

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.”¹¹

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.¹²

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.”¹³ 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.¹⁴ 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

a majority. There is a separate provision that allows a filibuster of changes in the Senate rules—call it the rules filibuster—which requires not three-fifths, but two-thirds of the Senate to end debate. It is the rules filibuster, not the ordinary filibuster, that is unconstitutional.

Because it is only the rules filibuster that is unconstitutional, the filibustering of Estrada has not been unconstitutional. If the Republicans thought that the Estrada filibuster was improper, they could seek to amend the Senate rules to prevent filibusters of judicial nominees (or even just to exempt the Estrada nomination from the filibuster). If the Senate Democrats chose to filibuster that amendment, then they would be acting unconstitutionally and the Senate Republicans could seek to have the Senate declare the rules filibuster unconstitutional. Significantly, several past Vice Presidents, in their role as President of the Senate, have opined that a majority of the Senate must have some ability to change the rules, despite the existence of the rules filibuster. While a clear holding that the rules filibuster was unconstitutional would certainly have an effect on legislative practice, it would have less of an effect than a holding that the filibuster was unconstitutional, because the former holding would allow supermajority rules in both the House and Senate to continue to operate.

Although a majority of the Senate would be able to amend the ordinary filibuster rule under this analysis, that does not mean that the rule would always be amended (or an exception created) whenever a majority wanted to end debate. Senators may vote to end a particular filibuster, but not be willing to amend the filibuster rule to stop that filibuster. Senators may be reluctant to create exceptions to the filibuster rule for a variety of reasons, including respect for the traditions of the Senate or a preference for generally operating the Senate in accordance with the filibuster rule.

Let me now turn to Professor Presser's second constitutional claim. Professor Presser appears to argue that the Constitution assigns to the President the primary role in appointments and limits the Senate to rejecting candidates who lack good character or professional accomplishments. I say that he "appears" to make this argument, because his essay expressly refers only to the intent of the Framers and to a two-century tradition. If Presser does believe that the Constitution assigns the Senate this secondary role, I disagree with him. There is nothing in the Constitution that prohibits the Senate from assessing nominees based on the same criteria as the President. The text says that the President should "nominate" and that the Senate should give "Advice and Consent." To conclude that the President may consider a broader range of matters when he nominates than the Senate may consider when it consents, one would need evidence, which has not been provided, that the terms "nominate" and "Consent" had these special meanings at the time of the Framing.

What the Constitution does do, however, is to establish a process in which the Senate will ordinarily choose to exercise a more limited role than the President. The Constitution gives the President a first mover advantage, which places the President in a different position than the Senate. The President can nominate essentially anyone that he chooses, but the Senate must then determine whether to confirm this one person. When considering a particular individual, it is natural for the Senate and the public to examine the individual's personal merits. If he is qualified and hon-

orable, then it seems unfair not to confirm him. Moreover, if he is rejected based on the political content of his legal views, then this would simply force the President to nominate another individual, causing additional controversy and delay.

While the appointment process gives the President an advantage, that does not mean that the Constitution *requires* that the Senate be deferential. Senatorial deference may be a result of the process that the Constitution established, but it is not one of the rules that govern the process. This point can be illustrated by considering the question whether Representatives should follow the views of the electorate on significant public questions. While the Constitution establishes an electoral process that provides Representatives with an incentive to consider the electorate's opinions on important questions, there is no constitutional requirement that the Representatives follow the public's views.

The third constitutional issue addressed by Professor Presser is the possible recess appointment of Estrada or Owen. Under the Recess Appointments Clause, the President can make appointments to vacant offices when the Senate is in an appropriate recess. Professor Presser's argument on this issue is difficult to interpret. It is not clear whether he believes a recess appointment of Estrada or Owen would be constitutional but questionable policy, constitutional but of uncertain political expediency, or simply unconstitutional. Presser notes that Presidents have used this power to appoint judges in the past, including Supreme Court justices, and that the power protects the government from Senate inaction. Nonetheless, he writes that "Republicans criticized Clinton for his attempt to circumvent the confirmation process through recess appointments," that such appointments ought to be employed only as a last resort, and that they would be "a dubious attempt to make two wrongs equal a right."

It is also not clear why Professor Presser has such a dim view of recess appointments. While Republicans may have criticized President Clinton's use of recess appointments, they have also used the filibuster that Presser criticizes. Moreover there was less justification for President Clinton to use recess appointments, because the Republicans had not filibustered any of his judicial nominees.

In fact, at first glance, it might seem that recess appointments would be an appropriate method for appointing persons whom the President believes the Senate has treated unfairly. When the Senate refuses to confirm a nominee for questionable reasons, the President could recess appoint that person. That would allow the person to serve, under public scrutiny, and to prove that he could perform the job. But there would be a check on the President, since the appointment of an unqualified person would cause the President to suffer politically. Thus, one might view the Recess Appointments Clause as a curb on the Senate's ability to behave unreasonably as to appointments. This use of the Recess Appointments Clause might seem especially appropriate as to someone in Estrada's position, who has received a hearing, been approved, been sent to the full Senate, and would be confirmed if he were not filibustered. On the other hand, it might be reasonably argued that recess appointments for judicial offices are often ineffective. While they allow the nominee to serve, it is only for a short time and the recess appointment may cause some Senators to harden their resolve against the full appointment.

