

## Judicial Nomination Filibuster Cause and Cure

Orrin G. Hatch\*

*[T]he filibuster has been the shame of the Senate. . . . The time has come for change. Surely, when both the disease and cure are clear, the Senate cannot fail to apply the proper medicine and end its present crippled state.*<sup>1</sup>

*I find it simply baffling that a Senator would vote against even voting on a judicial nomination.*<sup>2</sup>

Were Ken Jennings, a Utah native and famed winner of more than \$2.5 million, still a *Jeopardy* contestant and he saw these quotes, he might well have responded “Who is Senator Orrin Hatch?” However, the correct responses would have been “Who is Senator Ted Kennedy?” for the first and “Who is Senator Tom Daschle?” for the second. This is the story of how these Democrats’ views, expressed in 1975 and 1995 respectively, should result in filibuster reform today.

The word “filibuster” comes from the Dutch *vrijbuter*,<sup>3</sup> the Spanish *filibustero*,<sup>4</sup> or the French *filibustier*.<sup>5</sup> *Vrijbuter* originally referred to “pirates

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<sup>1</sup>See 121 CONG. REC. 3849–49 (1975) (statement of Sen. Kennedy) (advocating three-fifths vote for cloture).

<sup>2</sup>145 CONG. REC. S11,919 (daily ed. Oct. 5, 1999) (statement of Sen. Daschle).

<sup>3</sup>See ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 92 (2002) (“And there took place therefore so many ‘extended discussions’ of measures to keep them from coming to a vote that the device got its name, ‘filibuster,’ from the Dutch word *vrijbuter*, which means ‘freebooter’ or ‘pirate’ . . . and into legislative parlance because the device was, after all, a pirating, or highjacking, of the very heart of the legislative process.”).

<sup>4</sup>See Old Farmer’s Almanac, *Word of the Day*, at <http://www.almanac.com/word/oneanswer.php?wordnumber=14982> (last visited Aug. 27, 2005) (defining “filibuster” as “[a] lawless military adventurer, especially one in quest of plunder; a freebooter;—originally applied to buccaneers infesting the Spanish American coasts, but introduced into common English to designate the followers of Lopez in his expedition to Cuba in 1851, and those of Walker in his expedition to Nicaragua, in 1855”).

<sup>5</sup>See Online Etymology Dictionary, *Filibuster*, at <http://www.etymonline.com/index.php?search=filibuster> (Nov. 2001) (referring to “filibuster” as, in part, derived from *filibustero* and *filibustier*, and explaining that it was “[u]sed [in the] 1850s and ‘60s of [sic] lawless adventurers from the U.S. who tried to overthrow Central American countries. The legislative sense is first recorded c.1851, probably because obstructionist legislators ‘pirated’ debate. Not technically restricted to U.S. Senate, but that’s where the strategy works best.”); see also ROBERT C. BYRD, 2 THE SENATE 1789–1989: ADDRESS ON THE HISTORY OF THE UNITED STATES SENATE 93 (Wendy Wolff ed., 1988) (discussing origin of filibuster).

who pillaged the Spanish colonies in the West Indies.”<sup>6</sup> The word’s modern incarnation is understood as referring to “extreme dilatory tactics in an attempt to delay or prevent action especially in a legislative assembly.”<sup>7</sup>

The filibuster, used during the 108th Congress to defeat majority-supported judicial nominations, is a new tactic in the ongoing obstruction campaign against President George W. Bush’s judicial nominees. This campaign, in turn, is part of the broader conflict over judicial appointments, which is “an argument over the proper role of the Court in American society, and about the nature and extent of judicial power under a written Constitution.”<sup>8</sup>

Section I of this Article describes the cause of these filibusters and how we got where we are. Section II examines where we are by explaining how these judicial nomination filibusters are unprecedented, partisan, unfair, dangerous, and unconstitutional. Section III presents the cure for this political and constitutional crisis, showing that the Senate has periodically rebalanced the minority’s right to debate and the majority’s right to decide, and outlining two approaches for doing so.

## I. HOW WE GOT WHERE WE ARE

### A. *Judicial Power*

Conflict over judicial selection reflects the conflict between different views of the role judges should play in our system of government. Columnist Thomas Sowell correctly observed that, at the center of this clash, the “real issue is . . . what kind of judges” should be appointed.<sup>9</sup> President Bush has made clear his position on this issue. During the 2000 presidential campaign, candidate Bush said he would appoint judges who would not “legislate from the bench.”<sup>10</sup> On May 9, 2001, announcing his first nominees to the U.S. Court

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<sup>6</sup>Compact Oxford English Dictionary, *Filibuster*, at [http://www.askoxford.com/concise\\_oed/filibuster?view=uk](http://www.askoxford.com/concise_oed/filibuster?view=uk) (last visited Aug. 27, 2005); see also Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 187 n.26 (1997) (“[F]ilibustering originally referred to mercenary warfare intended to destabilize a government.”).

<sup>7</sup>Merriam-Webster OnLine, *Filibuster*, at <http://www.m-w.com> (last visited Aug. 27, 2005); see also SARA A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 3 (1997) (discussing etymology and present use of term).

<sup>8</sup>Gary L. McDowell, *Doubting Thomas*, NEW REPUBLIC, July 29, 1991, at 12, 12.

<sup>9</sup>Thomas Sowell, *Real Judicial Crisis Is Judges Who Ignore the Law*, POST & COURIER (Charleston, S.C.), Jan. 14, 1998, at A11; see also C. Boyden Gray, *Claude Allen & His Enemies*, NAT’L REV. ONLINE, July 7, 2004, at <http://www.nationalreview.com/comment/gray200407070947.asp> (stating that dispute over judicial selection flows from “a fundamental disconnect over the proper role of judges in our system of government”).

<sup>10</sup>See Sam Attlesey, *Bush Says Actions Speak in Opposition to Abortion*, DALLAS MORNING NEWS, Jan. 21, 2000, at 10A; Editorial, *Election 2000 Presidential Race: Courts on Political Stage*, L.A. TIMES, Sept. 24, 2000, at M4; Jonathon Groner, *Pro-Business But Still*

of Appeals, President Bush again described his judicial appointment standard: “Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. . . . My judicial nominees will know the difference.”<sup>11</sup> When accepting the 2004 nomination for reelection, President Bush again promised to “continue to appoint federal judges who know the difference between personal opinion and the strict interpretation of the law.”<sup>12</sup> In his 2005 State of the Union Address, he said that “judges have a duty to faithfully interpret the law, not legislate from the bench. As president, I have a constitutional responsibility to nominate men and women who understand the role of courts in our democracy . . . and I have done so.”<sup>13</sup>

President Bush’s view on the role of judges focuses on judicial *process*,<sup>14</sup> with judges taking law they did not make and cannot change and applying it fairly and impartially to settle legal disputes. In this approach, sometimes called judicial restraint,<sup>15</sup> the process legitimates the result.

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*Independent: The Bush Justices*, LEGAL TIMES (D.C.), Oct. 16, 2000, at 1, 1; Terry M. Neal, *Bush Resists GOP Rivals’ Nudging on Abortion*, WASH. POST, Jan. 21, 2000, at A5.

<sup>11</sup>Press Release, President George W. Bush, Remarks by the President During Federal Judicial Appointees Announcement (May 9, 2001), available at <http://www.whitehouse.gov/news/releases/2001/05/print/20010509-3.html>.

<sup>12</sup>President George W. Bush, Remarks at the Republican National Convention (Sept. 2, 2004), in WASH. POST, Sept. 3, 2004, at A24, available at <http://www.washingtonpost.com/wp-dyn/articles/A57466-2004Sep2.html>; see also Siobhan Gorman, *White House Calculus*, 36 NAT’L J. 3662, 3666 (Dec. 2004) (quoting President Bush as saying he “would pick somebody who would not allow their personal opinion to get in the way of the law”).

<sup>13</sup>President George W. Bush, State of the Union Address (Feb. 2, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>.

<sup>14</sup>See, e.g., Eugene W. Hickok, Jr., *Judicial Selection: The Political Roots of Advice and Consent*, in JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 3, 5 (Nat’l Legal Ctr. for Public Interest ed., 1990) (stating that “how that decision is reached, the interpretive road followed, is what judging ultimately is all about”); Attorney General Edwin Meese III, Address Before the Federalist Society Lawyers Division (Nov. 15, 1985) (“A jurisprudence that seeks fidelity to the Constitution . . . is not a jurisprudence of political results. It is very much concerned with process . . . .”), in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 31, 39 (Paul G. Cassell ed., 1986) [hereinafter THE GREAT DEBATE].

<sup>15</sup>The labels used in this Article, though perhaps imperfect, have been used throughout the modern debate over judicial power and selection. Supporters of President Ronald Reagan’s deliberate focus on judicial appointments, for example, “wanted him to recast the judiciary from one dominated by liberal ‘judicial activists’ appointed by Carter to one with a majority committed to ‘judicial restraint.’” *Reagan Nears Carter Record in Naming Judges*, in 1985 CONG. Q. ALMANAC 246, 246–48 (internal citation omitted). The charge that judicial restraint lacks real meaning typically comes from those who cannot defend the concept’s opposite, judicial activism. See, e.g., Anthony Lewis, *‘Judicial Restraint’: No Fixed Principle*, N.Y. TIMES, Sept. 27, 1981, at 20E (“The conservatives who hold political power often speak of the need for judicial restraint, for strict construction of the Constitution, for judges leaving policy decisions to legislators.”). In the sense used here, judges are restrained by the law, which, in both words and meaning, exists outside of the judge. Former U.S. Circuit Court Judge Robert Bork explained that if “the Constitution is law,” then its “words constrain judgment,” which

The competing view, often called judicial activism, focuses instead on judicial *results*.<sup>16</sup> The *Washington Post*, for instance, described the late Supreme Court Justice William Brennan as the voice of the Court's "social revolution," and said that he "found the essential meaning of the Constitution not in the past but in contemporary life," an approach that "compelled him to reach out to right perceived wrongs."<sup>17</sup> "A judicial activist is a judge who interprets the Constitution to mean what it would have said if he instead of the Founding Fathers had written it."<sup>18</sup>

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necessarily means that "any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges." See Judge Robert H. Bork, Address at the University of San Diego Law School (Nov. 18, 1985) (discussing how conservatives who normally applaud judicial restraint have lauded certain decisions characterized as activist), in *THE GREAT DEBATE*, *supra* note 14, at 44–45. Judges must also be self-restrained. See *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting) ("[T]he only check upon our own exercise of power is our own sense of self-restraint.").

<sup>16</sup>"Judicial activism" is neither a "hazy slur," nor, as Judge Jon Newman would have it, nothing but a label for "any decision [someone does] not like." See *The Senate's Judicial Farce*, N.Y. TIMES, Feb. 17, 1998, at A18; Jon O. Newman, *Misdiagnosing Courts' Problems*, N.Y. TIMES, Jan. 6, 1998, at A19; see also Herman Schwartz, *One Man's Activist . . . What Republicans Really Mean When They Condemn Judicial Activism*, WASH. MONTHLY, Nov. 1997, at 10, 10 ("The Congressional Republicans have officially declared war on 'judicial activists,' judges who go beyond interpreting the law into the realm of what GOP lawmakers consider 'making' the law."). This vocabulary may be imperfect, but it is the most common terminology and remains useful if properly defined. U.S. Circuit Judge Diarmuid O'Scannlain defined it this way: "When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully. This is the essence of judicial activism." Diarmuid F. O'Scannlain, *On Judicial Activism*, OPEN SPACES Q., Mar. 2000, at 2, 3, available at <http://www.open-spaces.com/issue-v3n1.php>. In criticizing "judicial activists who twist the law to impose their own policy preferences," I also said that "[a] judicial activist, on the left or right, is not, in my view, qualified to sit on the federal bench." See Henry J. Reske, *Withholding Consent: Senate Judiciary Chair Says He Won't Approve Activist Judges*, 83 A.B.A. J. 28, 28 (1997); see also Kenneth Jost, *The Federal Judiciary*, CONG. Q. RESEARCHER, Mar. 13, 1998, at 217, 221–22 (discussing Professor Ronald Rotunda's definition of activist judges as those "who are going beyond what is a fair reading of the Constitution, statutes or regulations" and arguing that "[i]f they do it for liberal reasons or conservative reasons, it's still judicial activism").

<sup>17</sup>Joan Biskupic, *Justice Brennan, Voice of Court's Social Revolution, Dies*, WASH. POST, July 25, 1997, at A1; see also Joan Biskupic, *The Biggest Heart in the Building*, WASH. POST, July 25, 1997, at A15 (characterizing Justice Brennan's philosophy as "the notion that the federal courts should actively seek to right society's wrongs"). In an October 1985 speech, Justice Brennan said that the Constitution's "majestic generalities and ennobling pronouncements are both luminous and obscure," and described the relationship of a judge to the Constitution as "the interaction of reader and text." Justice William J. Brennan, Jr., Address at the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in *THE GREAT DEBATE*, *supra* note 14, at 11.

<sup>18</sup>Sam J. Ervin, Jr., *Judicial Verbicide: An Affront to the Constitution*, in *FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION, A BLUEPRINT FOR JUDICIAL REFORM 7–8* (Patrick B. McGrigan & Randall L. Rader eds., 1981).

Laurence Tribe, a leading advocate of this model of judging, wrote that the courts should take a “candidly creative” approach to achieving justice.<sup>19</sup> Tribe explained that, under this view, the legitimacy of Supreme Court decisions is not “a product of method . . . but of outcome: the values these decisions invoked . . . are values we truly hold.”<sup>20</sup> Interpreting the Constitution, he wrote, “entails a major element of judicial creation.”<sup>21</sup> In this approach, the ends justify the means.

The written law,<sup>22</sup> which legislatures make and the judiciary interprets, has both words and meaning; changing either one changes the law. James Madison endorsed “the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution.”<sup>23</sup> The Supreme Court reaffirmed this fundamental axiom a century ago: “The Constitution is a written instrument. As such its

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<sup>19</sup>LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at iii–vii (1st ed. 1978).

<sup>20</sup>*Id.* at 52. In subsequent editions of this treatise, Tribe writes that legitimacy comes from a decision’s “contact with the consensus” of society. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 66 (2d ed. 1988); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 310 (3d ed. 2000). Needless to say, these constructs suit the judicial activist just fine, since it is the judge—or perhaps the professor—who decides what values we truly hold (and, indeed, who we are) and what society’s consensus is.

<sup>21</sup>Gary L. McDowell, *God Save This Honorable Court—And My Place on It*, 4 *BENCHMARK* 185, 188 (1990).

<sup>22</sup>“Every issue of law resolved by a federal judge involves interpretation of text—the text of a regulation, or of a statute, or of the Constitution.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 13 (1997).

<sup>23</sup>Letter from James Madison to H. Lee (June 25, 1824), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 441–42 (J.B. Lippincott ed., 1884). Joseph Story, appointed to the Supreme Court by President James Madison, and who served for thirty-four years, wrote in his famous treatise that the “the first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms and intention of the parties.” JOSEPH STORY, *1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, book 3, § 400 (1833). Justice James Wilson, one of the Constitution’s framers, and appointed by President George Washington, wrote that “when [the Constitution’s] intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended.” *See* *Gibbons v. Ogden*, 22 U.S. 1, 223 (1824). Dissenting in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), Justice Benjamin Curtis echoed Madison’s formulation:

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretations of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

*Id.* at 621 (Curtis, J., dissenting). Justice Felix Frankfurter more recently reaffirmed that “an amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption.” *Adamson v. California*, 332 U.S. 46, 63 (1947) (internal quotation marks and citations omitted).

meaning does not alter.”<sup>24</sup> In his farewell address, President George Washington warned:

If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.<sup>25</sup>

### *B. Judicial Practice*

The battle over judicial selection, then, is really a battle over judicial power. Until well into the twentieth century, there had been a consensus, grounded in the separation of powers, about judicial power and, therefore, about the kind of judge that should be appointed. At the time of America’s founding, it had already been established “from Francis Bacon on, [that] the function of a judge has been to interpret, not make, law.”<sup>26</sup> America’s founders insisted on the same distinction, arguing that the very system of ordered liberty they were establishing depended on it. Quoting Montesquieu, Alexander Hamilton argued that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>27</sup> Implementing this

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<sup>24</sup>*South Carolina v. United States*, 199 U.S. 437, 448 (1905); *see also Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838) (stating meaning of Constitution “must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states”).

<sup>25</sup>George Washington, Farewell Address to the People of the United States (1796), available at <http://www.yale.edu/lawweb/avalon/washing.htm> (last visited Aug. 27, 2005); *see also Harper v. Va. Bd. of Elections*, 383 U.S. 663, 680 (1964) (Black, J., dissenting) (“[F]or us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amounts, in my judgment, to a plain exercise of power which the Constitution has denied us but has specifically granted to Congress.”); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting) (“The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation.”). The other view is represented by Chief Justice Charles Evans Hughes’ famous remark that the Constitution “is what the judges say it is.” Charles Evans Hughes, Remarks Before the Elmira Chamber of Commerce (May 3, 1907), in *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 133, 139 (1908).

<sup>26</sup>Raoul Berger, “Original Intention” in *Historical Perspective*, 54 *GEO. WASH. L. REV.* 296, 310–11 (1986).

<sup>27</sup>THE FEDERALIST NO. 78 (Alexander Hamilton). Similarly, James Madison wrote of this separation of powers that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.” THE FEDERALIST NO. 47 (James Madison).

principle, the Constitution assigns different categories of government power to separate branches.<sup>28</sup> This separation alone means that the judiciary's power of "interpretation,"<sup>29</sup> which requires "judgment,"<sup>30</sup> is different than the legislature's power to make law,<sup>31</sup> which involves "will."<sup>32</sup> An activist judiciary turns this ordering on its head, "hobbl[ing] the political branches of government" and "undermin[ing] the judiciary itself."<sup>33</sup>

In the traditional framework, however, the law controls the judiciary, not the other way around. In *Marbury v. Madison*,<sup>34</sup> Chief Justice John Marshall reminded us that "the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature."<sup>35</sup> It can only serve that purpose if judges take the law as they find it, discover what it already means,<sup>36</sup> and apply it to the legal cases and controversies that come before them.<sup>37</sup>

Because of the judiciary's "comparative weakness, and from its total incapacity to support its usurpations by force," Hamilton dismissed as a "phantom"<sup>38</sup> concerns by some at the constitutional convention, such as

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<sup>28</sup>See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

<sup>29</sup>THE FEDERALIST NO. 78 (Alexander Hamilton). Interpretation is the "process of determining what something . . . means; the ascertainment of meaning." BLACK'S LAW DICTIONARY 824 (7th ed. 1999). It is the "'art or process of discovering and expounding the intended signification of the language use, that is, the meaning which the authors of the law designed it to convey to others.'" *Id.* (quoting HENRY CABELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 1 (1986)); see also MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 67 (10th ed. 1995) (defining "ascertain" to mean "to find out or learn with certainty"). Interpretation, then, requires finding meaning that is already there.

<sup>30</sup>THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>31</sup>Every state constitution similarly assigns these categories of legislative, executive, and judicial power to different branches, and most also explicitly prohibit each from exercising the powers of the others. *E.g.*, ALA. CONST. art. III, § 1; ARIZ. CONST. art. III; ARK. CONST. art. IV, §§ 1,2; CAL. CONST. art. III, § 3; COLO. CONST. art. III; CONN. CONST. art. II; FLA. CONST. art. II, § 3; IDAHO CONST. art. II, § 1; ILL. CONST. art. II, § 1; IND. CONST. art. III, § 1; IOWA CONST. art. III, § 1; KY. CONST. § 28; LA. CONST. art. II, § 2; ME. CONST. art. III, § 2; MASS. CONST. art. XXX; MICH. CONST. art. III, § 2; MINN. CONST. art. III, § 1; MO. CONST. art. II, § 1; MONT. CONST. art. III, § 11; N.J. CONST. art. III, § 1; OKLA. CONST. § IV-1; S.D. CONST. art. II; TENN. CONST. art. II, § 2; TEX. CONST. art. II, § 1; UTAH CONST. art. V, § 1; VT. CONT. ch. II, § 5.

<sup>32</sup>THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>33</sup>O'Scannlain, *supra* note 16, at 6.

<sup>34</sup>5 U.S. (1 Cranch) 137 (1803).

<sup>35</sup>*Id.* at 179–80.

<sup>36</sup>See *id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>37</sup>U.S. CONST. art. III, § 2.

<sup>38</sup>THE FEDERALIST NO. 81 (Alexander Hamilton).

Eldridge Gerry<sup>39</sup> and George Mason,<sup>40</sup> that the judiciary would not stay in its proper place. It generally did, following this basic pattern of judicial restraint for 150 years.<sup>41</sup> Writing in 1939, one scholar observed that, “with almost uninterrupted regularity,” the Supreme Court insisted that “the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it.”<sup>42</sup>

Less than fifteen years later, however, Justice Robert Jackson described the “widely held” belief that the Supreme Court decides cases based not on “impersonal rules of law” but “personal impressions which from time to time may be shared by a majority of Justices.”<sup>43</sup> In the intervening years, Presidents Franklin Roosevelt and Harry Truman had replaced the entire Supreme Court, and its new activist course began abandoning the traditional pattern of judicial restraint.<sup>44</sup> Writing at that crucial time, Justice George Sutherland highlighted the high stakes in this transformation:

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<sup>39</sup>A delegate from Massachusetts, Gerry opposed the Constitution’s ratification because it contained no “well defined limits to the judiciary powers.” Ervin, *supra* note 18, at 8.

<sup>40</sup>A delegate from Virginia, Mason also opposed ratification, arguing that “the power of construing the laws would enable the Supreme Court of the United States to substitute its own pleasure for the law of the land and that the errors and usurpations of the Supreme Court would be uncontrollable and remediless.” *Id.* at 9.

<sup>41</sup>*See, e.g., Ex parte Grossman*, 267 U.S. 87, 109–10 (1925) (“The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.”); *Lake County v. Rollins*, 130 U.S. 662, 670 (1889) (same); *Ex parte Wells*, 59 U.S. (1 How.) 307, 311 (1855) (“We still think so, and that the language used in the constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption.”); *Ogden v. Saunders*, 25 U.S. (1 Wheat.) 213, 302–03 (1827) (“If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction, or any proper ground upon which the intention of the framers of the constitution could be inquired into: this Court would be bound to give to it its full operation, whatever might be the views entertained of its expediency.”); *Hylton v. United States*, 3 U.S. (1 Dall.) 171, 177 (1796) (“Whether it be so under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land.”).

<sup>42</sup>Jacobus ten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939).

<sup>43</sup>*Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring).

