteristically republican belief in deliberative democracy" would "urge that principles of statutory construction be designed to ensure that decisions are made by those who are politically accountable and highly visible").

108 448 U.S. 448 (1980).

109 Id. at 549 (Stevens, J., dissenting).

110 See id. at 550.

111 Id.

112 See id. at 552. Justice Stevens' affinity for the theory of legislative due process can be seen in other cases as well. In his concurring opinion in Bowsher v. Synar, 478 U.S. 714 (1986), for example, he writes that "the critical inquiry . . . concerns . . . the manner in which Congress and its agents may act." Id. at 758 (Stevens, J., concurring); see also Delaware Tribunal Bus. Comm. v. Weeks, 430 U.S. 73, 98 (1977) (Stevens, J., dissenting) (finding "deprivation of property without the 'due process of lawmaking' that the Fifth Amendment guarantees").

113 Judge Posner, for example, argues that if the legislative system is really about powers and interests instead of maximizing the general welfare, then courts should not review legislation for a rational basis; rather, legislation should be the product of the normal political process. See Richard A. Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 S. Ct. Rev. 1, 29.

view should not be employed to overrule congressional decisions when Congress acts according to proper procedure, for such decisions are cloaked with the highest level of democratic legitimacy.[114] Rather, courts should use judicial review to ensure that democratic processes are followed. More extensive judicial review is appropriate for governmental actions carried out by, for example, administrative bodies, for such institutions lack the direct political responsibility that members of Congress have.[115] While this argument calls for judicial deference to legislative actions that are the result of fair process, it conversely must demand that courts step in when process is inadequate, especially in situations where the legislature is encroaching upon fundamental values.[116]

John Hart Ely, like Justice Linde, believes that the Framers' emphasis on political process should serve as a guide for courts engaged

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Professor Strong maintains that "[o]ne possible function for judicial review, in an age unsure of its consistency with democratic ideals, is to direct it to the realization and maintenance of the democratic character of the legislative process. . . . [T]his function might be dubbed that of guaranteeing the purity of the legislative process." Strong, supra note 97, at 2; see also Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833, 1865-71 (1992) (maintaining that allure of process-based judicial review is that it allows courts to avoid analysis of outcome fairness); Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 210 (1952) ("One of the central responsibilities of the judiciary . . . is to help keep the other arms of government democratic in their procedures.").

Professor Tribe divides due process review into three categories: procedural (looking at how the law is enforced), substantive (looking at the content of the law), and structural (looking at the form of legislative action which preceded law's passage). See Tribe, supra note 87, §10-7, at 664 & n.4. Tribe's third category—structural—is most similar to Justice Linde's idea of legislative due process. See id. §§ 17-1 to 17-3, at 1673-87 (setting forth theory of structural due process and explaining relationship between it and Linde's theory of legislative due process); cf. Devins, supra note 99, at 403-04 (comparing Linde's and Tribe's views on manner in which courts should review legislative procedures).

Justice Linde's position that courts should patrol legislative process is not universally accepted. See, e.g., Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503, 1556 (1990) (expressing doubts regarding merits of Linde's theory); J.A.C. Grant, Judicial Control of Legislative Procedure in California, 1 Stan. L. Rev. 428 (1949) (recommending that California Supreme Court leave improvement of legislative procedures to state legislature); see also infra notes 133-36 and accompanying text (discussing general criticism of procedural due process review).

114 See, e.g., Terrance Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1186-87 (1977) (writing that courts should be wary of overruling "deliberate and broadly based political decision, say, one made by Congress after full debate . . . because the process that has led to [such decisions] is the ultimate source of law's legitimacy in a democratic society"). Dean Sandalow explains that a "consensus achieved through a broadly representative political process is, thus, as close as we are likely to get to the statement of a norm that can be said to reflect the values of the society." Id. at 1187.

115 See id.

116 See id. at 1188 ("[I]f governmental action trenches upon values that may reasonably be regarded as fundamental, that action should be the product of a deliberate and broadly based political judgment.").

in judicial review.[117] When federal courts review congressional activity, Ely writes, their primary job is to "keep the machinery of democratic government running as it should, to make sure that the channels of political participation and communication are kept open."[118] In other words, courts must intervene during times of political malfunction that "occur[ ] when the *process* is undeserving of trust."[119]

The republican goal of political accountability lies at the heart of this concern with process. Constitutional essentials, such as a free press and the freedom to speak, are designed to guarantee the "free and effective popular choice of our representatives. But popular choice will mean relatively little if we don't know what our representatives are up to."[120] That legislators desire to elude accountability is

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117 Professor Ely observes that "the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values." Ely, supra note 69, at 92. Professor Ely reviews the Constitution and Declaration of Independence, highlighting specific illustrations of the Framers' focus on process rather than substance; for example, the Framers were not opposed to taxation—only taxation without representation. See id. at 89-90; see also supra note 102 (listing articles which discuss Constitution's emphasis on procedure).

118 Ely, supra note 69, at 76. Ely interprets the second paragraph of the "famed" footnote four in United States v. Carolene Products Co., 304 U.S. 144 (1938), as an indication that judicial review should be process-oriented. See id. at 76-77; see also Strong, supra note 97, at 14 (pointing to *Carolene Products* as the progenitor of political process theory). That footnote reads in part:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

Carolene Products, 304 U.S. at 152 n.4; see also Lea Brilmayer, Carolene, Conflicts, and the Fate of the "Insider-Outsider," 134 U. Pa. L. Rev. 1291, 1296 (1986) (explaining that, in response to question of countermajoritarian difficulty, "*Carolene* answers that constitutional adjudication is nothing more than policing the processes of democratic decisionmaking").

Professor Ely likens his approach to constitutional adjudication to the "antitrust" (as opposed to "regulatory") approach to judicial review of economic issues. Courts should simply ensure that the market (or, here, the political system) is working properly, rather than ordering substantive outcomes. See Ely, supra note 69, at 102-03. Ely alternatively makes an analogy to a referee in an athletic contest; courts should not care who scored, as long as neither team had any "unfair advantages." See id. at 103. Ely believes judges are especially qualified to serve as "referees." See id.; see also Daniel R. Ortiz, Pursuing a Perfect Politics: The Allure and Failure of Process Theory, 77 Va. L. Rev. 721, 725 (1991) (contending that "[t]his approach seeks to identify and correct failures in the democratic process, rather than accomplish any particular substantive ends").

119 Ely, supra note 69, at 103; see also id. at 135-36 (explaining that courts' role is to ensure system is working).

120 Id. at 125. In the context of equal protection, for example, the Supreme Court has attempted to protect individuals by requiring "articulated" purposes to explain suspect classifications. See id. According to Ely, this is the wrong approach. Real failure of political accountability occurs not when legislation does not include a purpose statement, but

not a novel phenomenon. "Individual politicians," Professor Stewart observes, "often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy."[121] As legislators most likely "act on the assumption that the stands they take will importantly affect their future success,"[122] it is not surprising that Senators will avoid taking stands on controversial issues if at all possible.[123] It is this same unwillingness of individual legislators to take public positions on controversial issues that to a significant extent has led to the current confirmation crisis.[124]

The legislative due process theory essentially posits that Congress is constitutionally constrained in its legislative capacity by a set of explicit and implied procedural requirements. Judicial review of legislative action, therefore, should focus on the extent to which Congress has complied with those procedural mandates. To apply the theory in the context of the Senate slowdown, a parallel must be drawn between the role of legislating and the role of advising and consenting. While the transition may not be perfect, the underlying concern of the theory—the value of process—resonates in this context.

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rather when the legislature itself fails to act, and instead "leav[es] that chore" to those who are not politically accountable. See id. at 130-31.

Of particular concern to Professor Ely is the tendency of Congress to pass broad laws and then delegate the responsibility of filling in the tough and controversial details to administrative bodies that are not politically accountable. See id. This process allows Congress to avoid political repercussions, which Ely condemns as "undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic." Id. at 132; see also supra note 107 (referring to Professor Sunstein's discussion of political accountability and republican theory of government). Professor Ely argues that the best way to ensure political accountability is to force Congress to act rather than to delegate. See Ely, supra note 69, at 131. Though Professor Ely would like to see a doctrine of nondelegation, see id. at 133, he acknowledges that the Supreme Court, except during a brief period in the 1930s, has upheld congressional delegation of legislative functioning to administrative agencies. See id. at 132.

