UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5422

JUDICIAL WATCH, INC.,

Appellant,

v.

THE UNITED STATES SENATE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

Patricia Mack Bryan, Bar #335463
Senate Legal Counsel

Morgan J. Frankel, Bar #342022
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250
(202) 224-4435

Counsel for Appellees

July 1, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

This appeal arises from a civil action in the district court, No. 03-CV-1066. The plaintiff-appellant is Judicial Watch, Inc. The defendants-appellees are the United States Senate, Emily Reynolds, in her official capacity as Secretary of the Senate, and William H. Pickle, in his official capacity as Sergeant at Arms of the Senate. No *amici curiae* appeared, and no parties intervened, below or in this Court.

B. Ruling Under Review

The ruling under review on this appeal, issued by District Judge Colleen Kollar-Kotelly on October 6, 2004, granted the motion of defendants United States Senate, Emily Reynolds and William H. Pickle, in their official capacities, to dismiss the complaint. *Judicial Watch, Inc. v. United States Senate, et al.*, 340 F. Supp. 2d 26 (D.D.C. 2004).

C. Related Cases

This appeal has not previously been before this Court. There are no related cases pending in this Court or in any other court.

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BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

Plaintiff-appellant asserted jurisdiction below under 28 U.S.C. § 1331. This Court has jurisdiction, under 28 U.S.C. § 1291, over this appeal from the October 6, 2004 Order dismissing the complaint for lack of standing. A timely notice of appeal was filed by plaintiff-appellant on November 22, 2004.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents two issues for review:

1) Whether the district court correctly held that Judicial Watch lacked standing to challenge the procedural rules governing floor debate on judicial nominations in the United States Senate; and

2) Whether the dismissal of the complaint should be affirmed on the alternative grounds that plaintiff's claims (i) are barred by legislative immunity provided by the Speech or Debate Clause of the Constitution, and (ii) raise a non-justiciable political question.

STATUTES AND REGULATIONS

Senate Rules V and XXII, which are challenged by plaintiffs, and Rule XXXI addressing the consideration of nominations, are set forth in the separately bound Addendum accompanying this brief.

STANDARD OF REVIEW

The district court's grant of a motion to dismiss for lack of standing is reviewed de novo. *See Information Handling Services, Inc. v. Defense Automated Printing Services*, 338 F.3d 1024, 1029 (D.C. Cir. 2003).

STATEMENT OF THE CASE

A. Introduction

Plaintiff-appellant Judicial Watch brought this suit challenging the constitutionality of the Senate's internal rules governing debate in the chamber as applied to the consideration of judicial nominations. Specifically, plaintiff claims that Senate Rule XXII's 60-vote requirement for invoking cloture to end debate on a pending matter over the objection of a Senator creates an unconstitutional requirement for confirming judicial nominations. And, plaintiff asserts, that requirement has blocked nominations and led to vacancies on the D.C. and Fifth Circuits, causing delay in its appeals before those courts.

Finding that plaintiff did not have standing to bring these claims, the district court dismissed the complaint for lack of Article III jurisdiction.

Since the district court's dismissal, the Senate has confirmed nominees to fill the two judgeships whose vacancies plaintiff alleged had delayed its appeals. The Senate has also since confirmed four of the six additional judicial nominations that plaintiff mentions in its opening brief in this appeal, including another judge to this Court. In light of these developments, plaintiff's allegations of injury from delay in its appellate litigation, which the district court correctly held insufficient to establish standing, have become even more attenuated.

All that remains of Judicial Watch's claimed injury, therefore, is its general allegation that filibusters of judicial nominations harm the proper and efficient functioning of the judicial system. Well-established caselaw demonstrates that such a generalized harm is inadequate to create Article III jurisdiction. Accordingly, this Court should affirm the dismissal of plaintiff's complaint. Alternatively, the dismissal should be affirmed because plaintiff's claims are barred by the Speech or Debate Clause and its complaint raises a non-justiciable political question.

B. Plaintiff's Allegations

Judicial Watch filed suit on May 14, 2003, against the United States Senate, Secretary of the Senate Emily Reynolds, and Senate Sergeant at Arms and Doorkeeper William H. Pickle challenging the application of Senate rules

to the floor consideration in the last Congress of the nominations of Miguel Estrada and Priscilla Owen to the D.C. and Fifth Circuits, respectively. In its complaint, Judicial Watch alleges that it "is a non-profit, tax-exempt educational foundation," Compl. ¶ 5 [Joint Appendix ("J.A.") 11], that "prosecutes lawsuit[s] . . . to highlight and inform the public about issues [it] believes are of public importance and to hold public officials accountable." *Id.* ¶ 6 [J.A. 11]. Judicial Watch asserts that since 1994, it "has filed more than one hundred lawsuits . . . in furtherance of its educational mission," *id.* ¶ 7 [J.A. 11], it "files the majority of its lawsuits in federal court in the District of Columbia," *id.* ¶ 8 [J.A. 11], and, at the time it filed this action, it had "a significant number of lawsuits pending in federal courts across the United States." *Id.* ¶ 10 [J.A. 12]. Judicial Watch claims that it "has experienced substantial delays in the disposition of matters pending before the federal courts, and before the D.C. Circuit in particular," *id.* ¶ 15 [J.A. 13-14], because of the "significant number of vacancies in federal judgeships," on those courts. *Id.* ¶ 11 [J.A. 12]; *see also id.* ¶¶ 13-15, 31 [J.A. 12-14, 17].[1] Judicial Watch asserts that these vacancies impair its "interest in the timely and efficient functioning of the judiciary." *Id.* ¶ 7 [J.A. 11].

Regarding the Estrada and Owen nominations to the D.C. and Fifth Circuits, plaintiff asserts, "Based upon published reports, at least a simple

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[1] Judicial Watch references six D.C. Circuit appeals, all since resolved, and two cases in federal district courts in Texas that it claims "demonstrate" the delay that its appeals have suffered. *See* Compl. ¶¶ 10, 15 [J.A. 12, 13-14].

majority of fifty-one (51) U.S. senators intend to vote in favor of the Estrada and Owen nominations." *Id.* ¶ 24 [J.A. 15]. Plaintiff alleges that, "[b]y refusing to end debate on the two nominations, a minority of . . . senators have prevented and are continuing to prevent [Estrada and Owen] from being confirmed." *Id.* ¶ 26 [J.A. 16]. Consequently, plaintiff argues, the use of Rule XXII effectively "imposes an additional, unconstitutional requirement that judicial nominees be confirmed by a supermajority of sixty (60) votes rather than the simple majority of fifty-one (51) votes required by Article II, Section 2 of the United States Constitution." *Id.* ¶ 27 [J.A. 16]. And, plaintiff continues, because Rule XXII requires a two-thirds vote to invoke cloture to amend the Senate's rules, a majority of Senators are unconstitutionally prevented from changing the cloture rule without achieving "an even larger supermajority" than required for cloture on other matters. *Id.* ¶ 29 [J.A. 16].

Plaintiff concludes by claiming that "[b]ut for the efforts of a minority of U.S. senators to use Senate Rules XXII and V to prevent the confirmation" of Estrada and Owen,[2] these nominees "would have been confirmed, and will be confirmed, for appointments to the D.C. Circuit and Fifth Circuit, respectively, and their confirmations would have lessened, and will lessen, the high vacancy rates" that have caused "significant and prejudicial delays" in Judicial Watch's litigation before those appellate courts. *Id.* ¶ 31 [J.A. 17]. To remedy this

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[2] Rule V provides that the Senate's rules "shall continue from one Congress to the next Congress unless they are changed as provided in these rules."

alleged harm, plaintiff requests that the Court "declar[e] that Senate Rules XXII and V are unconstitutional as applied to judicial nominees," and "enjoin[] Defendants from continuing to prevent votes on the [Estrada and Owen] nominations . . . ." *Id.* at 9 [J.A. 17].

C. Proceedings Below

On August 7, 2003, defendants moved to dismiss plaintiff's complaint on three grounds: (i) plaintiff lacks standing; (ii) its claims are barred by legislative immunity; and (iii) the complaint raises a non-justiciable political question.[3] On October 6, 2004, after full briefing, the district court granted defendants' motion and dismissed plaintiff's complaint for lack of standing. *Judicial Watch, Inc. v. United States Senate*, 340 F. Supp.2d 26 (D.D.C. 2004).

D. The District Court's Decision

The district court found that plaintiff failed to satisfy any of the three irreducible parts of Article III standing – injury-in-fact, causation, and redressability. As to injury-in-fact, the court determined that plaintiff's allegations of delay in the resolution of its appeals and general harm to the proper and efficient functioning of the judiciary were insufficient: "Plaintiff has failed to establish a legally protected interest and therefore does not possess standing to maintain this action." *Id.* at 36. The court explained that none of

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[3] Simultaneous with filing its opposition to the motion to dismiss, plaintiff cross-moved for summary judgment. The district court granted defendants' motion to hold in abeyance briefing on plaintiff's summary judgment motion pending resolution of the motion to dismiss. *See Judicial Watch, Inc. v. United States Senate*, 340 F. Supp.2d 26, 28 n.1 (D.D.C. 2004).

the three sources of authority that Judicial Watch relies on – 28 U.S.C. § 44 (fixing the number of judgeships for each court of appeals); the First Amendment; and a general right to the proper administration of justice (arising, apparently, from the Due Process Clause), *see* 340 F. Supp.2d at 32 – gives plaintiff a legally protected interest in the efficient functioning of the courts or the resolution of its appeals within a certain period. *See id.* at 32-35.

