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**Congress**

The nomination and confirmation process for judicial and executive branch positions has been embroiled in unprecedented levels of Senate obstruction since 2009, according to author Alicia Bannon of the Brennan Center for Justice at NYU School of Law.

Democrat-backed changes to the filibuster process in November 2013 have engendered new Republican “time-wasting techniques,” she adds, while the Supreme Court has undercut the president’s recess appointments power.

To adequately staff federal courts and agencies, Bannon endorses two common-sense fixes to overcome abuse of post-cloture debate time and of the blue-slip prerogative.

## **Obstruction of the Senate and the Future of Rules Reform on Nominations**

BY ALICIA BANNON

**O**n the eve of the Senate’s month-long August recess, Sen. Mike Enzi (R-Wyo.) blocked an effort to confirm a block of 25 ambassadors by unanimous consent—including ambassadors to foreign policy priority countries such as Russia. Citing Senate Democrats’ changes to the filibuster procedure in November 2013, Sen. Enzi observed that “[w]e used to pass ambassadors and all kinds of people en bloc,” but “it takes a little longer to do the whole process” now.

Following an outcry, the Senate eventually confirmed the Russian ambassador later that night, but dozens of other ambassador posts remain vacant, including in Guatemala, one of the principal origin countries for the surge of unaccompanied child migrants to the U.S. This is just one small, but important, sign of a broken Senate, which is making it dangerously difficult for our government to function effectively.

*Alicia Bannon is Counsel in the Democracy Program at the Brennan Center for Justice at NYU School of Law. Her work focuses on judicial selection and promoting fair and impartial courts, including a series of studies examining the impact of federal judicial vacancies on the trial courts.*

**Unprecedented Levels of Senate Obstruction.** The nomination and confirmation process for judicial and executive branch positions has been embroiled in unprecedented levels of Senate obstruction since 2009, even after changes to the filibuster process in November 2013 allowed up-or-down votes on several high-stakes nominees.

Moreover, a recent Supreme Court decision, *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014), has opened the door to even greater obstruction as the Court validated the use of “pro forma” Senate sessions—sessions in name only where no business occurs—as a way to block the president’s power to make temporary recess appointments.

As with Sen. Enzi’s actions in connection with the confirmation of ambassadors, Republican senators have cited the weakening of the filibuster power as justification for slow-walking nominations. But changes to the filibuster came only after unprecedented abuse of the practice—and it is our agencies, courts, and the American public that are paying the price from ongoing obstruction.

**Two Common-Sense Changes.** With the clock ticking down to the mid-term elections, pressure is mounting on the Senate to ensure that our courts and executive agencies are adequately staffed. Common-sense changes to Senate procedures, including requiring senators to forfeit post-cloture “debate” time if they fail

to use it and reforming the Senate Judiciary Committee's blue slip process, would go a long way toward ensuring that the Senate meets its constitutional duty to provide "advice and consent" on nominees. These reforms are vital.

While partisan disputes over executive and judicial nominees are nothing new, in recent years the Senate has seen a breakdown in comity and cooperation around the confirmation of nominees, leaving courts and agencies understaffed. In most cases, nominees have been held up not because of concerns about their qualifications, but for partisan reasons, including efforts to deny controversial agencies such as the National Labor Relations Board a quorum to adjudicate disputes.

### Response to Filibuster Abuse.

From 1967 through 2002, cloture—a motion to end debate, which is often used as a proxy for the use of the filibuster—was only once sought on more than five nominations in a two-year congressional term, according to the Congressional Research Service. In contrast, since 2002, cloture was only once sought on fewer than 14 nominations in a term. (That was in 2007-2008, when the president and the Senate minority were in the same party, making the filibuster an unlikely tool.)<sup>1</sup>

Reliance on the filibuster further escalated after President Barack Obama took office in 2009. In fact, of the 168 cloture motions ever filed or reconsidered on nominees, nearly half have occurred since 2009, according to a November 2013 Congressional Research Service report.<sup>2</sup> Among other changes, the Senate has seen levels of polarization unprecedented in the modern era, along with the loss of leaders who had previously brokered compromises when disputes over filibustered nominees threatened to derail the confirmation process.<sup>3</sup>

