

# CRS Report for Congress

## Constitutionality of a Senate Filibuster of a Judicial Nomination

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# Constitutionality of a Senate Filibuster of a Judicial Nomination

## Summary

The Senate cloture rule requires a super-majority vote to terminate a filibuster (i.e., extended debate). The Appointments Clause of the Constitution, which provides that the President is to “nominate, and by and with the Advice and Consent of the Senate, ... appoint” judges, does not impose a super-majority requirement for Senate confirmation. Critics of the Senate filibuster argue that a filibuster of a judicial nomination is unconstitutional in that it effectively requires a super-majority vote for confirmation, although the Appointments Clause does not require such a super-majority vote.

It has been argued that the Senate’s constitutional power to determine the rules of its proceedings, as well as historical practice, provide the foundation for the filibuster. The question of the constitutionality of the filibuster of a judicial nomination turns on an assessment of whether the Senate’s power to make rules governing its own proceedings is broad enough to apply the filibuster rule to nominations. Several factors have the effect of entrenching the filibuster (i.e., making it possible to filibuster a proposed amendment to the rules).

Supporters and critics of the filibuster of judicial nominations disagree about the relative roles of the President and the Senate in regard to judicial appointments, about whether the Senate has a duty to dispose of the President’s judicial nominations in a timely fashion, and about whether a simple majority of Senators has a constitutional right to proceed to a vote on a nomination. The constitutionality of the filibuster might be challenged in court, but it is uncertain whether such an action would be justiciable (i.e., appropriate for judicial resolution). Standing and the political question doctrine would be the primary justiciability issues raised by a court challenge to the filibuster rule.

(*Note:* This report was originally written by Jay R. Champansky, Legislative Attorney.)

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# Constitutionality of a Senate Filibuster of a Judicial Nomination

## Introduction

This report provides an overview of the major issues which have been raised recently in the Senate<sup>1</sup> and in the press<sup>2</sup> concerning the constitutionality of a Senate filibuster (i.e., extended debate)<sup>3</sup> of a judicial nomination. The Senate cloture<sup>4</sup> rule

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<sup>1</sup> See *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent*, Hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003)[hereinafter, *Judiciary Committee Hearing*].

From 6:00 p.m. on November 12 to 9:30 a.m. on November 14, 2003, the Senate engaged in an extended debate (a “talkathon”) concerning recent filibusters of several of President Bush’s judicial nominees. 149 *Cong. Rec.* S14528 — 14785 (daily ed. Nov. 12, 2003). The “extraordinary session” was intended to provide an opportunity to debate the merits of three pending judicial nominees, the Senate’s constitutional role in the appointment of federal judges, and filibuster reform. *Id.* at 14528 (remarks of Senator Frist). See generally Dlouhy, *Judicial War Far from Over*, 61 *Cong. Qtly.* 2824 (2003), Kane, *GOP Still Lacks Votes on Rules*, Roll Call, Nov. 17, 2003.

<sup>2</sup> See, e.g., Lane, *Filibusters: Whose Rule, and Whose to Change?*, Washington Post, May 9, 2003, at p. A13.

Concern has been expressed in particular about the possibility of a filibuster of a Supreme Court nominee. See Shane, *The Filibuster under Fire*, New York Times, Nov. 21, 2004, at p. 5. For analysis of the procedural issues in regard to a filibuster of a Supreme Court nomination, see generally CRS Report RL31989, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*, by Denis Rutkus. For analysis of the confirmation process of Supreme Court nominees, see generally CRS Report RL31171, *Supreme Court Nominations Not Confirmed, 1789-2002*, by Henry B. Hogue.

<sup>3</sup> “The Senate is traditionally understood as a body of unlimited debate.” *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d 26, 37 (D.D.C. 2004). There is no rule of the Senate which specifically provides for a filibuster. As explained in Riddick, *Senate Procedure*, S. Doc. No. 101-28, 101<sup>st</sup> Cong., 2d Sess. 717 (1992), “in the absence of either cloture or a statutory limitation of debate or a unanimous consent agreement, debate may continue indefinitely if there is a Senator or group of Senators who wish to exercise the right of debate.” (For a definition of “cloture,” see *infra* note 4.)

For analysis of the procedural issues, see generally CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Richard S. Beth and Stanley Bach; CRS Report 98-780, *Cloture: Its Effect on Senate Proceedings*, by Walter J. Oleszek; CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth (continued...)

(Rule XXII, par. 2) requires a super-majority vote<sup>5</sup> to terminate a filibuster. The Appointments Clause of the Constitution,<sup>6</sup> which provides that the President is to “nominate, and by and with the Advice and Consent of the Senate, ... appoint” judges, does not impose a super-majority requirement for Senate confirmation.

Since it has the effect of requiring a super-majority vote on a nomination, because it usually requires the votes of 60 Senators to end a filibuster,<sup>7</sup> it has been argued that a filibuster of a judicial nomination is unconstitutional. In the absence of (1) any constitutional provision specifically governing Senate debate<sup>8</sup> and (2) any judicial ruling directly on point, and given the division of scholarly opinion, this report will examine the issues but will not attempt a definitive resolution of them.