Another reason that recess appointments are often considered questionable is that the President's authority appears so extensive. Under the prevailing interpretation, a recess appointment can be made for any office so long as the Senate is in an appropriate recess, even if the vacancy initially occurred while the Senate was in session. As a result, virtually any nominee who is not quickly confirmed by the Senate can be recess appointed and therefore this power appears to circumvent the confirmation process.

In my view, the Clause should be interpreted more narrowly to permit recess appointments only when the vacancy arises during a recess *and* the appointment is made during that recess. While there is not space here to fully develop the argument, this interpretation is superior in terms of text, history, and structure. First, this interpretation better fits the language of the Clause, which provides the President with the power "to fill up all Vacancies that may happen during the Recess of the Senate."¹⁵ This language suggests a vacancy that arises during a recess, not one that originates while the Senate is in session and continues into a recess. Second, this interpretation accords more with constitutional structure and purpose, because it furthers what appears to have been the evident purpose of the Clause—to allow appointments during long periods when the Senate was not in session but not to permit the President to circumvent the confirmation requirement. Third, this interpretation also is superior in terms of the original understanding of the Constitution. For example, Edmund Randolph, an important constitutional Framer, wrote a legal opinion in 1792, as the first Attorney General, concluding that a vacancy that arose while the Senate was in session could not be filled by a recess appointment even when the Senate was in recess.¹⁶

Under my view, then, Estrada and Owen could not be recess appointed to the judicial offices for which they have been nominated. Even if these offices first became vacant during recesses, those recesses have long since ended. Yet, it might still be possible for the President to recess appoint these nominees. If a vacancy were to arise, during an appropriate recess, on the circuits for which Estrada and Owen have been previously nominated, the President could recess appoint them during that recess.

In the end, while I share Professor Presser's view that the filibustering of Estrada is a travesty (as would be the filibustering of Owen), I do not believe that the Senate is usurping the President's appointment powers or that the filibuster is unconstitutional. The problems with the behavior of the Senate Democrats is that they are further politicizing an already excessively politicized appointment process and are filibustering nominees because those nominees would apply the original meaning of the Constitution rather than the Senate Democrats' political preferences.

The nominations of Estrada and Owen are now significant political questions and the President should treat them as such. Unfortunately, as the judiciary's powers have expanded, judicial appointments have come to require the expenditure of more political capital. Fortunately, the extremity of the Senate Democrats' position makes their actions politically vulnerable. The President should use his popularity and position to highlight both the Senate Democrats' unprecedented behavior and how they urge the appointment of minorities, but then filibuster a truly superb nominee like Estrada. The President should also emphasize Estrada's per-

sonal odyssey from teenage immigrant to lawyer of extraordinary excellence. This is a political fight from which the President should not shy away, since it involves an important and worthy cause and is a contest which the President can win.

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Footnotes

1. John C. Armor, *Stop Judicial Filibusters*, UNITED PRESS INT'L, Mar. 13, 2003 (citing "non-democratic clauses in the Constitution . . . Some requir[ing] supra-majorities; some forbid[ing] certain decisions regardless of majorities in favor").
2. Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23.
3. *Id.*
4. *See Judicial Nominations: Hearings Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of Senator Charles Schumer) (taking testimony from multiple panels and discussing the nomination of Miguel Estrada). Senator Schumer stated, "Now, for the first time in a long time, there is balance on the DC circuit—four Republican judges, four Democrats. That doesn't mean each case is always decided right down the middle, but there's balance. Some of us believe that this all-important court should be kept in balance." *Id.*
5. *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body:").
6. Victor Williams, *Do a Recess Appointment*, NAT'L L.J., Mar. 10, 2003, available at <http://www.nlj.com/oped/031003williams.shtml>.
7. *Id.*
8. Douglas W. Kmiec, *Tedious—and Unconstitutional*, WALL ST. J., Mar. 6, 2003, at A12.
9. *Id.*
10. *Id.*
11. *Id.*
12. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Supermajority Rules: A Defense*, 105 YALE L.J. 483 (1995).
13. U.S. CONST. art. I, § 5, cl. 2.
14. *See* McGinnis & Rappaport, *The Constitutionality of Supermajority Rules: A Defense*, *supra* note 12, at 500-11.
15. U.S. CONST. art. II, § 2, cl. 3 (emphasis added).
16. *See, e.g.*, John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993) (describing the Attorney General's opinion that "a recess appointment could be made only if the vacancy occurred during a recess of the Senate" (citing Letter from Edmund Randolph to Thomas Jefferson (July 7, 1792), *quoted in* John J. Reardon, EDMUND RANDOLPH: A BIOGRAPHY 205 (1974))).