<sup>44</sup>Elements of this transformation include expanding federal government powers, which are supposed to be “few and defined,” and restricting state government powers, which are supposed to be “numerous and indefinite.” *See* THE FEDERALIST NO. 45 (James Madison). The Supreme Court has expanded federal power by, for example, expanding the affirmative grants of power in Article I, such as the power to regulate commerce “among the several states.” *See* *United States v. Lopez*, 514 U.S. 549, 584 (Thomas, J., concurring) (1995) (observing “that our case law has drifted far from the original understanding of the Commerce Clause”). The Court

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase “supreme law of the land” stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.<sup>45</sup>

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has restricted state government power by applying the Bill of Rights’ restrictions on government power to the states through the Fourteenth Amendment, expanding those restrictions, and even creating new constitutional rights, which can sometimes take on a life of their own. In *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965), for example, the Court said that “guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees,” which create a separate right to privacy for married couples. *Id.* at 484. Justice Hugo Black dissented, writing that the majority’s approach requires judges to “determine what is or is not constitutional on the basis of [their] own appraisal of what laws are unwise or unnecessary. This power to make such decisions is of course that of a legislative body.” *Id.* at 511–12 (Black, J., dissenting). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court said, citing *Griswold*, that the right of privacy includes “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person.” *Id.* at 453 (citations omitted). Chief Justice Burger dissented: “It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.” *Id.* at 470 (Burger, J., dissenting). In *Roe v. Wade*, 410 U.S. 113 (1973), the Court, citing *Griswold* and *Eisenstadt*, said the right of privacy is actually found in the “Fourteenth Amendment’s concept of personal liberty,” and is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 153 (citations omitted). Justice Byron White dissented:

The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

*Id.* at 221–22 (White, J., dissenting). In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion), the Court, citing *Griswold*, *Eisenstadt*, and *Roe*, said that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Id.* at 851 (citations omitted). Chief Justice Rehnquist dissented, saying that the majority’s “policy judgment . . . may or may not be a correct judgment, but it is quintessentially a legislative one.” *Id.* at 965 (Rehnquist, J., concurring in part and dissenting in part). In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court, citing *Griswold*, *Eisenstadt*, *Roe*, and *Casey*, said: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” *Id.* at 562 (citations omitted). *Lawrence* “involve[d] liberty of the person both in its spatial and more transcendent dimensions.” *Id.* Justice Scalia dissented, objecting to the majority’s approach that extended the right to privacy based on the Court’s perception of “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 514. Justice Scalia said that “such an ‘emerging awareness’ does not establish a ‘fundamental right.’” *Id.* at 598 (Scalia, J., dissenting).

<sup>45</sup>*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting). In terms echoing Justice Sutherland’s concern, Justice Scalia has said that too many issues that

One writer's observation about Supreme Court decisions related to the political process increasingly applies more generally: "Like a great, ever-spreading blob, judicial power has insinuated itself into every nook and cranny . . . ."<sup>46</sup>

### C. Judicial Selection

Professor Raoul Berger's picture of *Government by Judiciary*<sup>47</sup> evokes Senator Daniel Webster's warning: "There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters."<sup>48</sup> A *Wall Street Journal* editorial asked the key question: "So who makes policy in this country anyway, our elected officials or an increasingly imperial judiciary?"<sup>49</sup> So did Ed Asner's judicial character in a September 1997 episode of ABC's *The Practice*: "Do you really think I should leave legislative policy to the legislature?"<sup>50</sup> Leaving legislative policy to legislatures requires a process-focused view of judicial power and a restrained judiciary. Letting judges make policy requires a results-focused view of judicial power and an activist judiciary.<sup>51</sup>

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should be decided by the people and their elected representatives are, instead, decided by "abstract moralizing" by judges. *Scalia Slaps 'Abstract Moralizing'*, ASSOCIATED PRESS, Sept. 29, 2004, <http://www.cbsnews.com/stories/2004/09/29/national/main646403.shtml>.

<sup>46</sup>See Stuart Taylor, Jr., *Imperial Judges Could Pick the President—Again*, 36 NAT'L J. 2877, 2877 (Sept. 2004) (lamenting Supreme Court's role in 2000 presidential election); see also Herman Schwartz, *The Supreme Court Issue*, NATION, Oct. 9, 2000, at 4, 4 ("Since the New Deal, the Supreme Court and the lower courts have profoundly influenced almost every aspect of American life.").

<sup>47</sup>RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

<sup>48</sup>Quote DB, Interactive Database of Famous Quotations, at <http://www.quotedb.com/quotes/2157> (last visited Aug. 27, 2005) (quoting Daniel Webster).

<sup>49</sup>Editorial, *President Kessler, Etc.*, WALL ST. J., Jan. 15, 2004, at A14; see also Cal Thomas, *Why the Right Judge Matters*, WASH. TIMES, June 4, 2004, at A16 ("One issue that should be debated is whether 'we the people' wish to continue allowing unelected federal judges to decide what the law should be.").

<sup>50</sup>*The Practice: The Blessing* (ABC television broadcast Sept. 27, 1997).

<sup>51</sup>Studies of so-called judicial behavior that tally and analyze winners and losers in selected cases only reinforce this activist, results-focused perspective. See, e.g., Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 304 (2004) (evaluating ideological voting tendencies of judges on "a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees"). For an evaluation of this approach, see U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, *BY AND WITH THE ADVICE AND CONSENT OF THE SENATE: THE BORK AND KENNEDY CONFIRMATION HEARINGS AND THE IMPLICATIONS FOR JUDICIAL INDEPENDENCE* 29–33 (1989) [hereinafter *BY AND WITH*]; Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 387–91 (2000). As I have previously written, "[r]aw

A restrained judiciary following impersonal rules of law or enduring mandates will point to the legislative branch for pursuing a political or cultural agenda. An activist judiciary following personal impressions or moral reflections, on the other hand, may well assist pursuit of such an agenda directly. To be sure, few would openly advocate appointment of judges who will govern America and be the people's masters. If the end is all that matters, however, those who insist on pursuing it must embrace the means necessary to achieve it.

It is the rise of such judicial activism, what I have called the "politicization of the federal courts,"<sup>52</sup> that has led to a "steadily degrading" judicial selection process.<sup>53</sup> A political interest in an activist judiciary creates a stake in a politicized selection process aimed at producing such a judiciary. Former U.S. Attorney General Edwin Meese describes the interest this way: "The fact is, some members of the federal judiciary have all too frequently demonstrated what can only be called an ideological bias in the way they have reached their decisions. This tendency makes even more important the question of who is appointed to the bench."<sup>54</sup>

This important question was deliberately addressed during the 1980 presidential campaign. During the campaign, I warned against continuing the trend of appointing "avant garde liberal activists who will legislate from the bench."<sup>55</sup> President Ronald Reagan was elected promising to address the judicial activism that George Gilder described as "a threat from within"<sup>56</sup> the American constitutional order. In an October 1981 speech, U.S. Attorney General William French Smith described how the new administration would pursue strategies to "diminish judicial activism."<sup>57</sup> Just as President Franklin

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calculations of which party won and which party lost a lawsuit, without more, tell the Senate absolutely nothing relevant to its advice and consent function." Sen. Orrin G. Hatch, *The Politics of Picking Judges*, 6 J.L. & POL. 35, 44 (1989). Focusing only on results, rather than on the process for reaching those results, warrants U.S. Circuit Court Judge Harry Edwards' warning that "[g]iving the public a distorted view of judges' work is bad for the judiciary and the rule of law." Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1339 (1998).

<sup>52</sup>Hatch, *supra* note 51, at 35.

<sup>53</sup>Editorial, *Victory for a Smear*, WASH. POST, Feb. 25, 2003, at A20.

<sup>54</sup>Edwin Meese III, *Foreword* to HENRY J. ABRAHAM ET. AL, JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS, at ix (Nat'l Legal Ctr. for Public Interest ed., 1990).

<sup>55</sup>*Carter's Appointees Examined for Clues on Supreme Court*, N.Y. TIMES, Oct. 3, 1980, at A20.

<sup>56</sup>George Gilder, *Foreword* to FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION, A BLUEPRINT FOR JUDICIAL REFORM, at vii (Patrick B. McGrigan & Randal L. Rader eds., 1981). The media saw publication of this book, along with speeches by U.S. Attorney General William French Smith and presidential counselor Edwin Meese, as launching the campaign against judicial activism. See David S. Broder, *New Right Sounds Attack on Courts*, WASH. POST, Nov. 22, 1981, at A3.

<sup>57</sup>127 CONG. REC. 26,961 (1981) (statement of William French Smith). Edwin Meese, then Counselor to President Reagan, was also making the same case. See *Reagan Adviser Asserts*

Roosevelt moved the judiciary in an activist direction by changing its personnel, President Reagan's strategies for diminishing judicial activism included appointing restrained judges.<sup>58</sup>

Some early appeals court nominees represented Reagan's new direction, including the appointment of some jurisprudential heavyweights who were easily confirmed without even roll call votes.<sup>59</sup> Attorney General Smith, for example, praised appeals court nominee Robert Bork for his views "on what the President refers to as judicial restraint."<sup>60</sup> As a professor, Bork had criticized the Supreme Court, stating that "the Court is adrift and frequently performing not a constitutional but a legislative function."<sup>61</sup>

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*Courts Need to Change*, N.Y. TIMES, June 15, 1982, at A27. Solicitor General, Rex Lee, also talked about "the administration's campaign against judicial activism." See Fred Barbash, *The Solicitor in Time of Tension; Rex Lee Leads Fight on 'Judicial Excess'*, WASH. POST, Mar. 8, 1982, at A2.

<sup>58</sup>President Nixon also had promised to change the Court's direction by use of nominations. David S. Tatel, *Judicial Methodology, Southern School Desegregation, and the Rule of Law*, 79 N.Y.U. L. REV. 1071, 1097 (2004). He tended to use the label "strict constructionist," and often focused on criminal justice and law enforcement for examples of the judicial excesses he wanted to curb. *Id.* at 1072. He said he would appoint judges who would "interpret . . . not twist or bend the Constitution in order to perpetuate [their] personal political or social views." *Court Nominees: Powell and Rehnquist Confirmed*, 1971 CONG. Q. ALMANAC 851, 851 [hereinafter *Court Nominees*] (internal quotation marks and citation omitted). Jonathan Rose, who headed the Department of Justice's Office of Legal Policy in the first Reagan term, said President Carter "tended to appoint people who have a very activist role in mind for the judiciary, who believe that judicial intervention can solve all manner of problems that might better be left to political intervention." *Reagan's Judicial Selection*, 1982 CONG. Q. ALMANAC 417, 417.

<sup>59</sup>In 1981, for example, the Senate confirmed Yale law professor, Ralph Winter, to the Second Circuit, and University of Chicago law professor, Richard Posner, to the Seventh Circuit. See 127 CONG. REC. 29,001, 30,181 (1981). In 1982, the Senate unanimously confirmed University of Chicago law professor, Antonin Scalia, and former Yale law professor and Solicitor General, Robert Bork, to the D.C. Circuit. See 128 CONG. REC. 1117, 19,639 (1982).

<sup>60</sup>Stuart Taylor, *Bork, a Former Solicitor General Named to Key Appeals Court Post*, N.Y. TIMES, Dec. 8, 1981, at A1.

<sup>61</sup>Robert H. Bork, *Inside Felix Frankfurter*, 65 PUB. INT. L. REP. 108, 109 (1981). He applied this principle as a judge. See, e.g., *Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 445 (D.C. Cir. 1984) ("As we understand the law, we are not free to make a legislative judgment . . . Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy."). As a result, "[a]t its most fundamental level, the dispute over Judge Bork's nomination was a facet of the larger dispute in our society concerning the proper role of the federal courts under our Constitution." BY AND WITH, *supra* note 51, at 51. Testifying before the Senate Judiciary Subcommittee on the Separation of Powers, in June 1981, Professor Bork said that "most legal scholars" agree that "*Roe v. Wade* is, itself, an unconstitutional decision, a serious and wholly unjustifiable judicial usurpation of State legislative authority. I also think that *Roe v. Wade* is by no means the only example of such unconstitutional behavior by the Supreme Court." Richard Stengel, *Would Roe Go?*, TIME, Sept. 21, 1987, at 14, 14 (quoting Robert Bork), available at <http://www.time.com/time/archive/preview/0,10987,147652,00.html>.

The Reagan administration continued actively engaging the public debate over judicial power and selection, providing a more concrete picture of the kind of judge President Reagan sought to appoint. In his July 1985 speech to the American Bar Association, for example, Attorney General Meese described “a jurisprudence of original intention,” which he said was simply “the logical result of the philosophic foundations of our legal system.”<sup>62</sup> This description was accurate, and the reaction it provoked from legal scholars and jurists indicated how far, and how quickly, our legal system had strayed from its philosophic foundations.<sup>63</sup>

Advocates of judicial activism laid a more concrete intellectual foundation for a political strategy aimed at appointing activist judges. In 1985, as Meese was making the case for President Reagan’s judicial nominees, Tribe provided a new blueprint for how Senate Democrats could take control of the judicial selection process. He candidly acknowledged that the prospect of President Reagan, reelected in the 1984 landslide, appointing more judges prompted him to rush *God Save This Honorable Court* to press.<sup>64</sup> In this book,

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<sup>62</sup>Edwin Meese III, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1, 5 (1986). Attorney General Meese also gave a provocative speech titled, “The Law of the Constitution” at Tulane University on October 21, 1986. See Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). In it, he distinguished between the Constitution itself and constitutional law, which is “what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it.” *Id.* at 982. The *Washington Post* condemned this idea as “an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law.” Editorial, *Why Give That Speech?*, WASH. POST, Oct. 29, 1986, at A18. This kind of attack suggests Meese was positing some novel theory. Yet, it was no different than when Justice Felix Frankfurter wrote that “the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.” *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring). Likewise, Justice William Douglas agreed that “above all else . . . it is the Constitution which [the judge] swore to support and defend, and not the gloss which his predecessors may have put on it.” William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949); see also Stephen L. Carter, *The Courts Are Not the Constitution*, WALL ST. J., Feb. 7, 1989, at A24 (discussing distinction between court decision and Constitution). Attorney General Meese responded to the *Post*’s attack. See Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21 (rejecting claim that distinction between Constitution and constitutional law is self-evident).

<sup>63</sup>Only a few months after Meese’s speech, Justice Brennan dismissed the effort to “find legitimacy in . . . ‘the intentions of the Framers’” as nothing but “arrogance cloaked as humility.” William J. Brennan, Address to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), in THE GREAT DEBATE, *supra* note 14, at 14.

<sup>64</sup>LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY*, at ix–x (1985). Tribe said that his “good friend” and political consultant, Bob Shrum—chief strategist for Senator John Kerry’s 2004 presidential campaign—urged, after the 1984 election, that Tribe express his ideas “soon.” *Id.* at xi. Tribe was “the intellectual architect of the campaign to defeat Judge Bork’s nomination” and *God Save This Honorable Court* was “the primer used by Judge Bork’s opponents to defeat his nomination.” BY AND WITH, *supra* note 51, at 5–6.

Tribe argued for an activist Supreme Court that would “put meaning *into* the Constitution”<sup>65</sup> and for an equally politicized approach to judicial selection.<sup>66</sup>

Tribe argued that the Senate should condition confirmation on how a nominee could be expected to rule on certain issues—on the results a nominee might deliver.<sup>67</sup> This blueprint guided the effort that defeated the nomination of Robert Bork to the Supreme Court in 1987.<sup>68</sup> One year earlier, with a Republican majority, the Senate had voted sixty-five to thirty-three to confirm William Rehnquist as Chief Justice<sup>69</sup> and voted ninety-eight to zero to confirm Antonin Scalia to replace Rehnquist as Associate Justice.<sup>70</sup> The 1986 election, however, resulted in a Democrat majority, putting them in a position to assert a more robust campaign against targeted judicial nomination. During the debate on Judge Bork’s nomination, I argued that this new ideological results-focused approach to judicial selection threatens “the independence and integrity of the Federal judiciary.”<sup>71</sup>

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<sup>65</sup>TRIBE, *supra* note 64, at 43.

<sup>66</sup>In his book, Tribe offered what he called “a model for the Senate to follow in carrying out its constitutional duty” of advice and consent. TRIBE, *supra* note 64, at 125. Looking back on the Bork confirmation fight, Suzanne Garment observed that when Tribe “argued in *God Save This Honorable Court* (1985) that Supreme Court appointments had never been anything other than grossly and patently political, he was merely dressing up and codifying the changing liberal fashion.” Suzanne Garment, *The War Against Robert H. Bork*, COMMENTARY, Jan. 1988, at 17, 18. Reviewing the book for the *Harvard Law Review*, I argued that this politicizing approach was inconsistent with the Constitution’s assignment to “the president, but not the Senate, the power to ‘nominate’ Supreme Court justices” and “deny the president his constitutional prerogative and assert a power to select nominees that the Senate was not intended to possess.” See Orrin G. Hatch, *Save the Court From What?*, 99 HARV. L. REV. 1347, 1353–54 (1986).

<sup>67</sup>Tribe argued that “[k]nee jerk attitudes . . . about issues such as gun control, capital punishment, or the right to life, are profoundly antithetical to the judicial temperament.” TRIBE, *supra* note 64, at 97. He also criticized judges’ “tendenc[ies] to manipulate these technical requirements [such as standing, ripeness, and justiciability] to ensure a day in court for powerful interest groups while shutting the door on people with causes for which [they have] little sympathy.” *Id.* at 122.

<sup>68</sup>For an account of the Bork nomination fight by Bork’s supporters, see PATRICK B. MCGUIGAN & DAWN M. WEYRICH, *NINTH JUSTICE: THE FIGHT FOR BORK* (1990). For an account by his opponents, see MICHAEL PERTSCHUK & WENDY SCHAETZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* (1989).

<sup>69</sup>132 CONG. REC. S12,779 (daily ed. Sept. 17, 1986) (confirmations). “The 33 votes against Rehnquist were the largest number ever cast by the Senate against a Supreme Court nominee who won confirmation. In 1971, when he won confirmation as an associate justice on a 68-26 votes, Rehnquist tied for the second-highest number of ‘nay’ votes received by a twentieth-century Supreme Court nominee who won confirmation.” *Rehnquist, Scalia Win Senate Confirmation*, 1986 CONG. Q. ALMANAC 67, 67 [hereinafter *Rehnquist, Scalia Win*].

<sup>70</sup>132 CONG. REC. S12,842 (daily ed. Sept. 18, 1986) (confirmations). “In sharp contrast to the hours of floor debate over Rehnquist’s nomination, there were only a few moments of speeches about the equally conservative Scalia before he was confirmed.” *Rehnquist, Scalia Win*, *supra* note 69, at 67.

<sup>71</sup>133 CONG. REC. S11,921 (daily ed. Oct. 21, 1987) (statement of Sen. Hatch). This echoed Judge Bork’s own concern. After the Senate Judiciary Committee sent the Bork

So by the time President George W. Bush was elected in 2000, the battle over judicial appointments had been joined and the contending sides remained those seeking judges who refuse to exercise “personal power”<sup>72</sup> and those seeking judges who will “exercise their power in popular ways.”<sup>73</sup> President Bush promised to appoint judges who would not base their judicial decisions on their personal views,<sup>74</sup> while Senator Charles Schumer justified a politicized approach this way: “If you asked 100 Americans: Should nominees for such awesome positions . . . reveal their views? I bet 99 or 98 would say: Yes.”<sup>75</sup> Within two weeks of the inauguration, Senate Minority Leader Tom Daschle warned that Democrats would use “whatever means necessary” to defeat undesirable judicial nominations,<sup>76</sup> and that these means would include procedural weapons such as the filibuster.<sup>77</sup> The forty-two votes against John Ashcroft’s nomination to be U.S. Attorney General,<sup>78</sup> the most against a confirmed cabinet nominee in more than thirty years<sup>79</sup> and enough to sustain a

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nomination to the Senate floor with an unfavorable recommendation and undecided senators announced their views, the prospects for confirmation dimmed. To his credit, Judge Bork chose not to withdraw his nomination, but insisted on a Senate debate and vote.

Bork said he had “no illusions” about the outcome. Charging that events had transformed the process of confirming judges into a political campaign that “should not occur again,” he said, “Federal judges are not appointed to decide cases according to the latest opinion polls.” When judicial nominees “are treated as political candidates the effect will be to erode public confidence and endanger the independence of the judiciary.”

Cong. Q. Press, Historic Documents, *Bork Confirmation Battle*, available at [http://www.cqpress.com/incontext/SupremeCourt/bork\\_confirmation.htm](http://www.cqpress.com/incontext/SupremeCourt/bork_confirmation.htm) (last visited Aug. 27, 2005).

<sup>72</sup>O’Scannlain, *supra* note 16, at 2.

<sup>73</sup>*Id.*

<sup>74</sup>President Bush kept his promise, with appeals court nominees such as Charles Pickering, whose opponents’ attack on his personal views obviously derived from their belief that judges base their judicial decisions on such personal views. Yet, as Terry Eastland concluded, Judge Pickering’s “record on the bench isn’t that of a judge who fails to distinguish between his own personal and political views and what the law says.” Terry Eastland, *Nomination Trapped by the Jeffords Effect*, WASH. TIMES, Feb. 22, 2002, at A16.

<sup>75</sup>149 CONG. REC. S2752 (daily ed. Feb. 26, 2003) (statement of Sen. Schumer).

<sup>76</sup>See Muriel Dobbin, *Dems Send President a Message*, CHI. SUN-TIMES, Feb. 2, 2001, at 21; Editorial, *Vilification of Nominees Unacceptable*, ATLANTA J.-CONST., Feb. 2, 2001, at 18A; Michelle Mittelstadt, *Ashcroft Prevails in Bitter Fight: Senators Split on Impact of Confirmation Battle*, DALLAS MORNING NEWS, Feb. 2, 2001, at 1A.

<sup>77</sup>See Gar Joseph, *Bush Watch*, PHILA. DAILY NEWS, Feb. 1, 2001, at 9; Reuters, *A Democratic Message to Bush: Ashcroft Foes Press On, But Concede He’ll Win*, NEWSDAY, Feb. 1, 2001, at A17.

<sup>78</sup>See 147 CONG. REC. S1008 (daily ed. Feb. 1, 2001) (voting on Ashcroft nomination).

<sup>79</sup>The Senate confirmed President Richard Nixon’s nomination of Earl Butz to be Secretary of Agriculture by a vote of fifty-one to forty-four. See 117 CONG. REC. S44,048 (daily ed. Dec. 2, 1971).

filibuster, backed up the threat.<sup>80</sup> Democrats said this level of opposition was a “shot across the bow” regarding future judicial nominations.<sup>81</sup>

History repeated itself when—shortly before Senator Jim Jeffords’ early 2001 departure from the Republican Party gave Democrats control of the Senate—Democrats organized a retreat “where a principal topic was forging a unified party strategy to combat the White House on judicial nominees.”<sup>82</sup> Tribe briefed Democrats at this retreat on how to “change the ground rules” for the confirmation process, as he had done fifteen years earlier in his book.<sup>83</sup> After the 2002 election returned the Senate to Republican control, Abner J. Mikva, former Democratic congressman and federal appeals court judge, urged Senate Democrats to “not act on any Supreme Court vacancies” during President Bush’s first term.<sup>84</sup> Senator Schumer dismissed concerns about using the filibuster by saying “[t]he means is not the issue here; it is the end.”<sup>85</sup> He also stated: “Yes, we are blocking judges by filibuster[,]” otherwise “[e]very single one of the President’s nominees . . . will be approved.”<sup>86</sup>

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<sup>80</sup>Senator Trent Lott tried to blunt the symbolic impact shortly before the vote: “There will be those who will speak out about what this vote means, if it is not 60 votes . . . I don’t think we should read anything into it.” 147 CONG. REC. S1007 (daily ed. Feb. 1, 2001) (statement of Sen. Lott). On May 24, 2001, the Senate voted fifty-one to forty-seven to confirm Theodore Olson to be Solicitor General.