Use of the filibuster was transformed last November following a stand-off over Republicans blocking an up-or-down vote on three nominees to the U.S. Court of Appeals for the D.C. Circuit—a Court often described as a pathway for future Supreme Court justices and with outsized influence on regulatory cases. With Majority Leader Harry Reid (D-Nev.) arguing that minority obstruction had "turned 'advise and consent' into 'deny and obstruct,'" <sup>4</sup> Senate Democrats replaced the 60-vote requirement for cloture with a simple majority vote for all executive and judicial nominations (excluding

the Supreme Court), while leaving the super-majority requirement in place for legislation.<sup>5</sup>

These changes have had a substantial impact on the confirmation process, weakening the capacity of a Senate minority to obstruct nominations. Among other things, eliminating the super-majority requirement for cloture cleared the path to up-or-down votes on the three D.C. Circuit nominees, the director of the Federal Housing Finance Agency, the chair of the Federal Reserve, and the secretary of the Department of Homeland Security.

### Other Time-Wasting Techniques Employed.

At the same time, however, these changes contributed to further breakdowns in comity within the Senate, and substantial obstruction continues on two main fronts: the use of time-wasting techniques, such as utilizing the post-cloture debate period to eat up Senate floor time and slow the confirmation of nominees and other congressional business; and abuse of the blue slip convention, which gives home-state senators the ability to keep a judicial nominee from moving forward in the Judiciary Committee, to delay the nomination and confirmation process for judges.

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**"For the Senate to function, it needs comity, and to function well, it needs all of its members—all of them—to cooperate."**

SENATE SCHOLAR NORM ORNSTEIN

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As Senate scholar Norm Ornstein has explained, "The Senate runs on unanimous consent for almost everything it does, and it's more of a delicate organism than a well-oiled machine. For the Senate to function, it needs comity, and to function well, it needs all of its members—all of them—to cooperate."<sup>6</sup> Historically, non-controversial nominees have moved through the Senate by unanimous consent, a process by which the Senate can expedite proceedings by setting aside procedural rules if no Senator objects.

But unanimous consent has become increasingly rare for nominations—meaning that most confirmations today require overcoming a series of procedural hurdles, even for non-controversial nominees. Since the November 2013 filibuster changes, for example, 31 nominees have been subject to cloture votes even though they were ultimately confirmed unanimously, according to a Common Cause analysis.<sup>7</sup>

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<sup>5</sup> Senate Floor Wrap-Up for Thursday, November 21, 2013, <http://democrats.senate.gov/2013/11/21/senate-floor-wrap-up-for-thursday-november-21-2013/#.U-zyCPldU68>.

<sup>6</sup> Norm Ornstein, *Senate Minority Party Wields the Filibuster as a Weapon of Mass Obstruction*, National Journal (July 17, 2013), available at <http://www.nationaljournal.com/columns/washington-inside-out/senate-minority-party-wields-the-filibuster-as-a-weapon-of-mass-obstruction-20130717>.

<sup>7</sup> See Fix the Senate Now, *FTSN Memo: Senate Gridlock & Senate Reform* (July 24, 2014), <http://fixthesenatenow.org/news/entry/ftsn-memo-senate-gridlock-senate-reform/#.U-zzQvldU69>.

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<sup>1</sup> Richard S. Beth, Congressional Research Service, *Cloture Attempts on Nominations: Data and Historical Development* (June 26, 2013), available at [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C\\*P%2C%3B%3C%20P%20%20%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*P%2C%3B%3C%20P%20%20%0A).

<sup>2</sup> Richard S. Beth & Elizabeth Rybicki, Congressional Research Service, *Nominations with Cloture Motions, 2009 to the Present 1* (Nov. 21, 2013), available at <http://s3.documentcloud.org/documents/838702/crs-filibuster-report.pdf>.

<sup>3</sup> See, e.g., The Polarization of the Congressional Parties, Voteview.com (Jan. 19, 2014), [http://voteview.com/political\\_polarization.asp](http://voteview.com/political_polarization.asp).

<sup>4</sup> Senator Harry Reid, Press Release, Reid Remarks on Changing The Senate Rules (Nov. 21, 2013), available at [http://www.reid.senate.gov/press\\_releases/2013-11-21-reid-remarks-on-changing-the-senate-rules#.U-zwqPldU6](http://www.reid.senate.gov/press_releases/2013-11-21-reid-remarks-on-changing-the-senate-rules#.U-zwqPldU6).

