**THE WHITE HOUSE**

WASHINGTON

May 6, 2003

Dear Senator Schumer:

On behalf of President Bush, I write in response to your letter of April 30.

You propose that the President and Senate leader of the opposite party select in equal numbers members of citizen judicial nominating commissions in each State and circuit who would then select one nominee for each judicial vacancy. The President then would be required to nominate the individual selected by the commission and the Senate required to confirm that individual, at least absent "evidence" that the candidate is "unfit for judicial service." You propose this as a permanent change to the constitutional scheme for appointment of federal judges.

We appreciate and share your stated goal of repairing the "broken" judicial confirmation process and the "vicious cycle" of "delayed" Senate nominees. But we respectfully disagree with your proposal as inconsistent with the Constitution, with the history and traditions of the Nation's federal judicial appointments process, and with the soundest approach for appointment of highly qualified federal judges, as the Founders determined. Rather, as President Bush and many Senators of both parties have stated in the past, the solution to the broken judicial confirmation process is for the Senate to exercise its constitutional responsibility to vote up or down on judicial nominees within a reasonable time after nomination, no matter who is President or which party controls the Senate.

## I. The Constitution, the Current Problem, and the Solution

Article II of the Constitution provides: The President "shall nominate, and by with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ." During the first Congress and throughout most of this Nation's history, the Senate has both recognized and exercised its constitutional responsibility under Article II to hold majority, up-or-down votes on a President's nominees within a reasonable time after nomination. The Framers intended that the Senate vote on nominations would prevent Presidential appointment of "unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." *Federalist* 76.

Your proposal would effectively transfer the nomination power of the President and the confirmation power of the Senate to a group of unelected and unaccountable private citizens. As the Supreme Court has explained, however, the Appointments Clause is "more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Claude prevents congressional encroachment upon the Executive and Judicial Branches. This disposition was also designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to

interest-group pressure and personal favoritism than would a collective body." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citations omitted). Importantly, as the Supreme Court has also explained, the Appointments Clause not only guards against encroachment "but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. CIR*, 501 U.S. 868, 878 (1991). Therefore, "neither Congress nor the Executive can agree to waive this structural protection" afforded by the Appointments Clause. *Id*. at 880. These principles and precedents amply demonstrate the constitutional and structural problems with any proposal to transfer the constitutional responsibilities of the President and the Senate to a group of unelected and unaccountable private citizens.

That said, we very much appreciate your recognition that the Senate's judicial confirmation process is "broken." The precise problem, in our judgment, is that the Senate has too often failed in recent years to hold votes on judicial nominees within a reasonable time after nomination (often because a *minority* of Senators has used procedural tactics to prevent the Senate from voting and expressing its majority will). Many appeals court nominees have waited years for votes; many others have never received votes. Today, for example, although the Senate never before has denied a vote to an appeals court nominee on account of a filibuster, a minority of Senators are engaged in unprecedented simultaneous filibusters to prevent up or down votes on *two* superb nominees, Priscilla Owen and Miguel Estrada, who were nominated two years ago and who have the support of a majority of the Senate.

The problem of the Senate not holding votes on certain judicial nominees is a relatively recent development, albeit not new to this Presidency. In the Administrations of both President George H.W. Bush in the 102nd Congress and President Clinton in the 106th Congress, for example, too many appeals court nominees never received up-or-down votes. As President Bush has explained, however, the problem has persisted and significantly worsened in the 107th and 108th Congresses during this President's tenure.

President Bush's commitment to solving this problem also is not new. In June 2000, during the Presidential campaign, then-Governor Bush emphasized that the Senate should hold up-or-down votes on all nominees within a reasonable time after nomination (60 days). Last fall, after two additional years of Senate delays that were causing a judicial vacancy crisis (an "emergency situation," in the words of the American Bar Association), the President proposed a comprehensive three-Branch plan to solve the problem. President Bush stated that this three-Branch plan should apply now and in the future, no matter who is President or which party controls the Senate. In particular, he proposed that judges provide one-year advance notice of retirement where possible; in March 2003, the Judicial Conference adopted the President's recommendation. The President proposed that Presidents nominate judges within 180 days of learning of a vacancy; the President is complying with this part of the plan and already has submitted nominations, for example, for the 15 new judgeships created on November 2, 2002. The President also proposed that the Senate vote up or down on judicial nominees within 180 days of receiving a nomination, a generous period of time for all Senators to evaluate nominees and to have their voices heard and their votes counted.