<sup>81</sup>See Helen Dewar, *A Serious Breach in Bipartisanship: Democrats Fire ‘Shot Across the Bow’*, WASH. POST, Feb. 2, 2001, at A2; Mike Dorning, *Senate Confirms Ashcroft 58-42: Democrats Send Bush a Warning on Future Nominations*, CHI. TRIB., Feb. 2, 2001, at 1; Craig Gordon, *Ashcroft Voted In: 42 Democrats Vote No, Say Opposition is Warning to Bush*, NEWSDAY, Feb. 2, 2001, at A5. On May 24, 2001, the Senate voted fifty-one to forty-seven to confirm Theodore Olson to be Solicitor General. Jonathon Riskind, *Senate Reels After Defection*, COLUMBUS DISPATCH, May 25, 2001, at 1A. Though “Democrats decided not to filibuster the nomination,” the level of opposition reinforced the “shot across the bow.” *Id.* Other shots followed, including the forty-four votes against Dennis Shedd to be a judge on the U.S. Court of Appeals. See 148 CONG. REC. S11522 (daily ed. Nov. 20, 2002). These were widely seen as demonstrating that Democrats “have the ability to defeat conservative candidates in the future, particularly candidates for any Supreme Court vacancy.” Libby Quaid, *Senate Majority Votes for Ashcroft, 40-Plus Democrats Vote No*, ASSOCIATED PRESS, Feb. 2, 2001, available at <http://seattlepi.nwsourc.com/national/ashcroft02.shtml>; see also Alison Mitchell, *Ashcroft Debate Shows Deep Rifts*, N.Y. TIMES, Feb. 1, 2001, at A1 (discussing Democrats’ determination “to send Mr. Bush a message that they would fight conservative Supreme Court nominees”). In late April 2001, Judiciary Committee Democrats wrote President Bush a letter that Senator Schumer described as another “shot across the bow.” *Democrats: Don’t Change Judicial Nomination Process*, TELEGRAPH HERALD (Dubuque), April 28, 2001, at A7.

<sup>82</sup>Neil A. Lewis, *Democrats Readying for Judicial Fight*, N.Y. TIMES, May 1, 2001, at A19.

<sup>83</sup>*Id.* These new ground rules paralleled the same “emphatically political” approach he outlined in 1985, geared toward establishing “a judiciary that is itself an independent political force with an agenda to be advanced through decisions in individual cases.” BY AND WITH, *supra* note 51, at 7.

<sup>84</sup>Abner J. Mikva, *Supreme Patience*, WASH. POST, Jan. 25, 2002, at A25.

<sup>85</sup>149 CONG. REC. S14,096 (daily ed. Nov. 6, 2003) (statement of Sen. Schumer).

<sup>86</sup>*Id.*

Thereafter, Democrats used a potent combination of the ideological results-focused litmus test and whatever procedural tactics they could devise to stop nominees from receiving a fair up-or-down vote. One writer dubbed this approach “Schumerism,” which, he said, “licenses the use of any means necessary to retain a liberal judiciary.”<sup>87</sup> The new Center for American Progress, launched in 2004 to promote a “long term vision of progressive America,”<sup>88</sup> demonstrated that Tribe’s strategy lives on. The group, headed by former Clinton chief of staff John Podesta, in its first policy paper, urged senators to “give explicit consideration to a nominee’s ideology—including his or her beliefs about the Constitution and the role of the courts in interpreting it—to determine whether those views are within the constitutional mainstream.”<sup>89</sup> Those beliefs must include, as a condition of confirmation, recognizing “that the meaning of the Constitution has continued to evolve to meet the needs of a changing society.”<sup>90</sup> The circle, it appears, is now complete; advocates of judicial activism now approach judicial selection the way their favored judges approach the law, with the ends justifying the means.

## II. WHERE WE FIND OURSELVES

The filibuster campaign that began in the 108th Congress, then, is part of the conflict over judicial appointments, which, in turn, reflects the conflict over judicial power. Changing the Supreme Court’s membership in the 1930s and ’40s helped the judiciary abandon the traditional, restrained model of judging, which focuses on judicial process, in favor of the activist model, which focuses on results. Among President Reagan’s strategies to diminish judicial activism<sup>91</sup> was to appoint judges who embraced the traditional, restrained model of the judicial role. Advocates of judicial activism, who had achieved many judicial successes in the previous few decades, were at first put on the defensive. However, with Tribe’s substantive blueprint, Democrats soon took the offensive, striking back and continuing to argue that judges should be appointed because of their ideology, personal views, and the results they can

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<sup>87</sup>Brian C. Anderson, *Schumerism*, WALL ST. J., Nov. 5, 2003, at A20.

<sup>88</sup>Ctr. for Am. Progress, What We’re About, at <http://www.americanprogress.org/site/c/biJRJ8OVF/b.3459/> (last visited Aug. 27, 2005).

<sup>89</sup>Ctr. for Am. Progress, *Ideology Matters: A Progressive View of the Judicial Confirmation Process*, at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=250707> (last visited Aug. 27, 2005). In 1989, after the Senate defeated the Bork nomination, I described some of the tactics, direct or subtle, for extracting such information. Hatch, *supra* note 51, at 36–47.

<sup>90</sup>*Id.* This view represents “a profound misunderstanding of the judicial role in upholding the rule of law.” BY AND WITH, *supra* note 51, at 25. It blurs “the distinction between law and politics, between lawful authority and sheer power.” *Id.* at 26.

<sup>91</sup>See *supra* note 58 and accompanying text (discussing Reagan’s favor for restrained judges).

be expected to deliver. Senator Richard Durbin, a Judiciary Committee member and Assistant Minority Leader in the 109th Congress, stated that judges “met[e] out justice *according to their own values*.”<sup>92</sup>

The clash between advocates of restrained and activist views of judicial power is greatest in the context of nominations to the U.S. Supreme Court. Within hours of President Bush’s announcement that he would nominate U.S. Circuit Court Judge John Roberts to succeed Supreme Court Justice Sandra Day O’Connor, for example, Senator Edward Kennedy said that “[t]he Senate’s role [would] be to establish clearly whose side John Roberts would be on if confirmed to the most powerful court in the land.”<sup>93</sup> As Senator Charles Schumer put it, “[a]ll questions are legitimate.”<sup>94</sup> The debate over the Roberts nomination again raised the issue of the role of judges in our system of government and, therefore, how judges should be chosen. Consideration of these issues will keep alive the debate over judicial nomination filibusters.

Under Senate rules, debate must end on a matter before the Senate can actually vote on it.<sup>95</sup> The Senate can end debate either by unanimous consent, which one senator’s objection can defeat, or by a motion to invoke cloture. Senate Rule 22 provides for sixteen senators to sign a petition “to bring to a close the debate upon any . . . matter pending before the Senate” and requires

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<sup>92</sup>149 CONG. REC. S5440 (daily ed. April 29, 2003) (statement of Sen. Durbin) (emphasis added). Senator Durbin went on to say that, because judges make decisions according to their own values, senators must “ask questions and make inquiries as to what those values might be.” *Id.* When the Senate considered the nomination of J. Leon Holmes to the U.S. District Court, for example, Senator Durbin asked various questions to determine whether the nominee held “reasonable, mainstream, commonsense beliefs.” 150 CONG. REC. S7561 (daily ed. July 6, 2004) (statement of Sen. Durbin). This view, again, mirrored the politicized approach of those working to defeat the Bork nomination in 1987. “[T]he message they conveyed to the American people [was] that judges *should* permit their personal views of justice to dictate their interpretations of statutes.” BY AND WITH, *supra* note 51, at 24.

<sup>93</sup>151 CONG. REC. S8509 (daily ed. July 20, 2005) (statement of Sen. Kennedy). In a speech before the AFL-CIO convention on July 25, 2005, Senator Kennedy expanded on this theme: “For our future . . . we need to know whose side Mr. Roberts is on. . . . That’s what we want to know. Whose side is he on?” Senator Ted Kennedy, Union Vital to Issues that Shape American’s Lives, Remarks at the 50th Anniversary AFL-CIO Constitutional Convention, Chicago (July 25, 2005), *available at* <http://www.aflcio.org/mediacenter/prspmt/sp07252005c.cfm>.

<sup>94</sup>See Byron York, *The Moment that Schumer Has Been Waiting For*, HILL, July 6, 2005, at 12, 12, *available at* <http://www.hillnews.com/thehill/export/TheHill/Comment/ByronYork/070605.html>.

<sup>95</sup>See Richard S. Beth & Stanley Bach, *Filibusters and Cloture in the Senate*, Cong. Res. Serv. Rep. (CRS) 2 (2003) (“The lack of discretion by the chair in recognizing Senators, and the lack of time limits on debate, combine to create the possibility of filibusters in the Senate.”); Christopher M. Davis & Walter J. Oleszek, *Cloture: Its Effect on Senate Proceedings*, Cong. Res. Serv. Rep. (CRS) 1 (2003) (“Long known for its emphasis on lengthy deliberation, the Senate in most circumstances allows its members to debate issues for as long as they want.”).

“three-fifths of the Senators duly chosen and sworn” to end debate.<sup>96</sup> If at least forty-one senators vote against such a motion, they can prevent a final vote by preventing the end of debate.<sup>97</sup>

Thus, the most objective and consistent definition of a *filibuster* is the failure of efforts to end debate, either by objection to unanimous consent requests or defeat of cloture motions. During the 108th Congress, Democrats used such tactics to defeat ten nominations to the U.S. Courts of Appeals, each of which had majority Senate support, by objecting to all requests for unanimous consent and defeating all cloture motions.<sup>98</sup> These filibusters are unprecedented, dangerous, partisan, and unconstitutional.

#### A. *Unprecedented*

Let me be clear about the tactic being used. The Senate minority is essentially defeating majority-supported judicial nominees by preventing any vote from occurring. This changes the traditional pattern of judicial nominations reaching the Senate floor receiving a final confirmation decision.

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<sup>96</sup>Sen. Comm. on Rules & Admin., Standing Rules of the Senate, *available at* <http://rules.senate.gov/senaterules/menu.htm> (last visited Aug. 27, 2005).

<sup>97</sup>*Id.*

<sup>98</sup>*See* 150 CONG. REC. S8595 (daily ed. July 22, 2004) (cloture vote) (voting fifty-three to forty-four fails to invoke cloture on debate of David McKeague’s nomination to U.S. Court of Appeals for Sixth Circuit); *id.* (voting fifty-four to forty-four fails to invoke cloture on debate of nomination of Richard Griffin to U.S. Court of Appeals for Sixth Circuit); *id.* at S8593 (voting fifty-two to forty-six fails to invoke cloture on debate of nomination of Henry Saad to U.S. Court of Appeals for Sixth Circuit); 150 CONG. REC. S8460 (daily ed. July 20, 2004) (cloture vote) (voting fifty-three to forty-four fails to invoke cloture on debate of nomination of William Myers to U.S. Court of Appeals for Ninth Circuit); 149 CONG. REC. S14,785 (daily ed. Nov. 12, 2003) (cloture vote) (voting fifty-three to forty-three fails to invoke cloture on debate of nomination of Janice Rogers Brown to U.S. Court of Appeals for District of Columbia Circuit); *id.* at S14,783 (voting fifty-three to forty-three fails to invoke cloture on debate of nomination of Carolyn Kuhl to U.S. Court of Appeals for Ninth Circuit); *id.* at S14,777 (voting fifty-three to forty-two fails to invoke cloture on debate of nomination of Priscilla Owen to U.S. Court of Appeals for Fifth Circuit); 149 CONG. REC. S14,104 (daily ed. Nov. 6, 2003) (cloture vote) (voting fifty-one to forty-three fails to invoke cloture on debate of nomination of William Pryor to U.S. Court of Appeals for Eleventh Circuit); 149 CONG. REC. S13,572 (daily ed. Oct. 30, 2003) (cloture vote) (voting fifty-four to forty-three fails to invoke cloture on debate of nomination of Charles Pickering to U.S. Court of Appeals for Fifth Circuit); 149 CONG. REC. S10,468 (daily ed. July 31, 2003) (cloture vote) (voting fifty-three to forty-four fails to invoke cloture on debate of Pryor nomination); 149 CONG. REC. S10,203 (daily ed. July 30, 2003) (cloture vote) (voting fifty-five to forty-three fails to invoke cloture on debate of nomination of Miguel A. Estrada to U.S. Court of Appeals for District of Columbia Circuit); 149 CONG. REC. S10,100 (daily ed. July 29, 2003) (cloture vote) (voting fifty-three to forty-three fails to invoke cloture on debate of Owen nomination); 149 CONG. REC. S4676 (daily ed. Apr. 2, 2003) (cloture vote) (voting fifty-two to forty-four fails to invoke cloture on debate of Estrada nomination); 149 CONG. REC. S3834 (daily ed. Mar. 18, 2003) (cloture vote) (voting fifty-five to forty-five fails to invoke cloture on debate of Estrada nomination); 149 CONG. REC. S3217 (daily ed. Mar. 6, 2003) (voting fifty-five to forty-four fails to invoke cloture on debate of Estrada nomination).

Professor Sheldon Goldman wrote that the Senate's constitutional duty of advice and consent "in practice has meant confirmation by a simple majority of those present and voting on the Senate floor."<sup>99</sup> He opined that the "unprecedented use of the filibuster to prevent confirmation during the 108th Congress" has "colored the current debate on the confirmation process in crisis hues."<sup>100</sup>

Before the 108th Congress, the Senate took a total of fifteen cloture votes on fourteen different judicial nominations, and thirteen of those nominations were confirmed.<sup>101</sup> The only judicial nomination subject to a cloture vote that

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<sup>99</sup>Sheldon Goldman, *The Senate and Judicial Nominations*, EXTENSIONS, Spring 2004, at 4, 4.

<sup>100</sup>*See id.*; see also Mike France & Lorraine Woellert, *The Battle Over the Courts*, BUS.WK., Sept. 27, 2004, at 36, 40 ("And the Democrats are making unprecedented use of its [sic] filibuster power to block controversial Bush candidates."); Jeff Toobin, *Advice and Dissent*, NEW YORKER, May 26, 2003, at 42, 47 ("[T]he filibuster marked a dramatic change from senatorial tradition.").

<sup>101</sup>The Senate voted eighty-nine to zero to invoke cloture on debate of the nomination of Julia Smith Gibbons to the U.S. Court of Appeals for the Sixth Circuit. 148 CONG. REC. S7391 (daily ed. July 26, 2002) (cloture vote) (voting to invoke cloture). The Senate voted ninety-five to zero to confirm her. 148 CONG. REC. S7454 (daily ed. July 29, 2002) (nomination vote) (voting on Gibbons' nomination). The Senate voted ninety-seven to one to invoke cloture on debate of the nomination of Richard Clifton to the U.S. Court of Appeals for the Ninth Circuit and voted ninety-eight to zero to confirm him. 148 CONG. REC. S7016 (daily ed. July 18, 2002) (cloture vote and nomination vote) (voting to invoke cloture and Clifton's nomination). The Senate voted ninety-four to three to invoke cloture on the nomination of Lavenski Smith to the U.S. Court of Appeals for the Eighth Circuit, and confirmed the nomination the same day by unanimous consent. 148 CONG. REC. S6793 (daily ed. July 15, 2002) (cloture vote and nomination vote) (voting to invoke cloture and Smith's nomination). The Senate voted eighty-five to fourteen to invoke cloture on debate of the nomination of Richard Paez to the U.S. Court of Appeals for the Ninth Circuit. 146 CONG. REC. S1301 (daily ed. Mar. 8, 2000) (cloture vote) (voting to invoke cloture). The Senate voted fifty-nine to thirty-nine to confirm him. 146 CONG. REC. S1336 (daily ed. Mar. 9, 2000) (nomination vote) (voting on Paez's nomination). The Senate voted eighty-six to thirteen to invoke cloture on debate of the nomination of Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. 146 CONG. REC. S1301 (daily ed. Mar. 8, 2000) (cloture vote) (voting to invoke cloture). The Senate voted sixty-four to thirty-four to confirm. 146 CONG. REC. S1336 (daily ed. Mar. 9, 2000) (nomination vote) (voting on Berzon's nomination). On September 21, 1999, the Senate failed to invoke cloture on debate of the nomination of Brian T. Stewart to the U.S. District Court for the District of Utah. 145 CONG. REC. S11,096 (daily ed. Sept. 21, 1999) (cloture vote) (voting against invoking cloture). The Senate voted ninety-three to five to confirm the nomination on October 5, 1999. 145 CONG. REC. S11,919 (daily ed. Oct. 5, 1999) (nomination vote) (voting on Stewart's nomination). The Senate voted eighty-five to twelve to invoke cloture on debate of the nomination of H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit. 140 CONG. REC. S13,985 (daily ed. Oct. 4, 1994) (cloture and nomination vote) (voting to invoke cloture). The Senate voted sixty-three to thirty-five to confirm. *Id.* at S14,012 (voting on Sarokin's nomination). The Senate voted sixty-six to thirty to invoke cloture on debate of the nomination of Edward Carnes to the U.S. Court of Appeal for the Eleventh Circuit. 138 CONG. REC. S12,970 (daily ed. Sept. 9, 1992) (cloture and nomination vote) (voting to invoke cloture). The Senate voted sixty-two to thirty-six to confirm. *Id.* at S12,971 (voting on Carnes's nomination). The Senate voted sixty-eight to thirty-one to invoke cloture on debate of the nomination of William Rehnquist to be Supreme Court Chief

was not ultimately confirmed was President Lyndon Johnson's 1968 nomination of Abe Fortas to be Supreme Court Chief Justice.<sup>102</sup> In two important respects, even this lone example provides no precedent for the most recent filibusters. First, opposition to cloture on the Fortas nomination was almost evenly bipartisan.<sup>103</sup> In contrast, opposition to cloture during the current filibuster campaign has been completely partisan.<sup>104</sup> Second, and more important, the Fortas nomination did not have clear majority support,<sup>105</sup> prompting Senator Robert Griffin at the time to say that "it is ridiculous to say that the will of a majority of the Senate has been frustrated."<sup>106</sup> In contrast, each of the judicial nominations filibustered during the 108th Congress had majority support, and at least one Democratic supporter, and frustrating the will of the Senate majority was squarely the objective.

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Justice. 132 CONG. REC. S12,769 (daily ed. Sept. 17, 1986) (cloture and nomination vote) (voting to invoke cloture). The Senate voted sixty-five to thirty-three to confirm. *Id.* at S12,781 (voting on Rehnquist's nomination). The Senate voted sixty-four to thirty-three to invoke cloture on debate of the nomination of Sidney Fitzwater to the U.S. District Court for the Northern District of Texas. 132 CONG. REC. S2,923 (daily ed. Mar. 18, 1986) (cloture and nomination vote) (voting to invoke cloture). The Senate voted fifty-two to forty-two to confirm. *Id.* at S2,927 (voting on Fitzwater's nomination). On July 31, 1984, the Senate failed to invoke cloture on debate of the nomination of J. Harvie Wilkinson to the U.S. Court of Appeals for the Fourth Circuit. 130 CONG. REC. 21,600 (1984) (cloture vote) (voting against invoking cloture). Later, the Senate voted sixty-five to thirty-two to invoke cloture, and fifty-eight to thirty-nine to confirm, the nomination. *Id.* at 23,284 (cloture and nomination vote) (voting to invoke cloture and on Wilkinson's nomination). The Senate voted sixty-eight to twenty-eight to invoke cloture on debate of the nomination of Stephen Breyer to the U.S. Court of Appeals for the First Circuit. 126 CONG. REC. 33,009 (1980) (cloture vote) (voting to invoke cloture). The Senate voted eighty to ten to confirm. *Id.* at 33,013 (voting on Breyer's nomination). The Senate failed to invoke cloture on the nomination of William Rehnquist to be Supreme Court Associate Justice. 117 CONG. REC. 46,117 (1971) (cloture vote) (voting against invoking cloture). The Senate later voted sixty-eight to twenty-six to confirm. *Id.* at 46,197 (voting on Rehnquist's nomination). Confirmation occurred "a few hours" after the cloture vote failed. *Court Nominees, supra* note 58, at 859.

<sup>102</sup>See John Cornyn, *Our Broken Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 218 (2003).

<sup>103</sup>The forty-three votes against cloture included twenty-four Republicans and nineteen Democrats. 114 CONG. REC. 28,933 (1968).

<sup>104</sup>See *supra* note 100 and accompanying text and *infra* text accompanying notes 113–15 (discussing attempts by Democrats to defeat judicial nominations and votes by Democrats against cloture).

<sup>105</sup>For a detailed analysis of the evidence on this point, see Cornyn, *supra* note 102, at 218–23. Though opposition to cloture was evenly bipartisan and the Republican leader supported the nominee, commentators such as Stuart Taylor insist on calling the failed cloture vote on the Fortas nomination a "Republican filibuster." See Stuart Taylor, Jr., *Courting Trouble*, 35 NAT'L J. 1832, 1837 (June 2003). Nonetheless, Taylor acknowledged that "Fortas did not have clear majority support." *Id.* The Fortas nomination, itself, was also highly controversial. See Warren Weaver, Jr., *Fortas Case Raises Questions of Conscience in Capital*, N.Y. TIMES, June 1, 1969, at 62.

<sup>106</sup>114 CONG. REC. S29,150 (1968) (statement of Sen. Griffin).

*B. Dangerous*

This filibuster campaign is distorting how the Senate does business in several ways. Traditionally, cloture votes were used for legislation rather than nominations. Only 2.6% of cloture votes taken between 1949, when Rule 22 was applied to nominations, and 2002 were on judicial nominations.<sup>107</sup> During the 108th Congress, this figure jumped 1740% over the historical pattern, with nearly half of all cloture votes on judicial nominations.<sup>108</sup>

Looking more broadly at roll call votes provides another perspective on how the obstruction campaign against President Bush's judicial nominations has dramatically changed Senate confirmation methods. In President Bush's first term, the Senate was forced to take nearly three times as many roll call votes on judicial nominations as in both of President Clinton's terms<sup>109</sup> and more than twice as many as in the previous fifty years combined.<sup>110</sup> Historically, roll call votes have been reserved for opposed nominations, while unopposed nominations were confirmed more efficiently by unanimous consent. That is, the Senate rarely saw unanimous roll call votes on nominations. During the fifty years between 1951 and 2000, fewer than one-third of roll call votes on judicial nominations were unanimous. During President Bush's first term, that percentage jumped to 86%. The 124 unanimous roll call judicial confirmation votes during those four years alone dwarfed the twenty-four during the previous five decades.<sup>111</sup> These unnecessary roll call votes consumed a substantial amount of the Senate's

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<sup>107</sup>Between 1949 and 2002, fifteen of the Senate's 606 cloture votes, or 2.47%, were on judicial nominations. Experience is the same under the current version of Rule 22, adopted by the Senate in 1975. Between 1975 and 2002, thirteen of the Senate's 506 cloture votes, or 2.6%, were on judicial nominations. Roll call votes on cloture and confirmation of judicial nominees used in this section were obtained from one or more of the following sources: S. PRT. NO. 99-95, at 77-85 (1985); United States Senate, <http://www.senate.gov> (last visited Aug. 27, 2005); annual *Congressional Quarterly Almanac* and *Congressional Roll Call* publications from Congressional Quarterly, Inc.; annual *Senate Record Vote Analysis*, compiled by the Senate Republican Policy Committee; annual *Senate Rollcall Vote*, compiled by the Senate Democratic Policy Committee; and *Congressional Record*. The author maintains and updates charts organizing relevant data from these sources and is responsible for the calculations and analysis based on this data that appear in this section.

<sup>108</sup>During the 108th Congress (from 2003 to 2004), 45.5% of the Senate's cloture votes were on judicial nominations, compared to the previous pattern of 2.47% since 1949. For citation information, see note 107.

