

### **The Role of the Senate in Judicial Confirmations**

**by Stephen B. Presser**

For the last few weeks, a constitutional crisis has been brewing in the United States Senate. It is a constitutional crisis all but ignored by the public, but the resolution of this crisis is likely to determine the nature of federal jurisprudence for the next few decades. At one level, the struggle in the Senate is a struggle over one or two notable nominees to the lower federal courts, most particularly Miguel Estrada and Priscilla Owen, but, at a deeper level, the struggle is over what many of the Senate Democrats have called “judicial ideology,” by which they mean a disposition to decide particular cases in a particular manner. For the first time in memory, in public, one political party, the Senate Democrats, has taken the position not only that judges should be picked based on their preference for designated outcomes in cases that might come before them, but also that the Senate ought to be an equal partner in picking judges and that nominees who come before the Senate have a burden of persuading sixty Senators (the number necessary to cut off debate in the Senate), that they are worthy of ascension to the bench.

For those of us who still believe that judging ought to be impartial, that there actually is content to the rule of law, and that it ought not to be the task of judges to make policy from the bench, there is cause for great alarm over what is now happening in the Senate. It was that alarm, of course, even before the current imbroglio, that led candidate Bush to proclaim that he wanted to appoint judges who would interpret, not make law, and to point to Supreme Court Justices Antonin Scalia and Clarence Thomas as his models. Now that he has sought to do just that, those uncomfortable with the jurisprudence of Scalia and Thomas, those who would like to see constitutional interpretation as something other than fidelity to the original understanding of that document, have sought to deny Bush nominees confirmation. There is reason to be upset then, not only over the Senate’s frustrating the constitutional task of the President, but also over the theory of judging that lies behind the Democrats’ refusal to allow Senate votes on some of the Bush nominees.

Let’s take the constitutionality of what Miguel Estrada’s opponents have done as our first point of inquiry. Estrada served with distinction in the Solicitor General’s office. In both private practice and in the government, he was a respected member of the bar of the United States Supreme Court. He had a splendid law school record at Harvard Law School, and he secured a prestigious clerkship with Supreme Court Justice Anthony Kennedy. He had hearings before the Senate Judiciary Committee. He was unanimously rated “well-qualified” by the American Bar Association body charged with passing on nominees, formerly the “gold-standard” of qualifications for the bench, by the very Senate Democrats who now oppose his nomination. These opponents know that if the Estrada nomination is ever brought to a vote on the Senate floor, he will be confirmed, but they have managed to avoid such a vote by filibustering and invoking Senate Rule XXII. That rule, the “cloture” provision, states that the only way to cut off debate on a nomination or a pending bill is by a motion for which 60 of the 100 senators vote “aye.” Rule XXII and the other Senate Rules can

be changed only by the vote of two-thirds of the senators present, so that, as long as Estrada’s opponents number more than 40, they can prevent a vote on his nomination. As this is written, the Estrada opponents have just begun employing the same tactic to prevent a vote on the nomination of Priscilla Owen, a Texas Supreme Court Justice with credentials as impressive as those of Estrada, and who also received the ABA’s “well-qualified” ranking. Other Bush nominees are likely to be treated in an identical matter.

By invoking Senate Rule XXII, used now for the first time in connection with a nominee to the lower federal courts (there is one instance of the practice having been used against a Supreme Court nominee, the bipartisan move against Lyndon Johnson’s nomination of Abe Fortas for chief justice, which nomination was eventually withdrawn), the Democrat minority in the Senate, has, in effect, raised the number of Senators necessary to confirm a nominee from the mere majority previously regarded as sufficient to confirm, to the super-majority requirement of 60. As John C. Armor, writing for UPI, recently observed, since other constitutional provisions, notably the clauses regarding treaties, impeachments, expelling members, overriding presidential vetoes and constitutional amendments expressly require two-thirds supermajorities, the clear implication is that the clause regarding confirmation of judicial nominees, which merely speaks of “Advice and Consent,” should not.<sup>1</sup> One could then argue that Senate Rule XXII, at least when used to defeat a judicial nominee by denying him a vote on the Senate floor, unconstitutionally raises the number of votes required for confirmation, and thus ought not to be permitted to frustrate the President’s appointment power. Intriguingly enough, when the same problem was affecting appointments during the term of President Clinton, one of his most distinguished counsel, Washington super-lawyer Lloyd Cutler, made just that argument in an op-ed piece published in the *Washington Post* on April 19, 1993, suggesting that the unconstitutional rule be abolished. This could be accomplished, Cutler wrote, if

