

# *Filibusters and the Constitution*

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## INTRODUCTION

Renowned former Senate historian Floyd Riddick once said that Senators are expected to “restrain themselves” and “not abuse the privilege of debate.”<sup>1</sup> Yet today, a partisan minority of Senators has launched unprecedented filibusters to block the confirmation of the President’s judicial nominees by preventing a bipartisan majority of Senators from even calling a vote on their nominations. This wrangling has constitutional dimensions, raising important questions about the Senate’s role in the judicial confirmation process under the Advise and Consent Clause.

Because filibusters of judicial nominees have never been part of Senate tradition until now, the familiar guideposts of historical practice do not offer much direction in pointing the way out of the current judicial confirmation crisis. As a determined Senate minority continues to obstruct up-or-down votes on several nominees while still others languish for months under the threat of even more filibusters, however, the constitutional questions raised by this unprecedented state of affairs only become more pressing. In this paper, we attempt to bring some much-needed clarity to the current debate. First, we survey briefly the relevant Senate history, practice and tradition, which not only provides a helpful context for understanding the constitutional dimensions of the debate but also illustrates the extent to which the present crisis is unprecedented in our Nation’s history. Second, we outline the constitutional theories for resolving this crisis that have featured most prominently in the debate thus far. Finally, we conclude that whatever the constitutionality of the current filibustering of judicial nominees, an even stronger argument can be made that any Senate rule that purports to prevent a majority of the

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<sup>1</sup> Ward Sinclair, *Senate Filibuster: Some Call It Tyranny, Others Freedom*, Wash. Post, June 15, 1978, at A3.

Senate from codifying its tradition of ample but not endless debate would raise very serious constitutional questions indeed.

### **I. A Tradition of Restraint: Historical Practice and the Senate Rules of Debate**

We begin with the observation that the current treatment of judicial nominees is unprecedented and marks a radical departure from longstanding Senate tradition. For most of the Senate's history, its practice has reflected the Framers' understanding of the Senate's limited role in confirming the President's judicial nominees. As Alexander Hamilton explained in the Federalist No. 76, the Constitution gives the Senate a role to play in order to ensure that the President has not injected cronyism into his appointment process: "To what purpose then require the cooperation of the Senate? . . . It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." Indeed, Hamilton characterized the Senate's confirmation role as being "in general, a silent operation."

This understanding of the Senate's limited role in the confirmation process—that it would largely be what Hamilton called "a silent operation"—is reflected in the text and structure of the Constitution itself. The text of the Constitution makes plain that the power to *nominate* and to *appoint* rests with the President. Article II, Section 2, Clause 2 provides that the President "shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint, . . . Judges of the Supreme Court" and such inferior courts as Congress establishes. The Senate, of course, performs a vital check on both powers through the constitutional review signified by "advice and consent." Yet, it has long been understood that the nature of the nomination and appointment powers is executive, as the

placement of the Advice and Consent Clause in Article II of the Constitution signifies. The Senate itself recognizes this distinction by maintaining a separate executive calendar for nominations and going into executive session to consider them. As an early opinion of the Attorney General explains, the Senate’s “constitutional action is confined to the simple affirmation or rejection of the President’s nominations. . . .”<sup>2</sup>

So the text, structure, the original understanding of the Constitution all confirm that the Senate’s role in confirming the President’s nominees is quite a narrow one. Moreover, the confirmation process as historically practiced by the Senate (at least until the present Congress) clearly reflected this view. For much of our Nation’s history, the Senate did not even conduct confirmation hearings, not even for nominees to the U.S. Supreme Court. Instead, the Senate either deferred to the President’s choice or rejected nominees without resort to intrusive hearings or lengthy debate. Indeed, the Senate Committee on the Judiciary did not even exist during the first half-century of our Nation’s existence—nearly 30 years after the ratification of the Constitution. And, even when such hearings were later held, by custom the nominee would not even appear. It was not until 1925 that Harlan Fiske Stone became the first nominee for the Supreme Court would actually appear in person before the Judiciary Committee, and even that was a novel episode after which nominees reverted back to the tradition of not appearing personally before the Committee. That tradition continued for over a decade until Felix Frankfurter testified before the Committee in 1939. Even then, Justice Frankfurter read from a prepared statement in which he said he would not express his personal views on controversial issues before the Court. As late as 1949, Sherman Minton refused to appear before the Senate Judiciary Committee and was nonetheless confirmed to the Supreme

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<sup>2</sup> 3 Ops. Atty. Gen. 188 (1837).

