

3-2005

## No Constitutional Right to a Rubber Stamp

Richard J. Durbin  
*United States Senator*

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

Part of the [American Politics Commons](#), [Courts Commons](#), [Judges Commons](#), and the [Law and Politics Commons](#)

---

### Recommended Citation

Richard J. Durbin, *No Constitutional Right to a Rubber Stamp*, 39 U. Rich. L. Rev. 989 (2005).  
Available at: <https://scholarship.richmond.edu/lawreview/vol39/iss3/16>

This Letter is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

# NO CONSTITUTIONAL RIGHT TO A RUBBER STAMP

*The Honorable Richard J. Durbin \**

A new Congress is underway in Washington, D.C., but old problems persist. President Bush has again thrown down the gauntlet on judicial nominations.<sup>1</sup> He has announced his intent to renominate every judicial nominee who was not confirmed by the Senate in the previous Congress, except those who chose to withdraw. He has demanded that all his nominees receive up-or-down votes on the Senate floor, and he has supported legislative efforts that would turn the Senate into a rubber stamp for his judicial nominees. Mr. President, it is time to step back from the brink.

## I. ROOSEVELT'S COURT-PACKING PLAN

In the area of judicial nominations, this moment in history is remarkably similar to one that occurred sixty-eight years ago. The country had a newly re-elected president—Franklin D. Roosevelt—whose party controlled Congress and who set out to shape the federal judiciary in his image.<sup>2</sup>

---

\* United States Senator (D-IL), Assistant Minority Leader, and Member, Senate Judiciary Committee. B.S., 1966, Georgetown University; J.D., 1969, Georgetown University.

1. See Press Release, Office of the White House Press Secretary, Statement on Judicial Nominations (Dec. 23, 2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041223-1.html> (last visited Feb. 4, 2005). See generally Michael A. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges*, WASH. POST, Dec. 24, 2004, at A1; Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004, at A1.

2. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 158–59 (rev. ed. 1999) (discussing President Roosevelt's court-packing plan and his intent to increase the size of the Supreme Court of the United States in order to swing the liberal voting bloc in his favor). In the 75th Congress (1937–1939), the Democrats had seventy-six seats in the United States Senate and the Republicans had just sixteen. See United States Senate, Party Division in the Senate, 1789–Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Feb. 6, 2005). In the House, there were 333 Democrats and eighty-nine Republicans. See Office of the Clerk, U.S. House of Representatives, Party Divisions, Political Divisions of the House of Representatives (1789–

President Roosevelt was frustrated by the federal courts in general, and the Supreme Court of the United States in particular, for rejecting the National Industrial Recovery Act and other core legislative components of the New Deal, often by a vote of 5-4. So in 1937, early in his second term, he advocated legislation that would have increased the size of the Supreme Court from nine to as many as fifteen members if judges reaching the age of seventy declined to retire.<sup>3</sup>

One might assume that a popular, newly re-elected president whose party enjoyed large margins in both houses of Congress would face little opposition to his plan. On the contrary, Roosevelt's court-packing scheme was met by fierce resistance. The *New York Herald-Tribune* wrote that FDR's plan "would strike at the roots of that equality of the three branches of government upon which the nation is founded."<sup>4</sup> Walter Lippmann wrote that the Roosevelt plan would "compel the Court to express the will of the Executive."<sup>5</sup> Bar associations condemned the plan, and the former president of the American Bar Association, Silas Strawn, called it "a short cut to dictatorship."<sup>6</sup>

Even congressional Democrats rebelled. The Senate Judiciary Committee, controlled by President Roosevelt's own party, issued a report on the proposed legislation and concluded: "We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle."<sup>7</sup>

Senate Democrats took to the Senate floor in opposition. Senator Warren Austin of Vermont, quoting Theodore Roosevelt, de-

---

Present), [http://clerk.house.gov/histHigh/Congressional\\_History/partyDiv.html](http://clerk.house.gov/histHigh/Congressional_History/partyDiv.html) (last visited Feb. 6, 2005).