The court also found causation lacking. Acknowledging plaintiff's argument that filibusters had caused the Senate not to confirm the nominees at issue, the court explained that "[t]hese arguments do not connect the alleged harm, delayed justice, to the conduct of Defendants." *Id.* at 36. Rather, to establish causation, "Plaintiff must go one step further; it must connect two vacancies on the judiciary to delayed justice," which, the court found, "Plaintiff cannot do." *Id.* The court held that "[t]he connection between judicial vacancies and Plaintiff's claims of delay are simply too attenuated to satisfy causation under the standing doctrine." *Id.*

Completing its analysis, the court found that plaintiff had also failed to meet the third prong of standing – redressability. The court reasoned that, even if an order declaring Senate Rules V and XXII unconstitutional would be proper, such an order "would fail to redress Plaintiff's injuries," because the Senate is "a body of unlimited debate." *Id.* at 37. As the court explained, striking down the rule that provides a mechanism to close debate would not end debate on judicial nominees and require the Senate to vote on confirmation;

rather, it would mean only that "'the Senate could return to its former practice of allowing unlimited debate unless there existed unanimous consent to close debate,'" *id.* at 37-38 (quoting *Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C.), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998) (table)), making confirmation of the nominees even less likely. Finally, the district court explained that the declaratory and injunctive relief sought by plaintiff raised "serious separation of powers concerns," as granting such relief "would amount to an unprecedented exercise of the judicial power, directed at the core functions of the United States Congress." *Id.* at 38.

Accordingly, the court held that plaintiff failed to satisfy any of the requirements for Article III standing and dismissed the complaint for lack of jurisdiction.[4]

STATEMENT OF FACTS AND BACKGROUND

After setting forth the factual background and current status of the challenged judicial nominations, defendants will discuss more generally the Senate's procedures for considering nominations and the development of the Senate's rules for debate in order to provide context to plaintiff's challenge.

A. The Estrada and Owen Nominations

On May 9, 2001, during the 107th Congress, President Bush submitted to the Senate the nominations of Miguel Estrada for the D.C. Circuit and Priscilla

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[4] The court accordingly did not address defendants' arguments for dismissal under the Speech or Debate Clause and the political question doctrine. *See* 340 F. Supp.2d at 38 n.8.

Owen for the Fifth Circuit. *See* 147 Cong. Rec. S4773 (daily ed. May 9, 2001). The Judiciary Committee held hearings on both nominations, *see* 148 Cong. Rec. D805 (daily ed. July 23, 2002) (Owen); *id.* at D998 (daily ed. Sept. 26, 2002) (Estrada), voted not to report the Owen nomination to the full Senate, *id.* at D899 (daily ed. Sept. 5, 2002), and took no further action on the Estrada nomination. Upon the adjournment of the 107th Congress, both nominations were returned to the President under Senate Rule XXXI.6. *See id.* at D1181 (daily ed. Nov. 20, 2002).[5]

At the beginning of the 108th Congress, President Bush re-submitted the nominations of Estrada and Owen. 149 Cong. Rec. S65 (daily ed. Jan. 7, 2003). The Judiciary Committee voted to report favorably both nominations to the Senate, *id.* at D75 (daily ed. Jan. 30, 2003) (Estrada); *id.* at D310 (daily ed. Mar. 27, 2003) (Owen), and the nominations were subsequently brought to the floor. *Id.* at S1842 (daily ed. Jan. 30, 2003) (Estrada); *id.* at S4892 (daily ed. Apr. 7, 2003) (Owen). On the floor, both nominations were subjected to prolonged debate. Multiple times the Senate defeated motions to close debate on

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[5] Senate Rule XXXI.6 provides, "if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President . . . ." Except at the end of a Congress, this requirement may be waived. *See* Elizabeth Rybicki, Congressional Research Service (CRS) Report, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 12 (updated May 24, 2005) [Addendum 2]; Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 946 (Alan S. Frumin ed., rev. ed. 1992) [hereinafter "*Riddick's Senate Procedure*"].

the nominations, with each motion receiving a majority of votes but fewer than the sixty needed to invoke cloture and end debate. On September 4, 2003, the President withdrew the Estrada nomination, *see id.* at S11132 (daily ed. Sept. 4, 2003), and later submitted another nominee for that judgeship. *See* 150 Cong. Rec. S5168 (daily ed. May 10, 2004) (nomination of Thomas B. Griffith). At the end of the 108th Congress, the Owen and Griffith nominations were returned to the President under Senate Rule XXXI.6. *Id.* at S12086-87 (daily ed. Dec. 8, 2004).

On February 14, 2005, early in the 109th Congress, the President re-submitted the Owen and Griffith nominations to the Senate. 151 Cong. Rec. S1359 (daily ed. Feb. 14, 2005). The Judiciary Committee favorably reported both nominations to the Senate. *Id.* at S3652 (daily ed. Apr. 14, 2005) (Griffith); *id.* at S4108 (daily ed. Apr. 21, 2005) (Owen).

The Owen nomination was brought to the Senate floor on May 18, 2005. *Id.* at S5373 (daily ed. May 18, 2005). During consideration of that nomination, the Senate debated the filibustering of judicial nominations and also debated a proposal to interpret Senate rules to allow floor debate on judicial nominations to be closed by a majority vote rather than 60 votes. *See id.* at S5375-76 (Sen. Frist). Seeking to avert a contentious Senate vote over the interpretation and application of Senate rules to close debate on nominations by a majority vote, fourteen Senators entered into a Memorandum of Understanding regarding judicial nominations in the current Congress. *See id.* at S5830-31 (daily ed.

May 24, 2005). The fourteen Senators who signed that agreement agreed to vote to invoke cloture and close debate on the pending judicial nominations of Priscilla Owen, Janice Rogers Brown (D.C. Circuit), and William Pryor (11th Circuit). *Id.* at 5830. In addition, the signatories agreed that "[n]ominees should only be filibustered under extraordinary circumstances." *Id.* Furthermore, the fourteen signatories agreed "to oppose the rules changes in the 109th Congress, which we understand to be any amendment to or interpretation of the Rules of the Senate that would force a vote on a judicial nomination by means other than unanimous consent or Rule XXII." *Id.* Finally, the signatories "encourage[d] the Executive branch of government to consult with members of the Senate, both Democratic and Republican, prior to submitting a judicial nomination to the Senate," in order "to reduce the rancor that unfortunately accompanies the advice and consent process in the Senate." *Id.*

After this agreement was reached, the Senate voted 81-18 to invoke cloture on the Owen nomination, *id.* at S5828, and subsequently voted to confirm Owen. *Id.* at S5875-76 (daily ed. May 25, 2005). In addition, the Senate agreed by unanimous consent to limit debate on the Griffith nomination to the D.C. Circuit, *id.* at S5857 (daily ed. May 24, 2005), and voted to confirm that nomination. *Id.* at S6438 (daily ed. June 14, 2005).

Although not mentioned in its complaint, Judicial Watch also cites filibusters affecting six additional nominees: Brown and Pryor (as mentioned), as well as William G. Myers III (9th Circuit), Henry Saad (6th Circuit), David

McKeague (6th Circuit), and Richard Griffin (6th Circuit). *See* Appellant's Brief at 4. Each of those nominations was the subject of unsuccessful cloture votes in the 108th Congress and was returned to the President at the end of the 108th Congress. *See* 150 Cong. Rec. S12086 (daily ed. Dec. 8, 2004). As with the Owen and Griffith nominations, the President re-submitted those six nominations at the beginning of the 109th Congress. *See* 151 Cong. Rec. S1359 (daily ed. Feb. 14, 2005). Pursuant to the Memorandum of Understanding agreed to by the fourteen Senators described above, the Senate voted to invoke cloture on both the Brown and Pryor nominations, *id.* at S6129 (daily ed. June 7, 2005) (Brown); *id.* at S6218-19 (daily ed. June 8, 2005) (Pryor), and confirmed both nominations. *Id.* at S6218 (Brown); *id.* at S6284 (daily ed. June 9, 2005) (Pryor). In addition, the Senate agreed by unanimous consent to limit debate on the Griffin and McKeague nominations, *id.* at S5857 (daily ed. May 24, 2005), and voted to confirm both nominees. *Id.* at S6291-92 (daily ed. June 9, 2005). The other two nominees cited by Judicial Watch, Myers and Saad, have not been brought to the floor of the Senate nor been the subject of any cloture votes during the current Congress.

B. The Senate's Procedures for Considering Judicial Nominations

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, 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 . . . ." Pursuant to this Clause and as set forth in 28 U.S.C. §§ 44(a), 133(a), the President nominates judges of the Courts of Appeals and District Courts for appointment subject to the approval of the Senate.

The procedures by which the Senate discharges its constitutional duty to provide "Advice and Consent" are regulated by a set of rules and long-standing customs. First, nominations received from the President are referred to the appropriate Senate committee for review. *See* Senate Rule XXXI.1, Addendum 1. Judicial nominations are sent to the Committee on the Judiciary. *See* Senate Rule XXV.1(m); Rybicki, CRS Report, Addendum 2 at 3. The Committee chair has discretion whether to hold a hearing on a nomination and whether to schedule a vote on reporting the nominee to the full Senate. *See* Betsy Palmer, CRS Report, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History* 4-5 (updated Mar. 29, 2005) [Addendum 3]; Rybicki, CRS Report, Addendum 2 at 6.[6] If no action is taken, the nomination remains pending in committee until the end of the session, or a lengthy recess, when, under Senate Rule XXXI.6, it ordinarily is returned to the President.