Court. It was not until 1955 that John Marshall Harlan started the modern tradition of judicial nominees appearing and testifying before the Senate. Even then, confirmation hearings have typically been brief, even in cases of Supreme Court nominations. Justice Byron White's confirmation hearing in 1962, for instance, lasted less than two hours. The current judicial confirmation process has obviously come very far afield not only from the constitutional understanding of the Senate's limited role, but also from the Senate's own understanding of that role as reflected in its historical practice.

The current use of the standing rules of the Senate, not to ensure adequate debate but essentially to permit a fractious minority to change the voting rule on judicial nominations in order to block a Senate majority from confirming the President's judicial nominees, is unprecedented and contrary to this understanding. To be sure, the standing rules of the Senate do not impose strict time limits on debate. But to quote again from former Senate historian Floyd Riddick, the tradition of the Senate has long been for Senators to "restrain themselves" and "not abuse the privilege" of debate. Accordingly, the debate on a judicial nomination ends when Senators agree that they are ready to vote, or when 60 Senators agree to set time limits on debate by voting to invoke cloture under Rule XXII of the standing rules of the Senate. True, Rule XIX provides that once a Senator has been recognized by the Presiding Officer, "no Senator shall interrupt [him] in debate without his consent. . . ." But the rules nowhere state that debate should be unlimited, or that the rules themselves should be abused and exploited so that nominations actually require more than the support of a simple majority of Senators to secure confirmation.

Indeed, from 1789 until 1806 a simple majority of Senators had the power to conclude debate by a motion for the previous question. Although that motion was eliminated from the Senate Rules in 1806, the first filibuster did not take place until 35 years later. Later still, in response to a successful filibuster of President Wilson's proposal to arm American merchant ships so they could defend themselves against attacks by German U-boats, the Senate in 1917 abolished the century-old rule that debate could be cut off only with unanimous consent. Instead, the Senate adopted instead a rule permitting debate to be terminated if two-thirds of the Senate voted to invoke cloture (which is simply a parliamentary procedure that places time limits on debate). This rule was the precursor of modern Rule XXII, which requires that after a petition for cloture has been filed, "three-fifths of the Senators duly chosen and sworn" must vote affirmatively in order to bring debate to a close. Until now, however, the filibuster has never been used to prevent a majority that stands willing to vote on a judicial nominee from doing so.<sup>3</sup>

Because the Senate has traditionally relied on individual Senators to "exercise restraint" and "not abuse the privilege of debate," there is little institutional machinery for dealing with the current filibustering of the President's judicial nominees. The problem is only exacerbated by the fact that the filibustering minority's goal is apparently not to ensure a full and fair debate on a judicial nominee but rather to prevent a majority that

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<sup>3</sup> Some have argued that the current filibustering of judicial nominees is not without precedent, and in support point to Abe Fortas as the first—albeit, until this Congress, the only—judicial nominee ever to be filibustered. Fortas was not defeated by a filibuster, however, but because he could not garner the support of 51 Senators. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, XX Harv. J.L. & Pub. Pol'y 34-39 (forthcoming 2003). In any event, the current filibusters of the President's judicial nominees bears little resemblance to the Fortas episode: Fortas was debated for only a few days, opposed by a bipartisan group of Senators, and lacked the support of 51 or more Senators.

stands ready and willing to confirm the nominee from ever doing so.<sup>4</sup> Understandable frustration with this state of affairs has led some observers to suggest that the Senate majority should make the current filibustering of judicial nominees more painful and costly for the minority by forcing an around-the-clock, “24-7” performance.<sup>5</sup>

