AN END TO NOMINATION FILIBUSTERS AND THE NEED FOR CLOTURE MOTIONS:

TERMINATING DEBATE ON CONFIRMATION OF JUDICIAL NOMINEES BY THE VOTE OF A SIMPLE MAJORITY

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EXECUTIVE SUMMARY

Judicial vacancy emergencies exist in more than two dozen federal trial and appellate courts around the Nation. These emergencies frustrate the promise of justice that is a key component of ordered liberty. By that standard alone – these objectively defined "emergencies" – it is long past time for the Senate to have acted on pending nominations. While some seek a resolution to the partisan bickering over the cause of confirmation stalemates, delaying confirmations will not solve the emergencies or any underlying partisan differences that may have contributed to the emergencies. Agreement can be had on the key principle: the crisis in the courts is that there are empty benches in those courts.

Accepting the indisputable fact of the emergencies, and confronting the present broken condition of the advice and consent process, all concerned persons ask, Is there anything effective to be done in the Senate, to end the stalemate over nominees and improve the pace of confirmations for the well-qualified nominees pending there? At present, the search for cause never strays far from the Standing Rules of the Senate, particularly Rule XXII, governing the termination of filibusters. Under Rule XXII, the Senate departs from the democratic principle of majority rule, and makes the Senate hostage to voting blocs of Senators who are, by their numbers, a minority.

Confronted by an intractable minority, the Senate has options to move beyond the roadblock to confirmation that filibusters present. Each option targets the problem of the supermajority required under Rule XXII to restore power to the majority and to allow that majority to move forward on the country's business. The approaches vary:

- *One obvious solution is to seek approval of the Senate for a change in the Senate's Rules, and to do so in accord with Rule XXII.*

Perhaps the single best reason for employing this approach is that it is the least likely to provoke controversy. The approach suffers from a serious defect, however, because the Cloture Rule actually imposes an even greater supermajority requirement to overcome a filibuster against a motion to amend the rules than is imposed for the termination of other filibusters, such as the present one targeting the nomination of

a judicial officer.

- *Another seeks judicial intervention through litigation, challenging the diminution in the value of the votes of Senators who are in the majority but whose majority will is held hostage to minority voting blocks under the rigid supermajority requirements of Rule XXII.*

Two scholarly articles and two lawsuits have suggested litigation challenging the filibuster as an unconstitutional parliamentary obstruction. While the articles have much to recommend in analysis, the lawsuits have demonstrated the profound inadequacy of litigation as a means by which the express constitutional power of the Senate to make its own Rules would be subjected to the jurisdiction of a federal court. Moreover, in two instances of litigation challenging the constitutionality of the filibuster, arguments presented in the articles have failed to convince the federal courts of the justiciability of the question of the constitutionality of the filibuster.

- *Finally, a simple majority of the Senate can change the Standing Rules, casting off the supermajority yoke and recognizing that the Senate, a deliberative body moderated by accepted rules of parliamentary governance, can proceed in accordance with that most American of principles: Majorities Rule and Majorities Make the Rules.*

The Senate is to be a deliberative body, but nothing in the Constitution, the Federalist Papers or other source documents indicates that obstructive and delaying tactics by legislative minorities were intended to be the source of the Senate's deliberative care. The tenor of the Constitution broadly supposes internal governance of the two chambers, and a general principle of majority governance of the bodies. Unlike constitutional challenges to the filibuster, which have roundly failed, challenges to the exercise of majority rule in the House, the Senate, and in other deliberative bodies, provide a firm foundation for action by a willing majority of Senators to make new Rules for the Senate, either eliminating the filibuster, or substantially curtailing the impact of a filibuster by eliminating the supermajority requirements entirely.

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I. BACKGROUND

A. *Unfulfilled Responsibilities: A Senatorial Crisis in Advising and Consenting to the Appointment of Federal Judges*

According to publicly reported numbers, in March 2003, the federal district courts of the United States suffered from a vacancy rate of 6.4 %. The federal appeals courts suffered from over twice that rate, experiencing a 13.4 % vacancy rate.[1] The vacancy rates tell an important part of the story of the judicial crisis. Another part of that story is told by the number of judicial emergencies in existence around the Nation.

Judicial emergencies are defined in accordance with a numerical formula for case filings, authorized judgeships, and other factors. Because some kinds of cases are more complicated and require more time, the number of case filings is adjusted by assigning a weight or value to new cases according to their kind (e.g., student loan defaults are much simpler than patent litigation; new patent cases are assigned nearly four times the weight of student load default cases). At the present time, there are seventeen judicial emergencies in the federal appeals courts and nine in the federal district courts.[2]

Today's judicial vacancy crisis in the federal courts has unhappily coincided with the consequences of a fifty-year trend in abdication of control of the Senate by a majority of its members. The confluence of these factors virtually guarantees appointment gridlock. Key figures in the confirmation process may disagree as to causes. Regarding the existence of a vacancy crisis, however, there is no dispute among branches of the Government or between partisans:

- The President has described the current level of vacancies on the federal bench as a crisis:

> "We face a vacancy crisis in the federal courts, made worse by senators who block votes on qualified nominees. These delays endanger American

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1. The Administrative Office of the Courts provides the statistical information from which these percentages were derived on its website at http://www.uscourts.gov.

2. See "Judicial Emergencies," at http://www.uscourts.gov/vacancies/emergencies2.htm.

justice. Vacant federal benches lead to crowded court dockets, overworked judges and longer waits for Americans who want their cases heard."[3]

- The Chief Justice of the United States has explained the impact of the problem:

> "to continue functioning effectively and efficiently, our federal courts must be appropriately staffed. This means that judicial vacancies must be filled in a timely manner with well-qualified candidates. We appreciate the fact that the Senate confirmed 100 judges during the 107th Congress. Yet when the Senate adjourned, there were still 60 vacancies and 31 nominations pending."[4]

- The Chairman of the Senate Judiciary Committee, Senator Orrin Hatch, has said:

> "Historically, a president can count on seeing all of his first 11 Circuit Court nominees confirmed. . . . In stark contrast, eight of President Bush's first 11 nominations are still pending without a hearing for a whole year. History also shows that Presidents can expect almost all of their first 100 nominees to be confirmed swiftly. . . . But the Senate has confirmed only 52 of President Bush's first 100 nominees."[5]

- The Ranking Member of the Senate Judiciary Committee, Senator Patrick Leahy, has said:

> "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."[6]

Judicial vacancies that should have been filled long ago continue to stand open,[7]

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3. Weekly Radio Address of the President, February 22, 2003. See http://www.whitehouse.gov/news/releases/2003/02/20030222-1.html.

4. The 2002 Year-End Report on the Federal Judiciary. See http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html.

5. Senator Orrin Hatch, "Judicial Nomination Crisis," May 9, 2002. See http://www.senate.gov/~hatch/index.cfm?FuseAction=Topics.Detail&PressRelease_id=182703&Month=5&Year=2002.

6. Senator Patrick Leahy, Statement on Judicial Vacancies, Jan. 28, 1998. See http://leahy.senate.gov/press/199801/980128.html.

7. As of March 1, 2003, in the cases of the judicial emergencies in the federal appeals and district courts, the range of days that the emergency conditions have been pending is from 151 days up to 3167 days. See "Judicial Emergencies," at http://www.uscourts.gov/vacancies/emergencies2.htm. The average number of days in existence for

and as a consequence, justice is being denied in an untold number of cases, both civil and criminal. When they made the remarks quoted above, Chief Justice Rehnquist and Senators Hatch and Leahy all had in mind the delays in confirmation that resulted from the pace of confirmation hearings scheduled by the Judiciary Committee. See nn. 4-6, supra. From the context and times of his remarks, President Bush was addressing a different bottleneck than the one created by the slow pace of committee hearings on nominations. Given that his focus was on the stalled consideration of the whole Senate on the confirmation of Miguel A. Estrada to the United States Court of Appeals for the District of Columbia Circuit, it seems certain that the President was also concerned about the devastating impact that filibustering tactics would have on the orderly process of judicial selections.