If the Committee reports the nomination to the Senate or it is discharged, the nomination is placed on the Executive Calendar and may, but need not, be

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[6] The Senate may discharge a nomination from committee by majority vote, bringing it to the floor without committee action. *See* Rybicki, CRS Report, Addendum 2 at 7.

scheduled for floor consideration. If the nomination becomes the pending matter before the Senate, all the usual rules for debate on the floor apply, including, as described below, debate subject to the invocation of cloture by a vote of sixty Senators under Senate Rule XXII. If the Senate votes on consenting to a nomination, a majority vote of a quorum is required for confirmation. *See* Rybicki, CRS Report, Addendum 2 at 10.[7]

C. The Senate's History of Floor Debate and the Cloture Rule

Once brought to the floor, judicial nominations, like legislation, other nominations, and most other business that comes before the Senate, are subject to extended debate including what are often called "filibusters," which are commonly understood as an attempt by one or more Senators to prevent or forestall the Senate from voting on a pending matter by continuing to debate the matter. Although it is often difficult to identify when extended debate becomes a filibuster, the use of prolonged debate to forestall final action on a matter has long been a part of Senate floor practice. Throughout its history, the Senate has wrestled with the merits and shortcomings of allowing unlimited debate –

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[7] From 1977 through 2003, 416 nominations to the Courts of Appeals and 1,346 District Court nominations were received from the President and referred to the Judiciary Committee to begin the confirmation process. Of the 416 Courts of Appeals nominations, 311 received a committee hearing, 295 were voted on by the committee, and 276 (66% of those nominated) received a vote by the Senate. *See* Denis Steven Rutkus and Mitchel A. Sollenberger, CRS Report, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977-2003* at 30, Table 9 (updated Feb. 23, 2004) [Addendum 4]. Of the 1,346 District Court nominations, 1,142 received hearings, 1,113 were voted on by the committee, and 1,093 (81% of those nominated) received a Senate vote. *Id.*

including its susceptibility to filibusters – and has, over time, adopted and repeatedly adjusted the procedures for regulating debate.

1. Early History of Senate Debate

From 1789 to 1806, the Senate's procedures provided for a motion for the "previous question," which permitted a majority to determine whether matters on the Senate's calendar should be postponed or considered. *See* 1 Annals of Cong. 21 (J. Gales ed. 1789) (providing that "if the nays prevail, the main question shall not then be put"). This mechanism enabled the majority to postpone questions it wished to avoid deciding, and could be used to bring matters to a vote. The Senate abandoned that rule in 1806.[8]

From 1806 to 1917, there was no rule for closing debate over the objection of a Member who wished to speak. The Senate followed the practice that a question remains open until every Member who desires has spoken. During this period before the cloture rule, and especially in the first half of the nineteenth century before the term "filibuster" was employed, *see* Franklin L. Burdette, *Filibustering in the Senate* 5 (1940) (noting that term "filibuster" as applied to dilatory use of prolonged debate on Senate floor first appeared in 1860s), it is difficult to identify definitively instances when Senators employed lengthy debate in an attempt to prevent final action on pending matters (*i.e.*, a

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[8] *See* 15 Annals of Cong. 201-03 (1806); 1 George H. Haynes, *The Senate of the United States: Its History and Practice* 393-94 (1938); *The Previous Question: Its Standing as a Precedent for Cloture in the United States Senate*, S. Doc. No. 87-104, at 5-15 (1962) (arguing that rule used to postpone decisions, and noting that rule used ten times during seventeen-year existence).

"filibuster"), as opposed to instances of genuine, though extended, debate on the merits of an issue.[9] One of the earliest known occurrences of what might be described today as a "filibuster" involved an unsuccessful attempt by a minority of Senators in 1837 to block the consideration of a resolution to expunge from the Journal the Senate's 1834 vote to censure President Jackson. *See* Burdette, *supra*, at 19-20.

The first time extended debate was employed to seek to prevent the confirmation of a nomination appears to have been in 1881. In that year, a majority in the Senate "attempted repeatedly to take action upon nominations submitted by outgoing President . . . Hayes," but "the minority . . . demonstrated their adeptness in the use of the filibuster weapon and resorted to obstructionist tactics to delay action until the new president, James A. Garfield, could fill the vacant offices." 2 Robert C. Byrd, *The Senate 1789-1989: Addresses on the History of the United States Senate* 102 (Wendy Wolff ed. 1991); *see also* Burdette, *supra*, at 43.

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[9] Determining whether any particular instance of extended debate constitutes a filibuster is problematic because, by definition, what constitutes a filibuster depends, at least in part, on a judgment that the motivation of the debating Senators is to preclude action by the Senate on the matter. This difficulty is enhanced by the fact that before 1929 the Senate usually considered nominations in closed executive session, and thus records of debate are not readily available. *See* Palmer, CRS Report, Addendum 3 at 11.

2. Adoption of a Cloture Rule

By the early twentieth century, the increased intensity, frequency, and success of what had come to be termed "filibusters" heightened demands for reform. *See* Burdette, *supra*, at 79-80, 83-115. Pressure to adopt a rule to allow the Senate to close debate over objection came to a head in 1917, after a filibuster prevented passage of legislation authorizing President Wilson to arm American merchant ships. *See id.* at 118-23; Thomas W. Ryley, *A Little Group of Willful Men* 147-48 (1975). At the beginning of a special session later that year, the Senate adopted, by a 76-3 vote, a rule that provided for invoking cloture to end debate on the affirmative vote of two-thirds of Senators present and voting. *See* 55 Cong. Rec. 45 (1917); Burdette, *supra*, at 127.

Specifically, the new rule provided that whenever sixteen Senators moved to close debate on any pending measure, the Senate, after a two-day hiatus, would vote on the motion and, if two-thirds of those voting supported the motion, the underlying measure would become the pending business of the Senate until disposed of. After cloture was invoked, the rule limited debate to one hour for each Member, restricted amendments, and prohibited dilatory motions and non-germane amendments.[10] However, the rule applied only to "pending measures" and, therefore, did not cover motions to amend the rules,

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[10] *See* 55 Cong. Rec. 19 (1917); Senate Committee on Rules and Admin., *Senate Cloture Rule: Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, S. Prt. No. 99-95, at 105-06 (Comm. Print 1985) [hereinafter "Rules Committee, *Senate Cloture Rule*"].

procedural votes, or nominations. *See* Richard S. Beth and Betsy Palmer, CRS Report, *Cloture Attempts on Nominations* 2 (updated Apr. 22, 2005) [Addendum 5]; Rules Committee, *Senate Cloture Rule* at 109-10. The rule adopted by the Senate reflected a compromise between Senators who favored majority cloture, see, e.g., 55 Cong. Rec. 31, 33-34 (1917) (Sen. Thomas and Sen. Stone), and those who opposed it, but were willing to accept some form of cloture, *see id.* at 27, 36 (Sen. Norris and Sen. Hardwick).

3. Changes in the Cloture Rule Since Its Adoption in 1917

Although cloture was invoked four times between 1917 and 1927, *see* Rules Committee, *Senate Cloture Rule* at 77, the rule could be circumvented simply by filibustering a procedural motion. *See id.* at 21; *Amending Senate Rule Relating to Cloture: Hearings Before a Subcomm. of the Senate Comm. on Rules and Admin.*, 80th Cong., 1st Sess. 4 (1947) (Sen. Knowland). Accordingly, in 1949, the Senate extended the cloture rule to apply to motions or other pending matters, including nominations. *See* 95 Cong. Rec. 2724 (1949). But, as a compromise, the Senate increased the number of votes required to invoke cloture from two-thirds of those voting to two-thirds of the total Senate membership, and continued to exclude from cloture amendments to the Senate rules. *See id.* at 2509-10, 2724. Thus, cloture first became available to truncate debate on nominations in 1949.

Even after the 1949 amendment, many Senators remained dissatisfied with the cloture rule, and the filibuster of civil rights legislation in the 1950s

increased this discontent.[11] In 1959, the Senate reduced the number of votes required to invoke cloture from two-thirds of Senate membership back to two-thirds of the Members present and voting. *See* 105 Cong. Rec. 8, 494 (1959); Rules Committee, *Senate Cloture Rule* at 25. In addition, motions to proceed to resolutions to amend Senate rules were made subject to cloture for the first time, *see id.*, and the rule was amended to codify that the Senate's rules continue from one Congress to the next. *See* 105 Cong. Rec. 8, 494 (1959).