Although this argument may sound appealing in theory, the fact of the matter is that in practice the costs of forcing a “real” filibuster would fall much more heavily on the majority than on the filibustering minority. Notwithstanding the image popularized by Jimmy Stewart in the Hollywood classic *Mr. Smith Goes To Washington*, the reality is that “late-night or all-night sessions put as much or more of a burden on the proponents of the question being debated than on its opponents.”<sup>6</sup> This is so because “Senators participating in the filibuster need only ensure that at least one of their member is present on the floor to speak” whereas “[t]he proponents of the question . . . need to ensure that a majority of the Senate is present or at least available to respond to a quorum call or roll call vote.”<sup>7</sup> For this reason, the burden actually rests on the *opponents* of the filibustering Senators to ensure that the constitutional quorum requirement can always be met. This problem was highlighted by Senator Majority Leader Bill Frist in September 2003 when he explained that the chronic health problems of several Republican Senators was one reason why an all-out attempt to wear down the filibustering Senators had to be abandoned.<sup>8</sup> In the end, the chances of actually defeating a filibuster by attempting to

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<sup>4</sup> For example, one Senate leader of the current filibusters has said, “there is not a number [of hours] in the universe that would be sufficient” for debate on certain nominees. 149 Cong. Rec. S4949 (April 8, 2003).

<sup>5</sup> See, e.g., Robert R. Eberle, GOPUSA, *Senate Republicans Should Force ‘Real Filibuster’*, available at [http://www.gopusa.com/bobby/bobby\\_0929.shtml](http://www.gopusa.com/bobby/bobby_0929.shtml).

<sup>6</sup> Richard S. Beth, Congressional Research Service, *Filibusters and Cloture in the Senate*, at 9 (Mar. 28, 2003).

<sup>7</sup> *Ibid.*

<sup>8</sup> See Sarita Chourey, *Senate GOP retreats from all-night filibuster plans*, The Hill News, Sept. 9, 2003, available at <http://www.hillnews.com/news/090903/gop.aspx>.

wear down the filibustering minority are slim to none. Nonetheless, such efforts may be valuable as a means of focusing public attention on the issue and attempting to hold filibustering Senators accountable through the political process.

In a similar vein, some observers have suggested that Senate Rule XIX might be used to end the current filibustering of judicial nominees. Although the rule places no limit on the length of individual speeches or on the number of Senators who may speak on a pending question, it does have the potential to limit extended debate by providing that “no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate.” This provision, known as the “two-speech rule,” limits each Senator to making two speeches per day, however long each speech may be, on each debatable question that the Senate considers. In the entire history of the Senate, however, the two-speech rule has never been effective in ending debate, not even when the Senate possessed no other mechanism for doing so.

Moreover, before the two-speech rule could be applied to defeat filibusters of judicial nominees, two Senate precedents would have to be changed. First, the relevant “day” for purposes of enforcing the rule would have to be changed from a calendar day to a legislative day. This change is necessitated by the fact that a legislative day ends only with an adjournment, so that whenever the Senate recesses overnight, rather than adjourning, the same legislative day continues into the next calendar day. A legislative day may therefore extend over several days. Senate leadership could, therefore, in order to defeat a filibuster, continue to recess the Senate, rather than adjourning, so as to compel filibustering Senators to exhaust their opportunities of gaining recognition.



Second, the precedent for circumventing the two-speech rule by making a motion that constitutes a new and different debatable question would also have to be changed. For instance, each Senator can make two speeches not only on each motion, but also on each motion to postpone and on each motion to recommit. For the two-speech rule to be truly effective in limiting debate, then, it would be necessary to subsume such questions under the main question. If both precedents can be changed, however, then the two-speech rule could be enforced to “squeeze” the filibustering minority.

The administrative costs of changing these precedents in order to make the two-speech rule an effective anti-filibuster tool would not be inconsiderable, however. For instance, much Senate business is transacted by unanimous consent during the morning business period. If, in retaliation for the majority’s enforcement of the two-speech rule, a single member of the filibustering minority objected, then the Senate’s ordinary administrative processes would grind to a halt. In this way, the filibustering minority would be able to exact a cost from the majority, which is typically held more responsible by the electorate for the successes or failures of a particular congressional session. Moreover, the elaborate and lengthy process of enforcing the two-speech rule would have to be repeated for each nominee being filibustered. So the costs of such a strategy could be very great indeed.

