APPEAL NO. 04-5422

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUDICIAL WATCH, INC.,

Plaintiff-Appellant

v.

THE UNITED STATES SENATE, *et al.*,

Defendants-Appellees

BRIEF OF APPELLANT

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CORPORATE DISCLOSURE STATEMENT

Appellant, Judicial Watch, Inc., is a section 501(c)(3) educational foundation that advocates transparency, integrity and accountability in government, politics, and the law. Judicial Watch, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of Judicial Watch, Inc.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant Judicial Watch, Inc. hereby submits its Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici The Parties appearing in the lower court and in this appeal are Plaintiff-Appellant Judicial Watch, Inc. and Defendants-Appellees the United States Senate, Emily Reynolds, in her official capacity as Secretary of the United States Senate, and William H. Pickle, in his official capacity as Sergeant at Arms. There were no *amici curiae* in the lower court.

B. Rulings Under Review The ruling under review in this appeal is the October 6, 2004 Memorandum Opinion and Order of the Honorable Colleen Kollar-Kotelly, reproduced at pages 41-63 of the Joint Appendix and reported at 340 F. Supp. 2d 26 (D.D.C.).

C. Related Cases This case has not previously been before this or any other Court. Counsel for Appellant Judicial Watch, Inc. is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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STATEMENT OF JURISDICTION

This case arises under the United States Constitution. Jurisdiction in the District Court was based upon 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because a final judgment disposing of all parties' claims was entered by the District Court. This appeal is timely as the District Court entered its final judgment on October 6, 2004 and Appellant Judicial Watch, Inc. ("Judicial Watch") filed its notice of appeal on November 22, 2004.

STATEMENT OF ISSUES PRESENTED

Whether Judicial Watch, a non-profit educational organization that monitors the operation of government uses the civil litigation process to obtain and disseminate information to the public and to exercise its First Amendment rights, has standing to seek redress from unconstitutional rules of the U.S. Senate that effectively require a supermajority of the Senate to confirm judicial nominees, thus impairing the proper functioning of the federal judiciary.

STATEMENT OF THE CASE

I. Introduction.

A serious vacancy crisis exists in the federal judiciary that is directly impacting this Court. This crisis is being exacerbated by a constitutional crisis in

the U.S. Senate, as an obstructionist minority of Senators has invoked the Senate's filibuster rule (Senate Rule XXII) to block confirmation of seven Presidential nominees for federal judgeships.[1] Article II, section 2, of the U.S. Constitution provides that a simple majority of the total number of U.S. Senators is required to confirm a judicial nominee. Although a majority of the Senate reportedly supports the confirmation of the filibustered nominees, Senate Rule XXII has enabled a minority to undermine the Constitution and indefinitely prevent any vote from being taken on their confirmation. Because Senate Rule XXII requires 60 votes to pass a cloture motion to end the filibusters and proceed with a vote to confirm the nominees, the rule is unconstitutional on its face, as it effectively undercuts Article II, section 2, of the Constitution by effectively requiring a supermajority vote to approve judicial nominees. The filibuster rule also has made a mockery of the Senate's "advice and consent" role in the judicial nomination process because, as used here, the filibusters have no purpose other than preventing a vote by the Senate to confirm the President's nominees, leaving the federal judiciary in limbo. Knowing that they cannot prevent confirmation of the President's nominees in a

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[1] Senate Rule XXII provides for unlimited debate in the Senate until a cloture motion for ending debate is filed and the question is decided in the affirmative by three-fifths of the Senators duly chosen and sworn. *See* Addendum attached hereto.

Senate vote, the Senate minority has resorted to partisan political tactics of stonewalling any vote on these nominees in complete derogation of their constitutional responsibility.[2]

When Plaintiff-Appellant Judicial Watch filed its Complaint in this action on May 14, 2003, Senate filibusters were blocking votes on the confirmation of two judicial nominees: former Assistant Solicitor General Miguel Estrada (nominated to the D.C. Circuit) and Texas Supreme Court Justice Priscilla R. Owen (nominated to the Fifth Circuit). Twenty-eight exhausting months after he was nominated, on September 4, 2003 Mr. Estrada withdrew as a nominee without any Senate vote on his nomination, even though a majority of Senators supported his nomination. Almost two years after the filing of the Complaint, the crisis has escalated and worsened, as the number of unconstitutional filibusters against the

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[2] In 2003, then-Senator Zell Miller of Georgia summarized the status of the judicial appointment process in the U.S. Senate:

> Today, the U.S. Senate is tied in a Gordian Knot with two filibusters quietly going on to prevent a simple up or down vote on the President's nominees to the Judiciary [Miguel Estrada and Priscilla Owen]. And unless we find a way to untie that knot, the meaning of "advise and consent" is going to be changed forever. In fact, the Democratic process and the confirmation process, as we have known it since the birth of this nation will be changed forever.