In the past, you and Senators of both parties have publicly agreed with the need for timely Senate votes on judicial nominees. On March 7, 2000, for example, you stated: "The basic problem is it takes so long for us to debate those qualifications. It is an example of Government not fulfilling its constitutional mandate because the President nominates, and *we are charged with voting on the nominees*. . . . I also plead with my colleagues to move judges with alacrity – *vote them up or down*. But this delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of very sincere people who have put themselves forward to be judges and then they hang out there in limbo."

In the 2000 campaign, moreover, several Democrat Senators such as Senator Leahy and Senator Harkin publicly and expressly agreed with then-Governor Bush's proposal for timely votes on nominees. In addition, Senator Specter in 2002, Senator Leahy in 1998, and Senator Bob Graham in 1991 all introduced Senate proposals to ensure timely up-or-down votes on judicial nominees. The Chief Justice, speaking on behalf of the federal Judiciary, also has expressly asked the Senate to ensure prompt up-or-down votes on nominees. And the American Bar Association, for its part, adopted a resolution last summer asking the Senate to hold prompt votes on judicial nominations, stating: "Vote them up or down, but don't hang them out to dry."

In seeking to fix the broken Senate confirmation process, we respectfully ask that you and other Senators consider these past statements, a sample of which are listed below, advocating timely up-or-down Senate votes on judicial nominees and ensure such votes no matter who is President or which party controls the Senate:

- *Senator Leahy* on October 3, 2000, stated: "Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo. *Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no – not vote maybe*. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting 'maybe,' but we are doing a terrible disservice to the man or woman to whom we do this."

    - *Senator Leahy* on June 18, 1998, stated: "I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. *If we don't like somebody the President nominates, vote him or her down*. But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators."

- *Senator Daschle* on October 5, 1999, stated: "As Chief Justice Rehnquist has recognized, 'The 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.' *An up or down vote, that is all we ask for Berzon and Paez*. And after years of waiting, they deserve at least that much. . . . *I find it simply baffling that a Senator would vote against even voting on a judicial nomination*."

- *Senator Harkin* on September 14, 2000, stated: "I'll just close by saying that *Governor Bush had the right idea*. He said the candidate should get an up or down vote within 60 days of their nomination."

    - *Senator Harkin* on October 6, 2000, stated that then-Governor Bush's proposal for an up-or-down vote within 60 days of nomination was a "great idea."

- *Senator Biden* on March 19, 1997, stated: "I respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor *and have a vote on the floor*."

- *Senator Bob Graham* on April 24, 1991, introduced a bill that would require the Judiciary Committee to report a nomination within 90 days of nomination and *would require an up-or-down vote on the floor within 120 days of nomination*. Senator Graham stated: "I consider it a judicial emergency when a judgeship is vacant for one day more than necessary."

- *Senator Kennedy* on February 3, 1998, stated: "We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. *But give them a vote*."

    - On September 21, 1999, *Senator Kennedy* stated: "It is true that some Senators have voiced concerns about these nominations. But that should not prevent a roll call vote which gives every Senator the opportunity to vote 'yes' or 'no.' . . . *These delays can only be described as an abdication of the Senate's constitutional responsibility* to work with the President and ensure the integrity of our federal courts."

- *Senator Durbin* on September 28, 1998, stated: "I am not suggesting that we would give our consent to all of these nominees. I am basically saying that this process should come to a close. *The Senate should vote*."

- *Senator Feinstein* on September 16, 1999, stated: "*A nominee is entitled to a vote. Vote them up; vote them down*."

    - *Senator Feinstein* on October 4, 1999, stated: "Our institutional integrity requires an up-or-down vote."

- *Senator Harry Reid* on June 9, 2001, stated: "I think we should have up-or-down votes in the committee and on the floor."

- *Senator Feingold* on March 8, 2000, stated: "All Judge Paez has ever asked for was this opportunity: an up or down vote on his confirmation. Yet for years, the Senate has denied him that simple courtesy."

- *Senator Kohl* on September 21, 1999, stated: "These nominees, who have to put their lives on hold waiting for us to act, *deserve an up or down vote*."

    - *Senator Kohl* on May 15, 1997, stated: "[L]et's breathe life back into the confirmation process. Let's vote on the nominees who already have been approved by the Judiciary Committee, and let's set a timetable for future hearings on pending judges. *Let's fulfill our constitutional responsibilities*."

- *Senator Lincoln* on September 14, 2000, stated: "If we want people to respect their government again, then government must act respectably. It's my hope that we'll take the necessary steps to give these men and these women especially *the up or down vote that they deserve*."

- *Senator Boxer* on January 28, 1998, stated: "I think, whether the delays are on the Republican side or the Democratic side, let these names come up, *let us have debate, let us vote*."