It would seem, then, that neither forcing the minority to engage in a “real” filibuster nor enforcing the two-speech rule is likely to bring an end to the current filibustering of the President’s judicial nominees. That being so, the constitutional questions raised by the controversy must be confronted head on. It is to those questions that we now turn.

## **II. Majority Rule: Constitutional Issues Raised by the Current Filibustering of Judicial Nominees**

At the outset, it is important to be clear that the current filibustering of judicial nominees raises at least two distinct, though related, constitutional issues. The first question is whether the Senate rules may be employed to deny a majority its power to consent to the President's appointment of judicial nominees. The second question is whether the Senate rules may be employed to deny a majority its power to make or change those rules. We will address each question in turn.

### **A. Denying a Majority Its Power To Consent**

One view of the current filibustering of judicial nominees is that it is “not only unprecedented and wrong,” but also “offensive to our nation's constitutional design.”<sup>9</sup> Under this view, the Constitution establishes a general presumption of majority rule for congressional decision-making. The Constitution thus presumes that most decisions will be made by majority rule, except in those situations where the Constitution itself specifically requires a two-thirds vote (such as overriding presidential vetoes, ratifying treaties, approving constitutional amendments, and expelling a member). Proponents of this view rely on the canon of *expressio unius, exclusion alterius*, or that the enumeration of things in a series is generally supposed to be exclusive, to argue that no other super-majority requirements beyond those specifically enumerated in the constitutional text are permitted. If, the argument runs, “the Constitution provides that only a majority is necessary to confirm judges, any Senate rule that purpose to prevent a majority of the

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<sup>9</sup> See, e.g., Cornyn, *Our Broken Judicial Confirmation Process* at 14.

Senate from exercising that confirmation function directly contradicts and offense our constitutional design.”<sup>10</sup>

In its most aggressive form, this argument leads to the conclusion that filibusters of legislation, and not just judicial nominees, are unconstitutional because Article I, Section 7 (just like Article II, Section 2) does not provide for supermajority voting requirements. Indeed, numerous Democrats have previously taken just that position.<sup>11</sup> Whatever its merits as an original matter, however, the claim that legislative filibusters violate the Constitution runs into the significant obstacle of the longstanding historical use of such filibusters in the Senate.

This history stands in stark contrast to the striking absence of judicial filibusters from Senate tradition, and for good reason. Judicial filibusters uniquely threaten to weaken the power of the President in an area in which the Constitution gives him primary authority. Because the Constitution vests “all legislative powers herein granted” in the Congress, filibusters of legislation do not rise to the same level of constitutional concern as filibusters of judicial nominees because the latter intrude upon an executive function. What is more, the use of filibusters to defeat judicial nominees also threatens the independence of the federal judiciary by politicizing the confirmation process to an even greater extent.<sup>12</sup> In sum, one argument against the current filibustering of the President’s judicial nominees is that traditional principles of separation-of-powers analysis require that “Congressional incursions into executive power—such as the appointment power—

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<sup>10</sup> *Id.* at 17.

<sup>11</sup> *Ibid.* (citing examples).

<sup>12</sup> For example, then Chief Judge Harry Edwards of the Court of Appeals for the District of Columbia Circuit has written that the “Framers never intended for Congress to have . . . unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes.” *Skaggs v. Carle*, 110 F.3d 831, 838 (D.C. Cir. 1997) (Edwards, C.J., dissenting).

are to be construed narrowly, and are not permitted absent a clear expression in constitutional text.”<sup>13</sup>

### **B. Denying a Majority its Power to Change the Senate Rules**

Whatever the merits of the argument that filibusters of judicial nominees are unconstitutional, an even stronger constitutional argument can be made against the filibustering of proposals to change the filibuster rule itself. In *United States v. Ballin*, 144 U.S. 1, 6 (1892) the Supreme Court unanimously held that even though the Constitution empowers each house of Congress to determine its rules of proceedings, “[i]t may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.” Thus, just as one Congress cannot enact a law that subsequent Congresses could not amend by majority vote, one Senate cannot enact a rule that a subsequent Senate could not amend by majority vote. Such power would arguably offend the Constitution because it would be tantamount to amending the Constitution by majority vote of Congress. As the Supreme Court explained in *Ballin*, “[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 house.”<sup>14</sup>

On May 9, 2003—two years to the day since President George W. Bush nominated Priscilla Owen and Miguel Estrada to serve on the federal courts of appeals—

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<sup>13</sup> *Id.* at 19.

