

## Myth of the Up or Down Simple Majority Vote

Myths abound in American politics—false claims that are put forward for partisan gain under the guise of constitutional or moral legitimacy. Among them are the myth of the electoral mandate, the myth of original intent, and the myth of the will of the American people. The recent Supreme Court nominations from President Bush have been accompanied by an attempt to construct a new reality: the mandate of an up or down simple majority vote on Supreme Court nominees.

There are two parts to this emerging construction: that there be an up or down vote and that such a vote must be governed by a simple majority of those voting. Any claim that the Constitution or at least political tradition requires the Senate to conduct an up or down vote on whether to confirm a Supreme Court nominee is false. The relevant paragraph of the Constitution is Article II Section 2:

He (the president) shall have Power, by and with the 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 . . .

Whether one adopts an interpretative stance of plain meaning, original intent, or historical precedence, the argument that an up or down vote on Supreme Court nominees is required cannot be justified. While Section 2 clearly indicates that the consent of the Senate is required for a Supreme Court judge to be appointed, the failure to give that consent can occur in a number of ways: through a specific vote on the confirmation question, as with the nominations of Robert Bork, Harold Carswell, and Clement Haynsworth, or by not bringing the issue of consent to a vote at all.

Historically, avoiding an up or down vote on confirmation has happened in three ways. Most common has been postponing consideration of the issue, a technique easily used by the Senate majority, which controls the flow of business. Nominations submitted have languished by the failure to consider them, a consideration which lies with the leadership of the Senate majority and which has occurred no fewer than 10 times in Supreme Court nominations. This scenario is most common when a president's opponents control the Senate, as with Senate Republicans during the Clinton administration and Democrats during a portion of the senior Bush presidency.

Another way to avoid a Senate vote is for the president to withdraw the nomination. This has occurred in at least five instances, the only two in the past 50 years being Bush's withdrawal of Harriett Miers and Reagan's withdrawal of Douglas Ginsburg. Interestingly in both instances the pressure for withdrawal came principally from within the president's own party, not from the opposition. Speculation is cheap, but it is certainly possible that both could have commanded a majority vote for confirmation in the Senate had their nominations been permitted a vote.

Finally, a direct vote on whether to give consent has been avoided through the instigation of a filibuster, unlimited debate designed to keep an issue from coming to the floor of the Senate for a vote. Whereas postponement is a tool of the majority, the filibuster is an instrument by which a minority in the Senate can register its strong opposition regarding an issue, effectively forcing a super majority of 60 to shut off debate and permit the issue to come to a vote. In Supreme Court nominations, it has been used only once, in 1968 by a coalition of Republicans and conservative Southern Democrats to forestall a vote on President Johnson's nomination of Abe Fortas to be Chief Justice of the United States. At that time 67 votes were required to shut off debate and the vote of 45 to 43 in favor of closing debate fell well short of that requirement. Despite partisan efforts to claim either that this was not a filibuster or that it was not a scenario in which a majority favored the nominee, certainly the thinking at that time was that a straight up or down vote on Fortas would have confirmed his nomination. The vote itself suggests that and the fact that opponents felt it necessary to filibuster rather than permit an up or down vote also suggests that. Regardless, the action was a filibuster, permitted to operate as a filibuster, and no effort was made to circumvent the traditional operation of a filibuster or say it could not be employed in a Supreme Court nomination.

Of those three methods to prevent a consent vote, only the filibuster nonetheless provides an opportunity to vote on the nomination, albeit forcing a super majority (*viz.*, 60 among the 100 senators) to accomplish confirmation. That may be a reasonable criterion for appointments to lifetime positions.

Clearly, super majority approval of Court nominees was not required by the framers of the Constitution. Had they intended to do so, they would have made it explicit, as they did in the first part of Article II Section 2 regarding treaties. However, to assert that the Constitution mandates approval by a simple majority of those voting is also unjustified. The Constitution is simply silent on the matter, as it is about so much of the operation of Congress. Approval by a simple majority is merely the way the Senate has operated when voting on issues except where it has established specific rules to the contrary, as with the filibuster. To suggest that Supreme Court nominations cannot be filibustered has no constitutional foundation nor historical precedent.

In the current setting of the Alito nomination, supporters have opined that judicial nominations should be free from partisan rancor and decried the strong opposition expressed by the minority as partisan rhetoric. But partisan nominations evoke partisan responses. It is the president who determines whether a nomination will stir controversy. Presidents Johnson and Reagan opted for the politics of controversy in nominating Fortas and Bork, respectively. Presidents Hoover and Ford chose the politics of consensus in nominating Cardozo and Stevens. President Bush elected for the politics of controversy, unintentionally with the nomination of Miers who was surprisingly doomed by the president's own partisans, and then with Alito who pacified those same partisans clamoring for a known strong conservative while aggravating and activating those on the left seeking a more centrist nominee.

The only way to turn controversial nominations into more civil affairs is to appoint nominees who can command a super majority in the Senate. Nominees lacking support from three-fifths of the Senate are controversial, through no fault of their own, but by the circumstances of the vacancy and the political setting in which they have been placed. The filibuster provides an appropriate mechanism by which the Senate and the American people can be reassured through a 60-vote consensus that this nominee is right for this vacancy at this particular point in time. Were I a senator, I would filibuster every Supreme Court nomination in order to secure justices that have the support of at least three-fifths of the senators.