3. See ABRAHAM, *supra* note 2, at 158.

4. Editorial, *Seas Blow at Roots of Government*, N.Y. HERALD-TRIB., Feb. 8, 1937, at 10.

5. Walter Lippmann, *The Great Filibuster*, N.Y. HERALD-TRIB., July 6, 1937.

6. *Strawn Scores Proposal*, N.Y. TIMES, Feb. 6, 1937, at 10.

7. S. REP. NO. 75-711, at 14 (1937), reprinted in LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 85 (2d ed. 1996). The Democratic-led Senate Judiciary Committee also stated:

Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact.

clared: "Savages do not like an independent and upright judiciary. They want the judge to decide their way; and if he does not, they want to behead him."<sup>8</sup> A former aide to FDR, Samuel Rosenman, recalled later that "[c]ongressional opposition was carried on more violently and bitterly by members of the President's own party than by the Republicans. The strategy of the Republican leaders was to encourage the Democratic opposition, while they remained scrupulously silent but terribly interested."<sup>9</sup>

Of course, President Roosevelt's plan did not pass. Many historians suggest that the key to the scheme's failure was the "switch in time that saved nine"—the decision at the end of the Supreme Court's 1936–1937 Term by a former foe of key parts of FDR's agenda, Justice Owen Roberts, to change course and support challenged New Deal legislation.<sup>10</sup> Many saw Roberts' switch as proof that the exquisite balance of powers created by America's founders still worked after all. Nevertheless, by pressing Congress to pass his court-packing plan even after the supposed crisis had passed, President Roosevelt over-reached. In the end, opposition from within his own party proved fatal to his plan.

## II. BUSH'S COURT-PACKING PLAN

Much of the media discussion of President George W. Bush's political agenda focuses on how different it is from FDR's agenda. Indeed, President Bush sometimes appears determined to repeal the New Deal entirely. All of the attention to President Bush's apparent desire to repeal many of FDR's biggest successes has overshadowed the President's puzzling desire to repeat one of Roosevelt's worst mistakes.

Once again, a newly re-elected President whose party controls both houses of Congress is trying to change historic practices and upset a careful balance of power in order to re-shape the federal courts and push through his own agenda.

Frustrated with federal court rulings safeguarding privacy rights,<sup>11</sup> women's rights,<sup>12</sup> gay rights,<sup>13</sup> affirmative action,<sup>14</sup> civil

---

8. 81 CONG. REC. 6920 (1937) (statement of Sen. Austin).

9. SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT 156–57 (1952).

10. See ABRAHAM, *supra* note 2, at 159.

11. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2002) (affirming the right to privacy within the home).

liberties,<sup>15</sup> and the separation of church and state,<sup>16</sup> President Bush and his conservative allies accuse Senate Democrats of abdicating the Senate's constitutional responsibilities concerning federal judicial nominees.<sup>17</sup>

Like FDR, President Bush wants to change the rules in order to put more of his own nominees on the federal bench. He has proposed a plan that would require all judicial nominees to receive an up-or-down vote within 180 days of their nomination.<sup>18</sup> He has also expressed support for a proposed radical change in the Senate filibuster rules.<sup>19</sup>

Senate Republicans call the proposed rule-change "the nuclear option" because of the damage it is likely to cause and the retaliation it is likely to provoke.<sup>20</sup> It would reduce the number of votes needed to end a filibuster from sixty to fifty-one.<sup>21</sup> In doing so, it would fundamentally alter the nature of the United States Senate, which was designed to allow precisely the sort of prolonged debate the "nuclear option" seeks to prohibit.<sup>22</sup>

---

12. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (invalidating a ban on so-called "partial-birth abortions" lacking provisions to protect women's health).

13. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2002) (declaring that homosexual conduct is entitled to respect as private activity and that the state could not demean homosexual existence or control their destiny by making their private sexual conduct a crime).

14. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (recognizing the use of "diversity" as an important aspect of educational benefits).

15. See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (holding that a citizen-detainee, seeking to challenge his classification as an enemy combatant, is entitled to receive notice, the factual basis for his classification, and a fair opportunity to rebut the factual assertions before a neutral decisionmaker).

16. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that prayer as part of an official school graduation ceremony was inconsistent with the Establishment Clause of the First Amendment).

17. See, e.g., John Cornyn, *Debunking Double Standards*, 39 U. RICH. L. REV. 979 (2005); John Cornyn, *Standards for the Supreme Court*, 39 U. RICH. L. REV. 971 (2005).

18. See Press Release, President Calls for Judicial Reform, Remarks by the President on Judicial Independence and the Judicial Confirmation Process (May 9, 2003), at <http://www.whitehouse.gov/news/releases/2003/05/20030509-4.html> (last visited Feb. 6, 2005).

19. See *id.*; see also Keith Perine, *Call for Up-or-Down Vote on Judicial Nominees Likely to Fall on Deaf Democratic Ears*, CQ TODAY, Feb. 3, 2005, at 7.

20. See, e.g., Carl Hulse, *Frist Warns on Filibuster over Bush Nominees*, N.Y. TIMES, Nov. 12, 2004, at A21 (discussing the Democrat's filibuster of ten of President George W. Bush's judicial nominees); Charles Hurt, *GOP senators keep 'nuclear option' in reserve for judges*, WASH. TIMES, May 7, 2003, at A6 (discussing what Republican's originally described as the "nuclear option").

21. See Charles Babington, *GOP Moderates Wary of Filibuster Curb*, WASH. POST, Jan. 16, 2005, at A5.

22. See generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L.

It would probably happen like this: the Senate Majority Leader would call for a vote on a judicial nomination. A Senator—presumably a Democrat—would object, signaling his or her intention to filibuster the nomination. The Majority Leader would then offer a motion declaring the filibuster to be in violation of the Constitution. Vice President Cheney—acting in his capacity as presiding officer of the Senate—would decide the issue.<sup>23</sup> He would assert that while Article II, Section 2 of the Constitution requires a supermajority for ratification of treaties, it is silent on the size of the majority needed to confirm judges, cabinet secretaries, and other officers of the United States.<sup>24</sup> Thus, he would assert, filibusters of judicial nominees are unconstitutional.<sup>25</sup>

Proponents of the “nuclear option” are right in predicting that it would seriously damage bipartisan cooperation in the Senate.<sup>26</sup> They are incorrect, however, in claiming that such an extreme measure is necessary and unavoidable.

The truth is, filibusters are not unconstitutional. Article I, Section 5 of the Constitution explicitly states that “Each House may determine the Rules of its Proceedings . . . .”<sup>27</sup> The fact that filibusters are permitted in the Senate but not in the House reflects a fundamental and essential difference between the two bodies. As George Washington famously explained to Thomas Jefferson, the House is the hot coffee, and the Senate is the saucer into which the hot coffee is poured in order to cool.<sup>28</sup> Senate rules that

---

REV. 181, 239–45 (1997) (defending the constitutionality of judicial filibusters); Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & POL. 1 (2004) (defending the constitutionality of filibustering judicial nominees).

23. See U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

24. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

25. *But see supra* note 22.

26. See Babington, *supra* note 21, at A5 (reporting that “[i]f Republicans carry out their threat [to outlaw filibusters of judicial nominees], Democrats vow to use parliamentary tactics to grind the Senate to a standstill.”).