## Majority Rule

The framers of the Constitution were committed to majority rule as a general principle.<sup>9</sup> However, no provision of the Constitution expressly requires that the

<sup>3</sup> (...continued)

Rybicki; CRS Report RL31948, *Evolution of the Senate’s Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer; and CRS Report RL32878, *Cloture Attempts on Nominations*, by Richard S. Beth and Betsy Palmer.

<sup>4</sup> “Cloture is the means by which the Senate limits debate on a measure or matter.” Riddick, S. Doc. No. 101-28, at 282.

<sup>5</sup> A “simple majority” is a majority of legislators present and voting when a quorum is present (i.e., one-half plus one of the Members voting). An “extraordinary majority” (sometimes referred to as a “super majority”) requires some higher percentage of Members to pass a measure than a simple majority. See *Dyer v. Blair*, 390 F. Supp. 1291, 1296 n.4, 1305 (N.D.Ill. 1975)(three-judge court).

<sup>6</sup> Art. II, § 2, cl. 2.

<sup>7</sup> See King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. Ch. L. Sch. Roundtable 133, 136 (1999); Fisk & Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 215 (1997).

<sup>8</sup> See Fisk & Chemerinsky, *supra* note 7, at 224.

<sup>9</sup> See, e.g., *Federalist* No. 58, p. 397 (Cooke ed.; Wesleyan Univ. Press: 1961) (Madison, responding to objections that the Constitution should have required “more than a majority ... for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision,” asserted that such requirements would be inconsistent with majority rule, which is “the fundamental principle of free government”); *id.*, No. 22, p. 138-39 (Hamilton observed that “equal suffrage among the States under the Articles of Confederation contradicts that fundamental maxim of republican government which requires that the sense of the majority should prevail”).

One scholar (Leach, *House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress*, 44 U.C.L.A. L. Rev. 1253, 1263-64 (1997)) has observed:

(continued...)

Senate and the House act by majority vote in enacting legislation or in exercising their other constitutional powers. There is a provision specifying that “a majority of each [House] shall constitute a quorum to do business.”<sup>10</sup> There are also a few provisions dictating that the Senate or House muster a two-thirds extraordinary majority to transact certain business of an exceptional nature.<sup>11</sup>

Although there is no constitutional provision requiring that the Senate act by majority vote in instances not governed by one of the provisions mandating an extraordinary majority, “the Senate operates under ‘a majority rule’ to transact business — a majority of the Senators voting, a quorum being present — with the exceptions set forth in the Constitution and the rules of the Senate.”<sup>12</sup>

<sup>9</sup> (...continued)

Although *The Federalist* provides compelling evidence that majority rule is to be the procedural norm, it hardly follows that the Framers intended majoritarian procedures to be the only method by which Congresses could conduct themselves, nor does it necessarily preclude future Congresses from themselves deciding that certain issues should be the subject of supermajoritarian scrutiny. For one, despite the frustration the delegates had experienced with the supermajorities of the Articles of Confederation, they resisted any temptation to explicitly prohibit them.... [I]t is impossible to deny that the ... [Constitution] is replete with violations of the “fundamental” principle of majority rule. The most glaring example is the United States Senate, which originally was not popularly elected and whose structure still allows fifty-one senators from the twenty-six least populated states to defeat the will of the majority of the American people.... [T]he Framers had a number of competing goals. Despite ample reasons and opportunities for imposing a majoritarian requirement, the Framers remained silent on the subject, while giving Congress wide authority to make its own rules. Their intent can only be described as ambiguous.

<sup>10</sup> Art. I, § 5, cl. 1.

<sup>11</sup> It requires a vote of “two thirds of the Members present” for the Senate to convict an individual in an impeachment proceeding. Art. I, § 3, cl. 6. The Senate or House may, “with the concurrence of two thirds,” expel a Member from the body. Art. I, § 5, cl. 2. A vote of two thirds of each House is required to pass a bill (Art. I, § 7, cl. 2) or a joint resolution (Art. I, § 7, cl. 3) over a presidential veto. Treaties must be approved by a vote of “two-thirds of the Senators present....” Art. II, § 2, cl. 2. It requires a vote of “two-thirds of both Houses” to propose amendments to the Constitution. Art. V. To remove the disability imposed on persons who have engaged in rebellion or insurrection requires a vote of two thirds of each House. Amend. XIV, § 3. And to determine that the President remains unable to discharge the powers and duties of his office requires a two thirds vote of both Houses. Amend. XXV. Furthermore, in the event that a presidential election is decided in the House, a quorum is to consist of a Member or Members from two thirds of the states. Amend. XII. Likewise, two-thirds of the Senate constitutes a quorum for choosing a Vice President. *Id.*

<sup>12</sup> Riddick, S. Doc. No. 101-28, at 912. “There is no rule providing for consideration of business by a majority vote, but precedents of the Senate have been uniform in that respect.” *Id.* The House, in most instances, also operates by majority rule. *Jefferson’s Manual*, which is followed by the House (*see* House Rule XXVIII), states: “The voice of the majority decides....” *Jefferson’s Manual*, § XLI, reprinted in *Constitution, Jefferson’s Manual, and Rules of the House of Representatives — One Hundred Eighth Congress*, H. Doc. No. 107- (continued...)