The cloture rule was not amended again until 1975, even though a motion to amend Rule XXII was made at the beginning of every Congress from 1957 to 1971, *see* Rules Committee, *Senate Cloture Rule* at 24-30; *see also, e.g.*, 103 Cong. Rec. 13 (1957); 107 Cong. Rec. 232 (1961). In 1975, Senator Mondale and Senator Pearson sponsored a resolution to amend Rule XXII to authorize cloture by a three-fifths vote of Senators present and voting. *See* 121 Cong. Rec. 12 (1975). After vigorous debate over the resolution and the procedural mechanisms that proponents attempted to use to avoid the filibustering of their proposal, the Senate ultimately agreed to a compromise amendment to Rule XXII permitting cloture upon a vote of three-fifths of total Senate membership. *See id.* at 5650-52. The compromise provided that cloture on motions to amend the Senate's rules would continue to require a vote of two-

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[11] *See Limitation on Debate in the Senate: Hearings Before the Senate Comm. on Rules and Admin.*, 82nd Cong., 1st Sess. (1951); *Proposed Amendments to Rule XXII of the Standing Rules of the Senate*, 85th Cong., 2d Sess. (Comm. Print 1958).

thirds of Senators present and voting. *See id.*; Rules Committee, *Senate Cloture Rule* at 30-32, 119-21. The number of votes required to invoke cloture under Rule XXII has not changed since then.[12]

4. Application of Cloture Rule to Nominations

As mentioned, the cloture rule was made applicable to nominations in 1949. The first nomination on which cloture was sought was that of Associate Justice Abe Fortas to be Chief Justice in 1968. Senators vigorously debated the handling of the nomination.[13] After the Senate failed by a vote of 45-43 to invoke cloture, 114 Cong. Rec. 28933 (1968), President Johnson withdrew the nomination. *See* Rules Committee, *Senate Cloture Rule* at 44. Three years

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[12] Attempts to change the number of votes required to invoke cloture since have been unsuccessful. *See, e.g.*, 141 Cong. Rec. 639-47 (1995) (tabling by 76-19 proposed amendment to Rule XXII to provide for gradually declining number of votes – eventually to bare majority – on successive motions to invoke cloture).

The Senate has made other changes to Rule XXII since 1975, largely focused on post-cloture procedures, including limiting the number of amendments after cloture is invoked, *see* 125 Cong. Rec. 3194 (1979), and capping the time that the Senate devotes to a measure post-cloture, *see id.* at 3037-38, 3194 (capping at 100 hours time Senate would devote to matter post-cloture, but guaranteeing each Senator ten minutes of debate); 132 Cong. Rec. 3156-57 (1986) (lowering post-cloture debate cap to thirty hours).

[13] *Compare, e.g.*, 114 Cong. Rec. 28585 (1968) (Sen. Ervin) ("I think that rule XXII is perfectly constitutional. The Constitution provides that each House may determine the rules of its proceedings. The Senate adopted rule XXII in pursuance of that constitutional authority."), *with id.* at 26795 (Sen. Javits) ("Nothing in the Constitution decrees that a two-thirds vote of the Senate is required to pass any measure except a treaty or a constitutional amendment.").

later, in December 1971, President Nixon's nomination of William H. Rehnquist to be an Associate Justice of the Supreme Court was subject to extended debate. *See id.* at 49. The Senate attempted but was unable to invoke cloture on December 10. *See* 117 Cong. Rec. 46197 (1971). However, when a subsequent motion to postpone final consideration of the nomination until January 1972 was rejected, the opponents yielded, not wishing to detain the Senate any longer on the nomination, and allowed a final vote. *See* Rules Committee, *Senate Cloture Rule* at 49. The Senate then voted to confirm the nominee. *See id.*; 117 Cong. Rec. 46227 (1971).

After 1979, the number of nominations subject to cloture motions increased. While, prior to 1980, the Senate had cloture votes on only the Fortas and Rehnquist nominations, from 1980 through 2002 (the end of the Congress prior to plaintiff's filing this suit), Senators sought to invoke cloture on thirty-seven nominations -- three nominations of President Carter, six of President Reagan, one of President George H.W. Bush, twenty-two of President Clinton, and five of President George W. Bush. *See* Beth and Palmer, CRS Report, Addendum 5 at 7-8.[14] Cloture was successfully invoked on twenty-one of those

[14] Statistics on the number of attempts to invoke cloture do not necessarily reflect the number of filibusters. First, not every filibuster draws a cloture vote. Second, attempts to invoke cloture occur even when the debating Senators disavow an intent to filibuster, contending that they are speaking on the merits of the pending matter.

nominations, rejected on nine, and withdrawn, vitiated, or fell on seven.[15] *See id.* All but two of the thirty-seven nominations were ultimately confirmed. *See id.* Of those thirty-seven nominations subjected to cloture motions between 1980 and 2002, fifteen were judicial nominations – twelve Circuit Judges, two District Judges, and the nomination of then-Associate Justice Rehnquist to be Chief Justice. *See id.*[16] Cloture was successfully invoked on eleven of the judicial nominations, withdrawn or vitiated on three, and rejected on one. *See id.* All fifteen judicial nominations subjected to a cloture vote were ultimately confirmed. *See id.*

Since 2003, twelve judicial nominations have been subjected to cloture motions; of those twelve, seven have been confirmed by the Senate to date, one was withdrawn, two were returned to the President and not re-submitted, and two remain pending.[17]

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[15] "Vitiated" means that the Senate unanimously consented to treat the cloture motion as having no effect. A cloture motion that "fell" is one that became moot and received no action.

[16] The fifteen judicial nominations subjected to cloture motions during this period divide as follows: one by President Carter, four by President Reagan, one by President George H.W. Bush, five by President Clinton, and four by President George W. Bush. *See id.* at 5-6.

[17] *See id.* at 8-9. For confirmations, see 149 Cong. Rec. S9083-84 (daily ed. July 9, 2003) (Victor J. Wolski to be Judge on Court of Federal Claims); 150 Cong. Rec. S5575 (daily ed. May 18, 2004) (Marcia B. Cooke to be District Judge); 151 Cong. Rec. S5875-76 (daily ed. May 25, 2005) (Owen); *id.* at S6218 (daily ed. June 8, 2005) (Brown); *id.* at S6284 (daily ed. June 9, 2005)

(continued...)

5. Rule V and the Continuity of the Senate's Rules

As plaintiff challenges Senate Rule V as well as Rule XXII, it is necessary to discuss briefly Rule V, which provides that the Senate's rules continue from one Congress to the next, unless amended. From the First Congress, it has been the Senate's practice that its rules remain in effect from Congress to Congress and need not be readopted at the beginning of each new Congress. In contrast, the House of Representatives adopts its rules anew at the beginning of each Congress. *See* 5 Asher Hinds, *Hinds' Precedents of the House of Representatives of the United States*, § 6742, at 881 (1907). This difference is attributed to the fact that the Senate is considered a "continuing body."[18] In fact, since adoption of the Senate rules at the beginning of the First Congress in 1789, "the Senate has readopted or made only seven general revisions of its rules." *Riddick's Senate Procedure* at 1220 (1806, 1820, 1828,

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[17](...continued)
(Pryor); *id.* at S6291 (Griffin); *id.* at S6292 (McKeague). For withdrawal of Estrada nomination, see 149 Cong. Rec. S11132 (daily ed. Sept. 4, 2003). For return of nominations of Carolyn B. Kuhl (Ninth Circuit) and Charles W. Pickering, Sr. (Fifth Circuit), see 150 Cong. Rec. S12086-87 (daily ed. Dec. 8, 2004).

[18] *McGrain v. Daugherty*, 273 U.S. 135, 181 (1927); *see also* 4 *The Encyclopedia of the United States Congress* 1791 (Donald C. Bacon, et al., eds., 1995) ("Because only a third of the Senate is newly elected every two years, it is considered a continuing body whose rules require no readoption from one Congress to the next.").

1868, 1877, 1884, and 1979).[19] As mentioned previously, the practice of the Senate's rules continuing was formally codified in the rules in 1959 by S. Res. 5, 86th Cong. (1959), which provided: "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[20]

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[19] Of course, at many other times, as noted, the Senate has amended or adopted individual rules at various points in its session. The Senate also has refined and modified its practices and procedures through the interpretation of its rules.

[20] That provision was relocated, *see* 126 Cong. Rec. 6494 (1980), and is currently in Rule V. Notwithstanding this practice, at various times some Senators and Presidents of the Senate have argued that a majority of the Senate has authority under the Constitution to adopt rules at the beginning of each Congress. *See* Rules Committee, *Senate Cloture Rule* at 23-35; 103 Cong. Rec. 178 (1957) (Vice President Nixon's "advisory opinion" that majority's right to adopt new rules at beginning of a Congress could not be inhibited by two-thirds requirement for cloture on rule changes); 105 Cong. Rec. 8-9 (1959) (same); 115 Cong. Rec. 593, 994-95 (1969) (Vice President Humphrey announced that vote of 51-47 invoked cloture on motion to proceed to consider resolution to amend Senate's rules; Senate overturned ruling on appeal).

6. Recent Debate Over Filibusters and Judicial Nominations

As can be seen from the earlier discussion of the judicial nominations that are the subject of this suit, the Senate has been engaged in sustained debate over the cloture rule as applied to judicial nominations. As part of that debate, proposals to amend Rule XXII were introduced in the last Congress (108th), *see* S. Res. 138, 108th Cong. (2003); S. Res. 85, 108th Cong. (2003), and hearings have been held on the subject.[21] And just recently, during floor consideration of the Owen nomination, the Senate debated a proposal to interpret its rules to allow floor debate on judicial nominations to be closed by a majority vote rather than 60 votes. In an effort to avoid a confrontation over that proposal, fourteen Senators entered into the Memorandum of Understanding detailed earlier, in which they made commitments regarding the filibustering of judicial nominations and proposed changes or modifications in the interpretation of Senate rules. *See* 151 Cong. Rec. S5830 (daily ed. May 24, 2005). These developments are the most recent manifestation of the debate that has continued throughout Senate history about the proper procedures for regulating debate and fulfilling the Senate's "Advice and Consent" responsibility.