121 Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1695 (1975). Professor Ely concurs, adding that one reason "rational basis" review is not a satisfactory solution to the lack of political accountability is that the problem is not the failure of legislators to explain their decisions on controversial topics, but rather the failure of legislators to make such decisions at all. See Ely, supra note 69, at 134. Anonymous congressional action is not a rare occurrence. See, e.g., Burt Neuborne, In Praise of Seventh-Grade Civics: A Plea for Stricter Adherence to Separation of Powers, 26 Wy. Land & Water L. Rev. 385, 388 (1991) ("Congress has been permitted to carry out the legislative process in a procedurally indefensible manner that often shields legislative action from formal debate and scrutiny.").

122 Ely, supra note 69, at 129.

123 See Neuborne, supra note 121, at 387, 395.

124 See generally Nina Totenberg, The Confirmation Process and the Public: To Know or Not to Know, 101 Harv. L. Rev. 1213 (1988) (explaining why Senators have little to gain from public confirmation fights and why increased formality in process is not preferred by Senators).

2. *The Theory as Applied in the Context of the Confirmation Process*

In the current Senate slowdown, the Senate is not delegating its advice and consent duties to a nonaccountable administrative agency of the sort that worried Ely.[125] What it is doing, however, raises concerns similar to those Ely expressed. Just as Congress avoids accountability when it delegates decisionmaking authority, it also does so by making decisions off the public record. There can be no more basic a component of accountable democratic process then an open vote conducted by elected representatives. By rejecting presidential nominees en masse without hearings or votes, the Senate is failing to "play by the rules," and arguably violating legislative due process. When the issue is as central to our constitutional structure as the composition of a coordinate branch of government, the employment of judicial oversight to ensure fair process is justifiable.[126]

The argument for declaring congressional inaction unconstitutional has not been put forth by the proponents of legislative due process.[127] Scholars have focused on legislative due process in the context of the *passage of legislation*.[128] Since the Constitution contains no mandate directing Congress to pass specific laws, it would be quixotic to mount a constitutional argument that the failure of the legislature to pass a certain piece of legislation violates due process of law.

However, the Constitution does require unequivocally that the Senate must engage in the process of appointing federal judges.[129] Of course, this does not mean that the Senate is constitutionally required to approve certain individual nominees sent to it by the President.[130]

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125 See supra notes 117-20 and accompanying text.

126 As Justice Jackson instructed:

> [W]hen the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.

Robert H. Jackson, The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics 285 (1941).

127 See, e.g., Sandalow, supra note 114, at 1191-92 (discussing inapplicability of theory to situation where Congress chose not to pass legislation).

128 See supra note 113 (providing examples of such scholars).

129 See supra note 65 and accompanying text (discussing Advice and Consent Clause).

130 President Nixon was clearly incorrect in claiming that he had a right to see his judicial nominees appointed. See Tribe, supra note 14, at 91 (discussing Nixon's statement). But see infra Part II.C (discussing possibility that rejection, en masse, may constitute de facto revision of legislation establishing current number of federal court judgeships, violating constitutional requirements of bicameralism and presentment).

What it may be interpreted to mean is that the Senate's role in shaping the judiciary is sufficiently fundamental[131] so as to obligate a level of process sufficient to ensure accountability. The question raised here is whether that requirement of process can be deemed satisfied when the Senate, presented with an entire set of presidential nominees, simply remains silent. If not, there may exist a violation of due process of law, and judicial intervention therefore would be appropriate.[132]

One of the most prevalent criticisms of the procedural due process theory that has emerged out of the *Carolene Products*[133] line of cases is that procedural review of legislation is merely a "front" for what truly amounts to substantive review.[134] To the extent that this criticism is valid, however, it is not particularly effective in this context. Analysis of *Carolene Products* typically focuses on the third clause of the footnote—the one introducing the concept of the "discrete and insular minority."[135] Critics argue that the clause is used as a justification for the review of the substance of particular legislation under the guise of procedural review.[136]

Fewer concerns about "substantive review" would arise if courts were to use legislative due process as a basis for reviewing the Senate's actions in the confirmation process. Such an action would surely be the "easy" legislative due process case, because the only issue would be the Senate's literal, technical procedure.[137] The substantive

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131 John Hart Ely revealed no secret when he stated that "[t]he country needs functioning and competent federal courts, and everybody knows it does." Ely, supra note 69, at 46. See also supra note 85 and accompanying text (discussing the significance of the Senate's role in the appointment process).

132 See Barry v. United States ex. rel. Cunningham, 279 U.S. 597, 620 (1929) (stating that judicial involvement would be appropriate "upon a clear showing of such arbitrary and improvident use of the [Senate's] power as will constitute a denial of due process of law"); see also supra notes 92-94 and accompanying text (outlining appropriateness of judicial intervention).

133 304 U.S. 144 (1938); see also supra note 118 (discussing footnote four in *Carolene Products*).

134 See, e.g., Tribe, supra note 87, §17-3, at 1686 (noting that "a structural focus can sometimes be used as a subterfuge to 'rig' a desired substantive outcome"); Brilmayer, supra note 118, at 1306-07 (arguing that debates over process merely disguise "means/end" scrutiny); Devins, supra note 99, at 405 (same); Ortiz, supra note 118, at 728, 742 (same). For a powerful defense and thorough retrospection of the political process theory, see generally Michael J. Klarman, The Puzzling Resistance to Political Process Theory, 77 Va. L. Rev. 747 (1991).

135 *Carolene Products*, 304 U.S. at 152 n.4.

136 See Brilmayer, supra note 118, at 1294-95 (discussing individual clauses of *Carolene Products* footnote); Ortiz, supra note 118, at 729-30 (positing that clause three provides for most "interesting" aspects of process theory).

137 In *Carolene Products* parlance, such a claim would fall within the second, rather than the third, clause of footnote four. See *Carolene Products*, 304 U.S. at 152 n.4 (discussing

outcome of that process—who gets confirmed and who does not—is not at issue.[138]

On a more practical note, a litigant wishing to invoke the theory of legislative due process under the Fifth Amendment would have to identify a life, liberty, or property interest that is being abridged by the Senate slowdown.[139] It is at this point that the application of legislative due process theory becomes most tenuous. An exhaustive study of the meaning of "liberty" and "property" is beyond the scope of this Note.[140] However, it is possible to identify briefly several potential bases for a successful due process challenge.[141] For example, a nominee who has been denied a hearing or a vote may be able to assert a liberty or, somewhat less tenably, a property interest.[142] A nominee

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legislation which restricts political processes). Even Professor Brilmayer acknowledges that claims which fall within the second clause of footnote four are more genuinely rooted in procedural, rather than substantive, values. See Brilmayer, supra note 118, at 1294, 1315 (maintaining that "[t]he second clause . . . addresses process values, but in a more limited sense than the third clause does," and arguing that direct attacks on technical procedure do not raise substantive review concerns). In fact, such a claim would fit precisely within the category of *Carolene Products* challenges, referred to by Professor Brilmayer as "direct attacks," which she finds acceptable. Id. at 1296 ("A direct attack involves a frontal assault on defective processes. The remedy sought is the alteration of the decisionmaking processes that the challenger claims are unconstitutional.").

138 Cf. Brilmayer, supra note 118, at 1307 ("To show a process defect, one should focus on the process itself, as opposed to inferring a process defect from the fact that a substantively undesirable result was reached.").

139 See Linde, supra note 45, at 244-45 (explaining that legislative due process adds a layer of protection against injury to life, liberty, or property); see also Devins, supra note 99, at 405 n.112 (maintaining that Justice Linde considered life, liberty, or property interest essential to legislative due process claim).

140 It would be far too Herculean a task for this Note to attempt to delve fully into the discussion of what characterizes a life, liberty, or property interest. See generally Henry Paul Monaghan, Of "Liberty" and "Property", 62 Cornell L. Rev. 405 (1977) (describing complexity of issue).