<sup>14</sup> 144 U.S. at 8. *See also Newton v. Commissioner*, \_\_\_ U.S. \_\_\_, \_\_\_ (1879) (“Every 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. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil”); *Connecticut Mutual Life Ins. Co. v. Spratley*, \_\_\_ U.S. \_\_\_, \_\_\_ (1898) (“[E]ach

Senate Majority Leader Bill Frist, along with a bipartisan group of eleven other Senators, introduced Senate Resolution 138. This proposal would end the filibustering of judicial nominees by amending Rule XXII of the Standing Rules of the Senate to allow, over time, a simple majority of Senators to bring debate to a close and hold a vote on a judicial nominee. Essentially, Senate Resolution 138 provides for a series of progressively declining cloture requirements. At present, Rule XXII requires that after a petition for cloture has been filed, “three-fifths of the Senators duly chosen and sworn” must vote affirmatively in order to bring debate to a close. Under Senate Resolution 138, the first attempt at cloture would still require a three-fifths super-majority (or 60 votes).<sup>15</sup> Subsequent petitions for cloture would require fewer and fewer votes—57, then 54, then 51—until finally a simple majority could vote to end debate.<sup>16</sup> In this way, Senate Resolution 138 aims to “strike an appropriate balance between the right to debate and the need for a majority ultimately to close debate and take action on a nominee.”<sup>17</sup>

Senate Resolution 138 is not the first attempt to amend Rule XXII. In 1995, Senators Lieberman and Harkin proposed an amendment that, like Senate Resolution

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subsequent legislature has equal power to legislate on the same subject. The legislature has power at any time to repeal or modify [an] act”).

<sup>15</sup> S. Res. 138 (2003).

<sup>16</sup> *Ibid.*

<sup>17</sup> John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, XX Harv. J.L. & Pub. Pol’y (forthcoming 2003). Similar proposals have been endorsed by groups “as diverse as the American Enterprise Institute, the Brookings Institution, and the Cato Institute.” *Ibid.* See, e.g., Sarah A. Binder & Thomas E. Mann, *Slaying the Dinosaur: The Case for Reforming the Senate Filibuster*, Brookings Rev. 42, 45-46 (Summer 1995) (“To limit the harm done by the filibuster, the Senate should consider three approaches to reform. The first would limit the ability of senators to filibuster presidential nominations for executive and judicial branch positions. . . . Such a move would protect the full Senate’s power to advise and consent on nominations. . . . The third approach to reform . . . would ratchet down over several days the number of senators required to invoke cloture. . . . Ratcheting down the number of votes required to invoke cloture would both preserve the minority’s right to be heard while boosting the Senate leaders’ ability to move forward”); Sarah A. Binder & Steven S. Smith, *Filibusters a great American tradition*, Atlanta Journal-Constitution, May 25, 2003 (“[W]e favor a proposal similar to Frist’s that would change the 60-vote requirement for invoking cloture. Over a two-week period, the number of votes required for cloture would fall from 60 to 57 to 54 and finally to 51. We would couple this change with an increase in the number of days that must pass between the filing of and voting on cloture motions”).

138, provided for a successively lower threshold to invoke cloture until, upon the fourth motion for cloture, a simple majority of the Senate would be able to ensure that a vote was held. The Harkin-Lieberman proposal was endorsed by 19 Democratic Senators<sup>18</sup> and the *New York Times*, which opined at the time that the filibuster “frustrates democracy and serves no useful purpose.”<sup>19</sup> Unlike Senate Resolution 138, however, the Harkin-Lieberman amendment would have applied more broadly to all filibusters, not just those targeting the President’s judicial nominees.<sup>20</sup> All in all, at least 30 proposals to eliminate filibusters altogether have been considered by the Senate. What is more, at least 26 federal statutes currently prohibit filibustering with respect to certain kinds of measures.<sup>21</sup> If Senate Resolution 138 were adopted, it would not be the first time that the Senate acted to abrogate the filibuster under certain circumstances.