SUMMARY OF ARGUMENT

The district court correctly held that Judicial Watch lacked Article III standing to bring this case, and the dismissal should be affirmed on that ground.

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[21] *See* 149 Cong. Rec. D627 (daily ed. June 9, 2003) (Committee on Rules and Administration); *id.* at D450-51 (daily ed. May 6, 2003) (Judiciary Committee's Subcommittee on the Constitution).

Indeed, since the district court's ruling, the Senate has confirmed nominees to the two judgeships that were the subject of Judicial Watch's complaint, and thus plaintiff's claim of injury from appellate delay attributed to those vacancies has become completely groundless. Judicial Watch cannot reasonably claim to suffer any present injury from those previously vacant judgeships.

Even when those judgeships were vacant, Judicial Watch's allegations, as the district court concluded, did not demonstrate an injury-in-fact. The injury plaintiff asserts – harm from delay in its appellate litigation – is not an injury to a legally protected interest, because a civil litigant has no legal right to the adjudication of its claims on any particular schedule. Moreover, even if it did, plaintiff's allegations and the record in this case fail to establish that any of its appeals have been delayed in any significant and prejudicial way. In addition, Judicial Watch's broad assertion that its interest in the proper and efficient functioning of the federal courts is harmed by judicial vacancies constitutes nothing more than a generalized grievance that cannot substitute for the concrete and particularized injury-in-fact required to establish standing.

Second, as the district court explained, the time a court takes to resolve any particular appeal depends on numerous factors, most of which are entirely independent of the number of judges on the court. *See* 340 F. Supp.2d at 36. Thus, any alleged delay in a specific appeal cannot be fairly traced to the Senate's handling of any particular judicial nomination.

Third, as the judicial vacancies plaintiff relies on in its complaint have been filled, it is unclear how plaintiff's alleged injury of delay in its appellate litigation from those past vacancies can be remedied by a favorable decision in this case. The relief plaintiff seeks – a declaration that Senate rules governing floor debate on judicial nominations are unconstitutional and an injunction against further debate on the Estrada and Owen nominations – is meant to bring about the confirmation of the nominees to the two judgeships that are the subject of the complaint, presumably to shorten the time for resolving Judicial Watch's appeals before the D.C. and Fifth Circuits. Yet, the Senate now has confirmed nominees to those two judgeships. A favorable ruling in this action will not provide any further "remedy" to Judicial Watch's alleged injury.

Affirmance is also warranted on two alternative grounds presented to, but not resolved by, the district court. First, the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1, bars this suit. Under the Speech or Debate Clause, the Senate and its officers are absolutely immune from suit for actions taken in the consideration of judicial nominations because such acts fall squarely within the sphere of legitimate legislative activity protected from questioning by the Clause. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501-02 (1975).

Second, plaintiff's challenge to the Senate's rules governing floor debate on judicial nominations presents a non-justiciable political question. The authority to decide what procedures to follow in debating matters pending

before the chamber is constitutionally committed to the Senate, U.S. Const. art. I, § 5 ("Each House may determine the Rules of its Proceedings"), including how much debate should occur on nominations and when to bring pending business to a vote. *See Nixon v. United States*, 506 U.S. 224, 230-38 (1993) (non-justiciable textual commitment to Senate of "sole Power to try all Impeachments"). Furthermore, no judicially manageable standards exist for determining what amount of floor debate on a nomination is appropriate or what procedures for regulating debate or for putting a nomination to a vote should be established. In addition, a court's review of the manner by which the Senate considers judicial nominations would intrude directly into the Senate's internal deliberations, thereby showing a lack of the respect due a coequal branch. The Senate is the appropriate body to determine its procedures for considering judicial nominations and to resolve disputes over those procedures.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT JUDICIAL WATCH LACKS STANDING TO BRING THIS SUIT

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). "[T]he 'case or controversy' requirement," the Supreme Court has explained, "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1984). A vital part of the case-or-controversy limitation on the

judicial power is the requirement that a plaintiff have standing to invoke federal court jurisdiction. *See Valley Forge*, 454 U.S. at 471-73.

"The burden is on the plaintiff to allege facts sufficient to support standing." *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 55 (D.C. Cir. 1991) (internal quotation marks and citation omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To meet this burden and establish standing, a plaintiff must demonstrate the three elements that form the "irreducible constitutional minimum of standing" under Article III: (1) that the plaintiff "ha[s] suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical;" (2) that the injury was caused by, or is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks and citations omitted). If a plaintiff fails to satisfy any of these prerequisites for standing, the court lacks jurisdiction and must dismiss the complaint. *See Valley Forge*, 454 U.S. at 475-76. The Court's standing inquiry should be "especially rigorous" in cases such as this one, where "reaching the merits of the dispute would force [the Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (internal quotation marks and citation omitted).

As the district court correctly held, Judicial Watch's allegations fail to satisfy each of the elements of Article III standing. And, since the ruling below, the judicial vacancies allegedly causing Judicial Watch's injury – the judgeships to which Estrada and Owen were nominated – have been filled, making plaintiff's allegations of injury even more deficient. Accordingly, this Court should affirm the district court's holding that plaintiff lacks standing.

A. Plaintiff's Allegations Do Not Establish an Injury-In-Fact

1. Judicial Watch's articulation of its injury-in-fact has evolved during this litigation. In its complaint, Judicial Watch based its standing principally on allegations that the use of Senate Rules V and XXII to forestall confirmation of two particular nominations (Estrada and Owen) injured its First Amendment rights by leaving vacant judgeships causing "significant and prejudicial delays" in "the disposition of matters pending before the federal courts, and before the D.C. Circuit in particular." Compl. ¶¶ 15, 31 [J.A. 13-14, 17]. Judicial Watch cited particular appeals then pending before this Court that it claimed had experienced inordinate delays, *id.* ¶ 15 [J.A. 13-14], as well as two cases pending in district courts in the Fifth Circuit. *Id.* ¶ 10 [J.A. 12]. However, in its briefing below and its opening brief in this Court, Judicial Watch shifted its focus away from trying to establish injury based on delay in any particular pending appeal, and instead has relied on the more general allegation that the "unconstitutional use of the filibuster and Senate Rule XXII . . . is causing judicial vacancies to remain unfilled for extensive periods of time," harming

Judicial Watch's "well-established, demonstrable interest in the proper and efficient functioning of th[e federal court] system." Appellant's Brief at 16; *see also* Compl. ¶ 7 [J.A. 11] (alleging "concrete and particularized interest in the timely and efficient functioning of the judiciary"). Neither of these articulations of alleged harm qualifies as an injury to any "legally protected interest," *Lujan*, 504 U.S. at 560, sufficient to establish plaintiff's standing to bring this suit.

2. First, plaintiff's allegation that "filibusters" on the Estrada and Owen nominations have "impaired . . . the exercise of its First Amendment Rights," Compl. ¶ 31 [J.A. 17], by delaying specific appeals, fails to qualify as an injury-in-fact for standing. As an initial matter, Judicial Watch cannot suffer any present injury arising from those two vacancies because those judgeships are now filled. Thus, no current "delay" in appellate litigation could be caused by those past vacancies, and plaintiff cannot demonstrate standing based on these allegations of harm.[22]

Even before those judgeships were filled, plaintiff's allegations of delay did not constitute an injury-in-fact for standing, because, as the district court found, plaintiff has no "legally protected interest" in the speedy resolution of its

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[22] While the filling of these two judgeships undermines Judicial Watch's specific claims of injury from delay, defendants do not argue that the dismissal of plaintiff's complaint should be affirmed on mootness grounds, because plaintiff also asserts a general claim of injury from Senate rules harming Judicial Watch's interest in the proper and efficient functioning of the federal judiciary. While that broader claim of injury may not be mooted by the recent judicial confirmations, it certainly has not become any less generalized and abstract in light of them.

appeals. While the First Amendment right to petition the government includes the right to file suit in the courts, *see Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), it does not provide litigants with a right to have a court resolve their lawsuit – or rule on their appeal – within any specific period. *See L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 706 (9th Cir. 1992) ("Notwithstanding the fundamental rights of access to the courts, the [plaintiff] does not cite, nor has our independent research revealed, any decision recognizing a right to judicial determination of a civil claim within a prescribed period of time as an element of such right."). Consequently, any harm plaintiff claims that it suffered from "delay" in the adjudication of its appeals does not constitute an "invasion of a legally protected interest" sufficient for standing.

Furthermore, even if delay in resolving a litigant's civil appeal could, in some extreme instance, constitute injury-in-fact, plaintiff's allegations establish no such delay. Neither of the two appeals to which Judicial Watch was a party referenced in the complaint and in the affidavit filed below (Affidavit of Thomas J. Fitton ¶¶ 8-9 [J.A. 21-22]) remain pending, and they were decided in 8 and 13 months, respectively. *See In re Cheney*, Nos. 02-5354, 02-5355, 02-5356 (D.C. Cir.) (docketed Nov. 12, 2002; decided July 8, 2003, 334 F.3d 1096 (D.C. Cir. 2003)); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, Nos. 03-5093, 03-5094 (D.C. Cir.) (docketed Apr. 9, 2003; decided May 7, 2004, 365 F.3d

1108 (D.C. Cir. 2004)).[23] In addition, as of June 30, 2005, the electronic PACER docket reflects that Judicial Watch is a party to only one other appeal currently pending in this Court, *Judicial Watch v. U.S. Dep't of Justice*, No. 04-5444 (docketed Dec. 30, 2004), which has been pending for less than a year.[24] None of Judicial Watch's litigation in this Court could reasonably be claimed to have experienced "prejudicial delay" of constitutional magnitude.[25]

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[23] In the ten other appeals alleged in the complaint or cited in the Affidavit of Thomas J. Fitton ¶¶ 8-9 [J.A. 21-22], Judicial Watch served as counsel for a party, but was not a party to the case. Even if delay in a pending appeal could constitute an injury-in-fact for standing purposes (which it does not), a party's counsel does not have standing to assert a claim in counsel's own name based on alleged delay suffered by the client party. *See Goodman v. F.C.C.*, 182 F.3d 987, 992 (D.C. Cir. 1999) ("[P]laintiff must, in the ordinary case, 'assert [its] own legal interests, rather than those of third parties.'") (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)).