The Supreme Court has found that “the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body,” except when there is a specific constitutional limitation.<sup>13</sup> However, the Court has also found that the Constitution, history, and judicial precedents do not require that a majority prevail on all issues.<sup>14</sup>

Does the commitment of the framers to majority rule as a general principle, the fact that the Senate usually operates pursuant to majority rule, and the enumeration in the Constitution of certain extraordinary majority voting requirements mean that any exception to majority rule other than the enumerated ones is unconstitutional? Is there any constitutional defense to be offered for a Senate filibuster?

## Rulemaking Authority

Article I, Section 5, clause 2, of the Constitution authorizes “each House [to] determine the rules of its proceedings....”<sup>15</sup> The rule-making power has been construed broadly by the courts.<sup>16</sup> It has been argued that the rule-making power and

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<sup>12</sup> (...continued)

284, 107<sup>th</sup> Cong., 2d Sess. § 508 (2003).

Pursuant to their rulemaking authority (*see infra* text accompanying note 15), both the House and the Senate have adopted rules (in addition to the cloture rule) that impose extraordinary majority requirements in certain circumstances. For example, House rules require a two-thirds vote to suspend the rules (Rule XV, cl. 1) and a three-fifths vote to approve a measure, amendment, or conference report carrying a federal income tax rate increase (Rule XXI, cl. 5(b)). Also for example, Senate rules require a two-thirds vote to make a subject a special order of business (Rule X) and to agree to a motion to postpone indefinitely consideration of a treaty (Rule XXX, par. 1(d)).

<sup>13</sup> *United States v. Ballin*, 144 U.S. 1, 6 (1892).

<sup>14</sup> *See Gordon v. Lance*, 403 U.S. 1, 12 (1971) (no federal constitutional bar to state constitutional and statutory provisions requiring approval by 60 percent of the voters in referendum election).

<sup>15</sup> “The standing rules of the Senate may be amended by a majority vote....” Riddick, S. Doc. No. 101-28, at 1219.

<sup>16</sup> In *Ballin*, 144 U.S. at 5, the Court noted: “The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights....”

Recent exercises of the rule-making power by the House in regard to voting requirements have been challenged in court. *See Skaggs v. Carle*, 110 F.3d 831 (D.C.Cir. 1997) (holding that plaintiffs lacked standing to challenge House rule that requires three-fifths majority vote for bills carrying an income tax rate increase); *Michel v. Anderson*, 14 F.3d 623 (D.C.Cir. 1994) (upholding House rules change that authorized Delegates to the House to vote in Committee of the Whole, notwithstanding claims by plaintiff Members of vote dilution, because Delegates’ votes were not decisive).



historical practice are the foundation for the filibuster,<sup>17</sup> and that Article I, Section 5, permits the Senate to adopt procedures unless they conflict with a constitutional prohibition. Supporters of the filibuster have contended that Senate rules are not in conflict with the Constitution because the rules require 60 votes to end debate on a nomination, not to confirm a nominee,<sup>18</sup> and that therefore the Senate rules are not unconstitutional because they are not at odds with the few constitutional provisions in which the framers specified a particular type of majority. Opponents of the filibuster have claimed that Senate rules violate the constitutional principle of majority rule and in effect impose an extraordinary majority requirement for confirmation of nominees that is at odds with the Appointments Clause.<sup>19</sup>

## Entrenchment

Several factors have the effect of entrenching<sup>20</sup> the filibuster. First, Senate Rule XXII, par. 2 (the cloture rule) applies, *inter alia*, to amendments to the Senate rules. (A vote of three fifths of the entire Senate is usually required to invoke cloture. A vote of two thirds of the Senators present and voting is required to invoke cloture on a measure or motion to amend the Senate rules.) Second, Senate Rule V, par. 2, provides that “the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.” And third, because the Senate is a continuing body,<sup>21</sup> its rules “are not newly adopted with each new session of Congress.”<sup>22</sup>

Because the cloture rule may be applied to debate on a proposal to change the filibuster rule, it has been argued that the filibuster rule unconstitutionally interferes with the right of a majority to exercise the constitutional rulemaking authority<sup>23</sup> by

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<sup>17</sup> See *Judiciary Committee Hearing*, *supra* note 1 (testimony of Professor Michael Gerhardt); Fisk & Chemerinsky, *supra* note 7, at 240-41.

<sup>18</sup> See *Judiciary Committee Hearing*, *supra* note 1 (testimony of Professor Michael Gerhardt).

<sup>19</sup> See *Judiciary Committee Hearing*, *supra* note 1 (testimony of Dean Douglas Kmiec). *Cf. id.* (testimony of Professor Steven Calabresi).