<sup>109</sup>The Senate took roll call votes on 133 Bush nominees, compared to forty-eight Clinton nominees—this low number is despite Republican control of the Senate for six of President Clinton's eight years in office. For citation information, see note 107.

<sup>110</sup>The Senate took roll call votes on sixty-four lower court nominees between 1951 and 2000. For citation information, see note 107.

<sup>111</sup>For citation information, see note 107.

time, more than a dozen hours a year under President Bush compared to just an hour a year under President Clinton.<sup>112</sup>

### *C. Partisan and Unfair*

The average tally on the twenty judicial nomination cloture votes during the 108th Congress was fifty-three to forty-three, enough to confirm but not enough to end debate. Democrats provided every single vote against cloture, 868 in all, for these filibusters.<sup>113</sup> Interestingly, forty-three senators also voted against cloture on the 1968 Fortas nomination although opposition was evenly bipartisan.<sup>114</sup> Democrats have provided 92% of all votes against cloture on judicial nominations in American history.<sup>115</sup>

Let me put my own record on the table here. I have never voted against cloture on a judicial nomination. During the Clinton administration, when I chaired the Senate Judiciary Committee, I publicly condemned judicial nomination filibusters, calling them a “travesty,” and urging my colleagues to oppose them as well.<sup>116</sup> During debate on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit, I agreed with many newspaper editorials opposing these filibusters<sup>117</sup> and mentioned some of the ways in which the filibusters are unfair:

It is unfair to the majority of the Members of the Senate who stand prepared to vote on Mr. Estrada’s nomination. It is certainly unfair to Mr. Estrada, whose life is in limbo while the Senate engages in its endless debate. It is unfair to the American people, who have a justified expectation that the

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<sup>112</sup>This calculation uses the baseline of the average time consumed by unanimous roll call votes on judicial nominations in 2003.

<sup>113</sup>See *supra* note 98 (citing voting records in Senate).

<sup>114</sup>114 CONG. REC. 28,933 (1968).

<sup>115</sup>Democrat Senators have cast 1214 of the 1315 negative votes, or 92.3%, on thirty-eight motions to invoke cloture on judicial nominations. Even more striking, the average percentage of Senate Democrats voting against judicial nomination cloture is more than eleven times higher than the average percentage of Senate Republicans, 66.2% compared to 5.9%. For citation information, see note 107.

<sup>116</sup>See 144 CONG. REC. S641 (daily ed. Feb. 11, 1998) (statement of Sen. Hatch); 145 CONG. REC. S11015 (daily ed. Sept. 16, 1999) (statement of Sen. Hatch); 146 CONG. REC. S1297 (daily ed. Mar. 8, 2000) (statement of Sen. Hatch).

<sup>117</sup>See *A New and Low Level*, LAS VEGAS REV. J., Sept. 8, 2003, at B6; *After Estrada*, N.Y. SUN, Sept. 5, 2003, at 8; *Contempt For the Courts*, S.F. CHRON., Sept. 14, 2003, at D4; *Estrada Battle a Shameful Episode*, BOSTON HERALD, Sept. 6, 2003, at 18; *Estrada Withdrawal Reveals Flawed Senate Process*, DETROIT NEWS, Sept. 5, 2003, at A8; *Judicial Obstructionism*, ORANGE COUNTY REG., Mar. 27, 2003, at Commentary Section; *Schumer’s Shame*, N.Y. POST, Sept. 7, 2003, at 26; *Squandering Miguel Estrada*, CHI. TRIB., Sept. 7, 2003 at 8; *That Gridlock Expertise Would Come in Handy Now*, CHI. SUN-TIMES, May 6, 2003, at 33.

Senate will vote on Mr. Estrada's nomination and move on to debate and consider other important business.<sup>118</sup>

#### *D. Unconstitutional*

The elements discussed so far establish the current filibuster campaign as a political crisis, a completely partisan and unprecedented campaign that is dramatically distorting the way the Senate conducts its confirmation business. Even more serious, however, is that this campaign's attempt to use Rule 22's supermajority requirement for cloture to change the Constitution's simple majority requirement for confirmation also makes it a constitutional crisis.<sup>119</sup>

Right from the start, some would dismiss any constitutional concerns by observing that the Constitution gives the Senate, as well as the House of Representatives, authority to "determine the Rules of its Proceedings."<sup>120</sup> The Constitution also gives Congress the power to legislate, though we cannot do so in ways that conflict with the Constitution. Thus, the question is whether the Senate's power to determine its procedural rules "is limited by some explicit or implicit provision of the Constitution."<sup>121</sup> Offering his own filibuster reform plan in 1995, Senator Tom Harkin asked the same question: "Under the Constitution then, under the clause that each body can establish its own rules . . . can the Senate establish a rule that is clearly in contradiction to the Constitution of the United States?"<sup>122</sup> The Supreme Court had answered this

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<sup>118</sup>149 CONG. REC. S2626 (daily ed. Feb. 25, 2003) (statement of Sen. Hatch).

<sup>119</sup>Some have observed that the Constitution does not, in its plain text, either require a simple majority for confirmation of judicial nominations or, in the alternative, ban judicial nomination filibusters. Senator Charles Schumer tries to turn this into a charge of hypocrisy by those of us who take the Constitution's text seriously. For example, he has said that "the word majority is not in the Constitution. It doesn't say 51 votes. And the great irony is the conservative movement wants strict constructionists on the bench who won't read things into the Constitution." *NewsHour with Jim Lehrer* (PBS television broadcast May 8, 2003). Similarly, at the hearing on Alberto Gonzales' nomination to be U.S. Attorney General, Senator Schumer said: "I challenge . . . anyone from the other side who claims to be a strict constructionist . . . to find the words in the Constitution that say that." *Hearing on the Nomination of Alberto Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 118 (2005) (statement of Sen. Schumer, Member, S. Comm. on the Judiciary). At the same time, Senator Schumer argues that President Bush's exercise of explicit constitutional authority, found in the words of Article II, to make temporary appointments without Senate consent is "a vile repudiation of the Constitution." See Neil A. Lewis, *Deal Ends Impasse Over Judicial Nominees*, N.Y. TIMES, May 19, 2004, at A19. "While the principle of majority rule is not explicitly stated in the Constitution, certain principles are so inherent in the text and history of the Constitution that the Framers did not need to make them explicit." Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers' Intent, and the Judiciary's Role*, 100 DICK. L. REV. 341, 347-48 (1996).

<sup>120</sup>U.S. CONST. art. I, § 5.

<sup>121</sup>Delker, *supra* note 119, at 345.

<sup>122</sup>141 CONG. REC. S432 (daily ed. Jan. 5, 1995) (statement of Sen. Harkin).

question a century earlier, unanimously holding that the House of Representatives may not, when exercising this authority, “ignore constitutional restraints.”<sup>123</sup> These restraints come from constitutional principles and the constitutional text built on those principles.

America’s founders believed that majority rule is central to the very definition of democracy. Hamilton called it the “fundamental maxim”<sup>124</sup> and Madison the “fundamental principle”<sup>125</sup> of our republican form of government. Indeed,

the principle of majority rule was clearly, though implicitly, present throughout the debates of 1787. The Framers were extremely concerned about subjecting the will of the majority to the tyranny of the minority. They established in the Constitution a few well-delineated exceptions to majority rule, arguably leaving all other issues to be determined by a majority of the quorum.<sup>126</sup>

This means that majority rule is, in a sense, the default position for democracy.<sup>127</sup> As the Supreme Court has recognized, unless the Constitution says otherwise, in a legislative body, “a majority of the quorum . . . is empowered to act for the body.”<sup>128</sup> The Constitution has not said otherwise

<sup>123</sup>United States v. Ballin, 144 U.S. 1, 5 (1891). My colleague, Senator John Cornyn, discussed this issue on PBS and said that “ultimately, you cannot impose a rule that violates the Constitution.” *NewsHour with Jim Lehrer*, *supra* note 119.

<sup>124</sup>See THE FEDERALIST NO. 22 (Alexander Hamilton) (“[T]he fundamental maxim of republican government . . . requires that the sense of the majority should prevail.”).

<sup>125</sup>THE FEDERALIST NO. 58 (James Madison). Similarly, Thomas Jefferson called majority rule the “first principle of republicanism.” Letter from Thomas Jefferson to Alexander von Humboldt (June 13, 1817), in 15 THE WRITINGS OF THOMAS JEFFERSON 127 (Library ed. 1903); see also Walter J. Oleszek, *Super-Majority Votes in the Senate*, Cong. Res. Serv. Rep. (CRS) 1 (2001) (“Overall, the Framers generally favored decision-making by simple majority vote.”).

<sup>126</sup>Delker, *supra* note 119, at 343; see also J.R. Shampansky, *Constitutionality of a Senate Filibuster of a Judicial Nomination*, Cong. Res. Serv. Rep. (CRS) 2 (2004) (“The framers of the Constitution were committed to majority rule as a general principle.”).

<sup>127</sup>See Cornyn, *supra* note 102, at 195 (“The essence of our democratic system of government is simple: Majorities must be permitted to govern.”).

<sup>128</sup>FTC v. Flotill Products, Inc., 389 U.S. 179, 183 n.6 (1967) (citations omitted); see also *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 280 (1919) (“[F]ull legislative power is conferred by the Constitution in case of the presence of a quorum . . . .”); *Ballin*, 144 U.S. at 6 (“[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of the majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.”); *Brown v. District of Columbia*, 127 U.S. 579, 586 (1888) (noting “general rule” that “in the absence of special provisions otherwise . . . a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act”). Section 41.13 of Thomas Jefferson’s *Manual of Parliamentary Procedure* similarly provides that majority rule “is the law . . . where not otherwise expressly provided.” THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES § 41.13 (1801),

regarding confirming judicial nominees, which are not among the seven situations in which it requires a supermajority.<sup>129</sup> More specifically, the very same sentence mentions ratifying treaties and giving advice and consent on nominations, requiring a supermajority for the first but not for the latter.<sup>130</sup> Remembering that these filibusters target majority-supported judicial nominations, those that would be confirmed if a vote actually took place, they effectively add nominations to the Constitution's supermajority list. As Senator Joseph Lieberman has said, this amounts to "an amendment of the Constitution by rule of the U.S. Senate."<sup>131</sup> Professor Michael Gerhardt writes more modestly, but just as effectively, that filibusters of judicial nominations are "hard to reconcile with the Founders' reasons for requiring such a [supermajority] vote for removals and treaty ratifications but not for confirmations."<sup>132</sup>

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reprinted in S. DOC. NO. 103-8, at 78 (1993). Jefferson used the *Manual* to govern the Senate when he was Vice President during the Adams administration (1797–1801), and it still governs the House of Representatives today.

<sup>129</sup>These seven situations are expelling a member, U.S. CONST. art. I, § 5, removing an impeached public official, U.S. CONST. art. I, § 3, enacting legislation over a presidential veto, U.S. CONST. art. I, § 7, ratifying treaties, U.S. CONST. art. II, § 2, proposing constitutional amendments, U.S. CONST. art. V, permitting federal government service for former supporters of the Confederacy, U.S. CONST amend. XIV, and declaring presidential disability, U.S. CONST amend. XXV.

<sup>130</sup>See U.S. CONST art. II, § 2, cl. 2. The interpretive canon *expressio unius est exclusio alterius* is particularly applicable here. It means "whatever is omitted is understood to be excluded." 2 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 215 (1998); see also BLACK'S LAW DICTIONARY 602 (7th ed. 1999) ("A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative."). The Supreme Court applies this canon to constitutional provisions. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (stating that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution"); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 789 n.6 (1994) ("Though *Powell* addressed only the power of the House, the Court pointed out that its rationale was equally applicable to the Senate . . ."); *id.* at 793 n.9 (stating that "the Framers were well aware of the *expressio unius* argument"); see also Delker, *supra* note 119, at 350 (arguing that "the Framers intended majority rule to govern in all situations besides those specifically enumerated").

<sup>131</sup>141 CONG. REC. S37 (daily ed. Jan. 4, 1995) (statement of Sen. Lieberman). In 1953, as the modern period of filibuster reform efforts began, Senator Hubert Humphrey made this same argument, noting that, otherwise, more senators might be necessary to end debate than to impeach the President. See Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 235 (2004). Similarly, in 1959, senators used this argument from the Constitution's text to counter the argument that the Constitution is a "continuing body." *Id.* at 244.

<sup>132</sup>MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 297 (2000); see also Delker, *supra* note 119, at 347–48 ("While the principle of majority rule is not explicitly stated in the Constitution, certain principles are so inherent in the text and history of the Constitution that the Framers did not need to make them explicit."); Benjamin Lieber & Patrick Brown, *On Supermajorities and the Constitution*, 83

Significantly, some of the very Democratic senators leading the filibusters in the 108th Congress once made the same argument. Senator Tom Daschle argued in 1995 that the Constitution “is straightforward about the few instances in which more than a majority of the Congress must vote . . . . Democracy means majority rule, not minority gridlock.”<sup>133</sup> Senator Lieberman stated flatly that there is no constitutional basis for requiring a supermajority for cloture because the Constitution states certain “specific cases in which there is a requirement for more than a majority to work the will of this body.”<sup>134</sup> Similarly, Senator Tom Harkin argued that “the filibuster rules are unconstitutional” and that “the Constitution sets out . . . when you need majority or supermajority votes in the Senate.”<sup>135</sup> Each of these Senators supported each of the judicial nomination filibusters during the 108th Congress.

At this point in the discussion, some might object that this argument necessarily condemns all filibusters, including those of legislation.<sup>136</sup> The Senate’s constitutional authority to set its own procedural rules, however, is most broad concerning its own legislative power, the exercise of which does not inherently undermine the authority of the other branches.<sup>137</sup> Appointing judges, in contrast, is an exercise in executive, not legislative, power. By its plain text, the Constitution assigns both the nomination and appointment of judges to the President,<sup>138</sup> with the Senate serving as a check on the latter.<sup>139</sup>

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GEO. L.J. 2347, 2383 (1995) (“[I]t effectively institutes a supermajority voting requirement . . . contrary to the Constitution’s mandate of simple majority rule.”).

<sup>133</sup>141 CONG. REC. S1749 (daily ed. Jan. 30, 1995) (statement of Sen. Daschle).

<sup>134</sup>141 CONG. REC. S433 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman).

<sup>135</sup>140 CONG. REC. S2160 (daily ed. Mar. 1, 1994) (statement of Sen. Harkin).

<sup>136</sup>I would note that prominent Democrats, such as President Carter’s White House Counsel, Lloyd Cutler, do, indeed, make this argument. See Lloyd Cutler, *On Killing Senate Rule XXII (Cont’d)*, WASH. POST, May 3, 1993, at A19; Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23 (“A strong argument can be made that [Rule 22’s] requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional.”). Liberal Representative Barney Frank agreed: “There is no basis in constitutional history, democratic theory or logic for requiring 60 percent of the Senate to concur.” Barney Frank, *Now It’s Your Turn, Senators*, WASH. POST, Oct. 12, 1993, at A19.

<sup>137</sup>See Cornyn, *supra* note 102, at 199–201.

<sup>138</sup>See U.S. CONST. art. II, § 2 (“The President . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges . . .”). Testifying before the Senate Judiciary Committee on Rules and Administration in June 2003, Professor John Eastman raised the same point: “As the Supreme Court has itself noted, by vesting the appointment power in Article II, the framers of our Constitution intended to place primary responsibility for appointments in the President. The ‘advice and consent’ role of the Senate, then, was to be narrowly construed.” *Hearing on Senate Rule XXII and Proposals to Amend This Rule: Hearing Before the Senate Comm. on Rules and Admin.*, 108th Cong. (2003) [hereinafter *Hearing on Senate Rule XXII*] (statement of John C. Eastman, Professor of Law, Chapman University School of Law), available at [http://rules.senate.gov/hearings/2003/060503\\_hearing.htm](http://rules.senate.gov/hearings/2003/060503_hearing.htm). Even with Senate consent, a nominee must still receive a commission from the President before taking office, making the Senate even more indirectly involved in the appointment process. See

Indeed, the same separation of powers principle that prohibits judges from exercising legislative power prevents the Senate from using its rules to intrude upon executive power in the appointment process.

When considering judicial nominations, the Senate acknowledges it is doing executive rather than legislative business by going into executive session to consider nominations recorded on the executive calendar by the executive clerk.<sup>140</sup> In addition, the long history of legislative filibusters stands in stark contrast to the absence of judicial nomination filibusters before the 108th Congress. Rule 22 itself did not apply to nominations until decades after its adoption. Simply put, as Professor Douglas Kmiec describes, “[a]pplying the filibuster to judicial nominations is . . . qualitatively different than applying it to legislation.”<sup>141</sup> These filibusters intend to capture the “inherently executive power of appointment”<sup>142</sup> in which the President is the “principal agent,”<sup>143</sup> putting not just the Senate, but *a minority of senators* in charge.<sup>144</sup> Even liberal constitutional scholars agree that requiring a supermajority for confirmation would “upset the carefully crafted rules concerning appointments of both executive officials and judges and to unilaterally limit the power the

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Shampansky, *supra* note 126, at 7. Courts have looked at the President’s treaty-making power the same way:

It is significant that the treaty power appears in Article II of the Constitution, relating to the executive branch, and not in Article I, setting forth the powers of the legislative branch. It is the President as Chief Executive who is given the constitutional authority to enter into a treaty; and even after he has obtained the consent of the Senate it is for him to decide whether to ratify a treaty and put it into effect.

Goldwater v. Carter, 617 F.2d 697, 705 (D.C. Cir. 1979), *vacated on other grounds* by 444 U.S. 996 (1979).

<sup>139</sup>Hamilton wrote that the Senate’s role would be, “in general, a silent operation” to protect against appointment of “unfit characters.” THE FEDERALIST NO. 76 (Alexander Hamilton).

<sup>140</sup>Cornyn, *supra* note 102, at 199–201.

<sup>141</sup>*Hearing on Senate Rule XXII, supra* note 138 (statement of Douglas Kmiec); *see also* James L. Swanson, *Filibustering the Constitution*, WASH. TIMES, May 6, 2003, at A18 (defending legitimacy of filibusters of legislation and nominations that are “employed merely to guarantee a reasonable and limited period of debate before proceeding to an up or down vote”); George F. Will, *The Framers’ Intent*, WASH. POST, April 25, 1993, at C7 (“The Constitution provides only that, other than in the five cases, a simple majority vote shall decide the disposition by each house of business that has consequences beyond each house, such as passing legislation or confirming executive or judicial nominees. Procedural rules internal to each house are another matter.”).

<sup>142</sup>*Hearing on Senate Rule XXII, supra* note 138 (statement of Steven Calabresi).

<sup>143</sup>THE FEDERALIST NO.65 (Alexander Hamilton).

<sup>144</sup>Tribe’s blueprint would empower the Senate to act, not as a check on executive power, but as an independent power in the judicial selection process that acts to “essentially take over the appointment process from the President.” *See* Skaggs v. Carle, 110 F.3d 831, 347 (D.C. Cir. 1997) (Edwards, J., dissenting); *see also* Cornyn, *supra* note 102, at 201 (noting that abuse of Senate rules effectively increases power of Senate at expense of President).

Constitution gives to the President in the appointment process.”<sup>145</sup> Simply put, “[t]he filibuster of a judicial nomination raises constitutional issues, particularly separation of powers ones, not posed by the filibuster of legislation.”<sup>146</sup>

### *E. Attempts to Change the Subject*

The advocates of judicial activism behind the current filibuster campaign claim that without these filibusters, the Senate would be nothing but a “rubberstamp” for President Bush’s nominees.<sup>147</sup> They claim that solving the filibuster problem would “silence or chill minority opinion,”<sup>148</sup> cause the minority simply to “roll over,”<sup>149</sup> be “stampeded”<sup>150</sup> or “steamrolled,”<sup>151</sup> or would simply “obliterate the advise and consent process”<sup>152</sup> altogether. This notion that the minority’s only options are playing dead or effecting a hostile takeover of the confirmation process is belied most obviously by the fact,

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<sup>145</sup>Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENT. 1, 4 (1997).

<sup>146</sup>Shampansky, *supra* note 126, at 7.

<sup>147</sup>Some senators use this cliché so often, with such similar language, that one might think they were using talking points. *See, e.g.*, 149 CONG. REC. S5511 (daily ed. Apr. 30, 2003) (statement of Sen. Mikulski) (“We cannot rubberstamp nominations.”); 149 CONG. REC. S4666 (daily ed. Apr. 2, 2003) (statement of Sen. Leahy) (“The administration remains insistent that the Senate rubberstamp nominees.”); 149 CONG. REC. S5987 (daily ed. May 9, 2003) (statement of Sen. Dorgan) (“[T]here is nothing in the U.S. Constitution that says there is a requirement for the Senate to be a rubberstamp for any President.”); 149 CONG. REC. S5717 (daily ed. May 5, 2003) (statement of Sen. Leahy) (“The administration remains intent on packing the Federal circuit courts and on insisting that the Senate rubberstamp its nominees.”); 149 CONG. REC. S3831 (daily ed. Mar. 18, 2003) (statement of Sen. Leahy) (“The administration remains intent on packing the federal circuit courts and on insisting that the Senate rubber stamp [its] nominees.”); 149 CONG. REC. S2653 (daily ed. Feb. 25, 2003) (statement of Sen. Kennedy) (“The White House is asking the Senate to rubberstamp its judicial nominees.”); 149 CONG. REC. S2148 (daily ed. Feb. 11, 2003) (statement of Sen. Edwards) (“I will not just rubberstamp nominees.”); 149 CONG. REC. S2059 (daily ed. Feb. 6, 2003) (statement of Sen. Reid) (“The Constitution’s consent requirement is not just a rubberstamp requirement.”); Mikva, *supra* note 84 (“The Senate has a plenary power to advise and consent. This has never been perceived to be some kind of rubber-stamp function.”).

<sup>148</sup>Kirk Victor, *Bombs Away!*, 36 NAT’L J. 3668, 3670 (Dec. 11, 2004) (quoting Sen. Landrieu).

<sup>149</sup>Jennifer A. Dlouhy, *Judicial War Far From Over*, 61 CONG. Q. WKLY. 2824, 2826 (Nov. 2003) (quoting Sen. Edward Kennedy).

<sup>150</sup>*Id.*

<sup>151</sup>Editorial, *Steamrolling Judicial Nominees*, N.Y. TIMES, Feb. 6, 2003, at A1. The *Times* warns of “an era of conveyor-belt confirmations of Bush administration judicial nominations.” *Id.*

<sup>152</sup>149 CONG. REC. S3213 (daily ed. Mar. 6, 2003) (statement of Sen. Schumer); *see also* Erwin Chemerinsky & Catherine Fisk, *No to a Far-Right Court; Use Filibusters*, L.A. TIMES, Nov. 11, 2002, at B11 (stating Democrats “have only one way to check the president’s ability to pack the federal courts and they must use it: the filibuster”).

noted earlier, that these filibusters are entirely unprecedented. The simple remedy against being a rubberstamp is active opposition. As my colleague Senator Larry Craig put it: “Rubberstamping? I think not. Rubberstamping is not when any Senator can vote how he or she wishes. We are not suggesting that everybody vote yes. We are suggesting that everybody vote.”<sup>153</sup> Voting up or down, “ain’t a rubberstamp; that is doing what you are asked to do when you are sworn in as a Member of the Senate.”<sup>154</sup> Losing a fair fight does not make one side a rubberstamp for the other.

