SESSIONS OF THE LIVING DEAD

Why a Tyranny of the Retired and the Dead Prevents
Confirmation of Well-Qualified Judicial Nominees

James Matthew Henderson, Sr.
Senior Counsel

In January, 2005, the Senate will convene for the start of the First Session of the One Hundred Ninth Congress of the United States. When it does so, the proceedings of that august, deliberative body will be managed under Rules that *fewer than fifteen* sitting members of that body had any voice in adopting. The attrition of politics and of time has overwhelmingly altered the senatorial landscape over the last quarter century since the last substantive revision of the Rules of Senate completed in November, 1979.

When that revision was accomplished, fifty-nine Senators who are still living but now retired or not returned to office by the electorate participated in the overhaul of the Senate's Rules.[1] Then, twenty-six Senators who have subsequently died had the opportunity to decide on the rules that would govern the Senate's proceedings.[2] The Senate, whether governed by Republicans or Democrats, must be governed according to Rules that its members select. But if the Senate fails to address the question of the Rules by which it will proceed, the cold hands of fifty-nine former Solons, and the dead hands of twenty-six others, will govern imperative matters of process and decision.

Were it but a local genealogical society or garden club, the Senate's choice of its rules of proceedings would bear no importance to the Nation at large. The Senate is, like the House, something more than a club. It is the paired half of the federal Legislature, and with the House it

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1. Living former Senators who served in the Senate at the time of the major revision are: William Armstrong (R-CO), Howard Baker (R-TN), Birch Bayh (D-IN), Henry Bellmon (R-OK), John Bennett Johnston, Jr. (D-LA), Lloyd Bentsen (D-TX), David Boren (D-OK), Rudolph Boschwitz (R-MN), William Bradley (D-NJ), Dale Bumpers (D-AR), Harry Byrd, Jr. (I-VA), William Cohen (R-ME), John Culver (D-IA), John Danforth (R-MO), Dennis DeConcini (D-AZ), Alan Dixon (D-IL), Robert Dole (R-KS), David Durenberger (R-MN), John Durkin (D-NH), Thomas Eagleton (D-MO), James Exon (D-NE), Wendell Ford (D-KY), Jake Garn (R-UT), John Glenn (D-OH), Maurice Gravel (D-AK), Gary Hart (D-CO), Mark Hatfield (R-OR), Howell Heflin (D-AL), Jesse Helms (R-NC), Walter Huddleston (D-KY), Gordon Humphrey (R-NH), Roger Jepsen (R-IA), Nancy Kassebaum (R-KS), Paul Laxalt (R-NV), Charles Mac Mathias (R-MD), James McClure (R-ID), George McGovern (D-SD), John Melcher (D-MT), Howard Metzenbaum (D-OH), Robert Morgan (D-NC), Gaylord Nelson (D-WI), Samuel Nunn (D-GA), Robert Packwood (R-OR), Claiborne Pell (D-RI), Charles Percy (R-IL), Larry Pressler (R-SD), William Proxmire (D-WI), David Pryor (D-AK), Donald Riegle (D-MI), James Sasser (D-TN), Harrison Schmitt (R-NM), Richard Schweiker (R-PA), Alan Simpson (R-WY), Robert Stafford (R-VT), Adlai Stevenson (D-IL), Donald Stewart (D-AL), Richard Stone (D-FL), Malcolm Wallop (R-WY), Lowell Weicker (R-CT). See http://www.senate.gov.

2. Now deceased Senators who served in the Senate at the time of the major revision were: William Roth (R-DE), Paul Simon (D-IL), Strom Thurmond (R-SC), Russell Long (D-LA), Daniel Moynihan (D-NY), Paul Wellstone (D-MN), Herman Talmadge (D-GA), Howard Cannon (D-NV), Harrison Williams (D-NJ), Alan Cranston (D-CA), Barry Goldwater (R-AZ), Jennings Randolph (D-WV), Terry Sanford (D-NC), Abraham Ribicoff (D-CT), Edmund Muskie (D-ME), John Stennis (D-MS), Quentin Burdick (D-ND), Samuel Hayakawa (R-CA), John Tower (R-TX), John Heinz III (R-PA), Spark Matsunaga (D-HI), Warren Magnuson (D-WA), Edward Zorinsky (D-NE), Jacob Javits (R-NY), Frank Church (D-ID), Henry M. Jackson (D-WA). See http://www.senate.gov.

is the repository of all the legislative powers donated by the several States when they created the National government.

