The Senate has authority under the Constitution of the United States both to make rules for its proceedings, and to make changes to those rules. "Each House may determine the rules of its proceedings." U.S. Const. Art. I, sec. 5. This first principle governs the outcome of the pending constitutional crisis that has resulted from a determined minority preventing floor votes on well qualified judicial nominees. As now appears likely, a minority of Senators will force a constitutional crisis in the Senate by denying to a majority of Senators the right to have an up-or-down vote on judicial nominees. They will do this by asserting that their right to unlimited debate can only be terminated by invoking cloture under Senate Rule XXII.

In the face of this crisis, it appears that only a parliamentary ruling from the chair, followed by an appeal to the Senate from that ruling, can undo the present circumstance in which the minority has taken control of the Senate's calendar. When the chair rules, as it may currently be expected to do, that only a simple majority vote of the Senate is required to terminate debate and bring a nomination to a vote, it will lead to an appeal from the ruling of the chair. Under the Senate Rules, the ruling of the chair can be overturned or sustained, and a simple majority is required to do so.

Once a vote is held, and the determination is made that the chair's ruling should be sustained, then a vote to invoke cloture by a simple majority vote can be expected. At this point, while a vote on pending nominations may seem a foregone conclusion, it must be recalled that past masters of Senate procedure found ways to build into their obstructionist tactics various methods of further delay after cloture. Further delay may take the form of post-cloture filibusters, but such tactics are limited even under current Senate rules.[1]

Consequently, once the Senate, on appeal from the ruling of the Chair, affirms that only a simple majority vote is required to terminate debate and proceed to consideration of judicial nominations, it is reasonable to expect at least a couple different possibilities: further delay within the ambit of the 30 hour limit on post cloture debate; a vote upon the pending nomination(s); and, organized machinations by rules-saavy obstructionists who, though they will have lost the war, are not yet prepared to surrender the battle. At least one other possibility exists that would threaten to impede the Senate's progress on nomination confirmations.

One or more Senators may file an action in the federal district court in Washington, DC, complaining that the rule change violates some right personal to them as Senators. Such a suit would invite an *inferior* federal court *created by Congress* to consider whether the Senate has power to make its own rules, and to change them, by simple majority vote. While the federal trial and appeals court in Washington have entertained various suits in which vote dilution complaints are made by elected representatives, the courts observe a discretionary rule of abstention, in order to avoid yet another constitutional crisis, this one between lower courts of a co-equal branch and the Senate. Consequently, while such an action might be anticipated, its chances of success as a means of changing the outcome are highly unlikely.

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1. In 1979, the Senate refined the cloture rule by adopting a 100-hour limit on postcloture debate. And seven years later, in 1986, that post-cloture debate limit was reduced to 30 hours in 1986. That 30 hour, post-cloture limit, continues to be the rule for extended debate after cloture in the Senate today.