141 There has been a recent tendency to define more narrowly the scope of acceptable life, liberty, and property interests. See, e.g., id. at 408 (observing increased willingness by Supreme Court to define liberty and property interests more clearly); see also John E. Nowak & Ronald D. Rotunda, Constitutional Law §13.1, at 510 n.3 (5th ed. 1995) (providing sampling of academic literature discussing increasingly circumscribed scope of life, liberty, and property interests).

142 See Nowak & Rotunda, supra note 141, §13.4, at 532 (explaining that if an "individual has been denied a license to engage in a profession, it is not clear whether he is entitled to a hearing if the denial is based on any factual matter which might be contested or clarified at a hearing"). A nominee's qualifications could certainly be perceived as one such factual matter. But see Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (finding no property right in continued government employment). Professor Monaghan identifies *Roth* as the beginning of the Supreme Court's movement toward a more limited notion of "liberty." See Monaghan, supra note 140, at 420-23. It is important to note that while *Roth* speaks of "property," scholars such as Monaghan often interchange liberty and property when discussing due process interests.

It is highly unlikely that a court would find that a nominee has a property right in a job which he or she has not yet obtained. See Nowak & Rotunda, supra note 141, §13.5, at 538

also might try to argue a deprivation of liberty caused by damage to personal reputation.[143] Alternatively, a prospective litigant whose access to federal court is substantially delayed may be able to assert a liberty interest. Whether or not a constitutional right of access to federal court exists,[144] an argument may be made that once Congress creates a federal court system, it may not interfere with access to that system without complying with basic procedures.[145]

While the requirement of a life, liberty, or property interest complicates the use of legislative due process theory in this context, the "value of process"—which lies at the root of this theory—can provide support for judicial review based on other causes of action (such as those discussed herein). "Process" serves as a powerful justification for judicial action, even absent a formal due process claim. In fact, many of the paradigmatic—and least controversial—cases used to exemplify the *Carolene Products* notion of political process were not decided on due process grounds.[146] Thus, while the theory of legislative

("[I]f the person has not yet been hired, he has no property right which requires a hearing on the refusal to initially employ him."). This supposition is supported by the "present enjoyment" requirement, which, although not yet clearly mandated by the Supreme Court, is strongly implied in its decisions. See Nowak & Rotunda, id. at 537 n.8 (discussing the "present enjoyment" concept).

143 The Supreme Court in Paul v. Davis, 424 U.S. 693 (1976), held that government actions causing reputation damage do not amount to a per se deprivation of liberty. See id. at 702. This decision has been sharply criticized. See, e.g., Monaghan, supra note 140, at 427, 432 (arguing that *Paul* holding stands in sharp contrast to "our ethical, political, and constitutional assumption about the worth of each individual" and further advocating that *Paul* be read as narrowly as possible). Furthermore, other cases indicate that a due process claim may still be viable. See Owen v. City of Independence, 445 U.S. 622, 633-34 n.13 (1980) (right to reputation when combined with dismissal from at-will employment is liberty interest); cf. Nowak & Rotunda, supra note 141, §13.4, at 534-35 (stating that due process claim may exist when individual was deprived of tort remedy for his or her defamation injury because of immunity provided to government officials).

144 See Roller v. Gunn, 107 F.3d 227, 231 (4th Cir. 1997) ("[T]he right of access to federal courts is not a free-floating right, but rather is subject to Congress' Article III power to set limits on federal jurisdiction."); Pain v. United Techs. Corp., 637 F.2d 775, 798 (D.C. Cir. 1980) ("American citizens and residents have no indefeasible right of access to the federal courts." (footnote omitted)). But see Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir. 1984) (en banc) ("[T]he federal litigant has a personal right, subject to exceptions in certain classes of cases, to demand Article III adjudication of a civil suit.").

145 Cf. Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (holding that although state had no responsibility to confer property interest in government employment, it was obligated to follow constitutionally mandated procedures to terminate right once it was created).

146 Those cases were decided on equal protection and Fifteenth Amendment, rather than due process, grounds. See, e.g., South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966) (upholding constitutionality of Voting Rights Act); see also Klarman, supra note 134, at 757 (maintaining that fundamental rights identified by Warren Court as existing within scope of Equal Protection Clause can be justified on political process grounds); Linde, supra note 45, at 245 (acknowledging that courts need not rely on Due Process

due process may or may not provide a useful theory under which an action against the Senate may be brought, the essential value of process that the theory embodies can serve as a strong underlying justification for the more general claim of violation of separation of powers.[147]

C. The Senate's Failure to Provide Advice and Consent as a Violation of the Constitutional Requirements of Bicameralism and Presentment

As the number of vacancies rises, the strength of the claim that the slowdown is really a de facto reduction of the federal judiciary increases. Such a phenomenon would give rise to a third theory upon which a challenge may be based: That the Senate's actions are equivalent to a de facto one house repeal of legislation establishing the size of the judiciary, in violation of the constitutional requirements of bicameralism and presentment.[148] The Supreme Court in *INS v. Chadha*[149] held that a one house legislative veto was unconstitutional because of the absence of bicameralism and presentment.[150] If the legislature engages in an action that, upon examination, is revealed to be "essentially legislative in purpose and effect,"[151] both houses must take a vote and then, upon passage, present the action to the President.[152]

Clause to enforce explicit procedural rules). Professor Brilmayer identifies the cases which challenged literacy requirements for voting as classic examples of a direct, and thus more acceptable, political process action. See Brilmayer, supra note 118, at 1296.

147 See supra Part II.A (discussing claim based on separation of powers violation).

148 See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); id. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States . . . ."); id. art. I, § 7, cl. 3:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

149 462 U.S. 919 (1983).

150 See id. at 957-59.

151 Id. at 952.

152 See id. Underpinning the decision in *Chadha* was the fear that a one house legislative veto undermines political accountability. See Krent, supra note 88, at 1278 ("[E]xercise of the legislative veto undercuts the legislative accountability that the framers sought to achieve. . . . The constitutional interest in making Congress accountable for its actions therefore supports applying the bicameralism and presentment requirements to exercise of the veto.").

Congress has established by law the number of positions on the federal bench; there is little doubt that it may scale back the size of the judiciary. Indeed, it is possible that Congress could even eliminate the lower federal courts altogether.[153] Any such action, however, must proceed according to the legislative procedures set forth in the Constitution.[154] As the Supreme Court emphasized in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[155] when Congress exercises its legislative power, as it may be perceived to be doing here by reducing the size of the judiciary, "it must follow the 'single, finely wrought and exhaustively considered, procedures' specified in Article I."[156]

Courts have intervened when the Executive has attempted to engage in a de facto repeal of legislation. In a series of rulings referred to collectively as *The Impoundment Cases*, federal courts held that once Congress has earmarked funds for certain programs, the Executive may not demonstrate its disapproval of those programs by refusing to spend the monies.[157] Like *The Impoundment Cases*, this situation involves the refusal of a branch of the government to carry out a legislative mandate.[158] While here the branch that is refusing to

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153 See Palmore v. United States, 411 U.S. 389, 400-01 (1973) (stating that Constitution does not require Congress to create Article III courts); see also Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364-65 (1953) (stating that Congress's power is only constrained by prohibition on actions which will "destroy the essential role of the Supreme Court in the Constitutional plan"); David L. Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 Harv. L. Rev. 317, 341 (1977) (observing that Congress has "broad, perhaps plenary power to limit federal jurisdiction"). It is not uniformly accepted, however, that Congress may completely eliminate the existence of the lower federal courts. Professor Eisenberg, for example, states that the "lower federal courts are . . . indispensable if the judiciary is to be a co-equal branch and if the 'judicial Power of the United States' is to remain the power to protect rights guaranteed by the Constitution and its Amendments. Abolition of the lower federal courts is no longer constitutionally permissible . . . ." Theodore Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498, 533 (1974) (footnote omitted).

154 See supra note 148 (setting forth constitutionally-mandated procedure); see also Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) ("[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."); Tribe, supra note 14, at 126 (citing occasions on which Congress enacted legislation to reduce number of Supreme Court seats in order to prevent President from making unfavorable nominations).