27. U.S. CONST. art. I, § 5, cl. 2.

28. As the story goes, Thomas Jefferson is said to have asked George Washington, over breakfast, why the Constitution provides for the Senate as well as the House. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 359 (Max Farrand ed., rev. ed. 1966). Washington responded, “Why did you pour that coffee into your saucer?” *Id.* Jefferson re-

protect the rights of the minority and allow for extended (but not endless) debate reflect the will of our Founders, they don't undermine that will.<sup>29</sup>

Conservative columnist George Will has come out against the nuclear option because "[t]he filibuster is an important defense of minority rights, enabling democratic government to measure and respect not merely numbers but also intensity in public controversies. Filibusters enable intense minorities to slow the governmental juggernaut. Conservatives, who do not think government is sufficiently inhibited, should cherish this blocking mechanism."<sup>30</sup>

Listening to advocates of the "nuclear option," one might infer that filibusters are a new invention. On the contrary, the Senate has always permitted filibusters.<sup>31</sup>

For 128 years, from 1789 until 1917, individual senators could prevent the Senate from voting on nominations or legislation by refusing to stop talking.<sup>32</sup> In 1917, the Senate passed the first major reform of the filibuster rule.<sup>33</sup> No longer could one senator exercise a veto over the entire Senate.<sup>34</sup> Under the new rules, filibusters would be cut off if two-thirds of the Senate voted to end debate.<sup>35</sup> In 1949, the filibuster rule—which by then was known as Rule XXII—was extended to cover not only pending bills but

sponded, "To cool it." *Id.* Washington's rejoinder was, "Even so, we pour legislation into the senatorial saucer to cool it." *Id.* As explained by Professor Cass Sunstein, "Perhaps the goal of the House was to set proposals before the Senate in the hope that seeing the general direction in which the Nation should move, the Senate would enact more responsible and careful proposals." Cass R. Sunstein, *Legislative Foreword: Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 285 (1996). The Senate rules permitting the use of extended debate serve the express purpose of allowing reasoned debate while protecting the Senate, and the Nation, from drinking the coffee before it cools.

29. According to Professor James Gardner, "the Senate . . . shields minorities from the passions of the majority, to which the House may give effect, and in so doing stabilizes the political system by evening out its course and preventing it from taking ill-advised actions." James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1493 n.160 (2003).

30. George F. Will, *Shock and Awe in the Senate*, NEWSWEEK, Dec. 6, 2004, at 98.

31. See generally Fisk & Chemerinsky, *supra* note 22, at 187–90 (discussing the origins of the filibuster and its early use).

32. See *id.* at 187–98 (discussing the early evolution of the filibuster and the introduction of cloture to end a filibuster).

33. *Id.* at 198–99 (discussing the Martin Resolution which allowed a cloture petition in order to cut off the filibuster debate and force a vote).

34. *Id.*

35. *Id.*

also pending motions and other matters, including nominations.<sup>36</sup> In 1975, the number of votes needed to end a filibuster was reduced even further, from sixty-seven votes to sixty.<sup>37</sup>

“Nuclear option” advocates argue that extreme measures are needed to remedy what they claim is a “judicial emergency.”<sup>38</sup> They claim that Democrats have created a “constitutional crisis” by engaging in “unprecedented obstructionism” of President Bush’s judicial nominees.<sup>39</sup>

That’s nonsense. During President Bush’s first term, the Senate confirmed 204 of his judicial nominees and stopped just ten—a success rate of ninety-five percent. President Bush put more judicial nominees on the federal bench in his first term than any president since Jimmy Carter.<sup>40</sup> At the end of the 108th Congress, there were twenty-six vacancies out of nearly 900 federal judgeships—the lowest number in sixteen years.<sup>41</sup> Compare that to 1993, when the number of judicial vacancies hit 127 under Presi-

---

36. *Id.* at 209–10.

37. *Id.* at 198 n.91, 210; see also SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 106-15, 106th Cong., 2d Sess., R. XXII, at 15–16 (2000), available at <http://rules.senate.gov/senaterules/rule22.htm> (last visited Feb. 6, 2005) (requiring the support of “three-fifths of the Senators duly chosen and sworn” to end a filibuster).

