



ISSUE BRIEF

QUESTIONS AND ANSWERS: WHY SHOULD I CARE ABOUT JUDGES AND JUDICIAL NOMINATIONS?

Peter Sprigg

Q - Why should pro-family citizens care about the appointment of judges?

A - Many of the negative changes in American society over recent decades have been imposed by judges. The removal of prayer from public schools, the creation of a nationwide “right” to abortion, and the legalization of same-sex “marriage” in Massachusetts were all decisions imposed by activist judges, without considering the will of the people and their elected representatives.

Q - What do you mean by “activist” judges?

A - “Activist” judges are judges who impose their own policy preferences in their decisions. Judges are only supposed to interpret the law, not rewrite it. Legislatures, elected by the people, write laws, and the executive branch of government (headed by an elected official) is responsible for enforcing them. Activist judges effectively take away your right to affect policy by your vote.

Q - How have activist judges abused their power?

A - Judges are abusing their power if they read *into* the Constitution principles that are not declared by the plain language of the Constitution. For example, the First Amendment says, “Congress shall make no law respecting an establishment of religion.” But nowhere does it say that there should be a strict “separation of church and state” at all levels of government, barring any acknowledgment of God. The decision legalizing abortion was based on the “right to privacy” – but no such right is declared in the Constitution.

Q - Are there other concerns about how activist judges make decisions?

A - Yes. In several recent prominent court cases, judges supported their decisions by making reference to foreign laws, court decisions, and international agreements not ratified by the United States. Foreign law should play no part in American court decisions.

Q - How does someone become a judge?

A - Different states have different procedures for selecting judges. Some are appointed and some are elected. But all federal judges (in district courts, circuit courts of appeals, and the U.S. Supreme Court) are appointed by the president with the "advice and consent" of the Senate.

Q - If Republicans control 55 seats in the Senate, then what's the problem?

A - The problem is that a minority of senators, who *support* liberal judicial activism, are trying to prevent some of President Bush's nominees from even *receiving a vote* on the floor of the Senate.

Q - How can they do that?

A - Unlike the U.S. House of Representatives, where the length of debates is limited, the Senate has a tradition of "unlimited debate." In practice, that means that a minority of senators can prevent an issue from even coming to a final vote by insisting on continuing to debate it for an indefinite period of time. This process is known as a "filibuster."

Q - Is there any way to overcome a filibuster?

A - Yes. The Senate can take what is called a "cloture" vote to close debate. However, a cloture motion requires 60 votes (three-fifths of the Senate) to pass, instead of a simple majority of 51. If a judicial nomination can be filibustered, that would mean that a minority of senators (as few as 41 out of 100) could block the appointment of a nominee who has the support of as many as 59 senators.

Q - Have judicial nominations been filibustered before?

A - Filibusters are normally used only to block pieces of legislation. There is no precedent in American history for a judicial nominee who had the clear support of a majority of senators to be blocked from even receiving a vote, by a minority of senators, through the filibuster. And many judges have been confirmed even though more than 40 senators opposed them. (Democrats argue that President

Lyndon Johnson's nomination of Associate Justice Abe Fortas to be chief justice of the U.S. Supreme Court in 1968 was filibustered by Republicans in the Senate. However, Fortas was already a member of the Court, and it is not at all clear that he would have won confirmation if there had been a vote. His nomination was ultimately withdrawn by President Johnson.)

Q - Is it constitutional to require a super-majority of 60 votes in the Senate to approve a judicial nominee?

A - We believe it is not. The Constitution requires a two-thirds vote to do certain specific things, such as ratifying treaties, expelling a member, or convicting an official in an impeachment trial. It says nothing about requiring more than a simple majority to approve a judicial nomination.

Q - If senators can filibuster a bill, don't they have just as much right to filibuster a nomination?

A - No. Writing legislation is the Senate's primary function, and it is therefore appropriate for it to have more discretion in setting the rules when it is carrying out that function. However, appointing judges is primarily a function of the president, in which the Senate plays only a secondary role. Moreover, legislation is subject to amendments, and the filibuster adds a minority lever by which consensus-building amendments can be added to pending bills. A nomination, in contrast, is a basic yes-or-no proposition.

If the liberal minority in the U.S. Senate were as passionate about legislative privileges as it claims, it would object to judicial activism itself, which has done more than anything else to weaken the legislative role. The filibuster is most illegitimate when it is used to protect the seizure of power by the unelected branch of government, the judiciary. Therefore, the Senate should not add any additional barriers to the confirmation of a judge (such as requiring a 60-vote super-majority) beyond what is spelled out in the Constitution.

Q - If the Democrats do decide to filibuster President Bush's judicial nominees, is there anything that can be done about it?

A - Yes. The presiding officer of the Senate (which is Vice President Dick Cheney, when he is present) could rule that filibusters of judicial nominations are not permitted. Such a ruling could then be upheld by a simple majority vote. This "constitutional option" preserves the constitutional right of the president to appoint judges with the advice and consent of the Senate — without adding additional, unconstitutional conditions.

Q - If the constitutional option to end filibusters of judicial nominations only requires a majority vote of 51 senators, and the Republicans hold 55 seats, why haven't they already used it?

A - Some Republican senators are reportedly reluctant to take firm action against the filibuster. Some are hesitant to change longstanding rules and traditions of the Senate – even though, in fact, it is the Democrats who are violating tradition by filibustering judicial nominees in the first place. Some anticipate that someday, in a future Congress with a Republican minority, they might want to use the filibuster themselves to block a bad nominee. Also, Democrats have threatened to bring the rest of the Senate's business to a halt if the constitutional option is exercised.

Q - Does the Family Research Council support the constitutional option?

Yes. Senators of both parties are free to vote against the confirmation of any judge they believe is unqualified. However, we believe that denying some judicial nominees a straight up-or-down vote on the floor of the Senate violates the principles of justice, democracy, and the Constitution.

Q - So what should I do?

A - Write to President Bush and urge him to appoint only judges who know their proper place in our constitutional system and who will interpret the law rather than rewrite it.

Then call, write, or e-mail the two U.S. senators from your state and urge them to do the following three things:

- 1) Support the confirmation of judges who will interpret the law and the Constitution in accordance with its original meaning and intent.
- 2) Oppose the use of filibusters to block judicial nominations, and allow an up-or-down vote of the full Senate on each nominee.
- 3) Support the "constitutional option" to end the filibuster of judicial nominations.

Peter Sprigg is director of the Center for Marriage and Family Studies at the Family Research Council.