[24] A search of PACER for the Fifth Circuit did not reveal, as of June 30, 2005, any appeals pending in that court to which Judicial Watch is a party. Furthermore, the only judicial nominations currently pending in the Senate that have ever been subjected to a cloture vote are the nominations of Henry Saad to the Sixth Circuit and William Myers to the Ninth Circuit. Judicial Watch has not alleged, and a search of PACER has not revealed, that it is a party to any appeal currently pending in either of those circuits.

[25] Of course, if a party suffers prejudicial delay in the resolution of its appeal, that harm is most appropriately raised directly with the Court through a motion to expedite consideration of the appeal. *See, e.g., Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit*, Part VIII.B. Certainly, the Court is best situated to determine if there is an impending injury of constitutional proportions from delay in resolving a particular appeal and to expedite consideration if necessary.

3. Judicial Watch's more general assertion of harm (and the one it relies on in its opening brief in this appeal) – that it has a "well-established, demonstrable interest in the proper and efficient functioning of th[e federal court] system," which is being harmed by "judicial vacancies . . . remain[ing] unfilled for extensive periods of time," Appellant's Brief at 16; *see also id.* at 21 – also fails to establish standing, as it presents nothing more than a generalized grievance over the proper operation of government. As the Supreme Court has made clear, "abstract questions of wide public significance," such as plaintiff's allegation of the impaired functioning of the judiciary, are grievances that are "pervasively shared and most appropriately addressed in the representative branches," *Valley Forge*, 454 U.S. at 475 (internal quotation marks and citation omitted), and that courts "refrain[] from adjudicating." *Id.*; *see also Nevada v. Burford*, 918 F.2d 854, 857 (9th Cir. 1990) (finding "insufficient to demonstrate standing" claims that "merely constitute a general grievance that the [government] is not acting in a way in which [plaintiff] maintains is in accordance with federal laws") (internal quotation marks and citations omitted).

Judicial Watch asserts that its injury is not a mere general grievance but is "actual, particularized, and concrete," and points to the "filibusters against Mr. Estrada and Justice Brown" as blocking nominations to fill two vacant seats on this Court, thus harming "the administration of justice" in this Circuit. Appellant's Brief at 21-22. However, Judicial Watch's own articulation of this injury – harm to "the administration of justice" – demonstrates precisely the

generalized nature of its grievance against the operations of government. And in any event, as noted above, those two judgeships have now been filled by the confirmation of Griffith (to the judgeship to which Estrada had been nominated) and Brown.

Judicial Watch argues that its interest in the proper and efficient functioning of the judicial system is not a generalized concern but a concrete and particularized interest arising from (i) the First Amendment right to petition, (ii) 28 U.S.C. § 44 (which sets the number of judgeships for each court of appeals), and (iii) "fundamental due process." *See* Appellant's Brief at 17-21. The district court properly concluded that no concrete and particularized, legally protected interest to "the proper and efficient functioning" of the federal courts arises from any of those sources. *See* 340 F. Supp.2d at 32-36.

Although the First Amendment may protect the right to *access* the courts as a form of expression, "[p]laintiff does not claim that its right of access has been denied; it claims that judicial vacancies have led to the improper functioning of the judiciary." *Id.* at 33; *see also id.* at 33 n.6. And, as the district court noted, the First Amendment does not create a legally protected interest in the proper and efficient functioning of the court system. *See id.* at 33 ("Plaintiff has not cited to any authority establishing a First Amendment right to the proper functioning of the judiciary.").

Judicial Watch's assertion that it has a concrete and particularized interest in "the appointment of the full number of judges provided for by 28

U.S.C. § 44," Compl. ¶ 7 [J.A. 11], is similarly unavailing. That statute provides that the "President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits," and authorizes a number of judgeships for each circuit. As the district court explained, 28 U.S.C. § 44 merely provides for a maximum number of judges for each circuit; it does not mandate that those positions must be filled nor does it "provide Plaintiff with a legally protected interest" in having a specific number of judges on any court. 340 F. Supp.2d at 33. To read the statute to require a President to nominate, and the Senate to confirm, any set number of judges would "denigrate[] the Senate's role in the appointments process," *id.* at 32, as "the Senate cannot be required to accept the President's nominees without frustrating the Constitution's Advice and Consent Clause." *Id.* at 33. Indeed, accepting plaintiff's argument – that litigants have a legally cognizable interest in having the statutory maximum number of judges on a court – "would permit any party with business pending before the federal judiciary to challenge an unfilled vacancy, and the provision would be equally enforceable against the President as it would be against the Senate." *Id.* Such a result demonstrates that "no rational construction of 28 U.S.C. § 44 provides Plaintiff with the right it seeks." *Id.*[26]

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[26] It is worth noting that, contrary to Judicial Watch's assertion that a "serious vacancy crisis exists in the federal judiciary" that is "exacerbated" by "the Senate's filibuster rule (Senate Rule XXII)," Appellant's Brief at 1-2, there are, in fact, only a few judicial nominations now pending before the Senate, and (continued...)

The remaining basis for plaintiff's claim of a legally protected interest in the proper functioning of the judiciary – "fundamental due process" – also fails. To support its argument, plaintiff cites *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc), *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974), and *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 707 (9th Cir. 1992). *See* Appellant's Brief at 19. The district court considered each of these cases and correctly found that they do not establish any due process right to the proper functioning of the judiciary or to the timely resolution of appeals. *See* 340 F. Supp.2d at 33-36.

Instromedix and *Arnett* are inapposite to the issue here. *Instromedix* was a patent infringement case that did not involve Article III standing but rather addressed only whether the Constitution permitted the trial of a civil action before a non-Article III judge by consent of the parties. *See* 725 F.2d at 539-43.

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[26](...continued)
only a small percentage of vacancies on the federal courts. The Federal Judiciary's website report on judicial vacancies reveals that, as of June 30, 2005, only 11 of the 179 authorized circuit judgeships were vacant, and only five circuit nominations were pending in the Senate. *See* Federal Judicial Vacancies Report at http://www.uscourts.gov/judicialvac.html (last visited June 27, 2005). Similarly, of the 678 district court judgeships, 31 were vacant, and only six district judge nominations were pending in the Senate.

Similarly, no vacancy "crisis" exists in this Court. There are now eleven active judges confirmed to sit on this Court. There is pending in the Senate one more D.C. Circuit nomination, that of Brett Kavanaugh, to fill the one remaining open judgeship. That nomination has not received any floor action, much less been subject to a cloture vote.

Arnett involved the due process rights of a federal employee who had been dismissed from service and did not address the issue of standing. *See* 416 U.S. at 145-48. "[N]othing in *Arnett v. Kennedy*, . . . fashions the right Plaintiff must establish." 340 F. Supp.2d at 34.

Los Angeles County Bar Ass'n also does not support plaintiff's claim of standing, but in fact demonstrates the deficiency of plaintiff's allegations. In that case, the plaintiff claimed that the number of judges provided by state statute for the Superior Court of Los Angeles County was insufficient and caused inordinate delays that effectively deprived litigants of their access to the courts. *See* 979 F.2d at 700-01. The Ninth Circuit found that plaintiff had standing. *See id.* However, as explained by the district court here, plaintiff's standing in that case "rested on the assertion of a different right, the right to access [the courts], and a record establishing delays of more than six years." 340 F. Supp.2d at 35. As discussed above, there exists a legally protected right to access (i.e. file suit) in the courts. But unlike the plaintiff in *Los Angeles County Bar Ass'n*, Judicial Watch "does not contend that it has been denied access to the courts, and even a liberal construction of Plaintiff's Complaint fails to adduce delays that rise to the level faced by the court in *Los Angeles County Bar Association*." *Id.* Rather, Judicial Watch argues that it has an interest in the efficient functioning of the judicial system and the timely resolution of appeals. Far from supporting standing based on such an interest, the Ninth Circuit in *Los Angeles County Bar Ass'n* found "no basis in the

Constitution for a rigid right to resolution of all civil claims within [a specific] time frame." *Id.* at 36 (quoting *Los Angeles County Bar Ass'n*, 979 F.2d at 706).

4. Judicial Watch argues that the district court erred in finding it lacked standing because the court failed to analyze its injury under the principles set forth in *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 527 U.S. 167, 181-82 (2000), and *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 431-32 (D.C. Cir. 1998) (en banc). Those cases, Judicial Watch argues, found injury-in-fact based on allegations of "an established pattern of use by the plaintiff. . . ." Appellant's Brief at 14. Judicial Watch asserts that its allegation of "a long-standing pattern of use" of the federal courts should likewise be sufficient to constitute an injury-in-fact for standing purposes. *See id.* at 15.