155 501 U.S. 252 (1991).

156 Id. at 274 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

157 See, e.g., State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1973); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 76 (D.D.C. 1973).

158 Professor Choper, considering the power of the President to reduce the size of the Supreme Court by simply refusing to make nominations, concludes that because "executive nonuse of the appointment power for this end would be highly questionable in light of

abide by the act is the same branch that passed it, the constitutional implications are the same so long as Congress fails to comply with the requirements of bicameralism and presentment.

In the context of the debate surrounding the protracted confirmation of Merrick Garland to the United States Court of Appeals for the District of Columbia,[159] Senator Jeff Sessions (R-Ala.) proclaimed, "I think it would be very unwise for us to fill a vacancy . . . if there's any possibility that this caseload will continue to decline . . . [b]ecause once [vacancies are] filled, they hold [those positions] for life, and we're obligated to pay their salar[ies] for life."[160] Remarks such as those by Senator Sessions suggest that a desire to reduce the size of the federal judiciary may be a driving force behind the confirmation slowdown.[161] If the Senate were only refusing to hold hearings and votes on a few nominees at a time, a *Chadha*-based claim would be inappropriate. However, given the magnitude of the Senate's refusal to act, the labeling of the Senate's slowdown as a de facto repeal of the legislation establishing the size of the federal judiciary[162] becomes a more reasonable conclusion, and a powerful call for judicial intervention.

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our constitutional traditions, and because this would constitute a de facto reduction of the Court's membership by the President alone without the consent of Congress, this method appears never to have been attempted." Choper, supra note 86, at 851.

159 The Senate did not act upon Garland's nomination for over one and a half years. See Senate and Judges (NPR radio broadcast, Sept. 24, 1997), available in LEXIS, News Library, NPR File. In fact, Garland was the only circuit judge confirmed between January 2, 1996 and July 31, 1997; prior to that, the Senate had not gone more than one year without confirming a circuit judge since World War II. See Alliance for Justice 1997, supra note 12, at 11.

160 Senate and Judges (NPR radio broadcast, Sept. 24, 1997), available in LEXIS, News Library, NPR File. It is interesting to note that Senator Sessions was nominated for a federal judgeship by President Reagan in 1986; he became the first nominee in 40 years to be defeated in the Judiciary Committee. See Alliance for Justice 1996, supra note 15, at 5.

161 Senator Sessions is not alone in his desire to see a downsizing of the federal judiciary. Manus Cooney, staff director of the Senate Judiciary Committee, suggests that one should not "underestimate the view in Congress that there are too many federal judges." See Pro & Con Government Relations Forum: Improving the Process of Appointing Federal Judges, Fed. Law., Nov.-Dec. 1997, at 51, 54 (statement of Manus Cooney); see also Alliance for Justice 1997, supra note 12, at 28-29 (discussing movement to downsize the Federal Judiciary).

It should be noted that a claim on bicameralism and presentment grounds would turn largely on what is being done to the judiciary; the intent behind the Senate's actions likely would not be directly relevant. However, if it could be shown that a de facto reduction in the judiciary is a direct desire of the Senate, rather than simply an incidental result of another goal, then a bicameralism and presentment claim might be looked upon more favorably by the courts. Of course, a showing of such intent would face severe evidentiary obstacles.

162 See 28 U.S.C. §§ 44, 133 (1994).

III
PROCEDURAL OBSTACLES

Part II identified several substantive theories under which a judicial action may be brought against the Senate. In addition to shaping a theory, a party attempting such a challenge would have to overcome several formidable procedural obstacles.[163] Those that are most likely to preclude a suit are the standing doctrine, the Speech or Debate Clause, and the political question doctrine.[164]

The doctrine of standing speaks to the question of who may bring a suit. The Speech or Debate and political question doctrines work together to set limits on who may be named in the suit and what issues may be the subject of that suit. These latter two procedural doctrines form a protective shell around Congress when it acts within its prescribed sphere of responsibilities. Upon examination of these three obstacles in sections A, B, and C, respectively, this Note concludes that it is possible for a plaintiff in such an action to surmount all three.[165] Should one or more of these obstacles prove to be too great, however, Part III.D draws on the theory of underenforced constitu-

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163 Additionally, there exists general prudential concerns on which a court may rely in refusing to hear such a case. In National Treasury Employees Union v. Bush, 715 F. Supp. 405, 407 (D.D.C. 1989), the court refused to review the merits of a claim alleging that the President has a statutory duty to appoint a member to the Federal Labor Relations Authority within a given amount of time. In addition to finding the issue to be a nonjusticiable political question, the court stated that:

> [P]rudential considerations in this case counsel against judicial intervention. This Court is unaware of any case law . . . where a federal court directed a President to make an appointment. The implications of a decision requiring the President to make such an appointment within a specified time in the absence of any explicit statutory guidelines would be far-reaching indeed. Common sense and caution advise against such a decision.

Id.

164 A fourth potentially preclusive procedural bar is the ripeness doctrine, which seeks to prevent premature review of constitutional issues. See Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 506 (1972) (explaining that ripeness inquiry asks whether "'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'" (quoting Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941))).

For some nominees, the length of the specific delay has not risen to a level grave enough to merit judicial review. However, because there are potential litigants for whom a delay has been long enough to cause real injury, see infra Part III.A, and furthermore because there are no standards by which to set a precise length of time for appropriate consideration of nominees, this Note will not explore the potential for ripeness preclusion. Ripeness is certainly an issue to be considered, but not one that presents problems as serious as the three procedural obstacles discussed more thoroughly in the text.

165 Cf. Fisk & Chemerinsky, supra note 56, at 225-38 (offering a thoughtful analysis of these obstacles in context of potential judicial action to challenge constitutionality of filibuster and concluding that all three may be overcome).

tional norms to argue that the substantive theories advanced in Part II still serve to impose affirmative duties on the Senate.

A. Standing

In order to persuade a federal court to force the Senate to fulfill its advice and consent responsibilities, a plaintiff would first have to demonstrate that he or she has standing sufficient to satisfy Article III's requirement of a case or controversy.[166] At the heart of the standing doctrine is the requirement that the plaintiff demonstrate a personal stake in the outcome of the controversy sufficient to assure a level of adverseness that, in turn, will "sharpen[ ] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[167] Courts are especially strict in evaluating standing when the prospective action involves judicial review of the constitutionality of an action taken by a coequal branch of government.[168] In general, "[s]uch judicial intervention is not to be tolerated absent imperative constitutional necessity."[169]

A three part test for evaluating whether such a constitutional necessity exists was set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*.[170] First, the prospective plaintiff must demonstrate an "injury in fact" that is concrete and particularized, as well as actual or imminent.[171] A generalized complaint of a citizen that the government is not carrying out its duties is not sufficient to fulfill the injury-in-fact requirement.[172] Second, the plaintiff must show a causal connection between that injury and the defendant's actions, in this case the Senate's failure to meet its responsibilities.[173] Finally, it must be likely—not merely speculative—that judicial intervention would redress the injury.[174]

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166 See U.S. Const. art. III, § 2; see also Raines v. Byrd, 117 S. Ct. 2312, 2317 (1997) (describing "case" or "controversy" requirement as "bedrock").

167 Baker v. Carr, 369 U.S. 186, 204 (1962). The Supreme Court in Sierra Club v. Morton, 405 U.S. 727 (1972), explained that standing turns on "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." Id. at 731; see also Lee A. Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief, 83 Yale L.J. 425, 427-29 (1974) (discussing *Baker* and analyzing standing doctrine more generally).

168 See *Raines*, 117 S. Ct. at 2317-18 (describing inquiry as "especially vigorous" where court must decide whether one of other two branches acted contrary to Constitution).

169 Nixon v. Fitzgerald, 457 U.S. 731, 761 (1982) (Burger, C.J., concurring).

170 504 U.S. 555, 578 (1992) (holding environmental groups did not assert sufficiently imminent injury to have standing).