The delay in setting hearings on confirmation appears to be resolving under the direction of Chairman Hatch. Regrettably, while the Committee hearing process appears to be receding as a source of bottlenecking, the filibuster appears to be maturing into a serious source of delay that endangers timely confirmation of the President's well-qualified nominees.

B. *A Dangerous Development Emerges That Threatens To Leave Judicial Crisis Unchecked*

Upon taking office, President Bush proceeded with appropriate speed and care to identify well-qualified and worthy candidates for appointment to the federal courts. On May 9, 2001, President Bush announced his intention to appoint Miguel Angel Estrada to serve as a judge of the United States Court of Appeals for the District of Columbia Circuit. As the Nation subsequently learned, when President Bush put before it his case for confirmation of Estrada, his choice presented

> an exceptional nominee for the federal bench. [Estrada] has a remarkable personal story. He came to America from Honduras as a teenager, speaking little English. Within a few years, he had graduated with high honors from

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each of these emergencies is 1097, or just over three years.

> Columbia College and Harvard Law School. Miguel Estrada then served as a law clerk to Supreme Court Justice Anthony Kennedy, as a federal prosecutor in New York, and as assistant to the Solicitor General of the United States.[8]

Despite the personal merits and character of the man, and perhaps because of political payback,[9] his nomination – one that should have sailed through the Senate – has been foundering.

Following the shift in control of the Senate that resulted when Senator Jeffords resigned from the Republic Caucus, Estrada's nomination, like that of nearly a full dozen other of President Bush's first judicial nominees, languished before the Democrat-controlled Senate Judiciary Committee. Finally, in September, 2002, the Judiciary Committee held a hearing on Estrada's nomination. After that hearing, the Committee failed to put the question of his nomination to a vote. Ultimately, that interminable delay resulted in the adjournment sine die of the 107th Congress without action on Estrada's nomination. Consequently, on January 7, 2003, President Bush resubmitted his nomination of Estrada to the United States Senate.

Now that the Senate is controlled by the Republican members, Estrada's nomination has been approved by the Senate Judiciary Committee and placed upon the Executive Calendar for consideration by the full Senate. It was at that juncture that the present crisis came to the foreground.

The new obstruction to the confirmation of judicial nominations takes the form of filibusters on the Senate floor. A vocal minority of Senate Democrats is

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8. See http://www.whitehouse.gov/news/releases/2003/02/20030222-1.html (Weekly address of the President).

9. It is certain that groups opposing the Estrada nomination found his service as counsel in the Bush election battles as grounds automatically proving his unfitness to serve. Estrada is affiliated with the law firm of Gibson Dunn & Crutcher, a key firm representing the Bush/Cheney 2000 efforts. His role in Bush's election efforts has not been lost on those who oppose his nomination. See, e.g., http://www.feminist.org/news/newsbyte/uswirestory.asp?id=7498 ("Estrada was one of the five lead lawyers at Gibson, Dunn & Crutcher who worked on George Bush's legal strategy – hand in hand, of course, with five Supreme Court justices – to hijack the 2000 presidential election in Jim Crow's Florida"). In turn, as materials on their web sites prove, groups such as the Feminist Majority and People for the American Way heavily lobby for and demand obstructive action from Democrat Senators.

demonstrating their commitment to satisfying the ideological requisites set for them by left wing interest groups.[10] And, for now, at least, an intractable delay in the confirmation of one nominee, Miguel Estrada, is being played out on the Executive Calendar, as votes on cloture motions are scheduled, occur, but fail to break the minority's stranglehold on the process.

A determined minority of Senators is frustrating, perhaps temporarily, the wishes of the majority of Senators and of the President of the United States regarding the appointment of Miguel Estrada to the United States Court Appeals for the District of Columbia Circuit. Employing tactics of delay countenanced at least implicitly by Rule XXII of the Standing Rules of the Senate, that minority of Senators has prevented the nomination from proceeding to a vote, even though the Estrada nomination has precedence on the Executive Calendar.

In compliance with Rule XXII of the Senate, four successive efforts have been undertaken to break the deadlock on the Estrada nomination. Each time, the Senate failed to invoke cloture. By failing to invoke cloture and terminate debate, the Senate has condemned itself to continue to consider the nomination of Estrada but denied to itself the right to vote upon it. Such a circumstance frustrates all. And a process that was already substantially degraded by over a decade of partisan sniping and bickering approaches irreparable breakdown.

In the face of this crisis, Senator Hatch has said:

> If we continue to filibuster this man, the Senate will be broken, the system will be broken and I think we will have to do what we have to do to make sure that executive nominations get votes once they get on the calendar. . . .[11]

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10. As Senator Hatch has explained, "[i]n this new war over Circuit nominees, the extremists demand that the Democrats do whatever it takes to stop or slow the confirmations of the President's superb nominees. It is irrelevant to these groups that a nominee has the qualifications, the capacity, the integrity, and the temperament to serve on the federal bench. What they want are activists who support their political views regardless of the law." See http://www.senate.gov/~hatch/index.cfm?FuseAction=Speeches.Detail&PressRelease_id=191297&Month=3&Year=2003.

11. N.Y. Times, Mar. 12, 2003.

The purpose of this paper is to propose for the consideration of willing Senators that a ready solution to the filibuster crisis is at hand.[12]

II. PHOENIX RISING: THE SOLUTION TO THE "BROKEN" PROCESS OF SENATORIAL ADVICE AND CONSENT ON JUDICIAL NOMINATIONS LIES WITHIN THAT BODY

A. *Synopsis of Proposal*

The Constitution gives to the Senate the right to make its own rules of procedure. See U.S. Const. art. I, § 5. Beyond the bare terms of the Rulemaking Clause the Constitution provides no further illumination of the scope or limitations upon such Rules as the Senate may choose to adopt. Unsurprisingly, the seemingly broad grant of power, described in early cases in terms of vast and sweeping scope, has been, nevertheless, the subject of many judicial interpretations and decisions.

In one instance of such rule-making, the Senate assigned the responsibility for taking evidence on impeachment trials of lower federal officials to a committee, with its recommendation subject to a vote of the body. Nothing in the Constitution authorizes such an approach. The Rulemaking Clause grants the Senate the authority to make its own Rules. So, in a federal complaint challenging the practice as applied

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12. The scope of this paper is necessarily limited. We do not treat the source materials evidencing the well-developed intention of the Framers of our Nation that the Senate serve as a more deliberative body than the House of Representatives. Nor do we examine the particulars of the role envisioned by the Founders for the Senate in the exercise of its duty of advice and consent to nominations. Nor do we treat the rise of the filibuster, or the rise of the related motion to invoke cloture. All these topics have been addressed elsewhere. For an excellent short history of the nominations of Justices to the Supreme Court and the confirmation processes that decided which nominees would take a seat at the High Court, see HENRY J. ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (Rowman & Littlefield Publ. 1999). For a general treatment of the deliberative process in the Senate, and the rise of the role of the Senate, see FRED R. HARRIS, DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS (Oxford Univ. Press 1993). For the views of Framers on the unique role and durably deliberative character of the Senate, see The Federalist Nos. 62 and 63. For the views of the Framers on the Senate's participatory role in the confirmation process, see The Federalist No. 76 For an examination of the filibuster and its role in the Senate, see SARAH BINDER AND STEVEN S. SMITH, POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE (Brookings Institution Press 1997). For a brief, informative treatment of the relation between the filibuster and the confirmation process in the Senate, see Catherine Fisk and Erwin Chemerinsky, "The Filibuster," 49 STAN. L. REV. 181 (Jan. 1997). For the government's perspective on the filibuster and the Senate confirmation process, see Stanley Bach, "Filibusters and Cloture in the Senate," (Congressional Research Service, Jan. 17, 2001).

to the impeachment and removal from the office of federal judge, the Supreme Court concluded that the complaint presented a nonjusticiable political question. See Nixon v. United States, 506 U.S. 224 (1993).