<sup>20</sup> “Entrenchment” has been defined as “the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form.” Posner and Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1667 (2002).

<sup>21</sup> The courts (see *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927)) and the Senate itself (see Fisk & Chemerinsky, *supra* note 7, at 245) consider the Senate to be a continuing body because two thirds of the membership continues into the next Congress.

<sup>22</sup> Fisk & Chemerinsky, *supra* note 7, at 245.

<sup>23</sup> “...[T]he entrenchment of the filibuster violates a fundamental constitutional principle: One legislature cannot bind subsequent legislatures.” Fisk & Chemerinsky, *supra* note 7, at 247. It has also been argued that “popular sovereignty is frustrated when one session of the legislature can prevent or limit action by future sessions.” *Id.* at 248. See also *id.* at 250. (continued...)

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majority vote.<sup>24</sup> However, supporters of the filibuster have contended that “there is no constitutional directive against entrenchment,”<sup>25</sup> and that the reference to “each House” in the rule-making clause (Article I, Section 5), authorizing each House to “determine the rules of its proceedings,” means the House and Senate separately (not the Congress), and does not mean that one session of the Senate is barred from binding the next session.<sup>26</sup>

The entrenchment issue has given rise to a suggested scenario under which a simple majority might vote in favor of an amendment to the filibuster rule, a point of order might be raised asserting that a majority vote is sufficient to cut off debate on the amendment and to pass it (because the two-thirds requirement is unconstitutional), the matter would be referred by the Vice President to the Senate, and the point of order would be sustained by a simple majority of the Senate. A judicial appeal might ensue.<sup>27</sup>

Senators have considered changing Senate rules or practice by invoking the “constitutional” or “nuclear” option, terms that refer to various types of proceedings.<sup>28</sup> This option was a focal point of a recent bipartisan agreement.<sup>29</sup>

<sup>23</sup> (...continued)

Similarly, it has been suggested that entrenchment interferes with “the right of the electorate to rule according to its will.” *Id.*

<sup>24</sup> *See id.* at 210

<sup>25</sup> *Judiciary Committee Hearing, supra* note 1 (testimony of Professor Michael Gerhardt). It has also been argued that “neither the future legislative majority nor the underlying electorate has any general ‘right ... to rule according to its will.’” Posner and Vermeule, *supra* note 20, at 1695.

<sup>26</sup> *See* Posner and Vermeule, *supra* note 20, at 1676.

<sup>27</sup> The scenario was suggested in Cutler, *The Way to Kill Senate Rule XXII*, Washington Post, Apr. 19, 1993, at p. A23. *See generally* “Revision of Senate Rules at the Opening of a New Congress,” Dec. 20, 1966, memorandum of the American Law Division, Library of Congress, *reprinted in* 113 *Cong. Rec.* 1278-79 (1967) (analysis of procedures concerning resolution of question of constitutional right of majority to terminate debate on amendment of Rule XXII).

For a discussion of recent proposed amendments to the filibuster rule, see Dewar and Allen, *Frist Seeks to End Nominees Impasse*, Washington Post, May 9, 2003, at p. A12. On June 24, 2003, the Senate Committee on Rules and Administration reported S.Res. 138, 108<sup>th</sup> Cong., a measure that would gradually reduce the number of votes needed for cloture on presidential nominations from 60 to 51. *See generally* Cochran, *Senators Uneasy With Proposal to Alter Filibuster Rule on Judicial Nominations*, 61 *Cong. Qtly.* 1605 (2003).

<sup>28</sup> The option is referred to by some as “constitutional” because it concerns constitutional requirements, and by others as “nuclear” because of its potential to destroy comity. *See generally* CRS Report RL32684, *Changing Senate Rules: The “Constitutional” or “Nuclear” Option*, by Betsy Palmer; CRS Report RL32843, *“Entrenchment” of Senate Procedure and the “Nuclear Option” for Change: Possible Proceedings and Their Implications*, by Richard S. Beth; Dewar, *GOP Votes to Break Nominee Filibusters*, Washington Post, June 25, 2003, at p. A21; Perine, *Parliamentary Toolbox Full of Options* (continued...)

## The Senate, the President, and Judicial Appointments

The filibuster of a judicial nomination raises constitutional issues, particularly separation of powers ones, not posed by the filibuster of legislation.<sup>30</sup> These issues should be considered in light of the pertinent language of the Constitution and the intent of the Framers.<sup>31</sup>

The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law....”<sup>32</sup> There are three stages in presidential appointments by the President with the advice and consent of the Senate. First, the President nominates the candidate. Second, the President and the Senate appoint the individual. And third, the President commissions the officer.<sup>33</sup>

<sup>28</sup> (...continued)

to *Renovate Filibuster Rules*, 63 Cong. Q. 60 (2005). For a detailed analysis of legal issues concerning the constitutional option, see Gold & 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 (2004).