Its legislative function sufficiently important to demand that Senators fully commit to their service and fully accomplish their commitment, the Senate shoulders added responsibilities under the Constitution. In removing high government officials from office, in ratifying international treaties and obligations proposed to it by the President, and in giving its Advice and Consent to executive and judicial nominees propounded by the President, the Senate bears quasi-judicial and quasi-executive powers unique to its special role in the National scheme. And in the execution of all these duties, Senators and the Senate owe to the Constitution and to its People a faithful, a complete devotion.

Unfortunately, that devotion is absent from the Senate.

The current crisis in filling judicial vacancies has served to highlight a crass abdication of senatorial responsibility, an abdication made all the worse because it denigrates the Constitution. This is an abdication of duties, not just because votes are not being held, but because, while possessing entire authority to change the Rules that govern them, this Senate stands, doe-like, as the onrushing headlights of a determined minority rush down at them. And like the proverbial deer in the headlights, a constitutional majority behave as though there is nothing they can do to change the situation. And that pretense, which is all that it is, is the thinnest skin of civic falsehood.

Let us begin with first principles. And in the uniting colonies that became the United States of America, self-determination and self-government through elected representatives were the very first principles.

Indeed, among the usurpations inflicted on the American colonies by King George III of England, deprivations and depredations directed at the legislatures of the colonies were very keenly felt by the Founders. In fact, in the Declaration of Independence, where the abuses of the Crown against the colonies are detailed, the first six wrongs there tallied are legislative acts and omissions. Unsurprisingly, when the Constitutional Convention considered the construction of the planned National government, the Framers gave the House and the Senate broad authority over their own proceedings, including the power to make the Rules that would govern their proceedings. And, when the Senate first convened, among it immediately appointed a committee to consider and propose rules of proceedings for the Senate.

That power, to make rules of proceedings for itself, has, since the Constitution was ratified, always been part of the its legislative prerogative. Thus, when the Republican majority in the Senate pretends that its hands are tied by the filibusters of several well-qualified judicial nominees, a lie is being told, a history is being forgotten, and a Constitution is being ignored. Maintenance of a filibuster today requires a slavish adherence to an anti-constitutional sense that the Senate is not its own master and must bow to any significant minority of its voices. In truth, busting a filibuster requires only a startling realization of present power by the majority of the Senate.

The authors of the Federalist Papers argued *for* placing the power to nominate judges and other officers with the President, rather than Congress, for two reasons: increased efficiency in the nomination process and improved likelihood that the ability to insure the quality of selections would be greater if so situated. If President Bush, contrary to the oath of his office, chose to misuse that executive authority and to nominate thugs, criminals, charlatans, or unqualified candidates to judicial office in the United States, it would be the solemn duty of the Senate to vote down such nominees. While the President *might* make such nominations and appointments, the Framers of our Constitution intended that the Senate weed out unqualified appointees. The Framers' vision on this point was that the Senate would *vote down* such nominees.

The judicial nomination track record of President Bush is, however, spectacular. The Senate has not had to vote down a nominee that *lacked* appropriate qualifications or that was stained with some inappropriate disqualifying trait of character or behavior. If a Presidential Hall of Fame existed, President Bush's judicial selections would make him a sure pick for the Hall of Fame in his first year of eligibility. By our reckoning of ratings of the judicial nominees of President Bush by the American Bar Association, with unnerving consistency and thoroughness, the President has tapped the most well-qualified talent for judicial service in the federal courts.

Given the circumstances, then, it is an abuse of the Constitution for the Senate to willfully refuse to fulfill its duty by voting on the President's nominees. Yet that is precisely how the matter stands. While the Senate has held votes for the large majority of the President's judicial nominees, it persistently denied votes – up or down judgments of the Senate – on a particularly well-qualified group of judicial nominees. These nominees – including Miguel Estrada, Priscilla Owens, William Pryor, and Janice Rogers Brown – include nominations to fill six appeals court seats on courts that are currently experienced judicial emergencies due to death, retirements, and departures from judicial service. The delaying tactics have a heavy toll on nominees; ultimately, Miguel Estrada withdrew his name from consideration because of the impact on his family and professional life of having his confirmation undecided.

It will be a remarkable shame if, upon the President's re-submission in the new Congress of their names, the bundle of well-qualified nominees that either are currently being filibustered or are under threat of it, were to continue to languish. A shame that those who have the power to act would fail to do so. A shame that dead men would govern rather than merely *guide* the life of the Senate. A shame that Senators duly elected by the majority of voters in their States would bind themselves to rules imposed by other Senators turned out of office by the very same electorate.

The time to act is here. The means to accomplish change exists. It remains only to see if the will to act exists.