Most of the cases challenging the validity or application of the Rules of the Senate or the House of Representatives are litigated in the federal trial and appeals court in the District of Columbia. Judicial decisions of these courts generally affirm the breadth and scope of the Rulemaking power while concluding that the power to make its own rules does not authorize the Senate to disregard the Constitution. See n. 18, infra (citing cases). The role of the courts has been to consider narrowly the question of whether a particular challenged rule violates another constitutional provision or a fundamental right.

To illustrate the matters of concern, take as an example, a decision by the Senate to enact a Rule allowing ratification of treaties by a simple majority. In appropriate litigation, that is, brought by a person who can satisfy prerequisites such as standing, the courts will not decline to consider whether the Senate has violated the Constitution, in particular Article II, § 2, by reducing the number of Senators required for ratification.

In the same vein, assuming that standing prerequisites can be met, a court will consider whether the Senate adopted unlawfully discriminatory rules, for example discriminating among Senators based on race or religion. But, beyond the narrow category of circumstances in which Senate Rules directly violate the Constitution or impermissibly burden fundamental rights, as a general principle, only the Senate is the judge of its own need for rules and of the necessary contour of those rules.

The Senate has exercised that constitutional prerogative by enacting the Standing Rules. The Senate has exercised that power, as well, from time to time, by amending those Rules to meet the needs perceived by the Senate for such amendment or revision. Amongst the Rules it has adopted is Rule XXII, by which the Senate has bound itself to allow unlimited debate, unless sixty senators agree to a motion to invoke cloture, and to never change those Rules without approval thereof by two thirds

of the Senators present and voting, see Rule XXII ¶ 2.

Various possible solutions present themselves. One approach calls for an amendment of the Standing Rules, accomplished in accord with the requirements of the Rules. Another approach seeks the mediation of the federal judiciary in determining whether Rule XXII violates the United States Constitution. Finally, a third approach looks to a simple majority of the Senate to accomplish the necessary change in the Standing Rules by a bare majority of that body.

That last proposal has the most to recommend it. Reform advocates have established as a precedent of the Senate that a simple majority of the Senate can amend its own Rules. As discussed infra at 26-27, the precedents of the Senate recognize the power of the majority to do so, the Standing Rule to the contrary notwithstanding. A simple majority of the Senate can take just such action, calling upon itself, at the direction of a majority of its members, to decide three questions:

- First, whether a simple majority of the Senate may close debate on a resolution providing for new Standing Rules of the Senate,
- Second, whether, under such new rules, filibusters may be made "out of order" on questions related to the judicial nominations, and,
- Third, whether the nomination of Miguel Angel Estrada (or any other filibustered nominee) should be agreed to by a vote of the Senate.

These steps will no doubt provoke cries of "foul" by opponents of the nominee and by members of the minority in the Senate. Nonetheless, there is no constitutional objection against these steps, and there is substantial authority that undermines the likelihood of success of any challenge to them.

B. *The Standing Rules of the Senate Entrench the Procedural Preferences of Senators Long Gone from that Body, Even Long Dead*

George Washington, in answer to a question from Thomas Jefferson, who was in France during the Constitutional Convention, explained that the Senate would serve the valuable purpose of providing a "cooling off" feature to the legislative process. In keeping with a habit of the time, Jefferson had poured some coffee from his cup into

his saucer, there to cool a bit. Washington explained that House-initiated legislation would, in the same way, be poured into the Senate where the more deliberate body would insure that legislation was not unwisely adopted in the heat of a moment.[13]

Although the Senate was, in the view expressed by Washington and of the Framers, intended to serve this deliberative function, no mention is made of the filibuster in the Constitution, the Federalist Papers, or other writings of the Founders. In fact, the term "filibuster" is a transliteration from the French and Dutch terms for "pirates." The Dutch term from which "filibuster" derives was used to describe piracy by American citizens who fought naval expeditions in Central and South America. A filibuster was one who, against proper and lawful authority, seized control of a government.[14]

The rise of obstructionist tactics to prevent the enactment of legislation disapproved by some has been well described elsewhere.[15] The use of the term "filibuster" to describe obstructionist tactics – including extended debate and a panoply of procedural devices intended to prevent action – reflected the frank recognition that procedural gamuts that frustrated the will of the majority of the Senate were a legislative form of piracy. It suffices to note that the present rules governing procedures of the Senate, the Standing Rules of the Senate, provide a specific means for the termination of the panoply of obstructionist tactics described by the term filibuster. Rule XXII of the Standing Rules of the Senate, the "cloture rule," provides:

> at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but

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13. The metaphor is attributed to Washington, but not reported in either the papers of Washington or of Jefferson. See MONCURE. D. CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE OF EDMUND RANDOLPH 91 (1888).

14. See, e.g., http://www.bartleby.com/61/89/F0118900.html.

15. See generally Binder and Smith, supra n. 12.

> one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:
>
> "Is the sense of the Senate that the debate shall be brought to a close?"
>
> And if the question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn -- except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting -- then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of the all other business until disposed of. . . .

Standing Rules of the Senate Rule XXII ¶ 2.

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Currently, efforts to bring the nomination of Miguel Estrada to a vote by the full Senate are being frustrated by a filibuster conducted by members of a partisan legislative minority. In turn, efforts by a bipartisan majority to terminate the filibuster are frustrated by operation of Rule XXII ¶ 2. That provision allows essentially unlimited debate, unless sixty Senators vote to "invoke cloture." That same rule, in another provision, allows filibusters against changes in the Standing Rules unless cloture is supported by the vote of two thirds of the Senators present and voting.

Thus, the ability of a majority of Senators to fulfill their constitutional duty to provide advice and consent to the President's appointment of judicial officers is in jeopardy. As the matter stands, Senate Rule XXII insures both the continued frustration of the appointment process and the expansion of the judicial vacancy crisis already being felt in many of the Nation's judicial districts and circuits. Indeed, the filibuster targeting the nomination of Miguel Estrada has survived a record-breaking fourth motion to invoke cloture. At present, no end to that filibuster is in sight.

Rule XXII requires that those who would invoke cloture must amass at least sixty votes in support of the cloture motion. Thus, on any given day, fifty-nine senators who would like to conduct an up or down vote on the question of whether to consent to

the nomination of Estrada can be held hostage by a single Estrada opponent who is exercising the right to speak. Worse still, should fifty-one of those Senators seek to change the Standing Rules to accommodate their proportional majority, they run straight into an even more onerous two thirds super-majority requirement for cloture on motions to amend the Standing Rules.