Plaintiff misinterprets the standing decisions in *Friends of the Earth* and *Glickman*. In those cases, the courts found standing not merely based on allegations that a plaintiff frequently used or visited a particular body of water (*Friends of the Earth*) or observed particular animals in a zoo (*Glickman*). Rather, standing also depended on the legal fact that the plaintiffs' interests at issue there were "legally protected." *See Glickman*, 154 F.3d at 434 n.7 ("[N]ot every aesthetic interest can form the basis for a lawsuit; our injury-in-fact test protects only those aesthetic interests that have been 'legally protected.'"). Plaintiffs in those cases were found to have standing not simply because they used the river or observed animals in the zoo, but because their interests in the

quality of the river water and the humane treatment of the animals were protected by law. Judicial Watch's allegation that it has a "long-standing pattern of use and demonstrated interest . . . in the federal judicial system," is insufficient to establish standing because, in contrast to the plaintiffs in *Friends of the Earth* and *Glickman*, Judicial Watch has no "legally protected interest" in the efficient and proper functioning of the judicial system.[27]

B. Plaintiff's Alleged Injury Is Not Fairly Traceable to the Defendants Nor Likely to Be Redressed by a Favorable Decision

Even assuming plaintiff's allegations presented an injury-in-fact, plaintiff would still lack standing as its allegations fail to establish that its claimed injury – harm to the efficient functioning of the judicial system from the delay in adjudication of appeals – is caused by or "fairly traceable to" the failure to close debate and vote on particular judicial nominations. Nor is that injury likely to be redressed by an order declaring Senate Rules V and XXII unconstitutional or an injunction preventing further debate on the Estrada and Owen nominations.

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[27] Plaintiff also cites for support this Court's decision in *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994), which found that individual voters had standing to challenge a House of Representatives rule allowing delegates for non-state jurisdictions (*e.g.*, Puerto Rico, District of Columbia) to vote in the House's Committee of the Whole. However, in *Michel*, the Court pointed out that the Supreme Court had "repeatedly held that voters have standing to challenge practices that are claimed to dilute their vote . . .," *id.*, and the voter plaintiffs were asserting just such a vote-dilution injury from the House rule at issue there. Here, plaintiff has identified no cases, either from the Supreme Court or otherwise, that find a legally protected interest in the efficient and proper functioning of the judicial system. *See* 340 F. Supp.2d at 32-33.

1. Plaintiff's allegations of substantial delay in its pending appeals cannot be traced to filibusters of any particular nominations. The district court correctly found that "[t]he connection between judicial vacancies and Plaintiff's claims of delay are simply too attenuated to satisfy causation under the standing doctrine." 340 F. Supp.2d at 36. As the district court recognized:

> Numerous . . . factors [other than the number of judges on an appellate court] influence the length of time from the filing of a notice of appeal to the court's resolution of that specific appeal, including: the number of legal claims for which review is sought, the number of parties involved, the complexity of the legal issues, the length of the district court record to be reviewed, any extensions in the briefing schedule, whether a party files any motions, the existence of applicable circuit precedent, and the agreement or disagreement about the merits of the appeal within the appellate panel.

Id. (quoting Mem. of Points & Authorities in Support of Defs.' Mot. to Dismiss at 29). In light of the "myriad of other factors" that can affect appellate adjudication, "Plaintiff cannot claim that a delay in justice is fairly traceable to the judicial vacancies it invokes in its complaint," *id.*, or to the filibuster of any specific nomination. *See Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C.) ("The chain of causation between Rule XXII and any possible injury suffered by [the plaintiff] stemming from the failure of unspecified legislation to be enacted is far too remote to satisfy this second element of standing."), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998) (table).

In its opening brief, Judicial Watch argues that "it cannot seriously be denied that, but for Senate Rule XXII, a number of filibustered nominees would

have been confirmed including Mr. Estrada and Justice Owen." Appellant's Brief at 23. Yet, as the district court explained:

> These arguments do not connect the alleged harm, delayed justice, to the conduct of Defendants; they connect the failed nominations of Owen and Estrada to the purportedly unconstitutional use of the cloture rule. Plaintiff must go one step further; it must connect two vacancies on the judiciary to delayed justice – this Plaintiff cannot do.

340 F. Supp.2d at 36. Indeed, as the Senate has confirmed the Owen and Griffith nominations to fill those judicial vacancies, it is unclear how any current delay that plaintiff asserts could be fairly traced to Senate action.[28]

2. Plaintiff also cannot show that its alleged injury is likely to be redressed by the extraordinary relief it seeks. Judicial Watch requests that Senate Rules XXII and V be declared unconstitutional and that the Senate be enjoined from debating the Owen and Estrada nominations any further so that a final vote on those nominations can occur. However, neither nomination is currently pending in the Senate, and both vacancies already have been filled by the Senate's confirmation of Owen and Griffith. In fact, the Senate has confirmed not just one but two new judges (Griffith and Brown) to this Court since the district

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[28] Plaintiff's naming Secretary of the Senate Reynolds and Sergeant at Arms Pickle as defendants does not help satisfy the causation or redressability requirements of standing. As an initial matter, the complaint does not allege any actions by these officers that could have caused plaintiff's alleged injury. Moreover, as neither officer can control debate in the Senate, force debate to close, require cloture to be invoked, or otherwise bring a matter to a vote, neither could be the cause of any injury alleged to have resulted from the Senate's consideration of any nomination, and a favorable decision against them could not redress plaintiff's alleged injury.

court's decision. As those vacancies have now been filled, the requested relief plaintiff seeks cannot provide any further "remedy" to its injury.

Furthermore, as the district court recognized, granting plaintiff's requested relief, a declaration that Rules V and XXII are unconstitutional and an injunction against further Senate debate on judicial nominations, "would amount to an unprecedented exercise of the judicial power, directed at the core functions of the United States Congress." 340 F. Supp.2d at 38. This Court has long recognized that it "cannot enjoin legislative debate," *Hearst v. Black*, 87 F.2d 68, 72 (D.C. Cir. 1936), or "interfere with or impede the processes of the Congress." *Pauling v. Eastland*, 288 F.2d 126, 128 (D.C. Cir. 1960); *see also Hastings v. U.S. Senate, Impeachment Trial Comm.*, 716 F. Supp. 38, 41 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989) (table) (rejecting impeached judge's request to enjoin Senate's impeachment proceedings as "[t]he relief sought by plaintiff . . . would be utterly foreign to our system of divided powers"). The remedy plaintiff seeks is beyond the scope of appropriate judicial relief.

In addition, plaintiff's requested relief, even were it appropriate for judicial decree, would not redress its injury. For instance, far from closing debate on pending nominations, a declaration that Senate Rules V and XXII are unconstitutional would leave the Senate without any cloture rule for curtailing debate. 340 F. Supp.2d at 37-38 ("'[W]ere Rule XXII declared unconstitutional, the Senate could return to its former practice of allowing unlimited debate

unless there existed unanimous consent to close debate.'") (quoting *Page*, 995 F. Supp. at 29). The district court rightly concluded that such a declaration "would not redress Plaintiff's injury," and in fact, "might actually encourage an even smaller minority of senators to grind the Senate's legislative business to a halt." *Id.* at 38.

II. ALTERNATIVE GROUNDS ALSO SUPPORT AFFIRMANCE OF THE DISMISSAL OF PLAINTIFF'S COMPLAINT

Affirmance is also warranted on two alternative grounds presented to but not resolved by the district court – that plaintiff's claims are barred by the Speech or Debate Clause and that its claims raise a non-justiciable political question. *See Danielsen v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1230 (D.C. Cir. 1991) (court may "affirm a correct decision even if on different grounds than those assigned in the decision under review").

A. The Speech or Debate Clause Bars This Suit

The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. "The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975). To further this goal of legislative independence, the Clause protects from judicial inquiry activities that are an "integral part of the deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters

which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972); *see also Doe v. McMillan*, 412 U.S. 306, 311 (1973) (Speech or Debate Clause covers "anything 'generally done in a session of the House by one of its members in relation to the business before it.'") (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)); *Eastland*, 421 U.S. at 501 (immunity protects actions that "fall within the sphere of legitimate legislative activity"). The Clause's immunity shields Members from suit, *see Eastland*, 421 U.S. at 503, serving not merely as "a defense on the merits[,] but also protect[ing] a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *see also Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (per curiam).

Plaintiff's challenge to the Senate's proceedings on judicial nominations falls squarely within the coverage of the Speech or Debate Clause. Plaintiff charges that a "minority of U.S. Senators" are using Rule XXII to delay a vote on the Estrada and Owen nominations by refusing to close debate. Compl. ¶ 25 [J.A. 16]. This claim directly implicates the "speech or debate" of Senators, as it quite literally challenges the rules by which the Senate debates a matter. In addition, plaintiff's claim impinges on Speech or Debate immunity because it challenges the manner in which the Senate schedules its votes. *See Gravel*, 408 U.S. at 617 (Speech or Debate immunity "equally cover[s]" "the act of voting" as it does actual speech or debate). The procedures that the Senate uses to determine whether to confirm judicial nominees – including when to close

debate on a nomination – are unquestionably "part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration . . . of . . . matters which the Constitution places within the jurisdiction of either House." *Id.* at 625; *cf. Schultz v. Sundberg*, 759 F.2d 714, 717 (9th Cir. 1985) (per curiam) (for legislative immunity purposes, "'confirmation vote on [executive's] proposed appointees [is] "clearly legislative in nature"') (quoting district court).[29]

Accordingly, the Speech or Debate Clause bars plaintiff's claims.[30]

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[29] That plaintiff names the Senate as a whole and not individual Senators does not affect the applicability of Speech or Debate immunity. The Senate, which is nothing more than a collective group of individual Members, is protected from suit by the Speech or Debate Clause. *See Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003) ("[I]n light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation."), *rev'd on other grounds*, 542 U.S. 1, 124 S.Ct. 2301 (2004)); *cf. also Eastland*, 421 U.S. at 501 (Senate subcommittee immune from suit under Speech or Debate Clause).