<sup>29</sup> On May 23, 2005, a bipartisan group of 14 Senators reached an agreement, described as “political” and “ambiguous,” that at least temporarily ended disputes in the Senate over judicial confirmations and the use of filibusters in regard to judicial nominations. See Memorandum of Understanding on Judicial Nominations, reprinted in 151 Cong. Rec. S5830-31 (daily ed. May 24, 2005). See generally Babington, *Senate Set to Vote on Delayed Nominee*, Washington Post, May 25, 2005, at p. A1; Stern, *Deconstructing the Judges Deal*, 63 Cong. Q. 1443 (2005). In the first part of the agreement, the 14 signatories stated that they would invoke cloture on three pending judicial nominations, thereby permitting votes on these nominees. In the second part of the agreement, the signatories stated that judicial “nominees should only be filibustered under extraordinary circumstances” and committed themselves to opposing the nuclear option.

<sup>30</sup> See *Proposals to Amend Senate Rule XXII*, Hearing before the Senate Committee on Rules, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2003) [hereinafter, *Rules Committee Hearing*] (available in LEXIS, Legis Library, Congressional Testimony File) (testimony of Professor John Eastman).

<sup>31</sup> Cf. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. Chi. L. Rev. 337, 339 (1989).

<sup>32</sup> The Constitution further provides, in Art. II, § 3, that the President is to “Commission all the Officers of the United States.”

<sup>33</sup> *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 103-6, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 519 (1996). Chief Justice Marshall, in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 155 (1803), in dicta in a ruling on an appointee’s alleged right to a commission, described the appointment as “the act of the President,” which “can only be performed by and with the advice and consent of the Senate.” “Marshall’s statement that the appointment ‘is the act of the President,’ conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the (continued...) ”

**The Text.** It is noted that the Appointments Clause is in Article II of the Constitution, which sets forth the powers of the President.<sup>34</sup> The power of appointment is one of the executive powers of government.<sup>35</sup> “... [T]he power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects.”<sup>36</sup>

The language of the Appointments Clause is ambiguous.<sup>37</sup> It does not specify procedures or time limits applicable in confirmation proceedings, and it does not require that the Senate take a final vote on a nomination.<sup>38</sup>

**The Framers’ Intent.** “There is little evidence indicating the exact meaning of ‘advice and consent’ intended by the Framers.... Records of the constitutional debates reveal that the Framers, after lengthy discussions, settled on a judicial selection process that would involve both the Senate and the President. This important governmental function, like many others, was divided among coequal branches to protect against the concentration of power in one branch.”<sup>39</sup> The Senate’s role of advice and consent was intended as a safeguard against executive abuses of the appointment power.<sup>40</sup>

**The Arguments of Supporters and Critics of Filibusters of Judicial Nominations.** Citing the language of the Appointments Clause and the intent of

<sup>33</sup> (...continued)

appointing power.” S. Doc. No. 103-6, at 519, *citing* 3 Story, *Commentaries on the Constitution of the United States* 1525 (1833); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). In *dicta* in *Hennen*, a case involving the removal of a federal district court clerk, the Court made reference to “officers appointed with the concurrence of the Senate” (38 U.S. at 259) and to “the appointment of the officer ... by the President and the Senate.” *Id.*

<sup>34</sup> See *Rules Committee Hearing*, *supra* note 30 (testimony of Professor John Eastman).

<sup>35</sup> See *Myers v. United States*, 272 U.S. 52, 163-64 (1926).

<sup>36</sup> *Id.* at 119.

<sup>37</sup> See Gauch, *supra* note 31, at 339. However, it is clear that “the Senate’s power ... does not extend to the nomination itself.” *Id.*

<sup>38</sup> See *Rules Committee Hearing*, *supra* note 30 (testimony of Professor Michael Gerhardt).

<sup>39</sup> Renzin, *Advice, Consent, and Senate Inaction — Is Judicial Resolution Possible?*, 73 N.Y.U.L. Rev. 1739, 1753-54 (1988).

<sup>40</sup> See *Edmond v. United States*, 520 U.S. 651, 659 (1997). The advice and consent function of the Senate (in which all states are represented equally) was added as a restriction on the President’s appointment power at the urging of the smaller states, which were concerned that the President, elected by the electoral college (in which the influence of the larger states would be greater than that of the smaller states), might make too many appointments from the larger states. See *Myers*, 272 U.S. at 110-11, 119-20.