38. See generally Babington, *supra* note 21, at A5 (providing a good summary of the arguments of both sides and describing the “nuclear option”).

39. See, e.g., Richard Lessner, *A Reality Check on Conservative Agenda*, BOSTON GLOBE, Dec. 5, 2004, at D12 (discussing the alleged “unprecedented obstructionism” of Senate Democrats).

40. President Reagan had 165 judges confirmed during his first term, President George H.W. Bush had 195 judges confirmed, and President Clinton had 204 judges confirmed during his first term. See, e.g., Howard Kurtz, *Sen. Roth’s Wife Picked to Be a Federal Judge*, WASH. POST, May 25, 1985, A8 (stating that President Reagan appointed 165 federal judges in his first term); Tony Mauro, *Clinton and the Courts: Diversity of Issues, Judges is Expected*, USA TODAY, Nov. 9, 1992, at 1A (showing that President George H.W. Bush appointed 195 judges during his single term in the presidency); Associated Press, *Clinton Accuses GOP of Damaging Judiciary*, CHI. TRIB., Sept. 28, 1997, at 9 (stating that “Clinton appointed 204 federal judges to lifetime jobs in his first four-year term”). President Bush also had 204 judges confirmed, but his recess appointments of Charles Pickering and William Pryor resulted in a total of 206 Bush judges on the federal judiciary. 150 CONG. REC. S11,830 (daily ed. Nov. 20, 2004) (statement of Sen. Leahy) (stating that the Senate confirmed 204 federal judges during President George W. Bush’s first term in office).

41. 150 CONG. REC. S11,830 (daily ed. Nov. 20, 2004) (statement of Sen. Leahy) (stating that the “26 empty seats on the Federal courts” is the “lowest number of vacant seats on the Federal courts in 16 years” and that at the current pace President George W. Bush will appoint more judges than any president in our history).



dent Clinton.<sup>42</sup> Senator Orrin Hatch frequently stated that the federal judiciary was at “virtual full employment” with sixty vacancies, during the Clinton years.<sup>43</sup>

A look back at the Clinton presidency adds a valuable perspective to the current debate over judicial nominations. As it turns out, many of the judicial vacancies President Bush has filled were created during the Clinton years when Senate Republicans used parliamentary tactics to prevent votes on more than sixty of President Clinton’s judicial nominees.<sup>44</sup> Those sixty-plus nominees represented roughly fifteen percent of all of President Clinton’s judicial nominees.<sup>45</sup> Not only were they denied up-or-down votes on the Senate floor, many were even denied the courtesy of hearings and votes in the Senate Judiciary Committee.<sup>46</sup> Compare that to President Bush’s record: ninety-five percent of judicial nominees confirmed, with half of the total confirmed by a Democrat-controlled Senate.<sup>47</sup>

Even with the filibuster rule in place, President Bush has had considerable success moving our federal judiciary to the right. According to a recent study, President Bush’s nominees have the most conservative voting record on civil rights and civil liberties

---

42. Civilrights.org, *Judicial Nominations and the Clinton Administration*, <http://www.civilrights.org/publications/reports/judges/ch2.html> (last visited Feb. 6, 2005) (stating that when President Clinton assumed office in January 1993, “127 of the 828 authorized federal judgeships were vacant”).

43. 146 CONG. REC. S7519 (daily ed. July 25, 2000) (statement of Sen. Hatch).

44. According to Professor Sheldon Goldman, “before the confirmation wars can be resolved, there must be recognition by the Republicans of the legitimacy of the Democrats’ complaint that Republican obstructionism kept open vacancies that the Clinton Administration, by right, should have filled.” Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 898 (2005); see also Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV. 695, 716 (2003) [hereinafter Goldman, *Unpicking Pickering in 2002*].