[t]he Senate Rules Committee, [which the Republicans now control], would approve an amendment of Rule XXII permitting a majority to cut off debate after some reasonable period. When the amendment comes before the Senate, the [Republicans] would need to muster only 51 favorable votes (or 50 plus the vice president’s vote).<sup>2</sup>

Cutler recommended that a senator

would raise a point of order that this number is sufficient either to pass the amendment or to cut off debate against it, because the super-majority requirements of Rule XXII are unconstitutional. The vice president would support this view, backed up by an opinion of the attorney general. Following Senate custom on constitutional points, the vice president would refer the question to a vote of the entire Senate, where the same 51 or more votes, or 50 plus the vice president’s vote, would sustain it.<sup>3</sup>

At that point Rule XXII would be history and the problem of unconstitutionality would vanish, as the Senate would be able to cut off debate by a mere majority vote. Cutler had recommended this course to Democrats, of course, but his strategy could be used by Republicans, as well. Unfortunately, there is great reluctance to overturn longstanding Senate practice, such as Rule XXII, but if there ever were an occasion for it, it might well be the first time in history that Rule XXII has been used to defeat a lower-court nominee.

Overtaking Rule XXII at this time, or using some other means to stop the frustration of Estrada's and Owen's appointments would also be wise because the motivation behind the Democrat Senators' frustrating tactics is a serious revision of the original understanding of the appointment powers and the Senate's role in the process. In two hearings on the judicial appointments process while the Democrats still controlled the Senate, in an effort to challenge the nomination philosophy candidate Bush had expressed on the campaign trail, Senator Charles Schumer of New York made clear his belief (buttressed by some academics friendly to the Democrats' point of view) that it ought to be the task of the Senate to achieve a "balance" of judicial ideologies on the bench, and that each nominee had a burden of satisfying the Senators he or she was qualified for the position.<sup>4</sup> By "judicial ideology," Senator Schumer made clear at those hearings, he meant a belief that particular judicial decisions, including apparently many regarding race, religion, and abortion, were correctly decided and ought to be expansively applied and followed in the future. Senator Schumer (and some of his witnesses) strongly suggested that any Bush nominee with contrary views ought not to be permitted to be confirmed unless a nominee with a "judicial ideology" favored by Senator Schumer and those like him was also confirmed, in order to maintain "balance."

There is, of course, no constitutional requirement of "balance" on the bench, and, more importantly, Senator Schumer's concept of "judicial ideology," seems inconsistent with the Constitution's presumption with regard to judging. *Federalist No. 78*, and the writing of the Founders tells us that the proper "judicial philosophy" (not "judicial ideology"), is to decide cases according to a neutral interpretation of the Constitution and laws.<sup>5</sup> Judges are not to arrive on the bench with a preconceived set of responses or determined to implement a particular "ideology." Senator Schumer, pursuant to ascendant ideas in the legal academy about judges as forces for social change, has a different conception of judging, and wants a bench that will implement the policies he and many of his fellow Democrats favor. President Bush has made clear that he does not share that view, and his remarks about preferring judges who will not legislate from the bench (the views also of Scalia and Thomas) put him squarely at odds with Senator Schumer. If the President is forced (by the unconstitutional application of Rule XXII, or by other means) to give up half of his nominations to satisfy some Senators' ideological preferences, his constitutional appointment powers will have been severely compromised.