See generally Fisk & Chemerinsky, *Symposium: Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process: In Defense of Filibustering Judicial Nominations*, 26 Cardozo L. Rev. 331, 335 *et seq.* (2005) (arguing that filibusters are a check on executive power).

the Framers, supporters and critics of filibusters of judicial nominations disagree about the relative roles of the President and the Senate in regard to judicial appointments,<sup>41</sup> about whether the Senate has a duty to dispose of the President's judicial nominations in a timely fashion,<sup>42</sup> and about whether a majority of Senators has a constitutional right to vote on a nomination.<sup>43</sup>

**Recess Appointments.** If the Senate filibusters a judicial nomination, the President has “countervailing powers,” including the ability to make a recess appointment,<sup>44</sup> which does not require Senate confirmation but which is only temporary, expiring at the end of the next session of Congress.<sup>45</sup> Because recess appointments deny the Senate the opportunity to consider the appointees, they raise separation of powers questions about the roles of the President and the Senate in the appointments process.<sup>46</sup> Special issues are raised by recess appointments of Article III judges.<sup>47</sup> The independence of such judges is generally guaranteed by their life

<sup>41</sup> *Compare Judiciary Committee Hearing, supra* note 1 (testimony of Marcia Greenberger) (Constitution gives Senate and President equal roles in determining composition of federal courts) *and Rules Committee Hearing, supra* note 30 (testimony of Professor Michael Gerhardt) (same) *with Judiciary Committee Hearing, supra* note 1 (testimony of Professor Steven Calabresi) (power of appointment is “inherently executive”).

<sup>42</sup> *Compare Rules Committee Hearing, supra* note 30 (testimony of Professor Michael Gerhardt) (Constitution specifies no time limits for the consideration of nominations) *with Rules Committee Hearing, supra* note 30 (testimony of Professor Douglas Kmiec) (by not timely disposing of nominations for judgeships, the Senate affects responsibilities of judicial branch) *and Renzin, supra* note 39, at 1757 (“slowdown” by Senate in acting on judicial nominations disrupts judiciary).

<sup>43</sup> *Compare Judiciary Committee Hearing, supra* note 1 (testimony of Honorable Russ Feingold) *and* Klain, *Frivolous Suits and Judicial Activism from the Political Right?*, Roll Call, June 4, 2003, at p. 4 (Art. II, § 2 vests confirmation power in “the Senate,” not in majority of Senators) *with Judiciary Committee Hearing, supra* note 1 (testimony of Professor John Eastman).

<sup>44</sup> *Rules Committee Hearing, supra* note 30 (testimony of Professor John Eastman). *See also id.* (testimony of Professor Douglas Kmiec).

<sup>45</sup> The Recess Appointments Clause provides that “the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.” Art. II, § 2, cl. 3.

<sup>46</sup> *See generally* Fisher, *Constitutional Conflicts between Congress and the President*, at 38-43 (1997).

President Bush used his recess appointment authority to appoint Charles Pickering and William Pryor to judgeships. Bush's previous nominations of Pickering and Pryor had been blocked by filibusters. The President's use of his recess appointment authority precipitated a conflict with some Senators, who responded by delaying action on all of the President's judicial nominations. The impasse ended when the President agreed not to use his recess appointment authority for judicial nominees during the remainder of his first term in office in return for Senate action on specified judicial nominations. Dewar, *President, Senate Reach Pact on Judicial Nominations*, Washington Post, May 19, 2004, at p. A21.

<sup>47</sup> *See generally* CRS Report RS22039, *Federal Recess Judges*, by Louis Fisher. The (continued...)

tenure.<sup>48</sup> However, “a recess appointee lacks life tenure.... As a result, such an appointee is in theory subject to greater political pressure than a judge whose nomination has been confirmed.”<sup>49</sup>

## Appeal to the Courts

The constitutionality of the filibuster has been challenged in court,<sup>50</sup> and such litigation raises justiciability issues.<sup>51</sup>

In a number of cases, the courts have shown a reluctance to interpret the rules of either House<sup>52</sup> or to review challenges to the application of such rules.<sup>53</sup> However, the case law is not entirely consistent,<sup>54</sup> and it has been suggested that a court will be

<sup>47</sup> (...continued)

constitutionality of such appointments has been upheld recently on the basis of the text of the Constitution and on historical practice. *See Evans v. Stephens*, 387 F.3d 1220 (11<sup>th</sup> Cir. 2004) (*en banc*), *cert. denied*, 125 S.Ct. 1640 (2005). *See also United States v. Woodley*, 751 F.2d 1008, 1014 (9<sup>th</sup> Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1048 (1986). The ruling in *Woodley* was based in part on an “historical review,” which demonstrated “an unbroken acceptance of the President’s use of the recess power to appoint federal judges” by all three branches. 751 F.2d at 1011. In 1789, President Washington made the first judicial recess appointment. *Id.* From 1789 until 1985, when *Woodley* was decided, about 300 judicial recess appointments were made, including several such appointments of Justices of the Supreme Court. *Id.*

<sup>48</sup> Federal judges “hold their offices during good behaviour” (Art. III, § 1), but can be impeached.

<sup>49</sup> *Woodley*, 751 F.2d at 1014. “A judge ... who is given a recess appointment may be ‘removed’ by the Senate’s failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, she may be subject to influence not felt by other judges.” *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 103-6, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 522 (1996).