Most significantly, once cloture is invoked on a nominee, under the Senate rules time is set aside for “post-cloture debate” before the final vote takes place. For high-level executive positions and circuit court judges, the post-cloture debate period is 30 hours, while other executive branch nominees face eight hours of post-cloture debate time (equally divided between the parties), and district court nominees face two hours. (Even these shorter debate times are part of an agreement that expires in 2015—meaning that all nominees could face 30-hour post-cloture debate periods in the future.) Moreover, “debate” is a misnomer—under the rules, post-cloture debate time can keep the Senate from conducting any other business without any debate actually occurring.

By routinely using up post-cloture debate time, senators have been able to run down the clock on Senate floor time, leaving the Senate with insufficient time to consider an accumulating list of nominees. While Majority Leader Reid has prioritized confirming judicial nominees, substantially accelerating confirmation rates in recent months, scores of executive nominees are waiting for a vote. As of July 21, 2014, there were more than 120 nominees to executive branch offices and independent agencies pending on the Senate floor, according to Common Cause, as compared with only 29 at an equivalent point in President George W. Bush’s term and 25 at an equivalent point in President Clinton’s term.<sup>8</sup>

### Blue Slip Abuses

A second source of obstruction targets judicial nominees: the blue slip convention, by which a senator can keep a nominee to a judgeship based in their home state from moving forward through the Judiciary Committee, a practice that applies to both trial and appellate judgeships.<sup>9</sup> While the process is intended to ensure White House consultation with home-state senators on judicial nominees, senators need not give an explanation as to why they are withholding the blue slip, and may withhold one even if the White House sought input from the senator prior to the nomination.

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### More than half of all judicial vacancies currently lack nominees.

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The White House has complained about blue slip abuse, noting that among other things, some senators block nominees without explanation or refuse to consult with the White House in a timely manner while using the threat of the blue slip to discourage the president from moving forward with nominees.<sup>10</sup> These concerns are supported by the numbers: strikingly, more than half of all judicial vacancies currently lack nomi-

<sup>8</sup> *Id.*

<sup>9</sup> For appellate judgeships, the blue slip is provided to senators from the retiring judge’s home state.

<sup>10</sup> See White House Press Briefing by the Press Secretary Jay Carney (May 13, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/05/13/press-briefing-press-secretary-jay-carney-51314>.

nees, a figure that is heavily concentrated in states with Republican senators.

Indeed, according to a June 2014 analysis by Russell Wheeler at the Brookings Institution, there are 41 vacancies that are at least six months old with no nominees, 86 percent of which come from states with at least one Republican senator. These lop-sided numbers strongly suggest that abuses in the consultation process, along with the threat of the blue slip, have slowed down the process of filling judgeships. Moreover, obstruction at the consultation level appears more extensive than under previous administrations. At an equivalent point in President Bush’s second term, for example, there were 28 such vacancies, 63 percent of which came from states with at least one Democratic senator.<sup>11</sup>

While rapid progress in filling judicial vacancies in recent months has reduced the number of judicial nominees awaiting confirmation, the operation of the blue slip and related obstruction in the consultation process has left dozens of judicial vacancies without nominees altogether. As a result, many vacancies may remain unfilled for the foreseeable future—contributing to delays and other burdens on courts and litigants.<sup>12</sup>

### Impact of Noel Canning on the Recess Appointment Power

In the past, when the Senate was unable to move forward on confirming nominees, one backstop to ensure functioning courts and agencies was the president’s power to make recess appointments—temporary appointments that can be made without Senate confirmation when the Senate is in recess. In its June decision in *National Labor Relations Board v. Noel Canning*, however, the Supreme Court made it easier for Congress to block the president from making recess appointments as well—adding even greater urgency to Senate obstruction of the confirmation process.

*Noel Canning* affirmed the president’s historically broad power under the Constitution to make recess appointments, despite calls to dramatically narrow the kinds of vacancies and Senate recesses subject to this power. However, the Court also found that three of the president’s recess appointments to the National Labor Relations Board were invalid, because they were made during a period when the Senate was holding pro forma sessions—sessions in name only, which last a few seconds with no business taking place. By validating pro forma sessions as a way to block the president’s recess appointment power, the Supreme Court handed the Senate even greater power in the appointments process and created opportunities for further obstruction.

The NLRB recess appointments at issue in *Noel Canning* were made under the backdrop of a long-standing partisan tug-of-war about the agency. Senate Republicans blocked the president’s appointees through the use of the filibuster with the goal of rendering the agency, in the words of one senator, “inoperable.” As a

<sup>11</sup> Russell Wheeler, Brookings Institution, *Tempering Judicial Confirmation Optimism* (June 12, 2014), <http://www.brookings.edu/blogs/fixgov/posts/2014/06/12-obama-bush-judicial-confirmation-optimism-wheeler>.