Second, Democrats repeat the mantra that President Bush’s filibustered nominees are “extremists”<sup>155</sup> who are out of some kind of “mainstream.”<sup>156</sup> Senator Schumer put it bluntly: “We are opposing people because they are ideologically out of the mainstream.”<sup>157</sup> The best way to determine whether nominees merit appointment is for the Senate to fully debate, and then to vote, on their nominations. Whatever terms such as “extremist” or “out of the mainstream” mean, they are reasons to vote against a nominee, not reasons to vote against voting on a nominee at all.

Third, in an attempt to create historical precedent after the fact, Democrats redefine “filibuster” to include virtually any reason a nomination might be delayed or remain unconfirmed.<sup>158</sup> For example, they try to equate a formal filibuster, conducted pursuant to a Standing Rule of the Senate, with an informal “hold,” which is merely the threat of a filibuster.<sup>159</sup> As a Congressional Research Service analysis describes, however, a hold “has no formal standing in Senate rules, and is not binding on the leader.”<sup>160</sup> Indeed,

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<sup>153</sup>149 CONG. REC. S3380 (daily ed. Mar. 10, 2003) (statement of Sen. Craig).

<sup>154</sup>*Id.* Advocates of filibuster reform similarly insist on a robust Senate role in the judicial selection process. Majority Leader Bill Frist, who introduced a resolution to reform Rule 22, argued: “Many will contend that the Senate should not rubberstamp Presidential appointments. I fully concur . . . . For reasons sufficient unto itself, the Senate may reject any nominee.” 149 CONG. REC. S5982 (daily ed. May 9, 2003) (statement of Sen. Frist).

<sup>155</sup>*See* 149 CONG. REC. S14,655 (daily ed. Nov. 12, 2003) (statement of Sen. Lautenberg) (“The fact is, Democrats have used the filibuster only to block nominees with records of extremism.”).

<sup>156</sup>*See, e.g., id.* at S14533 (statement of Sen. Schumer) (“People who are getting life appointments should not be extremists, should not be out of the mainstream.”); *id.* (statement of Sen. Feinstein) (“I deeply believe that judges should be in the mainstream of American legal thinking.”); *id.* at S14539 (statement of Sen. Durbin) (“The fact of the matter is, the nominees we are receiving from the White House are not mainstream nominees.”).

<sup>157</sup>149 CONG. REC. S14,096 (daily ed. Nov. 6, 2003) (statement of Sen. Schumer).

<sup>158</sup>*See, e.g.,* 149 CONG. REC. S14,634 (daily ed. Nov. 12, 2003) (statement of Sen. Dorgan) (arguing that “there are many [Clinton nominees] who never got a hearing. That is a filibuster.”).

<sup>159</sup>*See, e.g., id.* at S14638 (statement of Sen. Leahy) (arguing that Clinton nominees were blocked by “a one-person anonymous filibuster”). Senator Tom Harkin, who, in 1995, had led a campaign to abolish both legislative and nomination filibusters, dismissed the difference between a “hold” and a filibuster this way: “Fancy words, different words—same result.” *Id.* at S14633 (statement of Sen. Harkin).

<sup>160</sup>Beth & Bach, *supra* note 95, at 22.

former Majority Leader Senator Robert Byrd once dismissed this very comparison between holds and filibusters in the context of legislation, arguing that “any majority leader worth his salt is not going to honor a ‘hold’ except for a few days.”<sup>161</sup>

Senate Democrats also claim that every Clinton judicial nominee who was not confirmed was “blocked” by Republican “filibusters.”<sup>162</sup> Perhaps because the definitions are so fluid, those making this argument claim 63,<sup>163</sup> 114,<sup>164</sup> and even 167<sup>165</sup> Clinton judicial nominations were “blocked.” Those making these claims know that nominations can, and many by President Clinton did, remain unconfirmed for a variety of reasons having nothing to do with the deliberate choices of the majority party.<sup>166</sup>

Even more absurd than claiming that these unconfirmed nominees were filibustered is claiming that many *confirmed* nominees were filibustered. On March 11, 2003, for example, Senator Leahy used a chart titled “Republican Filibusters of Nominees.”<sup>167</sup> The list included names of many nominees, such as Stephen Breyer, Marsha Berzon, and Richard Paez,<sup>168</sup> on whose nominations cloture was invoked before they were confirmed, hardly true filibusters.<sup>169</sup> It also included Rosemary Barkett, who was confirmed without a cloture vote being taken at all.<sup>170</sup> Each of these individuals is today a sitting federal judge.<sup>171</sup>

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<sup>161</sup> 141 CONG. REC. S436 (daily ed. Jan. 5, 1995) (statement of Sen. Byrd).

<sup>162</sup> 149 CONG. REC. S14,638 (daily ed. Nov. 12, 2003) (statement of Sen. Leahy).

<sup>163</sup> *Id.*

<sup>164</sup> Neil A. Lewis, *Bush Seats Judge After Long Fight, Bypassing Senate Democrats*, N.Y. TIMES, Jan. 17, 2004., at A1.

<sup>165</sup> Robert S. Greenberger, *Bush to Send List of 11 Diverse Nominees to U.S. Appeals Courts to Senate Panel*, WALL ST. J., May 9, 2001, at A3.

<sup>166</sup> According to Senate Judiciary Committee records, for example, President Clinton withdrew twelve of his own nominees and chose not to renominate another sixteen. 151 CONG. REC. S4634 (daily ed. May 9, 2005) (statement of Sen. Specter). Nearly two dozen more were either nominated too late to be considered or were opposed by home-state senators with whom President Clinton had not consulted. *Id.* These few reasons alone slash the number of unconfirmed Clinton nominees for which Democrats want to hold Republicans responsible.

<sup>167</sup> 149 CONG. REC. S3442 (daily ed. Mar. 11, 2003) (statement of Sen. Leahy).

<sup>168</sup> *Id.*; see also Kevin Drum, *Resist the Filibuster Fiat*, WASH. POST, Jan. 31, 2005, at A21 (claiming that filibuster was attempted against Paez nomination).

<sup>169</sup> See *supra* note 101 (discussing cloture and nomination voting).

<sup>170</sup> 140 CONG. REC. S4264 (daily ed. Apr. 13, 1994).

<sup>171</sup> Similarly, on November 12, 2003, Senator Leahy used a chart listing what he said were “Clinton circuit court nominees blocked by the Republicans.” 149 CONG. REC. S14,638 (daily ed. Nov. 12, 2003) (statement of Sen. Leahy). Senator Leahy’s list of nominees “blocked by the Republicans” included Roger Gregory, Richard Paez, Marsha Berzon, H. Lee Sarokin, and Rosemary Barkett. *Id.* The Senate not only confirmed each of these nominees, but it did not even take a cloture vote on two of them (Gregory and Barkett), and two (Sarokin and Barkett) had already been confirmed by 1995, when Republicans took over Senate control. 141 CONG. REC. S4326 (daily ed. Apr. 14, 1994) (voting sixty-one to thirty-seven to confirm Barkett nomination); 140 CONG. REC. S14,012 (daily ed. Oct. 4, 1994) (voting sixty-three to thirty-five

This argument appears to assume that merely taking a cloture vote is evidence of a filibuster. Senator Schumer even said that, during the Clinton years, “cloture votes were held because a filibuster was being conducted.”<sup>172</sup> As the nonpartisan Congressional Research Service (CRS) concluded, however, “[i]t would be incorrect to assume that situations in which cloture is sought correspond completely with those in which filibusters occur.”<sup>173</sup> Another CRS analysis similarly concluded that:

the Senate leadership has increasingly utilized cloture as a routine tool to manage the flow of business, even in the absence of any apparent filibuster . . . . [T]he presence or absence of cloture *attempts* cannot be taken as a reliable guide to the presence or absence of a filibuster . . . . In many instances, cloture motions may be filed not to overcome filibusters in progress, but to preempt ones that are only anticipated[,]<sup>174</sup>

or to ensure that the matter comes to a vote. This is why concretely and objectively defining the filibuster is so important. While a defeated cloture vote indicates a filibuster because an attempt to end debate failed, merely taking a cloture vote may have other purposes. When Republicans controlled the Senate during the Clinton administration, the Senate took cloture votes to prevent filibusters and ensure a full debate and vote.<sup>175</sup>

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to confirm Sarokin nomination). Judge Gregory was appointed to the U.S. Court of Appeals by President Bush. 147 CONG. REC. S7992 (daily ed. July 20, 2001) (voting ninety-three to one to confirm Gregory nomination). Senator Richard Durbin used a similar list on November 12, 2003. 149 CONG. REC. S14,545 (daily ed. Nov. 12, 2003) (statement of Sen. Durbin).

<sup>172</sup>149 CONG. REC. S5463 (daily ed. Apr. 29, 2003) (statement of Sen. Schumer). Senator Carl Levin has also made the argument that filibusters occurred whenever “cloture votes were required.” 150 CONG. REC. S11,464 (daily ed. Nov. 18, 2004) (statement of Sen. Levin).

<sup>173</sup>Richard S. Beth, *Cloture Attempts on Nominations*, Cong. Res. Serv. Rep. (CRS) 2 (2002).

<sup>174</sup>Beth & Bach, *supra* note 95, at 1, 22 (emphasis added).

<sup>175</sup>*See id.* at 1 (“[T]he Senate leadership has increasingly utilized cloture as a routine tool to manage the flow of business, even in the absence of any apparent filibuster.”). Two of the confirmed Clinton nominees which Democrats accused Republicans of filibustering are prime examples. On September 29, 1999, then Majority Leader Senator Trent Lott announced that, by March 15, 2000, the Senate would vote on the nominations of Richard Paez and Marsha Berzon to the U.S. Court of Appeals for the Ninth Circuit. *See* 145 CONG. REC. 14,503 (daily ed. Nov. 10, 1999) (statement of Sen. Lott). On March 8, 2000, the Senate invoked cloture on, and then confirmed, these nominations. *See supra* note 101 (listing nominations, votes to invoke cloture, and confirmations). Only about a dozen Republican senators opposed cloture, while approximately twice as many voted for cloture but then against confirmation. *See* 146 CONG. REC. S1301-02 (daily ed. Mar. 8, 2000); 146 CONG. REC. S1336-01 (daily ed. Mar. 9, 2000). Clearly, the cloture votes were not for the purpose of defeating these controversial nominations,

Fourth, filibuster advocates say they do not filibuster judicial nominations very often, an argument that grows more hollow as the number of filibuster targets grows. In June 2003 a newspaper reported that “Democrats are blocking votes on two of President Bush’s judicial nominees.”<sup>176</sup> That number had doubled by the time the Senate held an extended debate about judicial confirmations in November 2003.<sup>177</sup> Within a year, it had doubled again.<sup>178</sup> Senators have already used this argument in the opening days of the 109th Congress.<sup>179</sup> A better comparison is between the growing number of filibusters and the number of such filibusters occurring in all prior American history: zero. The comparison of filibusters with total confirmations is also misleading because the filibusters are targeting only appeals court nominations, keeping President Bush’s appeals court confirmation rate the lowest of any President since at least Franklin Roosevelt. Filibuster proponents cannot have it both ways. On the one hand, they try to make these filibusters seem commonplace by lumping them with all other factors delaying or preventing confirmation and, on the other hand, they attempt to make the filibuster total seem small by isolating it from all other obstructionist tactics.

Finally, filibuster defenders claim this is all about “debate.” Explaining the Senate’s legislative role to Thomas Jefferson, George Washington is said to have compared the Senate to a saucer into which the hot legislative action of the House can be poured to cool through extended debate.<sup>180</sup> Senate Democrats often use this metaphor as if uttering it alone justifies filibusters.<sup>181</sup> Senator

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but to clear the procedural path so that a confirmation vote could, as Senator Lott promised, finally occur.

<sup>176</sup>Bart Jansen, *Debate Over Rules Proves Talk’s Not Cheap*, PORTLAND PRESS HERALD, Jun. 29, 2003, at 2C.

<sup>177</sup>See 149 CONG. REC. S14,786 (daily ed. Nov. 12, 2003) (statement of Sen. Santorum) (“By affirming what has happened four times before today, now five, now six—that 168-to-4 chart, that 98 percent chart—that is now history; 168 to 6. That is not even accurate because there are 6 more they have said they will filibuster.”).

<sup>178</sup>150 CONG. REC. S11,848-01 (daily ed. Nov. 24, 2004) (statement of Sen. Frist). Including those nominations Democrats and their allies targeted for filibusters extends the list even further.

<sup>179</sup>These senators include Minority Leader Harry Reid, and Senator Byron Dorgan. See 151 CONG. REC. S5962-02 (daily ed. May 22, 2005) (statement of Sen. Reid); 151 CONG. REC. S4816-02 (daily ed. May 10, 2005) (statement of Sen. Dorgan).

<sup>180</sup>See, e.g., 149 CONG. REC. 3857 (daily ed. Mar. 18, 2003) (statement of Sen. Lieberman (“[T]his goes back to the very way in which our Founders and Framers conceived of the Senate, the famous saucer and cup metaphor.”)). Some say it cools the “coffee.” See 149 CONG. REC. S14,167 (daily ed. Nov. 6, 2003) (statement of Sen. Alexander); 149 CONG. REC. S26,663 (daily ed. Feb. 25, 2003) (statement of Sen. Reid).

<sup>181</sup>See, e.g., 149 CONG. REC. S14,565 (daily ed. Nov. 12, 2003) (statement of Sen. Schumer) (“Yes, my colleagues, we are the cooling saucer. When the President’s passion for hot rightwing judges . . . gets overwhelming, we will cool the President’s passion. That is what the Constitution is all about, and we all know it.”); 149 CONG. REC. S14,096 (daily ed. Nov. 6, 2003) (statement of Sen. Schumer) (“Yes, we are blocking judges by filibuster. That is part of the hallowed process around here of the Founding Fathers saying the Senate is the cooling saucer.”).

Schumer has even stated that “our Constitution says the Senate ought to be the cooling saucer.”<sup>182</sup> The Constitution, of course, says no such thing. The metaphor’s best application, and no doubt the context in which Washington used it, is in the legislative process.<sup>183</sup> And this metaphor fails completely unless we are actually talking about real deliberation and debate; these filibusters, however, are about defeating targeted judicial nominations, not debating them. On April 8, 2003, after failed unanimous consent requests regarding the appeals court nomination of Priscilla Owen,<sup>184</sup> Senator Robert Bennett asked if “any number [of hours] would be sufficient” to debate the nomination.<sup>185</sup> Senator Harry Reid, the Assistant Democratic Leader, responded that “*there is not a number in the universe that would be sufficient.*”<sup>186</sup>

Senator Edward Kennedy once condemned this strategy, arguing that “[n]o one objects to full debate” but that “too often, extended debate has been a euphemism for obstruction.”<sup>187</sup> In my May 2003 remarks to the Senate Subcommittee on the Constitution, I said that “Senators perpetuating this

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<sup>182</sup>149 CONG. REC. S14,565 (daily ed. Nov. 12, 2003) (statement of Sen. Schumer).

<sup>183</sup>See 149 CONG. REC. S14,286 (daily ed. Nov. 10, 2003) (statement of Sen. McConnell) (“Washington suggested that the Senate was the cooling saucer—a place where things cooled off—of this new Federal Government they were creating, where the heated passions that might bubble over could cool down. That is the way the Senate has worked for over 200 years.”).

<sup>184</sup>Senator Bennett asked for six hours, and then ten hours, of debate; Senator Reid objected. 149 CONG. REC. S4949 (daily ed. Apr. 8, 2003) (statements of Sens. Bennett & Reid).

<sup>185</sup>*Id.*

<sup>186</sup>*Id.* (emphasis added). Similarly, before taking the first cloture vote on the appeals court nomination of Miguel Estrada, senators made numerous unanimous consent requests in the hope of structuring a debate. 149 CONG. REC. S3216 (daily ed. Mar. 6, 2003) (statement of Sen. Frist); see also 149 CONG. REC. S3455 (daily ed. Mar. 11, 2003) (statement of Sen. Frist) (requesting that vote occur following additional hearing and four hours of debate); 149 CONG. REC. S2647 (daily ed. Feb. 25, 2003) (statement of Sen. Frist) (requesting that vote on Estrada nomination occur at 9:30 a.m. on February 28, 2003); *id.* at S2657 (statement of Sen. Craig) (requesting that vote occur immediately). Senator Frist’s proposals ranged from six hours to more than three weeks, to a full hour for every single senator. On March 6, 2003, Senator Frist said that “I have sought unanimous consent on 17 separate occasions to bring the nomination to a vote. Regrettably, those requests for consent have been denied—again, on 17 separate occasions.” 149 CONG. REC. S3216 (daily ed. Mar. 6, 2003) (statement of Sen. Frist). On February 11, 2003, on behalf of Senator Frist, I asked for unanimous consent that the Senate debate the Estrada nomination for six more hours, followed by a confirmation vote. 149 CONG. REC. S2156 (daily ed. Feb. 11, 2003) (statement of Sen. Hatch). Senator Christopher Dodd objected, as he did on my subsequent unanimous consent requests for fourteen hours of debate, then sixteen hours, then twenty-six hours. *Id.* (statement of Sen. Dodd). Eventually, Senator Dodd simply said that he would object to “every request for additional time” for debating the Estrada nomination. *Id.* I asked: “Is the Senator telling me no matter what I offer that Senate Democrats are going to object?” *Id.* (statement of Sen. Hatch). He responded that “any effort to limit debate will be objected to.” *Id.* at S2157 (statement of Sen. Dodd).

<sup>187</sup>121 CONG. REC. 3849 (1975) (statement of Sen. Kennedy).

obstructionist ploy aren't demanding the opportunity for extended debate."<sup>188</sup> Two scholars conclude that "the filibuster, at least traditionally . . . was intended to encourage debate" and, in fact, debate is what keeps the filibuster from violating the Constitution's implicit requirement of majority rule.<sup>189</sup> If, however, the filibuster "effectively institutes a supermajority voting requirement," it is "contrary to the Constitution's mandate of simple majority rule."<sup>190</sup> Senator Mike Enzi put it correctly when he said: "Our Founding Fathers intended for the Senate to be the cooling saucer for legislation. I don't think they intended it to become a stagnant pond."<sup>191</sup>

Senators filibustering President Bush's judicial nominees once opposed the very filibusters they now embrace. In 1998, Senator Patrick Leahy, Ranking Judiciary Committee Democrat, said: "I have stated over and over again . . . that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported."<sup>192</sup> In 2002, however, he said: "If there's a really bad nominee, I think a filibuster is merited."<sup>193</sup> In 1975 Senator Edward Kennedy, a longtime member of the Judiciary Committee, said: "I believe that the Senate should operate under the principle of majority rule, except as the Constitution otherwise provides."<sup>194</sup> Two decades later, he repeated this position that "Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate."<sup>195</sup> That year, he supported a reform proposal which would have made permanent filibusters of either nominations or legislation impossible.<sup>196</sup>

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<sup>188</sup> *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent: Hearing Before the Senate Subcomm. on the Judiciary*, 108th Cong. (2003), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=744&wit\\_id=51](http://judiciary.senate.gov/member_statement.cfm?id=744&wit_id=51).

<sup>189</sup> Lieber & Brown, *supra* note 132, at 2383.

<sup>190</sup> *Id.*

<sup>191</sup> 150 CONG. REC. S3752 (daily ed. Apr. 6, 2004) (statement of Sen. Enzi).

<sup>192</sup> 144 CONG. REC. S6521 (daily ed. Jun. 18, 1998) (statement of Sen. Leahy). Senator Leahy has "noted how improper it would be to filibuster a judicial nomination." 144 CONG. REC. S12,578 (daily ed. Oct. 14, 1998) (statement of Sen. Leahy).

<sup>193</sup> *Morning Edition* (Nat'l Public Radio broadcast Nov. 11, 2002). Senate Democrats are not the only ones who change their view of filibusters when the party controlling the White House changes. On January 1, 1995, with President Clinton making nominations, the *New York Times* editorial headline blared "Time to Retire the Filibuster," which it said had become "the tool of the sore loser." See Editorial, *Time to Retire the Filibuster*, N.Y. TIMES, Jan. 1, 1995, at 8. On February 13, 2003, with President Bush making nominations, the *Times* editorial urged filibustering Democrats to "keep talking," saying those who once had been sore losers were now just "senators doing their jobs." See Editorial, *Keep Talking About Miguel Estrada*, N.Y. TIMES, Feb. 13, 2003, at A40.

<sup>194</sup> 121 CONG. REC. 3849 (1975) (statement of Sen. Kennedy).

<sup>195</sup> 141 CONG. REC. S8806 (daily ed. Jun. 21, 1995) (statement of Sen. Kennedy).

<sup>196</sup> Senator Kennedy voted against a motion to table the Harkin/Lieberman proposal. 141 CONG. REC. S438 (daily ed. Jan. 5, 1995); see *infra* notes 253–58 and 303–06 and accompanying text (discussing proposals for filibuster reform).

Filibusters targeting legislation, which are entirely within the Senate's legislative power and have a long history, can often be justified; filibusters of judicial nominations, which are within the President's executive power and have no history, cannot be justified. Filibusters for the purpose of ensuring debate, which is a hallmark of the Senate as an institution, are defensible; filibusters ensuring defeat of majority-supported judicial nominations are not. The current filibusters targeting majority-supported judicial nominations to ensure defeat rather than debate are unjustified and indefensible.

### III. WHERE WE GO FROM HERE

On May 10, 2004, I said on the Senate floor that "the time for discussions, negotiations, and talk is drawing to a close . . . . The time for action is quickly coming upon us."<sup>197</sup> That time is here, and the question is what steps can be

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<sup>197</sup>150 CONG. REC. S5062 (daily ed. May 10, 2004) (statement of Sen. Hatch). These discussions and negotiations continued for another year. In December 2004, I outlined how a simple majority of senators could, at the beginning of a new Congress, change Senate rules to restrict judicial nomination filibusters. See Orrin Hatch, *Here's a Simple Solution to Judicial Filibusters*, HUMAN EVENTS, Dec. 27, 2004, at 5, 5. For more analysis of this approach, see *infra* notes 306–309 and accompanying text. With the 109th Congress under way, Senators focused on the option of changing Senate procedures through a parliamentary ruling without formally changing Senate rules. In early April 2005, as Majority Leader Bill Frist and Minority Leader Harry Reid continued to talk, "neither side . . . [held] out much hope of a deal to defuse the confrontation." Maura Reynolds, *Senate Primed for Filibuster Showdown*, L.A. TIMES, April 4, 2005, at A14. Senator Reid dismissed one Frist proposal as a "big wet kiss to the far right." See Keith Perine, *Senate Inches Ever Closer to Filibuster Showdown*, 63 CONG. Q. WKLY. 1146, 1146 (May 2005). Meanwhile, Senator Frist rejected a Democratic proposal to confirm a few disputed appeals court nominations while holding up others. See David Espo, *Senate Dems Float Filibuster Compromise*, POLITICAL NEWS, May 16, 2005, at <http://www.political-news.org/breaking/10642/senate-dems-float-filibuster-compromise.html>. On May 23, 2005, a bipartisan group of senators signed a "Memorandum of Understanding," which appears to have made judicial filibusters less likely, at least in the short term. Memorandum of Understanding on Judicial Nominations from Fourteen Members of the U.S. Senate (May 23, 2005), available at <http://nationalreview.com/benchmemos/064035.asp>. Seven Democrats agreed to support final confirmation votes for three previously filibustered appeals court nominees: Priscilla Owen, Janice Rogers Brown, and William Pryor. *Id.* In addition, the Democrats agreed to support other judicial filibusters only in "exceptional circumstances." *Id.* In exchange, seven Republicans agreed not to support, at least during the 109th Congress, changing Senate rules or procedures to ban judicial filibusters outright. *Id.* Each group had enough members to accomplish its respective purpose. *Id.* On May 24, 2005, the Senate voted eighty-one to eighteen to invoke cloture. 151 CONG. REC. S5828 (daily ed. May 24, 2005). And, the next day, it voted fifty-five to forty-three to confirm the Owen nomination. 151 CONG. REC. S5875 (daily ed. May 25, 2005). On June 7, 2005, the Senate voted sixty-five to thirty-two to invoke cloture. 151 CONG. REC. S6129 (daily ed. June 7, 2005). And, the next day, it voted fifty-six to forty-three to confirm the Brown nomination. 151 CONG. REC. S6218 (daily ed. June 8, 2005). On June 8, 2005, the Senate voted sixty-seven to thirty-two to invoke cloture. 151 CONG. REC. S6218 (daily ed. June 8, 2005). And, the next day, it voted fifty-three to forty-five to confirm the Pryor nomination. 151 CONG. REC. S6284 (daily ed. June 9, 2005). Because the agreement preserved the judicial

taken deliberately to solve this political and constitutional crisis. Reviewing some basic principles and Senate history shows that we can solve the problem while honoring the Constitution and preserving Senate tradition.