There is, in such a system, a manifest unfairness. It is not surprising that its unfairness has been recognized for many years.[16] When the many are prevented from governing themselves and subjected to the rules and decisions of the few, an oligarchy is in place, not a republic. Despite our national and constitutional commitment to a republican form of democracy, Senate Rule XXII is an anachronism demonstrating long-abandoned preferences for government other than by the will of the people. While reasonable minds agree that a majority must always resist inflicting unconstitutional deprivations upon minorities, President Lincoln quickly dispatched the argument that government by minority presented a workable proposition:

> A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.[17]

In addition to its manifest unfairness, the requirement of a supermajority vote not only puts government decisions in the hands of a minority, it guarantees governmental inertia, even in times of crisis. For this very reason, Alexander Hamilton criticized the Articles of Confederation, which conditioned many acts of the Committee of the States on approval by supermajorities:

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16. For example, in the years following the successful uses of the filibuster by Democrats and other opponents of civil rights legislation in the 1950s, the question of needed reform to the Standing Rules came up for discussion. At the time, observers noted this manifest unfairness. See 107 Cong. Rec. 235 (1961) (brief in support of cloture reform); 121 Cong. Rec. 756 (1975) (statement of Sen. Pearson).

17. A. LINCOLN, FIRST INAUGURAL ADDRESS (Mar. 4, 1861) (emphasis added).

> To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser. . . . The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority. . . . If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. . . . It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.[18]

These problems, particularly "tedious delays . . . intrigue . . . [and] contemptible compromises of the public good," animated the Framers in seeking a "more perfect union," see U.S. Const. pmbl. Consequently, in framing the general government under the Constitution, the number of instances in which a vote of greater than a majority would be required were limited and precisely stated. The Constitution requires a supermajority vote of two thirds: to convict of impeachment;[19] to expel one of their members;[20] to override a presidential veto;[21] to ratify a treaty;[22] to propound an amendment to the Constitution;[23] to lift disability from service in Congress of those who have participated in insurrection against the United States,[24]; and, to determine

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18. The Federalist No. 22, at 133-34 (Modern Library ed. 2000) (emphasis added).

19. See U.S. Const. art. I, 3, cl. 6.

20. See U.S. Const., art. I, § 5, cl. 2.

21. See U.S. Const., art. I, § 7, cl. 2.

22. See U.S. Const. art. II, § 2, cl. 2.

23. See U.S. Const. art. V.

24. See U.S. Const. amend. XIV, § 3.

that the President is under a disability preventing service.[25]

The general principle of majority rule in the Senate is also reflected in the Constitution's grant to the Vice President of a vote in that body if, but only if, "they be equally divided." U.S. Const. art. I, § 3, cl. 4. Thus, although it is not explicit that all other matters in the Senate are to be governed by majority rule, the implication of granting a tie breaking vote to the Vice President speaks for itself.

With each new Congress, the House of Representatives considers and adopts new Rules. Unlike the House, the Senate deigns itself a body of a continuing nature from Congress to Congress. Because of that self-conception as a continuing body, the Senate has eschewed the biennial rulemaking customary in the House. Consequently, the present Standing Rules do not reflect a fresh determination by the present majority of the Senate as to the best means for conducting the business of the Senate. In this way, the views of Senators long retired, even long deceased,[26] restrain change in the Senate with a cold hand, simply by operation of the supermajority requirement of Rule XXII.

C. *Finding the Way: Repairing the Broken Senatorial Process of Advice and Consent*

Senator Hatch's momentous commitment – to do what must be done to move nominations forward, even in the face of a determined minority – offers hope that if a sound and workable proposal for correcting the manifest injustice of the present circumstance can be found, it will be adopted by those who share Senator Hatch's resolve. The question arises, then, whether, other than successfully invoking cloture

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25. See U.S. Const. amend. XXV, § 4.

26. Because Rule XXII makes amendment of the Rules improbably difficult, the Rules now in effect are those that have been selected for the day to day operation of this Senate by Senators who no longer serve in that body. This fact is reminescent of the story about the Chicago area Sheriff who refused to allow a deputy to get back in the cruiser until he had gotten an equal number of names from the tombstones on both sides of the road dividing the community cemetery in half. "Son," he told the rain-soaked deputy, "the folks on this side of the cemetery have just as much right to vote for me in the upcoming election as the ones over on that side." Regrettably, because of the requirements of Rule XXII, long dead Senators have a preferred right to determine the procedures of the Senate over those currently serving.

on the filibuster, anything may be done to move the question forward of Senate's confirmation of Estrada.

Among possible responses to the crisis, three particular approaches merit examination. These approaches, which we treat in turn, are: amendment of the Standing Rules of the Senate to alter the Cloture Rule; litigation challenging the constitutionality of the Cloture Rule; and, assertion of the Rule-making power of the Senate by a simple majority of that body. While there is value in each of the approaches, the last one, which we recommend, has the best chance of bringing an early resolution to the filibuster of the Estrada nomination, and to the vacancy crisis.

1. Senate Resolution 85: Amending the Standing Rules

The Standing Rules of the Senate govern the process by which those Rules may be altered or amended. In addition to the provision cited above, imposing a two thirds supermajority requirement to invoke cloture against a filibuster of such Rule amendments, Rule V of the Standing Rules also addresses amendment of the Rules, and it provides:

> No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.
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> The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

"Except as otherwise provided by the rules." In those seven words, the Standing Rules condemn the Senate to the burdensome process of filibuster-breaking, and then heap on top of that burdensome task the added requirement "as otherwise provided" by Rule XXII of a two thirds majority vote to invoke cloture against any filibuster of such reforms.

Nonetheless, it is notable that the Standing Rules do not purport to be inviolate, that they provide for their amendment. In fact, in apparent response to the present crisis, on March 13, 2003, Senator Zell Miller submitted a proposed resolution

addressing this problem.[27] Senate Resolution 85 proposes that the Senate amend Rule XXII to modify the cloture provisions.

If agreed to, S. Res. 85 would modify the Cloture Rule by adding to it a "ratcheting down" feature for the total number of votes needed to invoke cloture. Under the proposed Rule, sixty votes would still be required to invoke cloture on a first motion. Upon each subsequent vote directed to the same matter, the number of votes required to invoke cloture would be reduced in number by three. Thus, cloture could be invoked with fifty-seven votes on a second motion, to fifty-four votes on a third motion, and finally, to fifty-one votes on a fourth motion.[28] Senator Miller's proposal is indistinguishable from one offered by Senators Tom Harkin and Joseph Lieberman in 1995.[29]

Senator Miller's proposal has considerable merit. After all, such a rule virtually guarantees an eventual end to every filibuster, while maintaining, at the same time, a deliberative pace to proceedings related to the invocation of cloture. By ratcheting down the total number of votes required to invoke cloture over a series of votes, the Senate would maintain its customary and anticipated role as a "cooling saucer." Senate Resolution 85 would work a welcome change in the Standing Rules, and could, ultimately, effectuate floor votes on all judicial nominees who make their way onto the Senate's Executive Calendar.

Although commendable, the proposal faces the same obstacle as a judicial nominee: a filibuster, or the threat of one. Already four attempts to invoke cloture on the Estrada filibuster have failed to garner sixty votes. It strains the imagination to see a partisan, minority voting bloc on the Estrada question voluntarily surrender its present superior position by agreeing to the proposed rule change. Under Rule XXII,

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27. See 149 Cong Rec S 3730 (daily ed. Mar. 13, 2003).

28. See the text of proposed S. Res. 85 as introduced by Senator Miller on Mar. 13, 2003, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:sr85is.txt.pdf.