171 See id. at 560.

172 See id. at 573-74.

173 See id. at 560.

174 See id. at 561.

The standing requirement should not preclude judicial review of the Senate confirmation slowdown.[175] There are several categories of persons who have suffered concrete injuries as a result of the Senate slowdown, and who therefore could present strong standing arguments. Perhaps most powerful would be challenges by those like Michael Schattman,[176] who have been nominated for judicial positions but have not been considered by the full Senate.[177] Additionally, a litigant whose access to federal court has been unduly delayed,[178] a Senator who has been unable to exercise his or her power to vote on nominees,[179] or a federal judge who is unable to carry out his or her responsibilities adequately because of an excessive workload,[180]

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175 Of the three procedural obstacles discussed here, standing should be the easiest to surmount.

176 See supra text accompanying notes 1-8.

177 Cf. Fisk & Chemerinsky, supra note 56, at 233-34 (maintaining that individual who could show injury from filibuster should have standing if it could be shown Senate would have passed measure but for filibuster).

178 See supra notes 142-45 and accompanying text (discussing injury to aspiring litigant). Cf. Clinton v. City of New York, 118 S. Ct., 2091, 2099-2102 (1998) (finding standing in action challenging line item veto since action was brought by party outside federal government directly injured by President's use of that veto).

179 The Supreme Court in Raines v. Byrd held that individual Senators cannot establish standing to challenge the line item veto on the grounds that they have been denied the effectiveness of their votes. See *Raines*, 117 S. Ct. at 2320-21. In *Raines*, the Court distinguished Coleman v. Miller, 307 U.S. 433 (1939), reasoning that the *Coleman* Court ruled that state legislators had standing (based on their voting power) because the merits of the Senators' challenge, if correct, would mean that their voting power was completely *nullified*. See *Raines*, 117 S. Ct. at 2319. Here, as in *Coleman*, the Senators would allege that they were denied completely the opportunity to vote. See also George v. Ishimaru, 849 F. Supp. 68, 72 (D.D.C. 1994) (holding that Commissioner of Commission on Civil Rights had standing to challenge deprivation of his right to vote on presidential nomination to position in his program); Fisk & Chemerinsky, supra note 56, at 235-37 (analyzing senatorial standing for claim challenging constitutionality of filibuster). But see Riegle v. Federal Open Market Comm., 656 F.2d 873, 879-82 (D.C. Cir. 1981) (ruling that although Senator had standing to challenge his inability to exercise his right to vote for members of Federal Open Market Committee, strong prudential concern and legislative capability of providing legal redress counseled for dismissal of action).

180 Given the traditional reluctance of federal judges to enter the maelstrom of political controversy, it is acknowledged that one likely would be unwilling (the issue of standing aside) to bring such an action. However, federal judges have engaged in litigation on other issues. See, e.g., United States v. Will, 449 U.S. 200, 221-24 (1980) (challenging validity of statute reducing judicial salaries under Compensation Clause); Hatter v. United States, 38 Fed. Cl. 166, 171-72 (1997) (challenging withholding of social security taxes from judicial salaries under Compensation Clause); Atkins v. United States, 556 F.2d 1028, 1043-51 (Ct. Cl. 1977) (challenging statute regarding judicial wages under Compensation Clause); see also Anne Farris, Judges Sue to Make Pay Keep Pace with Inflation, Wash. Post, Jan. 8, 1998, at A19. A federal judge hearing a claim brought by a fellow member of the federal bench would not be required to recuse him or herself. See *Will*, 449 U.S. at 210-17 (explaining why federal judge could hear challenge brought by other judges under Compensation Clause).

all have suffered injuries that should satisfy *Lujan*.[181]

It is also important to recognize that courts, when determining whether a particular plaintiff has standing, often look to the policy justifications of the standing doctrine rather than to a mechanical checklist of factors.[182] Standing, like the other procedural doctrines discussed in this Note, is designed to protect the separation of powers by "requiring that cases are presented in an adversarial context and in a form historically viewed as capable of judicial resolution."[183]

An example of courts' use of policy rationales to find standing, rather than a mechanical checklist, is the doctrine of third party standing.[184] Courts may find third party standing where plaintiffs seek to bring claims on behalf of others who are unlikely, or unable, to bring the claims themselves. First Amendment overbreadth challenges,[185] actions against racially motivated peremptory jury challenges,[186] and qui tam motions brought by private citizens on behalf of the federal government under the False Claims Act[187] all support the premise that standing is a somewhat flexible doctrine that can be satisfied if a court finds that the situation at issue accords with underlying policy rationales. The novel and pressing circumstances of the nomination slowdown may justify a court's finding that the standing requirements are satisfied even if a rigorous application of *Lujan* might counsel against such a finding.

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181 Showing that such injuries were caused by the Senate's failure to provide advice and consent does not pose a significant obstacle, as injuries were directly caused by the Senate's failure to hold hearings and votes. Similarly, the requirement that relief will likely redress the injury should be easily satisfied. Declaratory relief is directly appropriate for this type of situation. See supra text accompanying notes 41-46.

182 See, e.g., United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 749 (9th Cir. 1993) (using analysis of policy underlying doctrine to support holding that plaintiff had standing).

183 Id. (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)).

184 For a recent Supreme Court opinion analyzing the doctrine of third party standing and arguing for a narrow conception of that device, see Miller v. Albright, 118 S. Ct. 1428, 1442-45 (1998) (O'Connor, J., concurring).

185 A plaintiff has standing to challenge a speech restriction on overbreadth grounds even if the particular speech he or she uttered could have been punished under a more narrowly tailored restriction. See, e.g., Gooding v. Wilson, 405 U.S. 518, 520 (1972) ("It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute.").

186 See Powers v. Ohio, 499 U.S. 400, 415 (1991) (ruling that white defendant in criminal case has third party standing to challenge peremptory strike of black veniremember). In *Powers*, the Court set forth a general test for third party standing: first, the litigant must have a sufficiently concrete interest in the outcome of the case; second, the litigant must have a close relation with the third party; and third, some obstacle must be preventing the third party from representing his/her own interests. See id. at 410-11.

187 See *Kelly*, 9 F.3d at 748 (finding that qui tam scheme satisfies Article III standing requirements).

B. *Speech or Debate Clause*

The Speech or Debate Clause[188] protects congressional speech by privileging the legislative conduct of individual Senators and Representatives against civil or criminal suit.[189] However, the obstacle of legislative immunity may be avoided simply by naming the entire Senate as a party. While the Clause clearly protects individual representatives; it may not preclude judicial review of the merits of a decision made by a legislative body.[190] This Note will nonetheless evaluate the Speech or Debate Clause as a potentially preclusive provision.

The Clause can be seen as an element of the overall system of separation of powers designed by the Framers;[191] as such, its invocation should be limited to situations where judicial review would threaten the balance of powers.[192] Despite the specificity of the Clause's terminology ("speech" and "debate"), the Supreme Court

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188 The Constitution states the following:

> [Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U.S. Const. art. I, § 6. The history of the Speech or Debate Clause has been thoroughly discussed in numerous Supreme Court cases. See, e.g., United States v. Johnson, 383 U.S. 169, 177-80 (1966) (relating history of Clause); Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951) (same).

189 See Nowak & Rotunda, supra note 141, §7.7, at 256-57. For an example of the application of this immunity to preclude an action, see Doe v. McMillan, 412 U.S. 306, 313 (1973) (holding that Speech or Debate Clause immunized members of Congress from civil damages stemming from alleged invasion of privacy resulting from public dissemination of Committee report).

190 See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 513 (1975) (Marshall, J., concurring) (stating that Speech or Debate Clause protects legislators and aides from judicial review, but not congressional action); Powell v. McCormack, 395 U.S. 486, 503, 505 (1969) ("Legislative immunity does not, of course, bar all judicial review of legislative acts . . . . The purpose of the protection afforded legislators is not to forestall judicial review of legislative action . . . ."); Fisk & Chemerinsky, supra note 56, at 238 (maintaining that Clause has never been extended to block suits against government itself, and concluding that "United States Senate could be named as the defendant without running afoul of the Speech and Debate Clause"). But see *Tenney*, 341 U.S. at 379 (finding that state legislative committee was immune from suit).