<sup>50</sup> *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d 26 (D.D.C. 2004); *Page v. Shelby*, 995 F. Supp. 23 (D.D.C.), *aff’d*, 172 F.3d 920 (D.C.Cir. 1998) (*see infra* note 59). *Cf. Raiser v. Daschle*, 2002 U.S. App. LEXIS 27282 (10<sup>th</sup> Cir. 2002) (affirming dismissal, due to lack of standing, of suit challenging Senate procedures that permit Judiciary Committee to bar full Senate from voting on nomination by failing to report the nomination to the Senate), *cert. denied*, 539 U.S. 903 (2003).

<sup>51</sup> Under Article III, the judicial power is limited to “cases” and “controversies.” “‘Justiciability’ is the term of art employed to give expression to ... [the] limitation placed upon federal courts by the case-and-controversy doctrine.” *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

<sup>52</sup> *See, e.g., Vander Jagt v. O’Neill*, 699 F.2d 1166, 1172-73 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

<sup>53</sup> *See, e.g., Consumers Union of United States, Inc. v. Periodical Correspondents’ Association*, 515 F.2d 1341 (D.C.Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

<sup>54</sup> *See Miller, The Justiciability of Legislative Rules and the “Political” Political Question* (continued...)

more likely to reach the merits if a rule has an impact on parties outside the legislative sphere.<sup>55</sup>

Standing and the political question doctrine would be the primary justiciability issues raised by a court challenge to the filibuster rule.<sup>56</sup>

## Standing

Standing is a threshold procedural question which turns not on the merits of the plaintiff's complaint but rather on whether he has a legal right to a judicial determination of the issues he raises.<sup>57</sup> To satisfy constitutional standing requirements, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."<sup>58</sup>

It has been suggested that those who might have standing to challenge the rule would include a judicial nominee not confirmed because of a filibuster; the President; and Senators who are part of a majority in favor of a nomination, but who cannot obtain the necessary votes to invoke cloture or to change the filibuster rule, who might allege a dilution of their voting strength.<sup>59</sup> A nominee might have suffered a

<sup>54</sup> (...continued)

*Doctrine*, 78 Cal. L. Rev. 1341 (1990). "Normally, the courts will not interfere with the internal procedures of a co-equal branch, but there are exceptions...." *Judiciary Committee Hearing*, *supra* note 1 (testimony of Professor John Eastman).

<sup>55</sup> Deschler's *Precedents of the U.S. House of Representatives*, ch. 5, § 4, at p. 309 (1977). See also *United States v. Smith*, 286 U.S. 6, 49 (1932).

<sup>56</sup> If Senators were named as defendants, another procedural issue — that of immunity under the Speech or Debate Clause (Article I, Section 6, clause 1) — would be raised. See Fisk & Chemerinsky, *supra* note 7, at 238. See generally CRS Report RL30843, *Speech or Debate Clause Constitutional Immunity: An Overview*, by Jay R. Champansky. Although the clause might bar a suit, perhaps seeking declaratory or injunctive relief, naming Senators as defendants (see *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)), it has been suggested that the clause might not preclude an action naming a Senate employee (such as the Secretary of the Senate) as the defendant. Fisk & Chemerinsky, *supra* note 7, at 238. See also *Powell v. McCormack*, 395 U.S. 486, 503-06 (1969).

<sup>57</sup> See *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

<sup>58</sup> *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 329 (1999), quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>59</sup> See *Judiciary Committee*, *supra* note 1 (testimony of Professor John Eastman). See also Fisk & Chemerinsky, *supra* note 7, at 233-34, 236; *Michel v. Anderson*, 14 F.3d 623 (D.C.Cir. 1994)(vote dilution as basis of standing).

Neither a citizen (*Page v. Shelby*, 995 F. Supp. 23 (D.D.C.), *aff'd*, 172 F.3d 920 (D.C.Cir. 1998)) nor a public interest group (*Judicial Watch, Inc. v. United States Senate*, 340 F. Supp. 2d 26 (D.D.C. 2004)) has standing to challenge the filibuster rule. In *Judicial Watch*, the plaintiff argued that the failure of the Senate to vote on pending judicial nominations

(continued...)



personal injury, caused by a filibuster, which might be remedied if the filibuster were declared unconstitutional.<sup>60</sup>

The standing of the President and of Senators raises more difficult questions than does the standing of a nominee. In *Raines v. Byrd*,<sup>61</sup> the Court reviewed historical practice and concluded that constitutional disputes between the branches have generally not been resolved by the judiciary in cases brought by Members of Congress or presidents.<sup>62</sup> Because the constitutionality of the filibuster is an issue in contention between the branches, the courts, applying *Raines*, might not accord standing to Senators or President Bush.

Other issues, under *Raines*, arise in regard to the standing of Senators.<sup>63</sup> Under *Raines*, to challenge executive branch action or the constitutionality of a public law, a Member must assert a personal injury or an institutional injury amounting to nullification of a particular vote.<sup>64</sup> In regard to the filibuster dispute, it is questionable whether a Senator has suffered either a personal injury<sup>65</sup> or an institutional one that has the effect of nullifying a particular vote. Under *Raines*, the availability of some means of legislative redress precludes a finding of nullification,<sup>66</sup> and a court might find that the possibility of amending the filibuster rule is a means of legislative redress, even though a proposed amendment to the rule could itself be the subject of a filibuster.