29. See Binder and Smith, supra n.12, at 182-83.

two thirds of Senators present and voting are required to invoke cloture on filibusters of rule changes. Thus, to defeat the predictable filibuster of Senator Miller's proposed Senate Resolution 85 would require the willingness and action of Senators in numbers even greater than needed to invoke cloture on the Estrada filibuster.[30]

Because of the supermajority requirement, Senator Miller's proposal, without more, is likely to fall victim to the same obstructionist minority. It seems highly unlikely that Senators will vote in numbers sufficient to invoke cloture on this proposal where the result would be to take from many of those very Senators their most effective means of satisfying the demands of their Washington-based liberal interest group constituencies.

2. Litigating the Constitutionality of Senate Rule XXII

Two lawsuits, a law review article and a political science journal article have provided insight into the possibility of challenging Rule XXII through litigation. Although the articles argue vociferously for the prospects of such litigation, the only suits ever filed challenging the constitutionality of the filibuster and the supermajority requirements of the cloture rule have failed to produce a judicial order granting relief against the rule.

In the early 1990s, proceeding pro se, Douglas Page, a registered Democrat, sued Senator Dole and the Republican minority in the Senate over their successful use of the filibuster against a variety of legislative proposals supported by President Clinton and the Democrat majority. In an unreported decision (Page I), the district court dismissed Page's suit for lack of standing. See Page v. Shelby, 995 F. Supp. 23, 26 (D.D.C. 1998) (Page III) (explaining history of the litigation). On appeal from that dismissal, also in an unreported opinion, the Court of Appeals concluded that the change in control of the Senate following the 1994 election cycle mooted Page's complaint. Consequently, the

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30. The actual number of Senators required to invoke cloture to close debate on changes in the Rules will vary, according to the number of Senators present and voting. If all Senators are present and voting, sixty-seven votes would be required to invoke cloture; of course, if only a smaller quorum of Senators were present at the time, the number required to invoke cloture would be fewer.

court vacated the decision of the district court and remanded the case with instructions to dismiss as moot. See Page v. Dole, 1996 U.S. App. LEXIS 15491 (D.C. Cir. 1996) (Page II).

Subsequently, Page redrafted his complaint in an effort to avoid the defects that convinced the court of appeals that the earlier litigation was moot. In Page III, the district court concluded that Page had failed to assert any particularized injury to himself distinguishable from the injury suffered by all other citizens as a result of Senate inaction on filibustered legislation. Because he failed to assert particularized injury to himself, Page lacked standing to challenge the constitutionality of the Rule.[31]

> The district court explained the failings of Page's asserted standing:
>
> In this case, Mr. Page has not demonstrated that he has sustained or will imminently sustain direct harm as a result of Senate Rule XXII. This Court cannot find that a litigant has standing based solely on his speculation that, no matter which party's senatorial candidates he votes for, Senators of the other political party will invoke Rule XXII to prevent the passage of unspecified legislation favored by Mr. Page. Mr. Page asserts that Rule XXII 'drastically diminishes [his] voting power to obtain legislation he desires.' Yet he does not provide examples of the types of legislation he favors and does not indicate how he personally has been or will be injured if that legislation fails to become law.[32]

The court of appeals affirmed this second dismissal without published opinion, "for substantially the reasons" set out in the decision of the district court. See Page v. Shelby, 1998 U.S. App. LEXIS 20728 (D.C. Cir. 1998) (Page IV).

Page I is identified as the only judicial challenge to the constitutionality of the filibuster in the best-known law review article on the subject of filibusters.[33] In their article, Fisk and Chemerinsky argue that a constitutional challenge to the filibuster of a judicial nominee is necessary and feasible:

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31. See 995 F. Supp. at 27-28.

32. Id.

33. See Catherine Fisk and Erwin Chemerinsky, The Filibuster, 49 STAN. L. REV. 181, 233 (Jan. 1997) (hereinafter "The Filibuster"); see also Robert A. Heineman, Edward N. Kearny, "The Senate Filibuster: A Constitutional Critique," 26 PERSPECTIVES ON POLITICAL SCIENCE 5 (No. 1, 1997).

> The repeated failure of efforts to adopt majority cloture or to permit a majority to change Rule XXII suggests that it is unlikely that the Senate will decide on its own that the filibuster is unconstitutional. Therefore, judicial action will be needed for the filibuster to be ruled unconstitutional.[34]

The authors then take up the question of the difficulties that a successful challenge to the filibuster rule would face:

> The government, however, would likely move to dismiss any lawsuit challenging the constitutionality of the filibuster on three independent grounds: [1] that the constitutionality of the filibuster is a nonjusticiable political question; [2] that the plaintiffs lack standing to bring the suit; and [3] that the Speech and Debate Clause immunizes senators from being sued as to their votes.[35]

In laundry list fashion, the authors summarily list three very potent arguments against success in litigation. In fact, these three considerations – the political question doctrine, standing, and Speech and Debate Clause immunity – constitute the focus of substantive considerations in more than a dozen decisions of the United States Court of Appeals for the District of Columbia and the District Court for the District of

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34. See Fisk and Chemerinsky, supra n. 33, at 225.

35. See id.

Columbia.[36] Virtually every one of those cases resulted in no relief being granted.[37]

Nonetheless, Fisk and Chemerinsky propose that successful litigation could be devised in one highly improbable circumstance:

> Imagine the strongest case: The President nominates a woman to be Chief Justice of the Supreme Court and a group of senators filibuster, openly declaring that they believe that a woman should never hold the position. Imagine, too, that fifty-nine senators are on record supporting the nomination and have even voted for cloture.[38]

In that wildly improbable circumstance, Professors Fisk and Chemerinsky conclude that the obstacles of standing, the political question doctrine and the Speech and Debate Clause could be overcome.[39] Of course, here, the opposition to the confirmation

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36. See Kucinich v. Bush, 236 F. Supp. 2d 1 (D.D.C. 2002) (dismissing challenge to abrogation by President of ABM treaty on standing and political question grounds); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998) (dismissing challenge to constitutionality of filibuster on standing grounds); Schreibman v. Holmes, 1997 U.S. Dist. Lexis 12584 (D.D.C. 1997) (dismissing challenge to the denial of Capitol press credentials on political question grounds); Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (dismissing challenge to House rules governing the consideration of tax increase legislation for lack of standing); United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995) (rejecting interlocutory challenge to prosecution on Speech or Debate Clause grounds); Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994) (granting vote in Committee of the Whole to nonvoting Delegates does not violate the Constitution); CNN v. Anderson, 723 F. Supp. 835 (D.D.C. 1989) (declining to grant relief on grounds of equitable discretion); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984) (discussing doctrine of equitable discretion), vacated sub nom. Burke v. Barnes, 479 U.S. 361 (1987) (remanded with instructions to dismiss as moot); Moore v. U.S. House of Representatives, 733 F.2d 946, 957 (D.C. Cir. 1984) (Scalia, J., concurring in result) (criticizing D.C. Circuit's "equitable discretion" doctrine); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983) (affirmed the judgment of dismissal on the separate ground of the court's remedial discretion); Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982) (challenge to legislation adopted in apparent violation of parliamentary rules presented nonjusticiable political question); Consumers Union of United States v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975) (reversing judgment for complaining journalist on political question grounds).

37. In Barnes, 759 F.2d 21, the D.C. Circuit sided with the complainants and against President Reagan regarding his attempted exercise of a pocket veto on legislation. The appeals court, consequently, concluded that the complainants were entitled to an order directing that the legislation be duly enrolled as a statute of the United States. In Burke, 479 U.S. 361, the Supreme Court concluded that the case was moot and issued an order vacating the judgment below with remand instructions to dismiss the case as moot.