191 See United States v. Gillock, 445 U.S. 360, 369 (1980) (naming two underlying rationales for Clause as need to ensure legislative independence and need to avoid intrusion by executive or judiciary into affairs of coequal branch, and noting that Framers viewed Clause as "fundamental to the system of checks and balances"); see also Gravel v. United States, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch.").

192 See United States v. Brewster, 408 U.S. 501, 508 (1972) ("Our speech or debate privilege was designed to preserve legislative independence, not supremacy . . . [and therefore] to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." (footnote omitted)).

has interpreted it broadly, refusing to confine the protections it affords solely to words spoken or acts undertaken during speech or debate. Instead, the Court has invoked the Clause to protect legislators from judicial review of legislative actions that are within "the sphere of legitimate legislative activity."[193] The power of the clause is not limitless, however. If the legislative action in question transcends the bounds of legitimate legislative activity, legislators will not be able to avail themselves of this protection.[194]

The essential purpose of the Clause is to ensure that legislators are able to carry out their assigned duties without fear of reprisal.[195] The responsibility of advice and consent surely is such a duty, and were the Senate to hold a vote on a nominee, individual Senators would be entitled to protection from questioning regarding how they voted.[196] Here, however, there has been no legitimate process by which the representatives have come to a decision for which they are entitled to immunity. Simply put, the Senate has not taken the type of substantive action that the Supreme Court has found to be deserving of protection. As the Court explained in *United States v. Helstoski*,[197]

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193 *Tenney*, 341 U.S. at 376; see also *Powell*, 395 U.S. at 502 ("Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'" (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1881))).

194 The Court in *Gravel*, examining prior Speech or Debate cases, explained that those cases "reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." *Gravel*, 408 U.S. at 620. The Court further stated that in previous cases it had "not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." Id. at 624 n.15. Finally, the *Gravel* Court concluded that for other matters to fall within Speech or Debate protection, those matters must be an "integral part of the deliberative and communicative processes . . . . [T]he courts have extended the privilege to matters beyond pure speech or debate . . . 'only when necessary to prevent indirect impairment of . . . deliberations.'" Id. at 625 (quoting United States v. Doe, 455 F.2d 753, 760 (1st Cir. 1972)); see also *Brewster*, 408 U.S. at 513-14 (defining limits of sphere of legitimate legislative activity).

195 See, e.g., *Eastland*, 421 U.S. at 502 (stating Clause insures that legislators can fulfill their representative responsibilities without fear of judicial reprisal); *Powell*, 395 U.S. at 505 (same); *Tenney*, 341 U.S. at 373 (stating that protection is necessary "[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success" (quoting 2 The Works of James Wilson 38 (James DeWitt Andrews ed., 1896))).

An additional justification for the Speech or Debate Clause is efficiency. See, e.g., *Eastland*, 421 U.S. at 503 (discussing fear that private suits would be disruption used to delay legislative function). Since the Senate is *stalling* in regard to the confirmation process, judicial intervention designed to kickstart the process does not raise efficiency concerns.

196 They would, however, be accountable to their constituents, which is a favorable result. See supra text accompanying notes 57-58 (arguing for heightened accountability).

197 442 U.S. 477 (1979).

"it is clear from the language of the Clause that protection extends only to an act that has already been performed."[198]

In *Powell v. McCormack*,[199] the Supreme Court clearly stated that the Speech or Debate Clause does not prevent judicial review of the process used by Congress to remove one of its members:

> "Especially is it competent and proper for this [C]ourt to consider whether [the legislature's] *proceedings* are in conformity with the Constitution and . . . to determine . . . whether the powers of any branch of the government, and even those of the legislature . . . have been exercised in conformity to the Constitution."[200]

The Senate currently is not acting within the sphere of legitimate legislative activity, but rather in contravention of it.[201] Employing the Speech or Debate Clause to preclude judicial inquiry into the procedures of the Senate would be a perverse application of the Clause.[202] A clause that "protects Members against prosecutions that directly impinge upon or threaten the legislative process"[203] should not be used to deny courts the opportunity to ensure fair and open procedures, especially when a traditional check on the Senate (e.g. voting) is inhibited.[204]

C. *Political Question Doctrine*

A third procedural obstacle is the political question doctrine. The central premise of this doctrine is the desire to force federal

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198 Id. at 490. The Court further explained that a "promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate.' Likewise, a *promise* to introduce a bill is not a legislative act." Id.

199 395 U.S. 486 (1969).

200 Id. at 506 (emphasis added) (quoting Kilbourn v. Thompson, 103 U.S. 168, 199 (1881)). The Court in *Powell* allowed the action to be brought against congressional employees, but left open the question of whether the Speech or Debate Clause would block a suit if no agents participated in the challenged action and no other remedy was available. See id. at 506 & n.26.

201 See supra Part II.A (arguing that advice and consent is a constitutional mandate, not a discretionary prerogative).

202 The Court has invoked Thomas Jefferson to explain that the Clause "'is restrained to things done in the House in a Parliamentary course .... For [the Member] is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty.'" Hutchinson v. Proxmire, 443 U.S. 111, 125 (1979) (quoting T. Jefferson, A Manual of Parliamentary Practice 20 (1854), reprinted in The Complete Jefferson 704 (S. Padover ed., 1943)); see also United States v. Brewster, 408 U.S. 501, 517 (1972) (stating that Clause was designed solely to "preserve the integrity of the legislative process").

203 Gravel v. United States, 408 U.S. 606, 616 (1972).

204 See generally Mitchell v. Forsyth, 472 U.S. 511, 522 (1985) ("[M]ost of the officials who are entitled to absolute immunity . . . are subject to other checks that help to prevent abuses of authority from going unredressed. Legislators [for example] are accountable to their constituents . . . ."); Tenney v. Brandhove, 341 U.S. 367, 378 (1951) (stating that voters are greatest protection against abuse of legislative power).

courts to avoid deciding policy issues when they are not institutionally equipped to do so.[205] This is perhaps the most daunting hurdle in the path of a judicial resolution of the confirmation backlog. A court would likely be hesitant to inject itself into a battle between the Senate and the President over an issue that, on first glance, appears to be a matter squarely delegated to those two branches. The political question doctrine provides an easy way for a court to avoid reaching the merits of the substantive claims raised earlier in this Note.[206]

Like the Speech or Debate Clause, the political question doctrine helps to preserve the separation of powers by ensuring that the courts will not overstep their bounds.[207] The general test for determining whether an issue is a political question was established by the Supreme Court in *Baker v. Carr*.[208] The six factors that the *Baker* Court instructed future courts to consider are: 1) express textual language in the Constitution committing the issue to another branch of government; 2) an absence of standards by which a court could resolve the issue; 3) an inability to resolve the issue without resorting to political policymaking; 4) the danger of disrespecting another branch of government; 5) a strong need to adhere to a previously made political decision; and 6) the potential for embarrassment, caused by resolution of the issue in different ways by different branches.[209]

The *Baker* Court held that the issue of legislative apportionment is not a political question,[210] thus enabling federal courts to review a

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205 See Baker v. Carr, 369 U.S. 186, 287 (1962) (Frankfurter, J., dissenting) (stating that courts are not "fit instruments" for deciding large scale issues of public policy); see also Alexander M. Bickel, The Least Dangerous Branch 184 (1962). Bickel lists several factors to consider in deciding whether an issue is a political question: 1) the strangeness of the issue and its intractability to principled resolution, 2) the sheer momentousness of the issue (avoid unbalancing judicial judgment), 3) the fear that a judicial decision would not be followed, and 4) the "counter-majoritarian difficulty." Id.; cf. infra Part III.D (discussing underenforcement theory).

206 See Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1224-26 (1978) (citing political question doctrine as paradigmatic tool of judicial restraint in context of underenforced constitutional norms).

207 See *Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers."); see also Louis Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 598 (1976) ("[A]s long as the political branches act within their constitutional powers, whether they have done wisely or well is a 'political question' which is not for the courts to consider.").

208 369 U.S. 186 (1962).

209 See id. at 217. The Court made it clear that courts should apply this test conservatively. See id. ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.").