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<sup>59</sup> (...continued)

resulted in vacancies on two appellate courts that delayed the resolution of plaintiff's appeals pending in those courts, thereby injuring plaintiff. *Id.* at 28. The court dismissed the suit because the plaintiff could not satisfy the constitutional elements of the law of standing and because the court found that separation of powers concerns would be raised by judicial involvement in Senate rules and practices. *Id.* at 28, 38.

<sup>60</sup> See Fisk & Chemerinsky, *supra* note 7, at 233-34.

<sup>61</sup> 521 U.S. 811 (1997).

<sup>62</sup> *Id.* at 826-28. *But cf. United States v. Smith*, 286 U.S. 6 (1932) (Court interpreted Senate rule concerning nominations in suit brought by executive branch at request of Senate). (*Smith* was not cited by the Court in *Raines*.)

<sup>63</sup> *Raines* was a suit filed by congressional plaintiffs against officials of the executive branch. See 521 U.S. at 815. A suit raising the question of the constitutionality of the filibuster might be filed by congressional plaintiffs against congressional defendants. The standing test adopted in *Raines* might be applied in a suit involving congressional plaintiffs and defendants. The *Raines* test was based on separation of powers concerns about the limited role of the courts. See *id.* at 828. Similar separation of powers concerns are raised in suits by Members against their colleagues. See *Moore v. U.S. House of Representatives*, 733 F.2d 946, 951 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

<sup>64</sup> See 521 U.S. at 818-20, 821-24, 826.

<sup>65</sup> The majority in *Raines* considered an injury to a legislator's voting power to be an official injury. See *id.* at 821.

<sup>66</sup> See *id.* at 824. See also *Campbell v. Clinton*, 203 F.3d 19, 22-24 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000); Arend & Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 Harv. J.L. & Pub. Pol'y 209, 282 (2001) ("there will virtually always be some legislative remedies available").

## Political Question

Judicial review is not available where the matter is considered to be a political question within the province of the executive or legislative branch.<sup>67</sup> “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; ... or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government....”<sup>68</sup>

The rule-making clause (Article I, Section 5, clause 2) is a textual commitment of authority to each House to make and interpret its own rules of proceedings.<sup>69</sup> Notwithstanding this textual commitment, the political question doctrine will not preclude judicial review where there is a constitutional limitation imposed on the exercise of the authority at issue by the political branch.<sup>70</sup>

It might be argued that the political question doctrine bars judicial review of the constitutionality of the filibuster rule because the rulemaking clause permits the Senate to make its own rules, and the Constitution does not expressly limit debate.<sup>71</sup> On the other hand, it might be argued that the political question doctrine does not preclude judicial review because the exercise of the rulemaking power is restricted since the entrenchment of the filibuster may be at odds with “constitutional principles limiting the ability of one Congress to bind another.”<sup>72</sup>

## Conclusion

The question of the constitutionality of the Senate filibuster of a judicial nomination has divided scholars and has not been addressed directly in any court ruling. The constitutionality of the filibuster of a judicial nomination turns on an

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<sup>67</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962). Even in a case that presents a political question, “deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation” which is a judicial function. *Id.* at 210-11.

<sup>68</sup> *Id.* at 217.

<sup>69</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892). See also Miller, *supra* note 54, at 1348-49.

<sup>70</sup> Compare *Powell v. McCormack*, 395 U.S. 486, 518-49 (1969) (Court reached merits after finding that power of House to judge elections, returns, and qualifications of its Members restricts House to qualifications specified in Constitution) with *Nixon v. United States*, 506 U.S. 224, 237 (1993) (issue of whether Senate could delegate to a committee the task of taking testimony in an impeachment case presented political question in light of constitutional provision giving Senate “sole power to try impeachments”; Court found “no separate provision of the Constitution which could be defeated by allowing the Senate final authority to determine the meaning of the word ‘try’ in the Impeachment Trial Clause”).

<sup>71</sup> See Fisk & Chemerinsky, *supra* note 7, at 229.

<sup>72</sup> *Id.* at 230.

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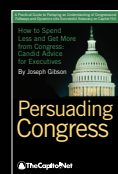
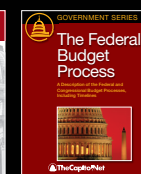
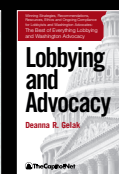
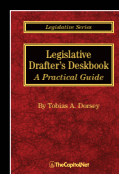
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assessment of whether the Senate's power to make rules governing its own proceedings is broad enough to apply the filibuster rule to nominations. Supporters and critics of the filibuster of judicial nominations disagree about the relative roles of the President and the Senate in regard to judicial appointments, about whether the Senate has a duty to dispose of the President's judicial nominations in a timely fashion, and about whether a simple majority of Senators has a constitutional right to proceed to a vote on a nomination. The constitutionality of the filibuster might be challenged in court, but it is uncertain whether such an action would be justiciable.