Those powers would be similarly compromised if Senator Schumer's notion that nominees have a burden of proof they must meet to satisfy ideologically-driven Senators goes unchallenged. According to *The Federalist*, at least, and according also to the prevailing practice in more than two centu-

ries of judicial appointments, a presumption of fitness has been generally accorded to presidential judicial nominees, and the Senate has properly opposed nominees only when they have been lacking in character or professional legal accomplishments. The authors of *The Federalist* made clear that the assignment of the "Advice and Consent" role to the Senate was to prevent the President from using the nomination process to reward unqualified or corrupt family members or cronies, and not to prevent him from actions taken in good faith to appoint qualified persons of high character. It is true that some nominees have been rejected or questioned on other grounds throughout our history (one thinks of the criticism leveled at Louis Brandeis, which did not prevent his confirmation, and that at Robert Bork, which did). It has been almost unheard of, however, for this kind of ideological litmus test to be applied to deny a confirmation vote to lower court nominees.

If President Bush is made to give in to the tactics of the Senate Democrats on this point, he will not only have suffered an ignoble political defeat, but he will have failed in his oath to support the Constitution, because he will have compromised his powers and will have seriously undermined the rule of law on which the Constitution depends. One suggestion that has been made, for example, by Victor Williams, is to do an end run around the Senate Democrats, by making a series of recess appointments of his judicial nominees. As Mr. Williams recently pointed out in the *National Law Journal*,

Clause 3 of Article II, Section 2, states: "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." The recess-appointments clause protects the government from Senate inaction and guarantees the ceaseless functioning of the judiciary. More than 300 jurists have risen to the bench via a recess appointment: Earl Warren, William Brennan, Potter Stewart, Griffin Bell and Augustus Hand, to name a few.<sup>6</sup>

Mr. Williams notes that John F. Kennedy "recess-appointed more than 20% of his judges, and each was subsequently confirmed for a tenured bench. . . . It was just such a Kennedy recess appointment that placed Thurgood Marshall, then a successful lawyer for the National Association for the Advancement of Colored People, on the 2d Circuit."<sup>7</sup> President Clinton made similar use of the recess appointment power, and there is, thus, precedent for President Bush to go that route. Still, the Republicans criticized Clinton for his attempt to circumvent the confirmation process through recess appointments. Thus, recess appointments for President Bush's nominees, though they ought to be considered if there are not other alternatives, are still a dubious attempt to make two wrongs equal a right.

My casebook co-author, Catholic Law School's Dean Douglas Kmiec, recently wrote in the *Wall Street Journal* that what is being done to Miguel Estrada is a "national disgrace."<sup>8</sup> He favors stopping the Democrat Senators' tactics by a frontal attack on "Senate Rule V, [which] provides that the rules of the Senate shall continue from one Congress to the next unless amended by two-thirds of those present and voting."<sup>9</sup> Dean Kmiec notes that "[t]his violates fundamental law as old as Sir William Blackstone, who observed in the mid-18th century that 'Acts of Parliament derogatory from the power of subsequent parliaments bind not.'"<sup>10</sup>

Kmiec also observes that

the Supreme Court has repeatedly held that the legislature does not have the power to bind itself in the future. As the Court stated in *Ohio Life Ins. and Trust Co. v. Debolt* (1853), for the political process to remain representative and accountable, “every succeeding Legislature possesses the same jurisdiction and power . . . as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less.”<sup>11</sup>

This is a good strategy for preventing the filibuster’s use as a means of changing the constitutional requirements for nominees, and would solve the problem, but perhaps such drastic means would not be necessary if President Bush (now that the War in Iraq is coming to an end and rebuilding has begun) were to make a few prime-time speeches exposing the manner in which the Senate is frustrating his appointment power through tactics of dubious constitutionality and in complete derogation of the traditional conception of the role of judges, Senators, and Presidents.