One obstacle to amending Rule XXII is that the rule itself provides that “the necessary affirmative vote” to end debate on the motion would be “two-thirds of the Senators present and voting.” In other words, if a majority of the Senate attempts to amend Rule XXII, and the minority launches a filibuster against the amendment, the language of Rule XXII would seem to require 67 votes to end debate and vote on the proposed amendment. Constitutional law scholars all along the ideological spectrum, however, have maintained that any use of a super-majority requirement enacted by a prior Senate to prevent the current Senate from adopting its own rules would be unconstitutional. For example, although Professors Catherine Fisk and Erwin

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<sup>18</sup> 141 Cong. Rec. S438 (Jan. 5, 1995). Among the Senators who supported the Harkin-Lieberman amendment were Senators Boxer, Feingold, Graham, Kerry, Lautenberg, Lieberman, Moseley-Braun, and Sarbanes.

<sup>19</sup> *Time to Retire the Filibuster*, N.Y. Times, Jan. 1, 1995, at 8.

<sup>20</sup> Ultimately, a motion to table the amendment was defeated by a vote of 76-19. Among the Senators voting against the motion to table were Senators Boxer, Feingold, Graham, Kerry, Lautenberg, Lieberman, Moseley-Braun, and Sarbanes.

Chemerinsky concluded that the filibuster rule was a constitutionally permissible exercise of the Senate’s power to enact its own rules, they also concluded that any “entrenchment” of the filibuster rule would be unconstitutional.<sup>22</sup> Similarly, Professor John Eastman recently testified before the Senate Committee on Rules and Administration that “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>23</sup>

The argument that the Constitution would render any such a super-majority requirement a nullity has also been advanced previously by Senator Kennedy (“The notion that a filibuster can be used to defeat an attempt to change the filibuster rule cannot withstand analysis. It would impose an unconstitutional prior restraint on the parliamentary procedure in the Senate.”); Senator Joe Lieberman (“[T]here is no constitutional basis for [the filibuster rule]. . . it is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate”); Senator Harkin (“I really believe that the filibuster rules are unconstitutional”); and Lloyd Cutler (“[R]equirement of 60 votes to cut off debate and two-thirds vote to amend the rules are both unconstitutional”).

In sum, Senate Resolution 138 and the arguments made in support of it can hardly be characterized as novel or unprecedented. Indeed, the proposal is arguably more moderate than past attempts to eliminate the filibuster altogether. Senate Resolution 138 would not limit the use of the legislative filibuster, nor would it eliminate delay

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<sup>21</sup> See Cornyn, *supra*, at 27-29 (listing statutes).

<sup>22</sup> See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181 (1997).

altogether. It would only ensure that a majority of the Senate could vote on a judicial nominee when it was ready to do so.

On first blush, Senate Resolution 138, just like other proposals designed to amend rules that have contributed to a broken judicial confirmation process, might be regarded as dead on arrival. There is no reason to think that the filibustering minority would permit such a rules change, particularly when the Senate rules themselves require an even greater majority to change the rules than is required to invoke cloture itself. The answer is that the use of supermajority requirements to bar the change in rules inherited from a prior session of Congress would itself be unconstitutional, and therefore Rule XXII must yield to the Constitutional principle of majority rule.

#### Conclusion

For more than two centuries, an unwritten Senate rule against the filibustering of judicial nominees has reinforced the constitutional design of the judicial confirmation process. The recent break with this longstanding tradition has set a worrisome precedent that raises serious constitutional questions. By intruding upon the power constitutionally vested in the President to nominate and appoint federal judges, and upon the power of the Senate majority to consent to the President's nominees, judicial filibusters pose a unique threat both to the separation of powers and to the independence of the federal judiciary. Moreover, should the Senate decide on its own initiative to repeal the offending use of the filibuster rule, thereby codifying the tradition of ample but not endless debate of judicial nominees, an even stronger argument could be made that any attempt to use the filibuster to entrench the filibuster itself would be unconstitutional.

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<sup>23</sup> Testimony of Dr. John C. Eastman, Professor of Constitutional Law, Chapman University School of Law, before the Committee on Rules and Administration of the United States Senate (available at