38. See Fisk and Chemerinsky, supra n.33, at 233.

39. See id.

of Estrada has not been made expressly upon invidiously discriminatory grounds.[40]

In the many cases that have come before the federal courts in Washington, DC,[41] after examining questions about standing, the political question doctrine, the Speech or Debate Clause, and equitable discretion, these courts have repeatedly left claimants standing with hats in hand but no relief in sight. Thus, while instituting and conducting litigation about the constitutionality of Rule XXII might create a sense of progress against the present stalemate, that progress would be only illusory because it is very likely that such litigation would produce no relief.

Of course, any proposal that assumes the propriety of the present construct, under which governance lies in the hands of the legislative minority, cannot be squared with representative democracy. As Hamilton explained, granting to a number fewer than a majority the powerful weapon of an absolute negative upon actions approved by a simple majority establishes, in effect if not name, government by that minority, as well as insuring paralysis of government, even at times of the most profound national crisis.[42] But, as President Lincoln explained, government by a minority as a fixed principle cannot be admitted.[43] The Senate's capacity to make whatever rules

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40. Activist groups and others who support the filibuster of the Estrada vote have not been quite so delicate about the question of Estrada's qualifications as a Hispanic American. See, e.g., Statement of Representative Reyes, at http://www.house.gov/reyes/CHC/miguelestrada.htm ("Miguel Estrada fails to meet the [Congressional Hispanic Caucus]'s criteria for endorsing a judicial nominee. In our opinion, his . . . failure to recognize or display an interest in the needs of the Hispanic community do not support an appointment to the federal judiciary"); Statement of Representative Menendez, at http://menendez.house.gov/speaks/viewspksubsections.cfm?id=38 ("Miguel Estrada, the D.C. Circuit Court nominee . . . whose record showed no understanding or commitment to the rights of individuals, or to the Hispanic community"); "Memorandum of the Mexican American Legal Defense and Educational Fund (MALDEF) and Southwest Voter Registration and Education Project (SVREP) Explaining Bases for Latino Opposition to the Nomination of Miguel Estrada to the DC Circuit Court of Appeals," at http://www.maldef.org/news/latest/est_memo.cfm ("he challenged whether the NAACP actually represented the black community's interests. If he does not even recognize the NAACP's ability to represent blacks, would he recognize Latino groups' standing in court to represent Latinos? His arguments in this case suggest he probably would not").

41. See n. 36, supra.

42. See text accompanying nn.16-18, supra (discussing problems of minority governance).

43. Id.

for its governance that it might make is constrained only by two considerations. As explained infra at 28-30 (discussing United States v. Ballin, 144 U.S. 1 (1891)), the Rule-making power is constrained only by a judicial construction of it that neither chamber may, by the rules they adopt, violate the Constitution or violate fundamental rights. Consequently, while the anti-majoritarian effect of the present Rule is indisputable, a judicial decision would not likely be forthcoming to upset the Senate's rule unless that decision found substantive constitutional fault with the decision of a simple majority to allow itself to be bound by supermajority voting requirements. Such a conclusion is improbable.

Having identified litigation as one possible approach, it must be noted that there are a substantial number of litigated cases disputing the very unreviewability of those Rules in a variety of circumstances, but still denying relief to the aggrieved claimants.[44] One observer has written:

> In Ballin, the Supreme Court aimed to establish a permanent framework within which the judiciary would have limited power to review legislative rules of procedure. In this it failed. Time after time, courts have expanded their power to hear these 'sensitive' cases. But no court has succeeded, or for that matter attempted, to break down the barrier constructed in Ballin entirely. All cases presuppose some limit on the judiciary's power to review legislative rules of procedure.[45]

It is assumed that the goal is ultimate success, not merely the instigation of litigation capable of surviving Rule 12(b)(6) dismissal. Unless meaningful relief can be forthcoming from the courts, repair to them may satisfy other interests, but litigation in this area will only add to the burden of overtaxed and understaffed courts. The cases demonstrate quite clearly that no meaningful relief is likely to be afforded

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44. See, e.g., Consumers Union of United States v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975) (litigation challenging rules governing process for credentialing members of the press); Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (litigation challenging House Rules restricting the means by which legislation proposing an increase in the income tax could be proposed); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.) (litigation challenging committee assignment system for purported disproportionality).

45. Michael B. Miller, Comment, The Justiciability of Legislative Rules and the "Political" Political Question Doctrine, 78 CALIF. L. REV. 1341, 1356 (Oct. 1990).

to a litigant challenging the Senate's Rules, in the absence of an articulable and principled claim that the challenged rule violates some provision of the Constitution.

In the area of intergovernmental relations and disagreements, the courts tread with great care. That care is summarized in a formulation known as the political question doctrine. When reference is made by a court to the political question doctrine, what is in contemplation are those alleged constitutional violations by either the Legislative or Executive Branch that a court will decline to adjudicate, despite the satisfaction of jurisdictional and other justiciability questions.

Perhaps the most familiar explanation by the Supreme Court of the nonjusticiable political question is the following:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*[46]*

In Baker v. Carr and a variety of other cases, the Supreme Court has held that when the task of constitutional interpretation presents "political questions," those questions are left by the Constitution to the politically accountable branches of government: the Legislative and the Executive.*[47]*

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46. See Baker v. Carr, 369 U.S. 186, 217 (1962).

47. So, for example, the Court consistently has held that cases brought under the Republican Form of Government Clause, U.S. Const. art. IV, § 4, present nonjusticiable political questions. See, e.g., Pacific States Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912); Taylor & Marshall v. Beckham, 178 U.S. 548, 578-79 (1900); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). Congress, not the courts, is to decide what is a "Republican Form of Government" and whether a State is governed by one. In like vein, the Court has turned away challenges to the conduct of foreign policy by the President, relying in the process on characterizations of the issues as presenting "nonjusticiable political question." See, e.g., Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (plurality opinion); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

The federal trial and appeals courts in the District of Columbia have concluded that constitutional standing requirements have been met in a variety of vote dilution or diminution cases brought by Senators or Representatives. For example, in Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994), the Court concluded that then-Minority Leader Michel had standing to complain of the diminution of his vote when the House adopted a rule allowing territorial delegates to vote when the House convened itself as a Committee of the Whole. The conclusion that standing requirements of injury have been met may be interpreted as a hopeful sign for a litigant concerned whether the courts will be open to hear a claim. But, as previously noted, the conclusion that one may maintain litigation because the minimum showing of standing has been met does not translate into success on the merits and does not guarantee a positive outcome at all. In Michel, the court of appeals concluded that the practice complained of by Michel did not violate the Constitution.

It seems certain that litigation will be one approach considered by those concerned with preserving or changing the nominations status quo. If litigation is inevitable, judgments must be made about the likelihood of producing a favorable, sustainable result. In making such evaluations, it can be beneficial to bear in mind the precise relief a litigant would seek from a court. Plainly, a judicial attempt to superimpose Rules upon the Senate, from without, would constitute a naked power grab by the Courts, perhaps at the behest of a Senate minority. In the previously discussed challenge to the constitutionality of the filibuster, the district court rejected the proposed resolution that it take responsibility for the crafting of the Senate's rules: "[I]t would be inappropriate for this Court to rewrite the Senate Rules as Mr. Page suggests. . . . The measures that Mr. Page suggests the Court should take – rewriting the Senate rules and withholding the Senators' pay – raise serious its [sic] separation of powers concerns."[48]

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48. Page v. Shelby, 995 F. Supp. 23, 29 (D.D.C. 1998). Cf. United States v. Rostenkowski, 59 F.3d 1291, 1306 (D.C. Cir. 1995) (noting that even mere "judicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the

Only one justiciable, nonpolitical question case that involved the rules of either the House or Senate has actually resulted in the grant of relief to a claimant. See Powell v. McCormick, 395 U.S. 486 (1969). The Supreme Court concluded that the House had wrongfully excluded Powell him from being seated in the House by finding him "disqualified," not on the constitutional grounds of age, residency, etc., but on his alleged violation of House ethics rules during a prior term of Congress. There, because the Congress to which he had been elected had expired, the only relief that could be fashioned for Congressman Powell was an order for back pay. It is worth noting that the back pay remedy did not affect the Rules of the House or interfere with the usual operation of the House under them.