210 See id. at 209. The Court engaged in a lengthy discussion of the main areas in which the doctrine has been traditionally applied, and showed that exceptions exist even for those issues. See id. at 211-25.

significant aspect of the process by which representatives are elected to public office.[211] The Court circumscribed the political question doctrine, proclaiming that it was "a tool for maintenance of governmental order" that should "not be so applied as to promote only disorder."[212] The Senate slowdown is clearly interfering with government order—the judiciary is severely hurting[213]—and thus the political question doctrine should not shield the Senate.

Despite the Supreme Court's indication in *Baker* that the political question doctrine is fairly narrow, the doctrine presents a potential barrier to a challenge because the Court has invoked the doctrine in the context of legislative procedures. In *Coleman v. Miller*,[214] the Court held that the question of how long a state may take to ratify a constitutional amendment was a nonjusticiable political question.[215] *Coleman*, however, was decided six decades ago; the political question doctrine is no longer as powerful as it once was.[216] Furthermore, the amount of time that a state takes to vote on a constitutional amendment—the issue in *Coleman*—does not involve the functioning of a coequal branch of government, and therefore does not raise the type of separation of powers issues that are implicated by the Senate slowdown. Courts, the Supreme Court unequivocally instructed in *Baker*, "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."[217]

More recently, the Supreme Court held in *Nixon v. United States*[218] that the Senate's decision as to how to carry out impeachment trials[219] falls within the scope of the political question doc-

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211 The Supreme Court has revisited the issue of legislative apportionment on numerous occasions, making clear the inapplicability of the political question doctrine to that particular issue. See, e.g, United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992); Davis v. Bandemer, 478 U.S. 109 (1986); United Jewish Org. v. Carey, 430 U.S. 144 (1977); Reynolds v. Sims, 377 U.S. 533 (1964); Wright v. Rockefeller, 376 U.S. 52 (1964).

212 *Baker*, 369 U.S. at 215.

213 See supra Part I.A.

214 307 U.S. 433 (1939).

215 See id. at 450. The Court based its decision on the finding that there were no criteria on which a judicial determination of the issue could be made. See id. at 453-54.

216 See Vander Jagt v. O'Neill, 699 F.2d 1166, 1173-74 (D.C. Cir. 1983) (summarizing decline of political question doctrine); see also Nowak & Rotunda, supra note 141, §2.15, at 110 ("Given the broad exercise of judicial review expressed in *Baker*, *Powell*, and *Nixon*, the Political Question Doctrine, while still viable, does not appear to have extensive growing power."). The authors are referring to Powell v. McCormack, 395 U.S. 486 (1969), in which the Court reviewed a congressional decision to remove a member, and United States v. Nixon, 418 U.S. 683 (1974), in which the Court reviewed the power of a special prosecutor to subpoena tapes held by the President.

217 *Baker*, 369 U.S. at 217.

218 506 U.S. 224 (1993).

219 In this case, the issue before the Senate was the impeachment of United States District Judge Walter Nixon. See id. at 224.

trine.[220] The Court, applying the *Baker* test for nonjusticiability, based its decision primarily on an absence of an identifiable textual limit for the word "try" in the Impeachment Trial Clause[221] of the Constitution.[222] The term, according to the Court, "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions."[223] The Court also relied heavily on the fact that the Constitution gives the Senate the sole power to try impeachments.[224]

Many of the factors counseling against justiciability in *Nixon* would not be present in a challenge to the Senate's failure to carry out its advice and consent responsibilities. For example, the *Nixon* Court feared that judicial review of impeachment procedures would "eviscerate the 'important constitutional check' placed on the Judiciary by the Framers."[225] If a court were to review the Senate's current failure to provide advice and consent, it would not be removing a check held by the Senate; rather, it would be simply ensuring that that check was carried out in a manner sufficient to satisfy the Framers' intentions.[226]

The lack of finality which presumably would surround judicial review of an impeachment proceeding, yet another concern expressed in *Nixon*,[227] also would not be a problem here, for a primary goal in seeking judicial review in this case would be to promote finality. Furthermore, the term "sole," upon which the *Nixon* Court relied,[228] is not found in the Advice and Consent Clause, nor is any other similar express term of exclusivity. Finally, the argument that there is no identifiable constitutional limit on the power to "try," which so trou-

220 See id. at 237-38.

221 See U.S. Const. art. I, § 3, cl. 6.

222 See *Nixon*, 506 U.S. at 238. The Court interpreted the Framers' use of the word "try" without further explanation as an indication that the Senate was intended to have wide latitude in choosing the method of conducting an impeachment trial. See id. at 230.

223 Id. at 230. Justice White disagreed with the majority's conclusion that "try" does not provide a clear textual limit. See id. at 246-47 (White, J., concurring) (arguing that Senate's choice of method for trial is amenable to judicial review).

224 See id. at 230 (citing U.S. Const. art. I, § 3, cl. 6). The Court emphasized that "the word 'sole' is of considerable significance. Indeed, the word 'sole' appears only one other time in the Constitution . . . ." Id. Justice White maintained that "sole" refers to Senate exclusivity in relation to the House, not to the other branches of government, and further observed that delegation to Congress of "all" power to pass laws has not precluded judicial review of legislation. See id. at 241-42 (White, J., concurring).

225 Id. at 235. See generally Abraham, supra note 11, at 44-51 (discussing impeachment of federal judges).

226 See *Nixon*, 506 U.S. at 244-45 (White, J., concurring) ("In a truly balanced system, impeachments tried by the Senate would serve as a means of controlling the largely unaccountable Judiciary, even as judicial review would ensure that the Senate adhered to a minimal set of procedural standards in conducting impeachment trials.").

227 See id. at 236.

228 See supra note 224 and accompanying text.

bled the *Nixon* Court,[229] does not find as strong an analogy in this context.

The *Nixon* Court's refusal to review whether the Senate properly conducted an impeachment trial could be an indication that the Senate's advice and consent activities would also be nonjusticiable. However, there is a significant distinction. In *Nixon*, the Court would not evaluate *how* the Senate was fulfilling a constitutional responsibility, while in this situation, a court simply would be telling the Senate *to* carry out a constitutional responsibility according to a minimal level of required procedure.[230] Justice Souter, concurring in *Nixon*, indicated that even in the context of impeachment, a certain amount of fair procedure is required and could be judicially enforced:

> If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy,' . . . judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.[231]

A likely response by the Senate to a suit would be to say that its advice and consent responsibilities are a matter of "internal housekeeping" and, as such, represent a political question that is off limits to judicial review.[232] The Senate would argue that its decision not to vote is a perfectly acceptable means of responding to a presidential nomination.[233] This is a powerful retort, but may be addressed in two ways.

First, while the text of the Constitution does not explicitly define how to carry out the duties of advice and consent, a court would be remiss in failing to find an implied obligation to carry out these responsibilities. If, as this Note maintains, an integral part of advice and consent is an actual vote, then the Senate's systematic failure to hold a vote would be by definition a failure to fulfill that obligation rather

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229 See supra text accompanying notes 222-23.

230 For similar arguments, see, e.g., Harold H. Bruff, That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress, 48 Ark. L. Rev. 105, 128 (1994) (suggesting that "perhaps *Nixon* will be confined to the impeachment context"); Fisk & Chemerinsky, supra note 56, at 230 (same).

231 *Nixon*, 506 U.S. at 253-54 (Souter, J., concurring) (citations omitted).

232 See supra note 86 (providing Senate's internal procedure for handling nominations).

233 The same response could be set forth to defend a filibuster, see supra note 56, and a hold, see supra note 38.

than simply a choice as to how to fulfill that obligation.[234] Even if a vote could be portrayed as a "housekeeping" decision, the Senate does not have absolute free reign to decide how to conduct its affairs. As the Supreme Court held in *United States v. Ballin*,[235] the "[C]onstitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights."[236]

The claim that the Senate is not complying with constitutional process by failing to hold hearings and votes on judicial nominees is not the type of issue that a court is institutionally unable to decide. On the contrary, courts are especially adept at resolving matters of procedure.[237] In *INS v. Chadha*,[238] the Court explained that the "plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that

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234 See supra Part II.A (maintaining that advice and consent, at minimum, requires hearings and vote).

235 144 U.S. 1 (1892).