#### A. Precedent

While America's founders began with a commitment to majority rule, extended debate has been described as "the single most defining characteristic of the Senate as a legislative body."<sup>198</sup> The Senate has adjusted the principle of majority rule, but has never displaced it altogether. Rather, even in the face of obstacles created by opponents of filibuster reform, the Senate has repeatedly acted to preserve the proper balance between the minority's right to debate and the majority's right to decide.

The very first legislative rules, adopted by the Continental Congress in 1778 and the Senate in 1789, allowed a simple majority to "move the previous question" and proceed to vote on a pending matter.<sup>199</sup> This mirrored the procedure already used in the British Parliament for nearly two centuries,<sup>200</sup> and is used today in the House of Representatives and in most state legislative chambers.<sup>201</sup> The Senate rules revision of 1806 dropped the previous question rule, which had been used just three times in the previous seventeen years.<sup>202</sup>

There is no evidence that this step was intended to create the opportunity to filibuster.<sup>203</sup> Indeed, "neither the concept nor the practice of filibustering to

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filibuster, I reminded my colleagues that the option of abolishing the judicial filibuster by changing Senate rules or procedures remained alive as well. See Orrin Hatch, *Nuclear Option Still on Table*, HUMAN EVENTS, May 30, 2005, at 1, 8. Thus, the need to understand why, and how, the judicial filibuster should be eliminated remains.

<sup>198</sup>Stanley Bach, *Filibusters and Cloture in the Senate*, Cong. Res. Serv. Rep. (CRS) 1 (2001).

<sup>199</sup>See Gold & Gupta, *supra* note 131, at 213–14 (recounting brief history of how Senate filibusters came about).

<sup>200</sup>S. PRT. NO. 99-95, at 11 (1985).

<sup>201</sup>See CARO, *supra* note 3, at 92 ("By 1948, some version of this motion had been incorporated into the functioning of forty-five of America's forty-eight state legislature, and most of the legislative bodies in the world's other countries as well.").

<sup>202</sup>*Id.* at 12; see also Gold & Gupta, *supra* note 131, at 215–16 (discussing creation of filibuster).

<sup>203</sup>See BINDER & SMITH, *supra* note 7, at 33 ("The records of the convention and the arguments in the Federalist Papers give no indication that the framers either anticipated or desired procedural protection for Senate minorities."); *id.* at 33–34 (stating that, while 1806 rules revision "made possible the filibuster—by eliminating the Senate's previous question motion . . . members of the original Senate expressed no commitment to a right of extended debate"); *id.* at 51 ("There is no evidence that supermajorities were envisioned by the framers nor demanded by the first senators in order to the ensure that the Senate could temper immoderate legislation passed by the House. In fact, the available evidence concerning the framers' views strongly suggests just the opposite."); see also Cornyn, *supra* note 102, at 193 (stating that lack of time limits for debate in Senate rules is not "because the drafters of the Senate rules actually wanted endless debate and delay, and eternal paralysis and inaction in the Senate").

prevent majority rule existed in the early Senate.”<sup>204</sup> Without a new rule mandating a specific procedure or vote threshold, however, ending debate after 1806 required unanimous consent. Dropping the previous question rule had, albeit unintentionally or “by sheer oversight,”<sup>205</sup> opened the door to filibusters,<sup>206</sup> though they still did not exist for another three decades.<sup>207</sup> And while there remained, as Senate historian and former parliamentarian Floyd Riddick describes it, the expectation that senators would “restrain themselves” and “not abuse the privilege of debate,”<sup>208</sup> no rule existed to back it up.

James Madison had warned against requiring supermajorities for legislative business: “It would be no longer the majority that would rule: the power would be transferred to the minority.”<sup>209</sup> With no rule to prevent it, however, that is what happened.<sup>210</sup> Senator Henry Clay in 1841 urged reinstating the previous question rule “to allow a majority to control the business of the Senate,”<sup>211</sup> arguing reform was necessary because the minority was abusing the privilege of unlimited debate.<sup>212</sup> That began a “long history of attempting filibuster reform.”<sup>213</sup>

The brief review of this reform history that follows focuses on *substance* and, perhaps more importantly, on *process*. On substance, it shows that

<sup>204</sup>Gold & Gupta, *supra* note 131, at 214.

<sup>205</sup>*Id.* at 216.

<sup>206</sup>See CARO, *supra* note 3, at 92 (“[T]he South’s power in the Senate rested on . . . a rule’s absence. This missing rule was one that would force senators to stop talking about a bill, and vote on it.”).

<sup>207</sup>BINDER & SMITH, *supra* note 7, at 39; Gold & Gupta, *supra* note 131, at 215.

<sup>208</sup>Warden Sinclair, *Senate Filibuster: Some Call It Tyranny, Others Freedom*, WASH. POST, Jun. 15, 1978, at A3 (quoting Floyd Riddick).

<sup>209</sup>THE FEDERALIST NO. 58 (James Madison). Similarly, Hamilton observed that supermajority requirements in the Articles of Confederation had caused problems. THE FEDERALIST NO. 22 (Alexander Hamilton). Hamilton “rejected the argument that requiring supermajorities would add a layer of protection against hasty decisions.” Delker, *supra* note 119, at 352.

<sup>210</sup>As Professor Steven Calabresi explains, the first filibuster, led by Senator John C. Calhoun, was used to defend the institution of slavery:

Since its inception in 1841, the filibuster of legislation has been used to block legislation protecting black voters in South, in 1870 and 1890–91; to block anti-lynching legislation in 1922, 1935, and 1938; to block anti-poll tax legislation in 1942, 1944, and 1946; and to block anti-race discrimination statutes on 11 occasions between 1946 and 1975.

*Hearing on Senate Rule XXII*, *supra* note 138 (statement of Steven Calabresi).

<sup>211</sup>FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* 23 (1940).

<sup>212</sup>S. PRT. NO. 99-95, at 12 (1985).

<sup>213</sup>Gold & Gupta, *supra* note 131, at 220. This included repeated proposals for reinstating the previous question rule. BYRD, *supra* note 5, at 115–16. In 1873, the Senate narrowly defeated a reform resolution including it. S. PRT. NO. 99-95, at 13 (1985). Ten years later, the Rules Committee approved a rules revision that, again, included it. *Id.* at 15–16. Between 1884 and 1890 alone, no fewer than fifteen reform resolutions were introduced to impose some sort of limitation on debate. *Id.*

unfettered debate of the kind that would let the minority abolish majority rule has not been the accepted norm (especially on nominations) that defenders of the current filibusters would suggest.<sup>214</sup> The steady trajectory of reform has been to lower the vote threshold for cloture. On process, this history firmly establishes that the Senate can change its rules and procedures by simple majority, avoiding a more onerous cloture requirement that may have been established by a prior Senate.

“By the early twentieth century, unrestrained filibustering had wreaked havoc on the Senate as the framers intended it to function.”<sup>215</sup> In 1917 an intercepted German communication warned of submarine warfare in the Atlantic, which began in February.<sup>216</sup> President Woodrow Wilson proposed arming American merchant ships to defend themselves, but a small group of senators launched a filibuster against the proposed bill, arguing it would draw the United States into the war.<sup>217</sup> In language echoing Madison’s earlier warning, President Wilson described what had become of majority rule: “The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action . . . . The only remedy is that the rules of the Senate shall be altered.”<sup>218</sup>

Senator Clay had backed down from his push for debate limitations in 1841, in part, because other senators threatened to filibuster filibuster reform.<sup>219</sup> This possibility still existed in 1917, since ending debate on any proposed cloture rule would require unanimous consent. In a pattern that would be repeated in future reform efforts, Senator Thomas Walsh, a Democrat from Montana, focused not on past Senate rules but on the Constitution itself, arguing that the Senate, acting as it normally does through a majority of the quorum, may always exercise its constitutional rulemaking authority.<sup>220</sup> Until a new Senate determines its own rules by adopting new ones or readopting old ones, he argued, traditional parliamentary rules govern, including the previous question rule.<sup>221</sup> Combined with presidential and public pressure,<sup>222</sup> Senator

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<sup>214</sup>Authors Sarah Binder and Steven Smith call this a “myth.” See BINDER & SMITH, *supra* note 7, at 1 (“According to conventional wisdom, the right of unrestricted debate in the Senate helps moderate extreme legislation, blocks passages of measures opposed by popular majority, and is inseparable from the origins and traditions of the Senate. Such claims are, in fact, mostly myth.”).

<sup>215</sup>BINDER & SMITH, *supra* note 7, at 6.

<sup>216</sup>BURDETTE, *supra* note 211, at 118.

<sup>217</sup>*Id.* at 118, 120; Gold & Gupta, *supra* note 131, at 218.

<sup>218</sup>S. PRT. NO. 99-95, at 17 (1985).

<sup>219</sup>BURDETTE, *supra* note 211, at 23; Gold & Gupta, *supra* note 131, at 217.

<sup>220</sup>Gold & Gupta, *supra* note 131, at 220.

<sup>221</sup>*Id.*

<sup>222</sup>BINDER & SMITH, *supra* note 7, at 79; BURDETTE, *supra* note 211, at 122–23; Gold & Gupta, *supra* note 131, at 219.

Walsh's arguments helped turn gridlock into reform<sup>223</sup> when the Senate, "after only six hours of debate,"<sup>224</sup> amended Rule 22 by a vote of seventy-six to three.<sup>225</sup> It provided that two-thirds of Senators present and voting could invoke cloture on any "pending measure."<sup>226</sup>

It quickly became clear, however, that "the cloture rule was not going to be effective."<sup>227</sup> In 1948 the presiding officer of the Senate ruled that while Rule 22 might help bring to a close debate on a pending measure such as a bill, it did not apply to a motion to proceed to that measure.<sup>228</sup> This, of course, would prevent a final vote as surely as filibustering the measure itself. It would also prevent amending Rule 22 to close this loophole. Robert Caro calls this "perhaps the ultimate legislative Catch-22: any attempt to close the loophole allowed the loophole to be used to keep it from being closed."<sup>229</sup> In 1917 President Wilson said that "[a] little group of willful men . . . have rendered the great government of the United States helpless and contemptible."<sup>230</sup> Similarly, in 1948 Senator Arthur Vandenberg said that "a small but determined minority can always prevent cloture under the existing rules."<sup>231</sup> Not much had changed.

Two other parallels with the events of 1917, however, provided the impetus for reform. First, public criticism of Congress's inefficiency was on the rise, including criticism of Senate rules.<sup>232</sup> Second, parliamentary arguments sparked another campaign to change Rule 22. Vice President Alben Barkley, the presiding officer in 1949, first opined that the "obvious intention of the Senate in 1917" was that Rule 22 would cover motions to proceed.<sup>233</sup>

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<sup>223</sup>Senator Clinton Anderson, who would later push for stricter limits on debate, credited Senator Walsh with a significant role in the final adoption of Rule 22. Gold & Gupta, *supra* note 131, at 222. Senator Paul Douglas agreed, insisting that reform would not have happened without Senator Walsh. *Id.*

<sup>224</sup>BYRD, *supra* note 5, at 124.

<sup>225</sup>*Id.*; S. PRT. NO. 99-95, at 17 (1985).

<sup>226</sup>S. PRT. NO. 99-95, at 17 (1985); Gold & Gupta, *supra* note 131, at 226.

<sup>227</sup>BYRD, *supra* note 5, at 124. Efforts to continue filibuster reform continued the very next year when Senator Oscar Underwood, who would become the Democratic leader in the 66th Congress, introduced a resolution to restore the previous question rule. *Id.* The Rules Committee approved, and the Senate only narrowly defeated, this proposal. S. PRT. NO. 99-95, at 17 (1985); BYRD, *supra* note 5, at 124.

<sup>228</sup>BINDER & SMITH, *supra* note 7, at 173; *Senate, House Vote on Rules*, 1953 CONG. Q. ALMANAC 313, 313; Gold & Gupta, *supra* note 131, at 228. This is still a problem today. *See* Beth & Bach, *supra* note 95, at 11. During debate on the Harkin/Lieberman filibuster reform proposal, Senator Byrd argued that the only potential problem related to filibusters involved the motion to proceed. 141 CONG. REC. S38 (daily ed. Jan. 4, 1995) (statement of Sen. Byrd). He suggested that the Senate "change the rule and allow a motion to proceed under a debate limitation of 2 hours, 1 hour, or whatever, except on motions to proceed to a rules change." *Id.* at S42.

<sup>229</sup>CARO, *supra* note 3, at 93.

<sup>230</sup>BYRD, *supra* note 5, at 122.

<sup>231</sup>*Id.* at 127.

<sup>232</sup>*See* CARO, *supra* note 3, at 101.

<sup>233</sup>Gold & Gupta, *supra* note 131, at 228.

This contradicted the 1948 ruling by President Pro Tempore Arthur Vandenberg that “the integrity of congressional procedures” required the conclusion that Rule 22 did not apply to a motion to proceed.<sup>234</sup> This ruling, in 1949, “made the threat of cloture almost totally ineffective.”<sup>235</sup> Filibuster proponents appealed the Barkley ruling to the full Senate, which effectively overturned it by voting against tabling the appeal.<sup>236</sup> These events prompted a compromise in which the Senate expanded Rule 22’s coverage from “any pending measure” to include any measure, “motions or other matters pending before the Senate” but raised the vote threshold from two-thirds of senators present and voting to two-thirds of senators chosen and sworn.<sup>237</sup>

This 1949 amendment took away as much as it gave and, not surprisingly, “proved to be less usable than the one it replaced.”<sup>238</sup> Just as dropping the previous question rule in 1806 unintentionally created the opportunity to filibuster legislation, the 1949 amendment’s broader language inadvertently created the opportunity to filibuster nominations. “Nominations were swept into the rule in 1949, but only by happenstance. The Senate debates include not a single mention of filibusters of nominations, likely because the concept was so alien to the Senate of 1949.”<sup>239</sup> At the same time, the 1949 amendment exempted proposals to change Senate rules from any cloture requirement at all, placing reform efforts in the precarious pre-1917 position of requiring unanimous consent to end debate.<sup>240</sup>

At the opening of the 83rd Congress, Senator Clinton Anderson, a Democrat from New Mexico, made a motion that the Senate consider the adoption of new rules.<sup>241</sup> As Senator Walsh had done in 1917, Senator Anderson focused on the Constitution, arguing that each Senate may decide for itself, by simple majority, the rules under which it will operate.<sup>242</sup> His opponents, in contrast, “contended that the Senate is a ‘continuing body,’ bound by the rules of earlier Senates.”<sup>243</sup> These rules included the 1949 amendment to Rule 22 that effectively required unanimous consent for cloture

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<sup>234</sup>CARO, *supra* note 3, at 215.

<sup>235</sup>*Id.*

<sup>236</sup>95 CONG. REC. 2275 (1949); S. PRT. NO. 99-95, at 21 (1985); BINDER & SMITH, *supra* note 7, at 173; CARO, *supra* note 3, at 217–18.

<sup>237</sup>S. PRT. NO. 99-95, at 25 (1985).

<sup>238</sup>BYRD, *supra* note 5, at 128.

<sup>239</sup>Gold & Gupta, *supra* note 131, at 229.

<sup>240</sup>BYRD, *supra* note 5, at 128.

<sup>241</sup>*Id.*

<sup>242</sup>*See* S. PRT. NO. 99-95, at 23 (1985) (“They based their strategy on the contention of Senator Walsh in 1917 that each new Congress brings with it a new Senate, entitled to consider and adopt its own rules.”).

<sup>243</sup>BYRD, *supra* note 5, at 128.

on amendments to Senate rules. On January 7, 1953, the Senate voted seventy to twenty-one to table the motion to proceed to Anderson's proposal.<sup>244</sup>

Senator Anderson tried again in 1957, this time making a motion on behalf of more than thirty senators to consider the adoption of new rules.<sup>245</sup> "The arguments echoed those raised in the 83rd Congress."<sup>246</sup> Opponents emphasized the continuing nature of the Senate and "the importance of protecting minority rights and states' rights."<sup>247</sup> The reformers "looked past the 'continuing body' question and turned to the U.S. Constitution."<sup>248</sup> The most significant development from the 1957 reform effort was an advisory opinion from Vice President Richard Nixon that the Constitution allows "the majority of the new existing membership of the Senate . . . the power to determine the rules under which the Senate will proceed."<sup>249</sup> He agreed with Senators Anderson and Walsh before him that "the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules . . . cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress."<sup>250</sup> Such a limitation would "den[y] the membership of the Senate the power to exercise its constitutional right to make its own rules."<sup>251</sup> This would allow the Senate, by simple majority, to readopt existing rules or choose new ones altogether. This opinion, however, was nonbinding because, as Nixon acknowledged, only the full Senate could decide such constitutional questions.<sup>252</sup> The fifty-five to thirty-eight Senate vote tabling Anderson's motion to consider new rules was much closer than the vote four years earlier.<sup>253</sup>

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<sup>244</sup>S. PRT. NO. 99-95, at 24 (1985); BYRD, *supra* note 5, at 129; Gold & Gupta, *supra* note 131, at 236.

<sup>245</sup>Gold & Gupta, *supra* note 131, at 236.

<sup>246</sup>*Id.*

<sup>247</sup>*Id.* at 237.

<sup>248</sup>*Id.* at 228.

<sup>249</sup>103 CONG. REC. 178 (1957) (statement of Vice President Nixon).

<sup>250</sup>BYRD, *supra* note 5, at 129.

<sup>251</sup>S. PRT. NO. 99-95, at 24 (1985); BYRD, *supra* note 5, at 129. During the 1957 debate, Senator Prescott Bush, whose son and grandson would become the forty-first and forty-third presidents, said the real question was whether "the Senate of each new Congress [is] free to adopt rules for its proceedings under the Constitution." 103 CONG. REC. 182 (1957) (statement of Sen. Bush).

<sup>252</sup>103 CONG. REC. 179 (1959) (statement of Vice President Nixon); S. PRT. NO. 99-95, at 24 (1985); BYRD, *supra* note 5, at 129; *see also* Betsy Palmer, *Changing Senate Rules: The 'Constitution' or 'Nuclear' Option*, Cong. Res. Serv. Rep. (CRS) 4 n.7 (2004) ("Under Senate precedents, the presiding officer may not rule on a constitutional point of order and instead must submit the point of order to the full Senate for a vote.")

<sup>253</sup>S. PRT. NO. 99-95, at 24 (1985); BYRD, *supra* note 5, at 129. Separately, a group of Democrats, led by Senator Hubert Humphrey, introduced a "liberal legislative program highlighted by strong civil rights laws—and . . . also [an] attempt to remove the main barrier to the program's enactment by introducing a motion to repeal Rule 22." CARO, *supra* note 3, at 839.

Like the amendment a decade earlier, the 1959 filibuster “reform” gave as much as it took away. Majority Leader Senator Lyndon Johnson, a Democrat from Texas, offered a resolution lowering the cloture threshold back to two-thirds of senators present and voting, including votes regarding rules changes,<sup>254</sup> but adding language that appears in Rule 5 today: “The rules of the Senate shall continue from one Congress to the next Congress, unless they are changed as provided in these rules.”<sup>255</sup> This approach sought to undercut the Walsh/Anderson case by bolstering the continuing body argument with the “continuing rules” language. In addition, reform opponents wanted to ensure that the vote threshold for cloture on rules changes, while lower than the unanimous consent previously required, would still be high enough to make it practically impossible to amend Rule 22 directly.<sup>256</sup> Nonetheless, Vice President Nixon repeated his advisory opinion that “the rules of the Senate continue from session to session until the Senate, at the beginning of a session indicates its will to the contrary.”<sup>257</sup> At that time, he said, “the majority has the power to cut off debate in order to exercise the right of changing or determining the rules.”<sup>258</sup> The sixty to thirty-six vote tabling Senator Anderson’s motion to consider new rules showed substantial, but less than majority, support for achieving filibuster reform by simple majority.<sup>259</sup>

The cause of filibuster reform certainly did not suffer when southern senators filibustered civil rights legislation for months in early 1960.<sup>260</sup> In fact, the filibuster had come to be called “the gravedigger in the Senate graveyard for civil rights bills.”<sup>261</sup> As the 87th Congress opened in 1961, Majority Leader Senator Mike Mansfield, a Democrat from Montana, made a motion to refer Senator Anderson’s reform proposal to the Rules Committee for review.<sup>262</sup> The

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<sup>254</sup>S. PRT. NO. 99-95, at 25 (1985).

<sup>255</sup>*Id.*

<sup>256</sup>Senators continued introducing a plethora of other filibuster reform proposals, including twenty-five from 1949 to 1954 and another eight from 1957 to 1958. *See id.* at 22–25.

<sup>257</sup>105 CONG. REC. 96 (1959) (statement of Vice President Nixon).

<sup>258</sup>*Id.* at 9.

<sup>259</sup>*Id.* at 207.

<sup>260</sup>*See* 107 CONG. REC. 600 (1961). That year, both the Democratic and Republican party platforms called for filibuster reform—the Democrats urging action “to improve congressional procedures so that majority rule prevails.” *See* 107 CONG. REC. 510 (1961) (statement of Sen. Javits); Gold & Gupta, *supra* note 131, at 246–47 & n.269.

<sup>261</sup>CARO, *supra* note 3, at 854; *see also* Gold & Gupta, *supra* note 131, at 230 (“Among the most noteworthy victims of the filibuster was early civil rights legislation.”).