45. See CRS REPORT FOR CONGRESS, JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977–2003, at CRS-13 tbl.2(b) (2004), available at <http://www.senate.gov/reference/resources/pdf/RL31635.pdf> (last visited Feb. 6, 2005) (showing that President Clinton appointed a total of 372 judges to the federal district and appellate courts, making a total of 374 with his two Supreme Court appointments).

46. See Goldman, *Unpicking Pickering in 2002*, supra note 44, at 716.

47. 150 CONG. REC. S11,830 (daily ed. Nov. 20, 2004) (statement of Sen. Leahy) (stating that the 204 federal judges confirmed during President George W. Bush’s first term is more than any recent president and of that 204, “the first 100 were confirmed in the 17 months of Democratic Senate leadership”); see also United States Senate, Party Division in the Senate, 1789–Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Feb. 6, 2005) (showing that from June 6, 2001 to November 12, 2002 the Senate was controlled by the Democrats).

issues of the past eight presidents.<sup>48</sup> Over a third of President Bush's nominees to the United States courts of appeal are members of the Federalist Society, an organization whose mission statement contends that "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society."<sup>49</sup> Fewer than one percent of America's lawyers belong to this ultra-conservative organization.<sup>50</sup>

Today, ten of the Nation's thirteen federal appeals courts have a majority of Republican-appointed judges, versus only two such courts with a Democratic majority.<sup>51</sup> The normal rate of attrition makes it nearly certain that all thirteen federal courts of appeal will have a majority of Republican-appointed judges by the time President Bush leaves office. Never before in our history has the federal judiciary been so one-sided. By eliminating the ability of the Senate to block the most extreme of President Bush's judicial nominees, the "nuclear option" would move an already conservative federal judiciary even further to the right.

The "nuclear option" is an extreme solution to a non-existent problem.

It represents an abuse of power. It would un-do the careful system of checks-and-balances Thomas Jefferson and the other Founders carefully and deliberately built into our system of government.<sup>52</sup>

---

48. Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 88 JUDICATURE 20, 26 & fig.1, 28 (2004).

49. The Federalist Society for Law and Public Policy Studies, *Our Purpose*, available at <http://www.fed-soc.org/ourpurpose.htm> (last visited Feb. 6, 2005).

50. See generally Neil A. Lewis, *Mixed Results for Bush in Battles over Judges*, N.Y. TIMES, Oct. 22, 2004, at A1 (discussing the prominent role of the Federalist Society in President Bush's judicial selections and the ultraconservative nature of the Society).

51. See, e.g., Carp et al., *supra* note 48, at 25 (discussing the increasing control of Republican-appointed judges over the federal appeals courts).

52. See generally Michael G. Collins, *Judicial Independence and the Scope of Article III—A View from The Federalist*, 38 U. RICH. L. REV. 675, 676 (2004) (discussing the Founders' view of the independent judiciary as "the bulwark[] of a limited Constitution"); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 495–96 (1995) (defending legislative supermajority requirements, such as the filibuster); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 87–88 (1996) (analyzing the "three-fifths rule" that creates legislative supermajority requirements).

## III. A WAY BACK FROM THE BRINK

It is not necessary to escalate this battle. Last December, shortly after becoming the new Senate Democratic Leader, Senator Harry Reid wrote to President Bush. He wrote, "I hope we can establish procedures for routine collaboration between the White House and Senate Democrats in the appointment of federal judges during the 109<sup>th</sup> Congress."<sup>53</sup>

Unfortunately, the response—so far—has not been encouraging. Rather than reply directly to Senator Reid's letter, President Bush has renominated seven of the ten judicial nominees the Senate refused to confirm in the last Congress (the other three rejected candidates have withdrawn their nominations).<sup>54</sup>

But there is a way back from the brink, and it does not require radical new rules.<sup>55</sup> To the contrary, we should use the rules and routines that have worked in the past.