236 Id. at 5; see also Vander Jagt v. O'Neill, 699 F.2d 1166, 1173 (D.C. Cir. 1983) ("[Article I] simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity."); Fisk & Chemerinsky, supra note 56, at 230 (maintaining that discretion to establish congressional rules of procedure is limited by Constitution).

237 The Supreme Court has refused to allow the political question doctrine to preclude review of challenges to governmental action "respecting matters of 'the administration of the affairs of the State and the officers through whom they are conducted' [when they] have rested on claims of constitutional deprivation which are amenable to judicial correction . . . ." Baker v. Carr, 369 U.S. 186, 229 (1962) (footnote omitted).

The reasoning succinctly employed by the Court in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), to explain why it was capable of settling an Origination Clause dispute supports the conclusion that it would also be able to find standards on which to base advice and consent responsibilities:

> Surely a judicial system capable of determining when punishment is "cruel and unusual," when bail is "[e]xcessive," when searches are "unreasonable," and when congressional action is "necessary and proper" for executing an enumerated power is capable of making the more prosaic judgments demanded by adjudication of Origination Clause challenges.

Id. at 396 (1990).

Highly insightful is Professors Fisk and Chemerinsky's conclusion, based on their analysis of Supreme Court political question jurisprudence, that a challenge to the filibuster would not be rendered a nonjusticiable political question. See Fisk & Chemerinsky, supra note 56, at 225-31. They conclude that "the Court will decide constitutional objections to congressional procedures when there is reason to believe that internal congressional mechanisms are inadequate . . . . The Supreme Court repeatedly has refused to dismiss allegations of constitutional violations simply because they involve judicial review of congressional procedures." Id. at 227-28.

238 462 U.S. 919 (1983).

power."[239] The political question doctrine is a tool used by courts to avoid encroaching on coequal branches when those branches are acting within their spheres of constitutional authority. It should not be used to insulate those branches when they are acting in contravention of that authority.[240] A court reluctant to reach the merits of this action could justifiably rely on the political question doctrine to do so. On the other hand, should a court be willing to consider the underlying theories discussed in Part II, the political question doctrine does not present an impenetrable barrier to adjudication.

D. An Alternative Proposal: Underenforcement

Although the focus of this Note is to consider the potential for judicial action, the significant procedural hurdles discussed above do make the success of such an action uncertain. Those realities, however, do not render the substantive theories advanced in Part II moot. Rather, as constitutional mandates, they merit serious consideration by members of the Senate, regardless of whether they may be judicially enforced. In an article introducing the concept of the judicially underenforced constitutional norm, Professor Lawrence Sager argues that limits on a federal court's ability to enforce a constitutional norm—typically because of institutional constraints such as the political question doctrine—do not translate into the boundaries of that norm.[241] Rather, the additional scope of such norms, even if unen-

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239 Id. at 940-41. The Court ruled that there was no political question which would render the case nonjusticiable. See id. at 941.

240 Once again, *The Impoundment Cases*, discussed supra Part I.C, provide a useful analogy regarding the power of courts to review the actions of the other two coequal branches. In those cases, the political question doctrine did not prevent federal courts from analyzing the refusal of the Executive to spend monies allocated by Congress. See, e.g., Pennsylvania v. Lynn, 501 F.2d 848, 851 & n.11 (D.C. Cir. 1974) (finding that political question doctrine did not preclude review of Secretary of Housing and Urban Development's refusal to fund certain low income housing projects); National Treasury Employees Union v. Nixon, 492 F.2d 587, 603 (D.C. Cir. 1974) (stating that political question doctrine does not prevent court from deciding whether President must grant pay adjustments as mandated by Federal Pay Comparability Act); State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099, 1106 (8th Cir. 1973) (holding that issue of whether Secretary of Transportation may withhold from state congressionally appropriated funds is not political question, and explaining that "'[i]n our overall pattern of government the judicial branch has the function of requiring the executive (or administrative) branch to stay within the limits prescribed by the legislative branch'" (quoting National Automatic Laundry and Cleaning Council v. Schultz, 443 F.2d 689, 695 (D.C. Cir. 1971))).

241 See Lawrence G. Sager, supra note 206, at 1221 (describing theory). Professor Sager's theory has been the subject of substantial commentary over the past two decades. See, e.g., Arizona v. Evans, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (citing theory for proposition that institutional restraints limit ability of Supreme Court to enforce constitutional guidelines); William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 549 (1986)

forceable by the federal judiciary, should have the "full status of positive law which we generally accord to the norms of our Constitution" and "are to be understood to remain in full force."[242]

Professor Sager vigorously maintains that the federal judiciary's adherence to principles of judicial restraint should not be seen as an indication of the complete meaning of the particular norm at issue.[243] The space between the extent of judicial enforcement and the full constitutional norm is, Sager posits, quite large, leaving a considerable amount of enforcement and self-policing to the other branches of government.[244]

The theory's application to the Senate's judicial confirmation duties is readily apparent, and provides an additional way to conceptualize the substantive theories introduced herein. An affirmative obligation on part of the Senate to vote on nominees[245] can be seen as the type of constitutional norm that may be unenforceable by federal courts for procedural reasons, but nevertheless still inherently binding on the Senate. For the reader skeptical of the likelihood of a judicial remedy due to procedural obstacles, the theory of the judicially underenforced norm introduces an alternative means of imparting to the Senate the constitutional duty established in Part II.[246]

CONCLUSION

George Washington wrote:

> Impressed with a conviction that the due administration of justice is the firmest pillar of good Government, I have considered the first arrangement of the Judicial department as essential to the happiness of our Country, and to the stability of its political system; hence the selection of the fittest characters to expound the laws, and dispense justice, has been an invariable object of my anxious concern.[247]

(expressing agreement with Sager's theory); Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129, 1133-34 (1986) (suggesting that prohibition on legislative preference for optometrists over opticians might fall within class of underenforced constitutional norms); Mark Tushnet, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, 94 Mich. L. Rev. 245, 263-64 (1995) (discussing institutional limitations on federal courts).

242 Sager, supra note 205, at 1221.

243 See id. at 1224.

244 See id. at 1263.

245 See supra Part II.A.

246 See Sager, supra note 206, at 1227 (discussing how officials must determine how to comply with underenforced norms); id. at 1264 ("[G]overnment officials are legally obligated to obey the full scope of constitutional norms which are underenforced by the federal courts and thus, these officials are not released from their obligation by a favorable decision of even the Supreme Court. . . .").

247 Letter from George Washington to John Randolph (Sept. 28, 1789) (quoted in Matteson, supra note 66, at 225).

Over the past two centuries, the importance of the federal judiciary's role in the nation's framework has increased markedly, to a position surely beyond even the vision of President Washington.[248] The integrity and efficiency with which the judiciary carries out that role, however, is being jeopardized by the Senate's failure to fulfill its constitutionally mandated duties to provide advice and consent with respect to presidential nominations for federal judgeships. A judicial remedy ought to be available to respond to this threatening situation.

The notion that a federal judge would be willing to intervene in a struggle between the President and the Senate over the appointment of that judge's potential colleagues is certainly novel. Powerful procedural doctrines present obstacles difficult to surmount, and no well established legal theory has been developed on which to base such a claim. Furthermore, a court presented with such a case would feel the pressures of the general prudential concerns that counsel against involvement in what may appear to be a purely political battle.[249]

What distinguishes this situation from other Beltway fights, however, is that the continued viability of the federal judiciary may hinge on the outcome. As the time that nominees are forced to wait increases and the number of backlogged cases rises, those prudential concerns begin to look less overwhelming, and legal methods of overcoming the procedural doctrines begin to look more reasonable. A look at the situation from a broader perspective reveals a Senate which is slowly debilitating a branch of the federal government in a manner that precludes an adequate opportunity for the people to exercise their right to check the Senate's power. Federal court action forcing the Senate to act accountably would not disrupt the division of powers that was so precisely crafted by the Framers. Rather, such an intervention would merely ensure that that power structure remains balanced.

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[248] See, e.g., Tribe, supra note 14, at 138-39 (providing examples of impact of Supreme Court on American society).

[249] See supra note 163 (discussing prudential concerns).

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