<sup>12</sup> See Alicia Bannon, Brennan Center for Justice, *The Impact of Judicial Vacancies on Federal Trial Courts* (July 21, 2014), available at <http://www.brennancenter.org/publication/impact-judicial-vacancies-federal-trial-courts>.

result, the president sought to staff the agency through recess appointments.

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**Pro forma sessions had never been used to interfere with the president's recess appointment power before 2007.**

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Recognizing that the president intended to make recess appointments, however, House Republicans refused to permit the Senate to adjourn for more than three days for its winter recess (pursuant to the Constitution's Adjournments Clause). As a result, the Senate utilized pro forma sessions in order to take a recess. Significantly, pro forma sessions had never been used to interfere with the president's recess appointment power before 2007, when Majority Leader Harry Reid used the tactic in an effort to block recess appointments by President George W. Bush.

The Court approved this procedural trick, ruling that pro forma sessions should be treated as any other Senate sessions—thus leaving either branch of Congress with the power to effectively block the president from making recess appointments by refusing to consent to a Senate recess absent pro forma sessions. While an individual senator could keep the Senate from using pro forma sessions during a recess by making a quorum call,<sup>13</sup> effectively forcing the Senate back into a normal session unless there was an agreement to have a true recess, there is strong institutional pressure to consent to pro forma sessions, as evidenced by their successful use in 2007 and 2012.

The result is that recess appointments are less likely to work as a safeguard when the Senate fails to move on nominees—further raising the stakes for the Senate's confirmation process and adding even greater urgency to the need to reform Senate practices.

### Time for Reform

In the short time remaining before the midterm elections, the Senate should undertake two common-sense

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<sup>13</sup> See Tom Goldstein, *Can a president (with a little help from one senator of his party) circumvent most of the Court's limitation on the recess appointments power?*, SCOTUSblog (June 27, 2014), <http://www.scotusblog.com/2014/06/can-a-president-with-a-little-help-from-one-senator-of-his-party-circumvent-most-of-the-courts-limitation-on-the-recess-appointments-power/>.

reforms to help return to historical norms, where obstruction of nominees was the exception, not the rule.

**1. 'Use-or-Lose' Post-cloture Debate Time.** First, the Senate should adopt a “use it or lose it” standard for post-cloture debate time—a change that Reid suggested in early July he might consider.<sup>14</sup> Debate time should be permitted only if it is actually being used for debate—and not as a procedural trick to slow down consideration of nominees without a single word actually being uttered. This reform would preserve space for real discussion about nominees while creating costs to slowing down the confirmation process simply for the purpose of delay.

**2. Curb Blue-Slip Abuse.** Second, Judiciary Committee Chair Sen. Patrick Leahy (D-Vt.) should adopt reforms to the blue slip process, including requiring transparency as to why a senator is blocking a nominee and barring blue slip obstruction when the White House had sought consultation with the senator before the nomination was announced. While Sen. Leahy has emphasized the importance of the blue slip practice in ensuring consultation on judicial nominations, these reforms would preserve the role of consultation with home-state senators in the identification of judicial nominees, without empowering senators to simply block the filling of judgeships.

Indeed, there is precedent for such changes. For example, when Sen. Orrin Hatch (R-Utah) chaired the Judiciary Committee in 2003, he did not allow a “negative” blue slip to prevent the committee from moving forward with a nomination, “provided that the Administration has engaged in pre-nomination consultation with both of the home-state Senators.”<sup>15</sup>

Too often in recent years, the Senate confirmation process has been an opportunity for partisan gamesmanship and obstruction, leaving courts, agencies, and the American public as political casualties. With only a small window of time left before the end of the Senate's term, it is time for procedural reform to help end obstruction of nominees.

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<sup>14</sup> See Sahil Kapur, *Harry Reid Threatens to Revisit "Nuclear Option" on Filibuster Rules*, Talking Points Memo (July 7, 2014), <http://talkingpointsmemo.com/dc/harry-reid-threatens-revisit-nuclear-option-filibuster-rules>.

<sup>15</sup> Mitchel A. Sollenberger, Congressional Research Service, *The History of the Blue Slip in the Senate Committee on the Judiciary, 1917-Present*, Summary (Oct. 22, 2003), available at [http://assets.opencrs.com/rpts/RL32013\\_20031022.pdf](http://assets.opencrs.com/rpts/RL32013_20031022.pdf).