Plaintiff also cannot evade the Speech or Debate Clause by naming as defendants the Secretary and Sergeant at Arms, as the Clause protects congressional officers and employees from suit when their conduct on behalf of a Member would be immune if performed by the Member. *See Eastland*, 421 U.S. at 507; *Gravel*, 408 U.S. at 618-22; *Hastings*, 716 F. Supp. at 42. Plaintiff alleges no actions by either Senate officer that would fall outside the scope of legitimate legislative activity protected by the Clause; in fact, other than naming them as defendants, plaintiff's complaint makes no allegations at all regarding these officers.

[30] As this suit names the Senate and two of its officers in their official capacity, plaintiff's claims are also foreclosed by sovereign immunity. *See*

(continued...)

B. Plaintiff's Complaint Presents a Non-Justiciable Political Question

Plaintiff's challenge to the Senate's debate over judicial nominations is also subject to dismissal because it presents a non-justiciable political question. Claims that raise political questions are not judicially cognizable and must be dismissed. *See Nixon v. United States*, 506 U.S. 224, 230-35 (1993).

The Supreme Court in *Baker v. Carr*, 369 U.S. 186, 210 (1962), identified six factors, the existence of any of which indicates a political question. *See United States v. Rostenkowski*, 59 F.3d 1291, 1304 (D.C. Cir. 1995). Plaintiff's challenge directly implicates three of those factors: (1) plaintiff's claim involves a matter textually committed by the Constitution to the Senate; (2) there is a lack of judicially discoverable and manageable standards for resolving plaintiff's claim; and (3) resolution of plaintiff's claim would require the Court to intrude into the Senate's internal proceedings, thereby expressing a lack of respect due a coordinate branch.

1. Article I, section 5, clause 2 of the Constitution commits to the Senate the power to "determine the Rules of its Proceedings." That textual commitment is of the same quality as the commitment of the power to try impeachments, which the Supreme Court found constitutes a non-justiciable

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[30](...continued)
Keener v. Congress of the United States, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (affirming dismissal because "Congress is protected from suit by sovereign immunity"); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit is, in all respects other than name, to be treated as a suit against the [government] entity").

political question in *Nixon*, 506 U.S. 224. Indeed, the Supreme Court has long recognized that the power committed in Article I, section 5 provides each House with broad discretion to determine what rules to adopt for its proceedings. *See United States v. Ballin*, 144 U.S. 1, 5 (1892). In order to present a justiciable challenge to congressional procedural rules, therefore, a plaintiff must identify a separate provision of the Constitution that limits the authority committed to the Senate. *See Nixon*, 506 U.S. at 237-38.

Plaintiff has not and cannot identify any constitutional provision that expressly limits the time for debate on a nomination or requires the Senate to vote on a nomination within a certain period. Although various constitutional provisions prescribe time requirements for the Senate on other matters, *see, e.g.*, U.S. Const. art. I, § 4, cl. 2; amend. XX, § 2 (Congress must meet at least once annually, at noon on January 3d); art. I, § 5, cl. 4 (neither House may adjourn for more than three days without consent of other House), none of those provisions addresses the length of time that the Senate should permit its Members to debate business before the chamber.

Plaintiff alleges in its complaint that Rule XXII's requirement of sixty votes to close debate on a nomination transgresses the constitutional provision directing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ." U.S. Const. art. II, § 2, cl. 2. *See* Compl. ¶¶ 23, 27 [J.A. 15, 16]. That provision, however, does not provide an

express limit on the Senate's authority to determine whether and at what time to close debate on a nomination. *Cf. Skaggs v. Carle*, 110 F.3d 831, 846 (D.C. Cir. 1997) (Edwards, J., dissenting) ("Requiring a supermajority to pass a bill into law can be distinguished from procedural rules – like the Senate cloture rule – that require a supermajority to bring an issue to a vote. Although such supermajority requirements may hinder or help a bill to become law, these procedural rules do not explicitly conflict with the presentment clause. . . .").

The lack of definitive constitutional guidance limiting the Senate's authority to set the rules for debate on nominations distinguishes this action from those cases where courts have found challenges to congressional rules or practices to be justiciable. For example, in *Powell v. McCormack*, the Supreme Court found justiciable former Representative Powell's challenge to his exclusion from the House because the Court determined that the House's power to judge the qualifications of its Members, U.S. Const. art. I, § 5, cl. 1, was expressly limited to the three criteria set forth in the Constitution, art. I, § 2, cl. 2 (age, residency, and citizenship). *See* 395 U.S. at 547-50. Similarly, in *Michel v. Anderson*, 14 F.3d 623, Article I, section 2's requirement that the House of Representatives "be composed of Members chosen every second Year by the People of the several States" constituted an express textual limit that rendered justiciable a challenge to a House rule permitting non-Member delegates to vote in the House's Committee of the Whole. *Id.* at 626-27. In contrast, the lack of any express textual limit on the time to be spent considering

nominations demonstrates that the Constitution commits to the Senate under its rulemaking authority the power to determine when and how to close debate on such matters.

2. Plaintiff's claim also presents a political question because no judicially manageable standards exist against which to review either the Senate's cloture rule or the length of debate on judicial nominees. Plaintiff suggests that the requirement of a majority vote to confirm nominees could serve as a standard against which to evaluate the length of Senate debate and to decide the proper number of votes required to invoke cloture. *See* Compl. ¶ 27 [J.A. 16]. However, that requirement provides no more guidance for a court to judge the Senate's cloture rule than did the provision granting the Senate power to "try all Impeachments" provide any measure by which to judge the Senate's impeachment proceedings. *See Nixon*, 506 U.S. at 229-30.

If the Constitution required, as the plaintiff appears to believe, that a majority is entitled to vote on a nomination whenever it chooses, it is difficult to discern at what point a Senate rule on the length of debate would transgress that requirement. Would, for example, a rule providing a fixed amount of time for each Member to debate deprive a majority of its right to end debate sooner? Does plaintiff's majority-vote principle entitle a majority completely to deprive other Members of any debate if the majority wishes to vote forthwith? As these questions make plain, there are no legal standards for resolving a dispute over

the proper time period for debate on judicial nominations or over the sixty-vote requirement in the Senate's cloture rule.

3. Furthermore, for a court to engage in the review plaintiff seeks would require an invasive inquiry into internal Senate processes that go to the heart of the Senate's prerogatives as a House of Congress – including scheduling of legislative business, establishing and interpreting the rules that govern its proceedings, allowing debate over matters before the body, determining how long such debate may continue, and deciding how and when to schedule votes. Judicial intrusion into these matters would express a lack of respect for the Senate as a coordinate branch of government. *See Brown v. Hansen*, 973 F.2d 1118, 1122 (3d Cir. 1992) (per curiam) ("Absent a clear command from some external source of law, we cannot interfere with the internal workings of the Virgin Islands Legislature 'without expressing lack of the respect due coordinate branches of government.'") (quoting *Baker*, 369 U.S. at 217).

Indeed, plaintiff's request for an injunction against further debate on particular nominations is nothing less than a request that the Court direct the Senate when to vote on matters pending before it. Such an encroachment on the procedures of the Senate would be even more "disastrously intrusive" than telling the House of Representatives how to allocate seats on its committees, which this Court has declined to do. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1176 (D.C. Cir. 1983). For a court to usurp the Senate's power and impose on that body rules regulating floor debate on nominations – precluding the Senate

and its Members from resolving matters of internal procedure through the mechanisms they deem proper – would surely express a lack of respect for a coequal branch.

* * *

The recent agreement by fourteen Members regarding debate on judicial nominations demonstrates well the evolving processes, both formal and informal, that are part of the Senate's collective determination on how to regulate its internal procedures. These deliberations are part of the Senate's long history of considering and modifying its rules governing debate on the floor. Under our system of government, such matters are properly considered, determined, and resolved within the Senate itself. In other words, those issues are quintessentially political questions that are not appropriate subjects for judicial resolution.

CONCLUSION

For the foregoing reasons, the Court should affirm the dismissal of this action.

Respectfully submitted,

Patricia Mack Bryan, Bar #335463
Senate Legal Counsel

Morgan J. Frankel, Bar #342022
Deputy Senate Legal Counsel

Grant R. Vinik, Bar #459848
Assistant Senate Legal Counsel

Thomas E. Caballero
Assistant Senate Legal Counsel

Office of Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510-7250
(202) 224-4435

Counsel for Appellees

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Thomas E. Caballero

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I hereby certify that, on July 1, 2005, two copies of the foregoing Brief for Appellees and two copies of the Addendum to Appellees' Brief were served by Federal Express overnight delivery on the following:

Paul J. Orfanedes, Esq.
James F. Peterson, Esq.
Michael J. Hurley, Esq.
Meredith L. Cavallo, Esq.
Judicial Watch, Inc.
501 School Street, SW, Suite 500
Washington, D.C. 20024

Counsel for Appellant

Thomas E. Caballero