Senator Orrin Hatch is a proud Republican and a former chairman of the Senate Judiciary Committee. In his autobiography, *Square Peg: Confessions of a Citizen Senator*, Senator Hatch reveals that in 1993, when President Clinton became the first Democratic president in twenty-six years with an opportunity to nominate a Supreme Court Justice, one of the first people he consulted was Senator Hatch.<sup>56</sup> Democrats controlled the Senate by a margin of 56-44,<sup>57</sup> but President Clinton wanted—and he understood that he needed—help from both sides of the aisle.<sup>58</sup>

Senator Hatch told the President that one of his top choices—former Congressman and then-Interior Secretary Bruce Babbitt—

---

53. Letter from Senator Harry Reid to President George W. Bush (Dec. 3, 2004), at <http://reid.senate.gov/record.cfm?id=229302> (last visited Feb. 6, 2005).

54. See Neil A Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. TIMES, Dec. 24, 2004, at A1 (stating that President Bush offered all ten filibustered nominees the prospect of renomination yet three declined the offer: Charles J. Pickering Sr. chose to retire from the bench, while Carolyn B. Kuhl and Miguel Estrada simply declined).

55. See, e.g., Laura T. Gorjanc, Comment, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435 (2004).

56. ORRIN HATCH, *SQUARE PEG: CONFESSIONS OF A CITIZEN SENATOR* 179-80 (2002).

57. See United States Senate, Party Division in the Senate, 1789-Present, [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm) (last visited Feb. 6, 2005) (showing that the 102nd Congress consisted of fifty-six Democratic senators and forty-four Republican senators).

58. See HATCH, *supra* note 56, at 180.

would be highly controversial because of substantial Republican opposition in the Senate.<sup>59</sup> But there were at least two good candidates who could win Senate confirmation, the Senator told the President.<sup>60</sup> Their names: Judge Stephen Breyer of the United States Court of Appeals for the First Circuit and Judge Ruth Bader Ginsberg of the United States Court of Appeals for the District of Columbia Circuit.<sup>61</sup> President Clinton heeded Senator Hatch's advice and nominated both of these distinguished, centrist jurists to the Supreme Court of the United States.<sup>62</sup> Justice Ginsburg was confirmed 96-3 in 1993<sup>63</sup> and Justice Breyer was confirmed 87-9 in 1994.<sup>64</sup>

#### IV. CONCLUSION

In 1937, President Roosevelt's own party stood up to him and said: No, Mr. President, we voted for you and we respect you, but you cannot dictate a change in the federal judiciary at the expense of our constitutional responsibility.

Today, President Bush is poised to repeat President Roosevelt's court-packing mistake. One hopes that members of the President's party will have the courage to stand up for principle and the Constitution, as members of President Roosevelt's party did. With a vacancy on the Supreme Court considered likely soon and possibly more vacancies over the next four years, the stakes couldn't be higher and the need for respectful cooperation couldn't be greater.

---

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. 139 CONG. REC. 18,414 (1993) (showing that on August 3, 1993, Ruth Bader Ginsburg was confirmed to the Supreme Court of the United States by a vote of 96-3); *see also* ABRAHAM, *supra* note 2, at 319.

64. 140 CONG. REC. 18,704 (1994) (showing that on July 29, 1994, Stephen G. Breyer was confirmed to the Supreme Court of the United States by a vote of 87-9); *see also* ABRAHAM, *supra* note 2, at 325.

\*\*\*

# ACKNOWLEDGMENTS

In his *Foreword* to the first issue of the *University of Richmond Law Review*, Dean William T. Muse stated that the journal began as “a service by the Faculty of the Law School which we hope will be of some value to the lawyers of Virginia. If the bar thinks the undertaking worthwhile it will become a permanent publication,—perhaps enlarged in scope and volume.”<sup>1</sup> Dean Muse’s prophecy has become a reality. The *Law Review* has undoubtedly increased its scope and volume to incorporate a more national focus while continuing to be a service to Virginia’s practitioners, judges, and legislators. This issue marks the completion of Volume 39 of the *Law Review*, and with it the end of my time as Editor-in-Chief. At this point, it is appropriate to look back and reflect upon this year’s tremendous accomplishments.