Many cases have been brought in which Senators or Congressmen have complained that some action, of the House or Senate, or of the Executive Branch, has had the effect of diminishing or diluting the votes of elected representatives.[49] In all the cases, the ultimate question becomes the question at the heart of the political question doctrine: is the matter unreservedly committed by the Constitution to the Legislative Branch. In all the cases, questions regarding the rules of either House are recognized by the courts as having been unreservedly committed to the Legislative Branch. In all the cases, the courts acknowledge their inability to fashion a remedy in such circumstances.

Consequently, it appears ill-advised to institute litigation to challenge the constitutionality of Rule XXII, unless the purpose is something other than success. Because such suits too frequently result in spectacular failures, the best strategy related to litigation battles over legislative rules is to position one's opponents as the claimants in any litigation challenging the Rules of the Senate. Amending the Rules and leaving it to a legislative minority to complain is the sure way of success. In the end, those who would employ the filibuster, but for amended Senate Rules, should be

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legislative branch under the Constitution").

49. See, n. 36, supra (citing cases).

the ones relegated to the option of pursuing judicial relief.

* * *

A separate constitutional consideration about instituting litigation to resolve this question must be examined. The litigating approach falls back on the pattern of repair to the Courts for the resolution of every constitutional question, and every potential dispute between the Legislative and the Executive Branch. The wisdom of this pattern and the constitutionality of it have concerned two judges of the D.C. Circuit whose opinions in such matters are entitled to great weight of respect: Robert Bork and Antonin Scalia.

In a dissent from a decision in one of these interbranch disputes, Judge Bork excoriated the Court for its headlong rush into a field not assigned to it under the Constitution:

> [T]he complete novelty of the direct intermediation of the courts in disputes between the President and the Congress, ought to give us pause. When reflection discloses that what we are asked to endorse is a major shift in basic constitutional arrangements, we ought to do more than pause. We ought to renounce outright the whole notion of congressional standing.
>
> I write at some length because of the importance of the constitutional issue and because in this case, unlike those in which similar protests have been lodged, the error in analysis produces an error in result. To date these protests have been unavailing. With a constitutional insouciance impressive to behold, various panels of this court, without approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against Congress or by congressmen against the President. That jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Barnes v. Kline, 759 F.2d 21, 41-42 (D.C. Cir. 1984) (Bork, J., dissenting) (citations omitted). Similarly, concurring in the judgment in Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), then-Judge Scalia explained why such interbranch disputes were unsuitable for litigation:

> This is not a suit between two individuals regarding action taken by them in

> their private capacities; nor a suit between an individual and an officer of one or another Branch of government regarding the effect of a governmental act or decree upon the individual's private activities. It is a purely intragovernmental dispute between certain members of one house of the Legislative Branch and -- in decreasing order of proximity -- (1) their own colleagues, (2) the other house of the same Branch, and (3) the Executive Branch, concerning the proper workings of the Legislative Branch under the Constitution. Such a dispute has no place in the law courts.

733 F.2d at 957 (Scalia, J., concurring in result) (emphasis added).

3. Majorities Rule – Majority Rules

During his service as Senator from Kansas, James Blackwood Pearson was a staunch advocate for recognition of the right of a simple majority of the Senate to change the rules of the Senate, including the rule governing cloture. The simple majority principle advocated by Senator Pearson – that a simple majority of the Senate may determine the Rules by which it proceeds – presents the clearest and best resolution of the present conflict. Moreover, pursuit of that solution now – while the appointment in question is to a court other than the Supreme Court – would both resolve the present controversy and make possible a smoother process of confirmation when vacancies there require the Senate to pass upon the President's nominees to the Supreme Court.

Moreover, as discussed within, the "simple majority" solution suggested herein: has a high degree of likelihood of success; is subject to only the very lowest degree of likelihood of invalidation if subjected to judicial challenge; and comports entirely with the constitutional role assigned to the Senate in the process of judicial confirmations, namely that of advising and consenting.

a. Existing precedent of the Senate recognizes the power of a simple majority of Senators to close debate on proposed changes to the Standing Rules

The provision of the Standing Rules regarding closing debate on the question of amending the Rules does not negate the majority's power to change the Rules. For at least a quarter century, it has been the settled precedent of the Senate that the power to make the Rules belongs to the majority. The establishment of this precedent

occurred during the leadership of Mike Mansfield, and resulted from Senate majority votes on virtually indistinguishable questions.[50] Of particular import the precedent is established that "a simple majority may close debate on a resolution providing for new rules at the beginning of a Congress . . . ."[51]

b. Because normal parliamentary rules govern the conduct of the Senate's business in the absence of extraordinary, constitutional constraints, a simple majority may assert control over those rules and over that body.

With the exception of those specific provisions for which a supermajority vote is constitutionally mandated,[52] after the power of the Senate to act rises with the presence of a quorum of its members, it may be exercised at the direction of a simple majority of that quorum. See United States v. Ballin, 144 U.S. 1 (1891). In the elegant phrasing of Ballin:

> The Constitution provides that 'a majority of each [house] shall constitute a quorum to do business.' In other words, when a majority are present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present, the power of the house arises.

144 U.S. at 5-6 (emphasis added).

Rulemaking for their proceedings is one of the fit subjects to which the power of the House and the Senate, when their power to act arises, may be applied. The Constitution assigns to each House of Congress the power "to determine the Rule of its Proceedings. . . ." U.S. Const. art. I, §5, cl. 2. For more than a century, it has been a bedrock of constitutional construction by the Supreme Court that the power of the

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50. See Binder and Smith, supra note 12, at 181 ("For the first time, a Senate majority endorsed [Senator] Pearson's interpretation of the Constitution that the Senate's standing rules cannot prevent a simple majority from acting on new rules at the beginning of a Congress"); id. (discussing 1975 reform efforts, including the adoption by the Senate of a point of order recognizing power of bare majority to close debate on new rules).

51. Id.

52. See text accompanying nn.19-25, supra.

Legislature to make such Rules is all but unreviewable. In Ballin, an importer challenged the assessment of a duty on certain goods. He claimed that the classification of his goods in accord with a United States Statute was invalid, because the law was not approved by a majority of the House of Representatives. 144 U.S. at 1-2. The United States defended on the ground that the statute had been validly enacted, and that the House's determination of the presence of a quorum was accomplished in accord with the Rules of the House.