    - *Senator Boxer* on May 14, 1997, stated: "According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. *It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor*."

- *Senator Sarbanes* on December 15, 1997, stated: "This politicization . . . has been extended to include the practice of denying nominees an up or down vote on the Senate floor or even in the Judiciary Committee. *If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served*."

    - *Senator Sarbanes* on March 19, 1997, stated: "It is not whether you let the President have his nominees confirmed. *You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today*."

- *Senator Levin* on September 14, 2000, stated: "The truth of the matter is that the leadership of *the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts*."

- *Senator Levin* on May 24, 2000, stated: "These Michigan candidates . . . deserve to have *an up or down vote* on their nominations. . . . The Senate slowdown has a serious impact on the administration of justice."

## II. Additional Points Regarding Your Proposal

I also want to make three other points regarding your proposal.

*First*, contrary to an implicit suggestion in your proposal, the members of these citizen committees themselves will bring their own views about the best qualities for judicial candidates, and their own preferences and visions and ideologies. But there is an important difference between these private citizens, on the one hand, and the President and 100 Senators, on the other. The American people did not elect these citizens to exercise this critical constitutional responsibility and cannot hold them accountable for their exercise of it.

Moreover, the Framers of the Constitution expressly considered and rejected a committee nomination process, concluding that such a process was unlikely to focus on the "intrinsic merit of the candidate." *Federalist* 76. As Hamilton explained, "in every exercise of the power of appointing to offices by an assembly of men we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly." *Id.* It will "rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations." *Id.*

By contrast, "[t]he sole and undivided responsibility of one man" – the President – "will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." *Id.* The Framers wanted the President alone to exercise the power of nomination, moreover, because the "blame of a bad nomination would fall upon the President singly and absolutely." *Federalist* 77. In a committee nomination process, by contrast, "all idea of responsibility is lost." *Id.*

For these reasons, the Framers concluded that the President alone was to nominate and the Senate as a body was to vote up or down on the President's nominations.

*Second*, you explain that your proposal would ensure the merit of federal judges. In your letter to President Bush of March 16, 2001, however, you and Senator Leahy expressed the view that the American Bar Association ratings provide "unique, unbiased and essential information" about judicial candidates, and provide an "independent, apolitical" evaluation of their qualifications. You referred to the ABA rating as the "gold standard" for evaluating nominees. All 42 of the President's appeals court nominees rated so far have received "well-qualified" or "qualified" ABA ratings. By the standard outlined in your letter of March 16, 2001, all of these appeals court nominees warrant your support.

*Third*, you explain that your proposal would avoid "extremist" judges. The Framers intended that the President would nominate judges and the Senate as a body would vote up-or-down on the nominations to express the majority will of the Senate. The constitutional scheme of Presidential appointment and majority vote in the Senate ensures that the nominees are not unfit. And your proposal would not preclude judges you might label as "extremist" from emerging from the citizen committees. Indeed, even more troubling is the fact that your proposal would not prevent judges whom both the President *and* a majority of the Senate might view as "extremist" from emerging from the citizen committees, yet the President and Senate would be essentially powerless to prevent the appointment.

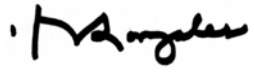
One final point warrants mention. We assume that you include Miguel Estrada and Priscilla Owen in your description of "extremists" given the extraordinary ongoing filibusters of their nominations. But Miguel Estrada and Priscilla Owen represent the mainstream of American law and American values, as indicated by the fact that the President nominated them and a majority of the Senate supports them. Moreover, Miguel Estrada is supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and by a bipartisan group of 14 former colleagues in the Solicitor General's office, among many others. He worked for four years in the Clinton Administration. He was unanimously rated "well-qualified" by the American Bar Association. Priscilla Owen is supported by three former Democrat Justices on the Texas Supreme Court with whom she served and 15 past Presidents of the State Bar of Texas. She also received a *unanimous* "well-qualified" rating from the American Bar Association.

These two nominees are the mainstream. It bears note, moreover, that you and other Democrat Senators have supported nominees such as Jay Bybee and Michael McConnell who (unlike Mr. Estrada and Justice Owen) have taken strong public positions contrary to yours on significant issues of concern to you. We believe that an unfair double standard is being applied to both Miguel Estrada and Priscilla Owen.

* * *

We appreciate your desire to fix the broken judicial confirmation process. The President believes that the fix is for the Senate to exercise its constitutional responsibility and ensure that every judicial nominee receives an up-or-down Senate vote within a reasonable time after nomination, no matter who is President or which party controls the Senate.

Sincerely,



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