<sup>262</sup>Gold & Gupta, *supra* note 131, at 248. Senator Anderson proposed lowering the cloture threshold to three-fifths of senators present and voting. *Id.* Senators Hubert Humphrey and Thomas Kuchel proposed dropping it to a simple majority. S. PRT. NO. 99-95, at 25 (1985). For insight into “Nice Guy Kuchel,” *see The Nice Guy*, TIME, Oct. 29, 1956, at 20–21.

fifty to forty-six vote indicated growing, but still minority, support for filibuster reform.<sup>263</sup>

In 1963, when Senator Anderson again proposed lowering the cloture threshold to three-fifths,<sup>264</sup> he made a motion “under the Constitution that without further debate the Chair submit the pending question to the Senate for a vote.”<sup>265</sup> Filibuster reformers hoped for a favorable ruling which could effectively be affirmed by a simple majority tabling an appeal of that ruling. “Anderson’s supporters reasoned that once the motion to table was adopted and the Vice President’s ruling was thereby affirmed, they would have set a binding Senate precedent that would allow them to defeat future filibusters of rules changes by a simple majority vote.”<sup>266</sup> If, however, the presiding officer submitted the motion to the full Senate rather than deciding it himself, “the question would be debatable, the minority could filibuster, and the . . . reformers would have made no progress.”<sup>267</sup> Because the motion raised a constitutional issue, Vice President Johnson stated “that since 1803, such matters invariably had been decided by the Senate itself.”<sup>268</sup>

In 1967 Senator George McGovern proposed reducing the cloture threshold to three-fifths of senators present and voting<sup>269</sup> and made a complex motion essentially allowing the Senate to invoke cloture by a simple majority on the motion to proceed to his reform proposal.<sup>270</sup> Like the strategy pursued in 1963, this required a favorable ruling from the presiding officer which could be affirmed by a simple majority tabling an appeal of that ruling. Minority Leader Senator Everett Dirksen made a point of order that the McGovern motion was inconsistent with Rule 22.<sup>271</sup> Vice President Hubert Humphrey, who had supported filibuster reform as a senator, concluded that this point of order raised a constitutional issue and, therefore, submitted it to the full Senate for decision.<sup>272</sup>

While that decision mirrored Vice President Johnson’s handling of the 1963 reform strategy, Humphrey’s next decision took a new turn. Just as tabling an appeal of a presiding officer’s ruling affirms that ruling, Vice President Humphrey said that tabling a point of order raised against a motion

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<sup>263</sup>S. PRT. NO. 99-95, at 25 (1985). When the committee reported the resolution back, the Senate voted forty-six to thirty-five to table it. *Id.* at 25–26; Gold & Gupta, *supra* note 131, at 248.

<sup>264</sup>Senator Humphrey proposed a two-step procedure, with two-thirds required on the first cloture vote and fifty-one on the second. S. PRT. NO. 99-95, at 26 (1985).

<sup>265</sup>*Id.*; 109 CONG. REC. 1214 (1963) (statement of Sen. Anderson).

<sup>266</sup>Gold & Gupta, *supra* note 131, at 248–49.

<sup>267</sup>*See id.* at 249 (discussing Civil Rights reformers).

<sup>268</sup>S. PRT. NO. 99-95, at 26 (1985).

<sup>269</sup>*Id.* at 27. Senator Kuchel proposed allowing for simple majority cloture after twenty days of debate on a measure. *Id.*

<sup>270</sup>*Id.*

<sup>271</sup>*Id.*

<sup>272</sup>*Id.*; BINDER & SMITH, *supra* note 7, at 178; Palmer, *supra* note 252, at 4.

has the effect of approving that motion.<sup>273</sup> Specifically, he said that if the Senate tabled the Dirksen point of order, which it could do by a simple majority, it would effectively approve Senator McGovern's original motion to proceed to his reform proposal.<sup>274</sup> This would establish the precedent of simple majority cloture without having to amend Rule 22 at all. The Senate rejected this course, first voting thirty-seven to sixty-one against tabling the Dirksen point of order, and then voting fifty-nine to thirty-seven to sustain it.<sup>275</sup>

At a few key points during this series of filibuster reform efforts, presiding officers had either offered opinions or made rulings which could contribute to a successful strategy. The Senate itself, however, had not affirmatively adopted these positions. In 1969, Senator Frank Church, an Idaho Democrat, introduced a proposal to lower the cloture threshold to three-fifths, filed a motion to invoke cloture on it, and asked Vice President Humphrey whether a simple majority, "but less than two-thirds"<sup>276</sup> as required by Rule 22, would be sufficient to invoke cloture.<sup>277</sup> Citing the Nixon advisory opinion of 1957, Humphrey ruled that, because this was the beginning of a new Congress, a simple majority was sufficient to invoke cloture.<sup>278</sup> Two days later, the Senate voted fifty-one to forty-seven on the cloture motion and Vice President Humphrey indeed announced that cloture had been invoked.<sup>279</sup> "Thus, [Senator] Church was allowed to take advantage of the cloture procedure to curtail debate without being required to meet Rule [22]'s requirement for a two-thirds vote of Senators present."<sup>280</sup> This victory was very short lived, however, when reform opponents immediately appealed that ruling and the Senate voted forty-five to fifty-three against sustaining it.<sup>281</sup>

Finally, in 1975 Senators Walter Mondale, a Minnesota Democrat, and James Pearson, a Kansas Republican, introduced a resolution to reduce the cloture threshold to three-fifths.<sup>282</sup> Senator Mondale stated that "the supporters

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<sup>273</sup>S. PRT. NO. 99-95, at 27 (1985).

<sup>274</sup>*Id.*; 113 CONG. REC. 918-19 (1967) (statement of Vice President Humphrey); BYRD, *supra* note 5, at 130; Gold & Gupta, *supra* note 131, at 250.

<sup>275</sup>S. PRT. NO. 99-95, at 27 (1985); BYRD, *supra* note 5, at 130.

<sup>276</sup>115 CONG. REC. 593 (1969) (statement of Sen. Church).

<sup>277</sup>Gold & Gupta, *supra* note 131, at 251.

<sup>278</sup>115 CONG. REC. 593 (1969) (statement of Vice President Humphrey); S. PRT. NO. 99-95, at 28-29 (1985); BINDER & SMITH, *supra* note 7, at 180.

<sup>279</sup>115 CONG. REC. 994 (1969) (statement of Vice President Humphrey).

<sup>280</sup>Gold & Gupta, *supra* note 131, at 251.

<sup>281</sup>115 CONG. REC. 995 (1969); S. PRT. NO. 99-95, at 29 (1985); BYRD, *supra* note 5, at 131; *see also* Beth & Bach, *supra* note 95, at 4 ("In the Senate, to table something is to kill it."). Significantly, Senator Edward Kennedy later argued that "although a Vice President's ruling may have been reversed, the reversal was accomplished by a majority of the Senate. In other words, majority rule prevailed on the issue of the Senate's power to change its rules." 121 CONG. REC. 1148 (1975) (statement of Sen. Kennedy).

<sup>282</sup>121 CONG. REC. 12 (1975) (statement of Sens. Mondale & Pearson). In 1971, Senator Pearson proposed to lower the cloture threshold to three-fifths. Gold & Gupta, *supra* note 131, at

of this resolution do not acquiesce” in Rule 22’s two-thirds vote threshold for cloture on rules changes, “nor do they waive any rights . . . to amend rule [22], uninhibited in effect by rules during previous Congresses.”<sup>283</sup> This step was intended to freeze in place the general parliamentary rules, including calling the previous question, that exist at the beginning of a new Congress. Significantly, the Senate itself affirmed that this state of affairs would continue until the Senate could attend to the matter.<sup>284</sup> Finally, on February 20, Senator Pearson offered the same kind of complex motion, to allow simple majority cloture, which Senator McGovern had proposed in 1967.<sup>285</sup> A repeat of the 1967 scenario continued unfolding as Majority Leader Mansfield raised a point of order that the Pearson motion was inconsistent with Rule 22, and Vice President Nelson Rockefeller submitted the question to the full Senate to decide.<sup>286</sup> The Vice President also ruled that tabling the Mansfield point of order would establish the legitimacy of the Pearson motion, which the Senate would then vote on.<sup>287</sup>

Significantly, the Senate tabled points of order three times against the Pearson motion, which “temporarily endorsed the doctrine that majority cloture may be invoked to change Senate rules at the start of a Congress.”<sup>288</sup> After more parliamentary maneuvering by filibuster reform opponents, however, the Senate voted to reconsider one of those votes to table the point of order, and then voted to sustain the point of order against the original Pearson motion.<sup>289</sup> “Thus, the Senate erased the precedent of majority cloture . . . .”<sup>290</sup> Other negotiations resulted in a new proposal to set the cloture threshold at “three-fifths of the senators duly chosen and sworn” but retaining the two-

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252. In the same year, Vice President Spiro Agnew reaffirmed that only the Senate can decide motions or points of order raising constitutional questions. *Id.*

<sup>283</sup>121 CONG. REC. 12 (1975) (statement of Sen. Mondale).

<sup>284</sup>*Id.* at 12–13.

<sup>285</sup>*Id.* at 3835–36.

<sup>286</sup>Gold & Gupta, *supra* note 131, at 254.

<sup>287</sup>121 CONG. REC. 839–40 (1975) (statement of Vice President Rockefeller); Gold & Gupta, *supra* note 131, at 255.

<sup>288</sup>S. PRT. NO. 99-95, at 31 (1985); *see also* BYRD, *supra* note 5, 132 (“When the Senate voted 51 to 42 to table the point of order, it was, in effect, endorsing the doctrine that cloture may be invoked by a majority to change Senate rules at the start of a Congress.”); Palmer, *supra* note 252, at 5 (“By a vote of 51–42, the Senate agreed to a motion to table the Mansfield point of order, thus implicitly agreeing to the majority cloture proposition.”). For details on each of these three votes, *see* Gold & Gupta, *supra* note 131, at 255–57.

<sup>289</sup>S. PRT. NO. 99-95, at 31 (1985).

<sup>290</sup>*Id.*; *see also* Palmer, *supra* note 252, at 5–6 (“Disagreements remain about whether the Senate obliterated the precedent of majority cloture with its subsequent actions.”). Senator Mondale, a leading filibuster reformer, insisted that these maneuvers “in no way” undermine the right of a simple majority to adopt new rules at the beginning of a Congress. *See* Walter F. Mondale, *The Filibuster Fight*, WASH. POST, Mar. 18, 1975, at A16.

thirds present and voting threshold for cloture on rules changes.<sup>291</sup> The Senate adopted this resolution, which governs today.<sup>292</sup>

In January 1995, as the 104th Congress opened, several senators, including Tom Harkin, an Iowa Democrat, and Joseph Lieberman, a Connecticut Democrat, introduced a filibuster reform proposal.<sup>293</sup> Senator Harkin called it a “new procedure for ending filibusters” and, as he described it, this approach would require declining vote thresholds on successive cloture votes—from sixty, fifty-seven, fifty-four, to fifty-one on the fourth vote—with at least two days between each vote.<sup>294</sup> Even with this sliding-scale approach, considering the several steps in the legislative process,<sup>295</sup> “you could slow a bill down for a minimum of 57 days, 57 legislative days. That would translate into about 3 months. So it is a modest proposal.”<sup>296</sup> The true reform, however, would be that “at some point in time a majority of the Senate ought to be able to end debate and get to the merits of the legislation.”<sup>297</sup>

Senator Harkin noted that “80 percent of independents, 74 percent of Democrats, and 79 percent of Republicans said that when enough time was consumed in debate, that after debate a majority ought to be able to . . . end the debate.”<sup>298</sup> Significantly, even though Democrats had lost control of the Senate in the 1994 election, he argued that the majority “ought to have the right to have us vote on the merits of what they propose.”<sup>299</sup> He said: “I do not believe that I as a member of the minority ought to have the right to absolutely stop something because I think it is wrong, that that is rule by minority.”<sup>300</sup>

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<sup>291</sup>BYRD, *supra* note 5, at 132. The difference between “present and voting” and “chosen and sworn” is very important. It means that the 1975 reform lowered the cloture requirement only when more than eighty-eight senators are present. If eighty-eight are present, the 1959 version of Rule 22 would permit fifty-nine to invoke cloture, while the 1975 version would still require sixty.

<sup>292</sup>S. PRT. NO. 99-95, at 31–32 (1985); BYRD, *supra* note 5, at 132.

<sup>293</sup>141 CONG. REC. S430 (daily ed. Jan. 5, 1995).

<sup>294</sup>*Id.*

<sup>295</sup>These legislative stages include “the motion to proceed . . . the bill itself . . . the appointment of conferees, insisting on Senate amendments, disagreeing with the House, and . . . the conference report.” *Id.*

<sup>296</sup>*Id.* Under Senate procedures, a legislative day can be considerably longer than a calendar day because it lasts until the Senate adjourns. *Id.*

<sup>297</sup>*Id.*

<sup>298</sup>*Id.* at S431. A Zogby poll, in February 2004, found that large majorities of many demographics, from current members and veterans of the military, to those who attend or do not attend church, oppose the Democrats’ recent filibusters of judicial nominations. See John M. Powers, *Hatch and Frist Fire Whistleblower: Public Opposition to Blocking Bush Nominees*, INSIGHT, Apr. 13, 2004, at 24, 34.

<sup>299</sup>141 CONG. REC. S431 (daily ed. Jan. 5, 1995) (statement of Sen. Harkin).

<sup>300</sup>*Id.*

*B. Prescription*

Section II outlined reasons why the Senate must, as it has done in the past, change its procedures to achieve a more appropriate balance between the minority's right to debate and the majority's right to decide. When he advocated filibuster reform in 1975, Senator Edward Kennedy, a Massachusetts Democrat, spoke on the Senate floor and his remarks provide a useful review of the case for reform. Insisting that "the majority has rights, too," Senator Kennedy argued that we must "eliminate the obstructive and destructive effect" that filibuster abuse "has on the Senate's business and on the vital interests of the Nation;" that filibusters are "the last resort of special interest groups;" that "the Constitution enshrines no prohibition on action by the people's representatives in Congress that may be construed as justifying the filibuster rule;" that we need "a better balance of . . . the needs of the modern legislative process, the need for full debate, the rights of the majority and the rights of the minority;" that the minority should not be able to use the "shelter" of the filibuster after "all relevant arguments . . . meaningful discussion . . . [and] reasonable debate should have been brought to a close;" and that since "[n]othing in the Constitution or commonsense suggests that [the Senate]" may adopt a rule "that binds a future [Senate]," a "simple majority can change the Senate rules."<sup>301</sup>

The present case for filibuster reform in the context of judicial nominations is even more compelling. In addition to the general concern about undermining, or even abolishing, majority rule, crossing the line from filibusters of legislation to filibusters of judicial nominations gives the matter a constitutional, as well as a political, dimension by potentially changing the Constitution's established balance between the President and the Senate. This is a difference not in degree, but in kind from past situations giving rise to concern about the filibuster. Making appointments is an executive, not a legislative, function. Targeting majority-supported *judicial* nominations, which are intended to turn a supermajority for cloture into a supermajority for confirmation, affects the judicial branch as well, implicating the separation of powers on an additional level. The time for reform is now. As Majority Leader Senator Bill Frist told the Federalist Society in November 2004: "One way or another, the filibuster of judicial nominees must end."<sup>302</sup>

Since the case for reform is compelling, the final question is how it may successfully be achieved. The specific goal is a mechanism whereby, after a full and vigorous debate, a simple majority can proceed to a vote on judicial nominations. The long history of attempting filibuster reform,<sup>303</sup> what Senator

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<sup>301</sup>121 CONG. REC. 3848-49 (1975) (statement of Sen. Kennedy).

<sup>302</sup>Carl Hulse, *Frist Warns on Filibusters Over Bush Nominees*, N.Y. TIMES, Nov. 12, 2004, at A21.

<sup>303</sup>See *supra* note 213 (referencing history of attempts for filibuster reform).

Byrd has described as “decades of trial and experience aimed at curbing the extremes in the use of filibusters to block Senate action,”<sup>304</sup> offers the components of a successful reform strategy. The first is the conviction that the Senate never intended that judicial nominations, an executive rather than a legislative prerogative, be subjected to filibusters. As Senator Frist described to the Rules Committee in June 2003: “Read the impassioned reform debates of 1967, 1969, 1975, 1979, and even 1995 and the word ‘nominations’ never appears.”<sup>305</sup> Second, the Senate’s constitutional authority to determine its procedural rules, amplified by repeated parliamentary precedents, establishes that a simple majority can invoke cloture and change Senate rules at the beginning of a new Congress.<sup>306</sup> Third, the presiding officer will not rule on a point of order raising a constitutional question, but will submit it to the full Senate for decision. Finally, tabling an appeal of the presiding officer’s favorable ruling on a point of order effectively affirms that ruling. These factors provide a concrete plan for either changing the rules at the beginning of a new Congress or, by affirming a parliamentary ruling, allowing simple majority cloture.

### 1. Senate Rules

The Senate, acting through a majority of the quorum, can exercise its constitutional authority to determine its rules by changing Rule 22 unburdened by its onerous two-thirds cloture requirement. Even though filibusters were made possible only inadvertently by the 1806 rules revision, senators whose political interests filibusters served have created various obstacles to thwart filibuster reform.<sup>307</sup> They routinely assert that the Senate is in some sense a continuing body, as if this observation alone settles all the constitutional and political questions. Yet, this idea is only an observation or description, not a constitutional imperative. And the language in Senate rules regarding their continuing nature has existed for less than fifty years.

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<sup>304</sup>BYRD, *supra* note 5, at 133. Similarly, Senator Kennedy argued, in 1975, that “nearly two centuries of Senate experience have put a gloss of practice on the principle of majority rule in the Senate.” 121 CONG. REC. 3849 (1975) (statement of Sen. Kennedy).

<sup>305</sup>Hearing on Senate Rule XXII, *supra* note 138 (statement of Sen. Frist).

<sup>306</sup>This argument has a long history in the Senate. For example, Senator Walsh made the argument in 1917. Gold & Gupta, *supra* note 131, at 225–26. In 1953, the Senate debated it but avoided voting on it. *Id.* at 236. Vice President Nixon endorsed it in 1957 and 1961, and Vice President Humphrey endorsed it in 1967 (although the Senate rejected it). *Id.* at 250. In 1969, the Senate endorsed it, then rejected it. *Id.* at 250–52. And in 1975, the Senate endorsed the idea three more times before rejecting it. *Id.* at 252–60.

<sup>307</sup>These impediments include requiring unanimous consent for cloture on reform proposals by exempting them from Rule 22, setting a higher stated threshold for reform proposals than for other measures, and adding to Rule 5 the statement that the rules can only be changed according to the rules. See Part III.A for a general discussion of the history of these proposals.

Additionally, the most important sense in which the Senate is a continuing body is its continuing constitutional authority to determine its procedural rules. Even though only one-third of the Senate's membership is chosen in each biennial election, it exercises its constitutional rulemaking authority at the beginning of each Congress just as certainly as does the House, whose entire membership is determined in each election. Like the House, the Senate sometimes determines its rules explicitly by voting to adopt new rules or to amend old ones. Unlike the House, the Senate also determines its rules implicitly; operating under existing rules readopts them by acquiescence. Either way the Senate exercises its constitutional authority to determine its rules.

Rule 5 states that Senate rules can only be changed "as provided in these rules," which includes Rule 22's two-thirds vote threshold for cloture.<sup>308</sup> This alone makes changing any Senate rule challenging, but changing Rule 22 itself even more so. The climate of partisanship and ideological rancor surrounding judicial appointments described in Section I makes using a filibuster to block filibuster reform all the more enticing. Senator Kennedy once condemned "[t]he notion that a filibuster can be used to defeat an attempt to change the filibuster rule" as "an unconstitutional prior restraint on the parliamentary procedure of the Senate. It would turn rule [22] into a Catch [22]."<sup>309</sup>

Avoiding this Catch-22 requires avoiding Rule 22's two-thirds cloture requirement. The simple answer is that Rule 22 does not apply until the Senate, explicitly or implicitly, chooses to make it apply. At the beginning of each Congress, before the Senate has adopted Rule 22 by acquiescence,

the mechanics of cloture as set out in Rule [22] would not yet apply and the Senate would be operating under general parliamentary law. Senate acceptance of these conditions would allow decisions to be made by majority vote and could permit the use of parliamentary devices to end debate, such as calling for the previous question, that would be decided by majority vote.<sup>310</sup>

On January 4, 2005, as the 109th Congress opened, Senator Frist did not pursue a formal rules change but sought to preserve the ability to do so in the future by stating: "Right now, we cannot be certain judicial filibusters will

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<sup>308</sup>S. PRT. NO. 99-95, at 25 (1985); *see also supra* notes 291-92 (discussing two-thirds requirement).

<sup>309</sup>121 CONG. REC. 3850 (1975) (statement of Sen. Kennedy).

<sup>310</sup>Palmer, *supra* note 252, at 3.

cease. So I reserve the right to propose changes to Senate Rule [22] and do not acquiesce to carrying over all the rules from the last Congress.”<sup>311</sup>

The principle that each legislature possesses the same power to enact and amend as its predecessors is at least as old as the principle of majority rule. William Blackstone, who attributed the idea to Cicero, wrote that “[a]cts of parliament derogatory from the power of subsequent parliaments bind not.”<sup>312</sup> The Supreme Court has similarly affirmed that “[e]very succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less.”<sup>313</sup> As a result, Rule 22 cannot automatically bind a future Senate without destroying its constitutional authority to determine its own rules.

Indeed, even legislators and scholars who do not believe that filibusters themselves are unconstitutional nonetheless believe that entrenching rules that limit a subsequent Senate’s ability to determine its own is certainly unconstitutional. While defending filibusters of legislation, for example, former Senate Majority Leader Howard Baker argued that “[a] simple majority of senators can change any rule they wish to change.”<sup>314</sup> Similarly, Professor Douglas Kmiec expresses doubt that the current filibusters of majority-supported judicial nominations are unconstitutional, but insists that entrenchment of Rule 22’s supermajority rules by one Senate against the next is unconstitutional.<sup>315</sup> Each Senate, he argues, must be able to exercise its constitutional authority to determine its rules by simple majority.<sup>316</sup> Liberal scholars such as Professor Erwin Chemerinsky also see no constitutional defect

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<sup>311</sup>151 CONG. REC. S14 (daily ed. Jan. 4, 2005) (statement of Sen. Frist). There is some debate about precisely what this position means for the future. See Alexander Bolton, *Frist Aims Nuke at the Dems*, HILL, Jan. 19, 2005, at 1, 1. In 1975, after introducing a resolution to amend Rule 22, Senator Mondale stated that its supporters “do not acquiesce to the applicability of certain . . . rules to the effort to amend rule [22].” 121 CONG. REC. 12 (1975) (statement of Sen. Mondale). Senator Mansfield, the Majority Leader and opponent of filibuster reform, asked for unanimous consent, which was granted, that “notwithstanding any delay in the consideration of the [reform] resolution, all proceedings, rights and privileges concerning the efforts to change rule [22] . . . be reserved, so that proponents of such a change not be prejudiced in any way in the actual commencement of the consideration of this resolution.” *Id.* (statement of Sen. Mansfield). These steps, including the introduction of a reform proposal and, more importantly, the Senate itself choosing to preserve the procedural status quo, were not taken at the opening of the 109th Congress.

<sup>312</sup>See *Hearing on Senate Rule XXII*, *supra* note 138 (statement of John C. Eastman); Fisk & Chemerinsky, *supra* note 6, at 247.

<sup>313</sup>*Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899) (quoting *Newton v. Comm’rs*, 100 U.S. 548, 559 (1879)); see also Cornyn, *supra* note 102, at 203–05 (discussing arguments that support Senate’s ability to regulate use of filibuster).

<sup>314</sup>Howard H. Baker, Jr., *Rule XXII: Don’t Kill It!*, WASH. POST, Apr. 27, 1993, at A17 (emphasis omitted).

<sup>315</sup>Douglas W. Kmiec, *Tedious—and Unconstitutional*, WALL ST. J., Mar. 6, 2003, at A12.