The Supreme Court turned away the challenge to the enactment of the statute, and deferred to the judgment of the House on whether the method for determining a quorum was satisfactory to it:

> The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

144 U.S. at 324-325. The plain import of the Court's opinion is that a simple majority of a quorum of each House continues to possess, while it has risen in its constitutional power, the authority to make its rules. In other words, the rule making process is not fixed and static. Instead, it is subject to adjustment and refinement, or outright changes, at the discretion of a simple majority of a quorum.

c. Consistent with the Rule-making Clause and with the decision in Brown v. Hansen, a simple majority of a quorum of the Senate can make rules for the governance of the body and the conduct of its business

In Brown v. Hansen, 973 F.2d 1118 (3d Cir.), aff'g 1992 U.S. Dist. Lexis 3483 (D.V.I. 1992), the validity of certain acts and resolutions of the Virgin Islands Legislature were drawn into question because they were adopted in contradiction to the express terms of the Rules of the Legislature. A review of the facts reveals the striking conflict in that legislative body and the surprising circumstances in which the challenged enactments were approved:

> When the Nineteenth Legislature of the Virgin Islands convened on January 14, 1991, it adopted standing rules ("the 1991 Rules") and made committee and chair assignments. Among other things, the 1991 Rules provided they could be amended, suspended, or waived only upon a vote of two-thirds of the Senators. These rules were adopted by an 11-4 vote of the legislature.
>
> A year later, a majority of the Senators (defendants) had become disenchanted with the committee leadership and 1991 Rules, and petitioned Senate President Virdin C. Brown to convene a special session of the legislature to consider the [certain] bills and resolutions[, including ones changing some of the 1991 Rules.]
>
> [Senate] President Brown convened the legislature in public session on January 22, 1992 in Charlotte Amalie. After reading defendant Senators' petition, Brown stated that the proposed bills and resolutions were not submitted in accordance with the 1991 Rules and, over the objections of several Senators, declared the meeting adjourned. Brown and his six supporters then left the Senate chambers. After their departure, Senate Vice President Alicia Hansen assumed the president's chair and continued deliberations with the remaining Senators present. Defendant Senators then adopted the proposed bills and resolutions by a vote of 8-0. Six days later, Senator Hansen forwarded the bills and resolutions to the governor [for action.][53]

In other words, the majority of Senators that remained after the departure of the Senate President took the gavel, made it in order for the Senate to consider the relevant legislation and rules changes, and then adopted them by simple majority votes. Litigation ensued.

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53. 973 F.2d at 1120.

The Third Circuit affirmed the judgment of the lower court that the legislation was validly enacted despite the steps taken in contradiction to the requirements of the 1991 Rules. The Court began by considering whether the acts of the majority violated "any constitutional or statutory provision," because, in the view of the Third Circuit, "the question whether the legislature violated its own internal rules is nonjusticiable."[54] In the Court's view, "[a]bsent a clear command from some external source of law, we cannot interfere with the internal workings of the Virgin Islands Legislature 'without expressing lack of the respect due coordinate branches of government.'"[55]

In 1982, Senator Metzenbaum and others sued to challenge the validity of certain consumer legislation that was, according to the complainants, not enacted in accordance with a set of statutorily imposed parliamentary procedures. Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982). The Court of Appeals concluded that the task of interpreting the internal procedural rules of the House, and perhaps even putting itself in the position of deciding whether the House had correctly interpreted its own Rules, was an impermissible position for a federal court:

> Complainants first argue that Pub.L.No.97-93 is invalid because it was passed in violation of [parliamentary rules enacted by statute], which bar consideration by either house of Congress of a resolution approving proposed waivers within 60 days of considering any other resolution respecting the same Presidential [recommendation]. This provision was enacted by Congress
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> > as an exercise of the rulemaking power of each House of Congress, respectively, and as such it is deemed a part of the rules of each House . . . with full recognition of the constitutional right of either House to change the rules (so far as those rules relate to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.
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> 15 U.S.C. § 719f(d)(1). Thus, complainants ask us to decide whether or not the rules of the House of Representatives permitted consideration of the Senate

54. 973 F.2d at 1121.

55. Id. (citation omitted).

> resolution so quickly after passage of the House resolution. To resolve this issue would require us not only to construe the rules of the House of Representatives but additionally to impose upon the House our interpretation of its rules, i.e., whether the Senate resolution was in fact another resolution within the meaning of the [statutory parliamentary rules] and further whether the rule actually adopted by the House to allow consideration of the Senate resolution was effective under or took precedence over [those statutory parliamentary rules] so as to permit a change in the procedures it prescribes. There is no question here of whether Constitutional procedural requirements of a lawful enactment were observed, but only of whether the House observed the rules it had established for its own deliberations. We conclude that this issue, like most questions involving the processes by which statutes ... are adopted, is political in nature, and is therefore nonjusticiable.[56]

The court in Metzenbaum demonstrated an appropriate deference to the Rule-Making Clause authority of the House:

> Were not the express constitutional commitment of rulemaking authority to the houses of Congress sufficient in itself to identify the issues raised here as political questions, prudential considerations (would) counsel against judicial intervention. Among these is concern with the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. To invalidate Pub.L.No.97-93 on the ground that it was enacted in violation of House rules would be to declare as erroneous the understanding of the House of Representatives of rules of its own making, binding upon it only by its own choice. We must assume that the House acted in the belief that its conduct was permitted by its rules, and deference rather than disrespect is due that judgment.

Id. (emphasis added).

In light of Brown v. Hansen and Metzenbaum v. FERC, and the precedents on which they are constructed, including Ballin and Baker v. Carr, together with the previously noted sense of the Senate regarding the power of a majority to make the Rules of the Senate,[57] it is within the power of a majority of the Senate to amend the Rules by the vote of a simple majority. Under Brown, a simple majority of Senators could act, and if they share Senator Hatch's commitment to do what must be done to

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56. 675 F.2d at 1286-88 (emphasis added; citations and internal quotation marks omitted).

57. See text accompanying nn. 50-51, supra.

repair the Senate's substantially broken confirmation processes, they will. Under Metzenbaum, the majority of a legislative body does not have to answer to a federal court as to the correct interpretation of its own rules.

Finally, in a decision arising from the State of Arizona, the Ninth Circuit rejected a similar invitation to weigh in on the internal rule-making and rule-interpretation activities of the Arizona House of Representatives. In Davids v. Akers, 549 F.2d 120 (9th Cir. 1977), the Democrat minority challenged the majority's allocation of committee seats and committee assignments.[58] The court commented,

> The principle that such procedures are for the House itself to decide is as old as the British Parliament. It is embodied in the Constitution of the United States: 'Each House may determine the Rules of its Proceedings. . . .' (Art. I, Sec. 5, cl. 2). It is embodied in the Constitution of Arizona: 'Each house to determine rules of its proceedings' (Art. IV, Sec. 8).[59]

In a footnote, the Ninth Circuit panel explained the historicity of the deference due to the legislature for determination of parliamentary questions: "From the earliest period in its history, the English Parliament has accepted the principle that the wishes of the majority are decisive."[60] Thus, again, the long-standing principle of representative bodies, the majority rule, is vindicated by the action of a simple majority deciding that it may make the rules of the Senate, deciding in the making of those rules that filibusters of nominations are out of order (or are subject to cloture by a simple majority vote), and deciding to give consent to the nomination of Miguel Estrada (or any other nominee) to be a federal judge.

CONCLUSION

Given the prerogative of the majority, and the respect for that prerogative expressed in Brown, Metzenbaum, and Davis, a willing majority in the Senate could make it in order for the Senate immediately to take up the questions proposed above,

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58. Id.

59. 549 F.2d at 123 (footnote omitted).

60. Id. n.2.

regarding the making of the Senate's rules, the prohibiting of filibusters on judicial nominations (or the phasing out of them), and the confirmation of Miguel Estrada (or other nominees). And while sixty votes may not be found to invoke cloture, Brown, Metzenbaum, Davis, and their predecessors in law and Senate practice confirm that all that would be required to make the necessary rule changes is a majority of a quorum of the Senate – a sufficient number of Senators to insure that the power of the body to act has arisen.