In November 2004, the *Law Review* published the *2004 Annual Survey of Virginia Law*, perhaps the most comprehensive survey ever published by the *Law Review* in its forty-seven years of existence. The highlight of the *2004 Annual Survey* is its tribute to the fiftieth anniversary of the historic decision made by the Supreme Court of the United States in *Brown v. Board of Education*. Contributors to the issue included Oliver W. Hill, Sr., Governor Mark R. Warner, and Judge Robert R. Merhige, Jr., whose passing has greatly saddened the Richmond legal community. To borrow a phrase from Dean Rodney A. Smolla, Judge Merhige truly lived within the law, and I am pleased to announce that the *2005 Annual Survey of Virginia Law* will be dedicated to Judge Merhige’s tenure on the bench and his immense contributions to the law.

The *2005 Allen Chair Symposium* issue contains remarks and essays concerning the federal judicial selection process. The troubles facing the judicial selection process threaten the one attrib-

---

1. William T. Muse, *Foreword*, 1 U. RICH. L. REV. 2 (1958).

ute of the federal government that is truly American: the separation of powers. Political battle lines have been drawn, and the nation is bracing itself for another epic battle over the next nominee to the Supreme Court. Many scholars, a sitting federal appellate judge, and two United States senators contributed to the *2005 Allen Chair* issue, highlighting the troubles facing the judicial selection process and offering possible solutions to the problems.

Finally, the January and May issues included articles written by scholars from all over the nation, dealing with the Confrontation Clause, energy law and the electric utility industry, securities law and regulation, the Federal Sentencing Guidelines, and judicial decision making. The timeliness of these articles illustrates the diligence and hard work of the *Law Review's* members and demonstrates the journal's ability to remain on the cutting edge of the law. The *Law Review* must continue to exploit its ability to publish on time and attract scholars willing to push legal debate to its limits.

As the final chapter to Volume 39 closes, I owe thanks to those people who have made the *Law Review's* success possible. First, I thank my wife, Carrie, for her unwavering love and patience this year. I thank Dean Smolla for his leadership; he has brought an energized, innovative perspective to the law school that was not present when I arrived. The *Law Review's* advisors, Professors John G. Douglass and Carl W. Tobias, deserve many thanks for their steadfast support and sound advice. I also thank Glenice Coombs for her hard work and guidance, without which not one page would have been printed.

My tenure as Editor-in-Chief ends with the publication of this issue. History will not place any significance upon my contributions to the journal. The significance will be placed on the efforts of the *Law Review* Staff and Editorial Board. It was through their hard work that four issues made it to print on time. Although no written words will convey properly my gratitude, I want to personally thank members of the Executive Board—Whit Ellerman, Ryan Frei, Bobby Proutt, Brandy Rapp, and Sean Roche—for their tremendous contributions and leadership this year. Finally, I want to thank Dana Dews for being a constant, calming force in the office throughout the entire year. She filled the role of Executive Editor, advisor, confidante, and friend to many, and I am grateful for her encouragement and support.

Although I am excited about the future, I am saddened somewhat that I will be unable to continue the daily working relationships I have developed this year. I will always cherish the opportunity I have had—the friendships made, the disagreements had, the solutions found, and the goals accomplished. In my mind, the year is ending too quickly.

*These moments we're left with  
May you always remember  
These moments are shared by few  
And those harbor lights  
Aw they're coming into view  
We bid our farewell much too soon  
So drink it up  
This one's for you  
Honey, it's been a lovely cruise<sup>2</sup>*

It has been a privilege.

Thomas K. Johnstone IV  
*Editor-in-Chief*

---

2. JIMMY BUFFETT, *Lovely Cruise*, on CHANGES IN LATITUDES, CHANGES IN ATTITUDES (MCA Records 1977).