<sup>316</sup>*Id.*

in the filibusters themselves, but join in condemning entrenchment of Rule 22 in a way that prevents a subsequent Senate from determining its own rules.<sup>317</sup> As Professor John Eastman recently told a Senate Judiciary subcommittee, “whatever the constitutionality of the filibuster itself, the use of supermajority requirements enacted by a prior Senate to thwart the will of the majority of the current Senate, and even to prevent it from adopting its own rules, is patently unconstitutional.”<sup>318</sup>

The compelling conclusion is that, before the Senate readopts Rule 22 by acquiescence, a simple majority can invoke cloture and adopt a rules change. This is the basis for Vice President Nixon’s advisory opinion in 1957; as he outlined, the Senate’s right to determine its procedural rules derives from the Constitution itself and, therefore, “cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.”<sup>319</sup> Senator Kennedy once agreed: “My own view of the relevant constitutional provision is that the Senate is entitled to enact new rules and amend its existing rules by majority vote at the beginning of each Congress.”<sup>320</sup> Former Majority Leader

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<sup>317</sup>Chemerinsky & Fisk, *supra* note 152, at B11. Professors Chemerinsky and Fisk actually urge the Senate to filibuster President Bush’s judicial nominations, but argue that one Senate cannot impose on the next rules that make changing the rules more difficult. *Id.*; see also Fisk & Chemerinsky, *supra* note 6, at 247 (“[T]he entrenchment of the filibuster violates a fundamental constitutional principle: One legislature cannot bind subsequent legislatures.”).

<sup>318</sup>*Hearing on Senate Rule XXII*, *supra* note 138 (statement of John C. Eastman). Professor Eastman does believe the current use of Rule 22, not to encourage debate but to thwart the majority’s will, is unconstitutional. *Id.* Nonetheless, he sided with Professors Chemerinsky and Fisk in concluding that “the attempt to lock in the filibuster rule by permitting amendment of it only by a supermajority vote—what they called ‘entrenchment’ of the filibuster rule—was itself unconstitutional.” *Id.*

<sup>319</sup>*Senate Rules*, 1957 CONG. Q. ALMANAC 655, 656.

<sup>320</sup>121 CONG. REC. 3849 (1975) (statement of Sen. Kennedy). Just as filibuster defenders today cry “debate,” filibuster reform opponents have long cried “continuing body.” If the continuing application of previously adopted rules stems from the inherent continuing nature of the Senate as an institution, however, then Rule 5 seems purely redundant. If, on the other hand, the rules continue because Rule 5 says so, it begs the question of how a mere rule adopted less than fifty years ago can change the inherent nature of the institution itself. Additionally, the two-thirds cloture threshold was applied to proposed rules changes in the same year Rule 5 provided that the rules must continue. This looks much more like a political gimmick than a sound argument, setting the cloture threshold unnecessarily high for proposed rules changes and then insisting that such an impenetrable barrier continue in perpetuity. The Constitution has been around much longer than Rule 5. Indeed, the most important sense in which the Senate is a continuing body is in its continuing present authority, derived from the Constitution itself, to determine its own procedural rules. Any individual rule, adopted pursuant to that constitutional authority, takes a back seat. In 1892, the Supreme Court unanimously held that “[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the [Senate].” *United States v. Ballin*, 144 U.S. 1, 5 (1892). Just as the Constitution trumps Rule 22 with respect to confirmation supermajorities, it trumps Rule 5 with respect to entrenchment. Some have speculated that this approach would require a ruling from the presiding officer that the Senate is not a continuing body, “that its rules do not continue from one Congress to the next.” Victor, *supra* note 148, at 3672. I do not believe this is necessary.

Senator Robert Byrd once concurred as well: “[I]t is my belief—which has been supported by rulings of Vice Presidents of both parties and by votes of the Senate—in essence upholding the power and right of a majority of the Senate to change the rules of the Senate at the beginning of a new Congress.”<sup>321</sup>

So it is clear that the Senate, at the beginning of a new Congress, can invoke cloture and amend its rules by simple majority. The next question is what form such an amendment should take. That is, what cloture rule would correct the abuse while honoring both the Constitution and Senate tradition?<sup>322</sup> One reform meeting these standards is embodied in Senate Resolution 138, introduced in May 2003, by Senators Bill Frist and Zell Miller.<sup>323</sup> Applying only to nominations, it would decrease the vote threshold in three-vote increments on subsequent cloture votes as follows: sixty, fifty-seven, fifty-four, fifty-one, and then a majority of senators present and voting.<sup>324</sup> This proposal would not abolish all filibusters of nominations, but only those posing the greatest political and constitutional concern. It would, in fact, allow the minority to defeat up to four cloture votes on a single judicial nomination, more than have been taken on all but one judicial nomination in American history. By the fourth cloture vote, nominations lacking clear majority support may well effectively expire. But this approach would make impossible the kind of permanent, defeat-rather-than-debate filibusters of majority-supported judicial nominations at the heart of the current crisis.<sup>325</sup>

This sliding-scale approach also ensures the debate that current filibuster proponents posit is the heart of Senate tradition and that they use to justify their filibusters. By not allowing even the first cloture vote until after twelve hours of debate, and requiring at least two days between subsequent cloture votes,<sup>326</sup> this approach would create a safe harbor during which nearly two

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<sup>321</sup>121 CONG. REC. 144 (1975) (statement of Sen. Robert Byrd).

<sup>322</sup>See 149 CONG. REC. S6002 (daily ed. May 9, 2003). In addition, Dave Hoppe, Chief of Staff to Senator Trent Lott when he was Majority Leader, proposed to “change the Senate rules so that every nominee would be guaranteed a vote on the floor.” Dave Hoppe, *Time to Grow Up*, WALL ST. J., Nov. 15, 2004, at A22. “The committees would retain an advisory role, but wouldn’t be able to scuttle a nominee.” *Id.* His proposal would discharge a nomination to the Senate floor, and allow any senator to bring up the nomination for a debate and vote if the committee or majority leader do not act within specific time limits. *Id.* “Every nominee could get a vote in the Senate after his nomination has been in the Senate for 60 session days.” *Id.*

<sup>323</sup>In addition to Senators Frist and Miller, cosponsors of Senate Resolution 138 included Senators McConnell, Stevens, Santorum, Kyl, Hutchison, Lott, Hatch, Cornyn, Chambliss, and Allen. S. Res. 138, 108th Cong. (2003).

<sup>324</sup>*Id.*; 149 CONG. REC. S6002 (daily ed. May 9, 2003).

<sup>325</sup>One writer described this approach as “allow[ing] opponents of a nominee to hold up a vote for several days if they so desired, but no longer would a legislative minority be able to keep a nominee who has reached the Senate floor from having a confirmation vote.” Jason M. Roberts, *Parties, Presidents, and Procedures: The Battle over Judicial Nominations in the U.S. Senate*, EXTENSIONS, Spring 2004, at 13, 17.

<sup>326</sup>Rule 22 currently allows filing multiple petitions for cloture on the same nomination.

weeks would be available for a full and vigorous debate. As Senator Frist explained, if this entire series of votes occurred, “[b]etween the time a nomination is brought to the floor and the moment that it can be confirmed by a simple majority vote, the elapsed time would be 13 session days.”<sup>327</sup> Senator Kennedy once argued that this sliding-scale approach “help[s] to highlight the importance of the dividing line at which opportunity for full debate shades off into opportunity for obstruction.”<sup>328</sup>

Senator Kennedy is one of nine Democrats serving in the 109th Congress who voted against tabling the 1995 Harkin/Lieberman sliding-scale proposal.<sup>329</sup> Two decades earlier, during the 1975 filibuster reform debate, he said he had previously embraced this kind of “shifting cloture formula.”<sup>330</sup> In fact, this type of reform has a long history.<sup>331</sup> In 1971 Senator Robert Dole, a Republican from Kansas, proposed decreasing the threshold, in one-vote increments, from two-thirds to three-fifths of senators present and voting.<sup>332</sup> In 1957 Senator Paul Douglas, a Democrat from Illinois, introduced Senate Resolution 17 which would require two-thirds on the first cloture vote and a simple majority on the second.<sup>333</sup>

Senate Joint Resolution 138 is just one proposal that would solve the current filibuster crisis by preventing permanent filibusters of majority-supported judicial nominations, while honoring both the Constitution and Senate tradition. Whether by this sliding-scale approach or another, Senator Harkin’s 1995 call for reform should be ours today: “But I hope that when the new Congress reconvenes . . . we will take a look at changing the rules on the filibuster so that the majority can indeed rule here as was envisioned by our Founding Fathers.”<sup>334</sup>

## 2. *Parliamentary Ruling*

While parliamentary rulings have provided an incentive for the Senate to formally amend Rule 22,<sup>335</sup> they can provide an independent direct way to

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<sup>327</sup>141 CONG. REC. S5982 (daily ed. May 9, 2003) (statement of Sen. Frist).

<sup>328</sup>121 CONG. REC. 3849 (1975) (statement of Sen. Kennedy).

<sup>329</sup>141 CONG. REC. S438 (daily ed. Jan. 5, 1995). The others are Senators Bingaman, Boxer, Feingold, Harkin, Kerry, Lautenberg, Lieberman, and Sarbanes. *Id.* Each of these one-time proponents of filibuster reform voted for each of the unprecedented filibusters against judicial nominations during the 108th Congress. For citation information, see note 107.

<sup>330</sup>121 CONG. REC. 3849 (1975) (statement of Sen. Kennedy). Referring to reform proposals that would “allow cloture by progressively smaller majorities as the length of the debate continues,” Senator Kennedy said, “I have supported such proposals in the past.” *Id.*

<sup>331</sup>Senator Cornyn describes other plans for controlling filibusters of judicial nominations. See Cornyn, *supra* note 102, at 214–15.

<sup>332</sup>S. PRT. NO. 99-95, at 30 (1985).

<sup>333</sup>*Id.* at 24.

<sup>334</sup>140 CONG. REC. S2160 (daily ed. Mar. 1, 1994) (statement of Sen. Harkin).

<sup>335</sup>See Gold & Gupta, *supra* note 131, at 260.

solve this crisis. A parliamentary ruling can allow a simple majority to proceed to a vote on an individual judicial nomination, thereby changing Senate procedures without changing Senate rules.<sup>336</sup> Rule 20 allows a senator to raise a “question of order” for decision either by the presiding officer or, if he chooses, by the full Senate.<sup>337</sup> As the earlier review of filibuster reform efforts established, the presiding officer will submit questions of order raising constitutional questions to the full Senate for decision. There, as long as cloture can be invoked, a simple majority can decide the question favorably. Senators who want to use these filibusters to defeat majority-supported judicial nominations, however, will certainly oppose cloture on a question of order they believe the majority will answer in a way that would deprive them of the filibuster. As such, the only way this approach can succeed is for the presiding officer to rule favorably on a question of order framed in *nonconstitutional* terms. The majority can affirm this ruling by tabling the minority’s appeal.

As the filibuster crisis has proceeded, media coverage and commentary have frequently speculated about a specific way the question of order might be framed. One newspaper, for example, said this approach would seek “a ruling from the chair . . . that judicial filibusters are unconstitutional.”<sup>338</sup> With some variation, the most common assumption is that the question of order would challenge the filibusters,<sup>339</sup> or Rule 22 itself,<sup>340</sup> on constitutional grounds. The

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<sup>336</sup>The objection might be raised that this parliamentary approach is an attempt to sidestep Rule 22. However, it should be understood that the Standing Rules of the Senate are one of several authorities governing the Senate as an institution. During the 95th Congress, Majority Leader Senator Robert Byrd used this parliamentary procedure several times to change Senate procedures without changing Senate rules. *See id.* at 262–69. Another approach whereby the current filibuster crisis might be addressed is through the use of standing orders. *Id.* at 269–71.

<sup>337</sup>Sen. Comm. on Rules & Admin., *supra* note 96.

<sup>338</sup>Paul Kane, *GOP Cools to Judicial Gambit*, ROLL CALL, Sept. 13, 2004, at 1, 18.

<sup>339</sup>*See, e.g.,* Victor, *supra* note 148, at 3669 (noting possibility of “a ruling from the presiding officer . . . that filibusters of nominations to the federal bench are unconstitutional”); *A Truce on Nominations*, MILWAUKEE J. SENTINEL, Jan. 12, 2005, at A12 (noting that Senator Frist may seek “a ruling from the Senate’s presiding officer . . . that a filibuster against a judicial nominee is unconstitutional”); Charles Babington & Helen Dewar, *House Republicans Act to Protect DeLay*, WASH. POST, Nov. 18, 2004, at A4 (explaining that “nuclear option” would occur if “the Senate’s presiding officer . . . find[s] that a supermajority to end filibusters is unconstitutional”); Helen Dewar & Mike Allen, *GOP May Target Use of Filibuster*, WASH. POST, Dec. 13, 2004, at A1 (describing how Republicans could seek “a ruling from the chamber’s presiding officer . . . that filibusters against judicial nominees are unconstitutional”); Helen Dewar, *Judiciary Panel Backs Specter*, WASH. POST, Nov. 19, 2004, at A6 (explaining that Senator Arlen Specter may employ “a parliamentary maneuver . . . under which filibusters on judicial nominations would be declared unconstitutional”); Helen Dewar, *Filibuster Rule Change is Urgent, Frist Says*, WASH. POST, June 6, 2003, at A25 (describing how some Republicans favor “a controversial parliamentary maneuver to force a rule change by majority vote on grounds that filibusters on judicial nominations are unconstitutional”); *Frist and the Filibuster*, PLAIN DEALER (CLEVELAND), July 5, 2003, at B8 (describing “nuclear option” as occurring if “the president of the Senate . . . would simply declare any filibuster to be unconstitutional”); Michael Gerhardt & Erwin Chemerinsky, *Senate’s ‘Nuclear Option’*, L.A.

exact origin of this wording may never be known, though speculation has, perhaps, focused there because it captures an essential component of the crisis itself. As described in Section II, these filibusters do indeed undermine the Constitution. Since this question is framed in constitutional terms, however, the presiding officer will submit, rather than decide it; as such, this cannot serve as the basis of a successful parliamentary strategy. To remain nondebatable and a question the presiding officer will answer rather than submit, the question of order must be framed in nonconstitutional terms.

Just as the constitutionally framed question of order appeared to capture an element of this current crisis, it is possible to frame a nonconstitutional question of order that also does so. Generally speaking, the filibuster reflects the Senate's tradition of deliberation and debate; indeed, it allows the minority to "prevent precipitant action by voting majorities."<sup>341</sup> A question of order, therefore, could posit that the Senate should proceed to a vote because it has fully debated the nomination under consideration and that further delay would simply be dilatory.<sup>342</sup> Precipitant action by the majority has, in fact, been prevented. Should a simple majority affirm the presiding officer's favorable ruling by tabling its appeal, the Senate could proceed to vote on the nomination immediately under consideration. The final question would be how the precedent established by this ruling would affect Senate consideration of future nominations. In general, this depends on the facts of the situation in which the question of order is made, as well as "the terms of the point of order."<sup>343</sup>

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TIMES, Dec. 5, 2004, at M5 (describing "nuclear option as "a ruling by the Senate's presiding officer . . . declaring filibusters of judicial nominations unconstitutional"); Hulse, *supra* note 302, at A21 (exploring how Republicans are considering "a ruling . . . that filibusters against executive nominations are unconstitutional"); Collin Levey, *Democrats May Filibuster Their Way Out of Congress*, SEATTLE TIMES, Dec. 17, 2004, at B7 (arguing that Republicans may "invok[e] the power of . . . the Senate presiding officer . . . to declare the filibuster against judicial nominations unconstitutional"); John R. Lott Jr. & Sonya D. Jones, *Breaking the Siege in the Judge War*, L.A. TIMES, Nov. 16, 2004, at B11 (explaining that some Republicans advocate for "the presiding officer of the Senate [to] rule that filibusters against judicial nominees . . . are unconstitutional"); David E. Rosenbaum, *Off-Off-Budget*, N.Y. TIMES, Dec. 26, 2004, Section 4, at 5 (positing that Republicans may seek "a ruling from the presiding officer . . . that filibusters against nominations are unconstitutional").

<sup>340</sup>See, e.g., Duncan Currie, *Full Court Press: Will Senate Republicans "Go Nuclear" Over Judges?*, WKLY. STANDARD, Sept. 13, 2004, at 19, 19 ("Republicans would request a ruling from the Senate chair that the cloture rule—requiring 60 votes to end debate—is unconstitutional as applied to judicial confirmations."); Taylor, *supra* note 105, at 1837 ("[T]he Senate's presiding officer . . . would declare unconstitutional either the Senate rule allowing filibusters of nominations or the rule requiring an (unattainable) two-thirds majority to amend the rules . . .").

<sup>341</sup>Stanley Bach, *Minority Rights and Senate Procedures*, Cong. Res. Serv. Rep. (CRS) 1 (2001).

<sup>342</sup>See Gold & Gupta, *supra* note 131, at 260.

<sup>343</sup>*Id.* at 261.

This argument has some historical precedent. In 1922, as Southern Democrats filibustered an antilynching bill,<sup>344</sup> Senator Oscar Underwood, a Democrat from Alabama, made a motion that the Senate adjourn immediately after it convened.<sup>345</sup> Senator Charles Curtis, a Republican from Kansas, raised a question of order that this motion was purely dilatory.<sup>346</sup> Acknowledging that the Senate had no specific rule against dilatory motions, he argued that “it is a well-settled principle that in any legislative body where the rules do not cover questions that may arise, general parliamentary rules must apply.”<sup>347</sup> Citing a ruling by the Speaker of the House, Senator Curtis argued that under this standard dilatory motions are not in order.<sup>348</sup> Vice President Calvin Coolidge, the presiding officer, did not rule on this question.<sup>349</sup>

Thus, there exist two simple majority solutions to these permanent filibusters of majority-supported judicial nominations. A simple majority can change Rule 22 at the beginning of a new Congress, substituting a cloture mechanism that allows a full and vigorous debate but also ensures that the majority can proceed to a vote. A simple majority can also uphold a parliamentary ruling allowing a vote on an individual nomination.

Since a simple majority can change Senate rules only at the beginning of a Congress, timing is not a tactical consideration. The parliamentary approach, however, can be pursued at any time. These filibusters are intended to manipulate Senate rules to accomplish the political objective of defeating specific judicial nominations. This crisis should be solved in a way that minimizes the opportunity for receiving the same criticism. It is, of course, in the political interest of filibuster proponents to charge that any concern about, let alone any solution of, this filibuster crisis is inherently political. For that reason, the arguments that a solution is necessary, what solution is most appropriate, and how that solution should be implemented should be as principled and nonpolitical as possible. Waiting until a Supreme Court vacancy has already occurred, and a nominee is already before the Senate, would likely polarize and politicize the debate even further.

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<sup>344</sup>I would note here that, while filibusters of judicial nominations are constitutionally different than filibusters of legislation, much of the history of legislative filibusters is less than noble. See *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights, S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Steven Calabresi, Professor, Northwestern University Law School), available at [http://judiciary.senate.gov/testimony.cfm?id=744&wit\\_id=2044](http://judiciary.senate.gov/testimony.cfm?id=744&wit_id=2044); BINDER & SMITH, *supra* note 7, at 138–43; Gold & Gupta, *supra* note 131, at 230.

<sup>345</sup>BYRD, *supra* note 5, at 125.

<sup>346</sup>*Id.*

<sup>347</sup>*Id.*

<sup>348</sup>*Id.*

<sup>349</sup>*Id.*

## IV. CONCLUSION

The Senate must not allow the partisan political objective of the moment to subvert fundamental principles that define our form of government and the institution of the Senate itself. As politically contentious or ideologically divisive as judicial confirmations can sometimes be, they must nonetheless be handled through a process that is fair and honors the Constitution. If the fight is fair and constitutional, let the chips fall where they may.

The current filibuster campaign against majority-supported judicial nominations is the latest weapon in the ongoing conflict over the kind of judge that should be appointed. That conflict is between process-focused restrained judges that allow the people and their elected representatives to make law, and results-focused activist judges who make law for the people. The filibuster campaign also represents yet another imbalance between the minority's right to debate and the majority's right to decide. In this case, however, targeting majority-supported judicial nominations has serious constitutional as well as political dimensions, making the case for reform all the more compelling.<sup>350</sup> Indeed, it is this new and unconstitutional filibuster, and not its solution, that "strike[s] a blow to chamber tradition"<sup>351</sup> and "throw[s] out 200 years of Senate history and tradition."<sup>352</sup> To quote Senator Daschle: "They have broken the process and we want to fix it."<sup>353</sup>

In 1999 I described what had been, and should be again, the standard for considering judicial nominations reaching the Senate floor: "Let's make our case if we have disagreement, and then vote."<sup>354</sup> I repeated the same argument after President Bush took office: "I think there is much merit in having healthy debate, raising the difficulties you have with a judge, but then having a vote up

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<sup>350</sup>As Section II demonstrated, these filibusters are far more than merely annoying or inconvenient, and they are not part of Senate tradition. Therefore, this crisis requires a deliberate solution rather than, as some have suggested, hoping that a few more election cycles will provide a practical solution by electing more Republicans. See, e.g., Editorial, *Let Them Filibuster*, NAT'L REV. ONLINE, Dec. 15, 2004, at <http://www.nationalreview.com/editorial/editors/200412150737.asp> ("It may be wiser to insist on political accountability for filibusters of judicial nominees than to change the rules to prevent them."); Collin Levey, *The Real Stakes in the Judge Wars*, N.Y. POST, Dec. 17, 2004, at A16 ("The last election showed that voters have remarkable aptitude to sift out the important lessons at the ballot box. . . . Republicans are right to see Democrats' abuse of [the filibuster] as an unearned power grab, but they should realize that voters see it too . . ."); Kimberly Strassel, Editorial, *Life After Daschle*, WALL ST. J., Nov. 5, 2004, at A12 ("The GOP's best shot . . . is to let Democrats know they'll be ready with strong candidates who'll run campaigns that highlight any obstructionism, along with the voting record."), available at <http://www.opinionjournal.com/columnists/kstrassel/?id=110005859>.

<sup>351</sup>Keith Perine, *Conservatives Defend 'Nuke' Option to Protect a High Court Nominee*, 62 CONG. Q. WKLY. 2150, 2150 (Sept. 2004).

<sup>352</sup>Victor, *supra* note 148, at 3670.

<sup>353</sup>150 CONG. REC. S3200 (daily ed. Mar. 26, 2004) (statement of Sen. Daschle).

<sup>354</sup>145 CONG. REC. S11,015 (daily ed. Sept. 16, 1999) (statement of Sen. Hatch).

or down.”<sup>355</sup> There was a time when my Democrat colleagues agreed. Senator Joseph Biden said in 1997 that “everyone who is nominated is entitled to have a shot . . . to be heard on the floor and have a vote on the floor.”<sup>356</sup> Instead, to use Senator Kennedy’s words quoted at the beginning of this Article, as currently used against majority-supported judicial nominations, “the filibuster has been the shame of the Senate. . . . The time has come for change.”<sup>357</sup> Senator Lieberman’s perspective on filibuster reform in 1995 similarly applies today: “It is not a popular battle. But it is the right fight to make . . . .”<sup>358</sup>

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<sup>355</sup>149 CONG. REC. S5463 (daily ed. Apr. 29, 2003) (statement of Sen. Hatch).

<sup>356</sup>143 CONG. REC. S2541 (daily ed. Mar. 19, 1997) (statement of Sen. Biden).

<sup>357</sup>121 CONG. REC. 3848–49 (1975) (statement of Sen. Kennedy).

<sup>358</sup>141 CONG. REC. S434 (daily ed. Jan. 5, 1995) (statement of Sen. Lieberman).