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## Judicial Appointments: A Constitutional Analysis by Michael B. Rappaport

In “The Role of the Senate in Judicial Confirmations,” Professor Stephen Presser eloquently argues that Senate Democrats have behaved improperly concerning the nominations of Miguel Estrada and Priscilla Owen. Professor Presser rightly condemns the Senate Democrats for opposing Estrada and Owen because they would seek to apply the actual Constitution rather than the political preferences of Senate Democrats. Presser also justly criticizes the Senate Democrats for taking the nation another step down the road to politicization of judicial appointments by filibustering lower court nominees based on political disagreements.

While I agree with these criticisms of Senate Democrats, Professor Presser also argues that the Senate Democrats have acted unconstitutionally. It is here where Presser and I part company. Although the Senate Democrats have a faulty constitutional vision, their tactics have not been unconstitutional.

When politicians behave badly, as the Senate Democrats have, there is a tendency, especially among constitutional lawyers, to view their actions as violating the Constitution. Although this reaction is understandable, defenders of the rule of law must resist the temptation, because it is essentially commits the same error, of reading one’s political preferences into the Constitution, that our opponents have made.

Professor Presser addresses three main constitutional issues. First, and most importantly, he maintains that the filibuster, especially as used against judicial nominees, is unconstitutional. Second, he appears to argue that the Constitution contemplates that the President should have the primary role in appointments

and that the Senate should defer to presidential nominees. I disagree with both of these arguments. Finally, Presser raises the possibility of the President making recess appointments of these nominees. Although his argument here is hard to interpret, I also believe that we have different positions on this issue.

First, Professor Presser mistakenly argues that the filibuster is unconstitutional, because it is inconsistent with a constitutional requirement of majority rule in the Senate. In a series of articles, John McGinnis and I have shown that when the Constitution does not specifically mention a voting rule, as with the confirmation of judicial nominees and the passage of bills, it allows each house to choose the voting rule it desires.<sup>12</sup>

For example, after the Republicans gained control of the Congress in 1994, the House of Representatives enacted a rule that required a three-fifths supermajority to pass increases in income tax rates. Liberals such as Bruce Ackerman claimed that the three-fifths rule was unconstitutional. Relying on an argument that Presser also uses, Ackerman contended that the fact that the Constitution specifically requires supermajority rules in certain instances, such as treaties and impeachments, indicates that majority rule was required in other situations. McGinnis and I argued, however, that this inference was unwarranted. When it does not specify a voting rule, the Constitution leaves the choice of the voting rule to the individual house by providing that “each House may determine the Rules of its Proceedings.”<sup>13</sup> Rules of proceedings include, of course, voting rules.

The Constitution does place one important limit on each house’s voting rules. It prevents a house from entrenching a voting rule against repeal by a majority.<sup>14</sup> For example, it would be unconstitutional for the House to require anything more than a majority to repeal the three-fifths rule.

There are at least two reasons why the Constitution allows each house to select ordinary voting rules, but prevents them from entrenching those voting rules against repeal by a majority. First, while ordinary voting rules can require a supermajority to enact a measure, these voting rules can be changed by a majority. By contrast, entrenched rules cannot be changed by a majority and might even be drafted to permit changes only with unanimous support. Consequently, entrenched rules function like constitutional amendments. The Constitution, however, requires that such amendments be passed only through the double supermajority rule specified in Article V. Second, legislatures were historically understood not to have the authority to bind future legislatures, as Blackstone’s statement that Presser quotes suggests. While an ordinary voting rule that requires a supermajority does not bind a future legislature, because a majority of that legislature can change the voting rule, entrenched rules do restrain a majority of the future legislature.

The same analysis applies to the filibuster. The filibuster rule—the rule that allows Senators to prevent a vote by continuing to debate unless three-fifths of the Senate votes to end debate—is not unconstitutional. It is simply a Senate rule that has the effect of requiring three-fifths of the Senate to take actions and is therefore as constitutional as the House three-fifths rule for income tax rate increases. What is problematic and distinguishes the filibuster from the three-fifths rule is that the filibuster rule cannot be changed by