Hearing on Senate Rule XXII Before the Senate Committee on Rules and Administration, 108th Cong. (June 5, 2003).

President's judicial nominees has multiplied. Not only does the filibuster of Justice Owen continue unabated today, but six other nominees are currently being filibustered: Janice Rogers Brown (nominated to the D.C. Circuit), William H. Pryor, Jr. (nominated to the Eleventh Circuit), William G. Myers III (nominated to the Ninth Circuit), Henry Saad (nominated to the Sixth Circuit), David McKeague (nominated to the Sixth Circuit) and Richard Griffin (nominated to the Sixth Circuit).

It is beyond dispute that this Court and the other federal courts of appeals would function more efficiently and effectively with the full complement of judges required by 28 U.S.C. § 44. Indeed, the high number of vacancies in the federal judiciary has been cited as a serious issue for three consecutive years by Chief Justice Rehnquist of the U.S. Supreme Court. J.A. at 12-13, ¶¶ 12, 14. This vacancy crisis in the federal judiciary, which is being exacerbated by the unconstitutional filibusters of the President's judicial nominees under Senate Rule XXII, is occurring at the same time that the caseload of the federal courts is increasing.[3] The unconstitutional filibuster of the President's judicial nominees is

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[3] According to the Administrative Office of the U.S. Courts, the number of cases filed before the U.S. Courts of Appeals increased from 56,534 in 2002 to 60,505 in 2004. The number of cases pending similarly increased from 39,242 to 46,978.

thus damaging the proper functioning of the federal courts, which lack their full complement of judges as a result.

Judicial Watch is a nonprofit, educational organization dedicated to monitoring and increasing public understanding of the operations of government. Unlike most other litigants in the federal courts, Judicial Watch also uses the civil litigation process as the means through which it obtains and disseminates information to the public in furtherance of its educational mission. In addition, Judicial Watch also uses the civil litigation process to exercise its First Amendment rights. For these reasons, unlike most other litigants, Judicial Watch has a unique and particularized interest in the proper functioning of the federal courts in which it files its public interest lawsuits. Therefore, Judicial Watch is an appropriate plaintiff with standing to seek a declaratory judgment finding that Senate Rule XXII is unconstitutional, as well as injunctive relief.

II. Factual Background.

The judicial appointments process contemplates that the President will nominate qualified candidates for vacant federal judgeships and the Senate will consider and vote either to confirm or reject each nominee. Under the authority of 28 U.S.C. § 44 and subject to the advice and consent of the U.S. Senate, President Bush appointed former Assistant Solicitor General Miguel Estrada and Texas

Supreme Court Justice Priscilla Owen for vacant federal judgeships on the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit"), respectively. J.A. at 15, ¶ 18. Under Article II, section 2, of the U.S. Constitution, a simple majority vote in the Senate is required to approve these judicial nominations. However, after eight exhausting months of a filibuster by a minority of obstructionist Senators blocking any vote on his nomination, Mr. Estrada withdrew his nomination, even though a majority of the Senate openly and repeatedly supported his confirmation. Several years later, still no vote has been yet taken on Justice Owen's confirmation because of a filibuster being made possible by Senate Rule XXII.

Unfortunately, the Estrada and Owen nominations are not isolated instances of the unconstitutional use of Senate Rule XXII to block the Senate from voting on confirmation of the President's judicial nominees. The minority of obstructionist Senators who are using Senate Rule XXII to block voting in the Senate on judicial nominations has escalated. During the 108th Congress, Senate Rule XXII was used to block Senate votes on the confirmation of nine judicial nominees.[4] In each case, the judicial nominee had the support of more than a

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[4] Senate Rule XXII was used to prevent votes on confirmation of the following judicial nominees: Priscilla Owen and Charles W. Pickering, Sr. (nominated to the Fifth Circuit), Carolyn B. Kuhl and William G. Myers

majority of the Senate, as demonstrated by a majority voting repeatedly to invoke cloture. However, because of the supermajority requirement of Senate Rule XXII, the Senate was never allowed to proceed to a vote on these nominations.

Senate Rule XXII provides for unlimited debate in the Senate until a cloture motion for ending debate is made and the question is "decided in the affirmative by three-fifths of the Senators duly chosen and sworn." *See* Addendum (Senate Rule XXII). Thus, a vote on confirmation of a judicial nominee can be prevented whenever there are as few as forty-one Senators who do not vote in favor of ending debate. Senate Rule XXII conflicts with Article II, section 2, of the Constitution because it effectively requires a supermajority to confirm a judicial nominee.

III. Procedural Background.

On May 14, 2003, Judicial Watch filed suit against Appellees for declaratory and injunctive relief. In its complaint, Judicial Watch alleged that Senate Rules XXII and V[5] were unconstitutional and violative of its First

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(nominated to the Ninth Circuit), Janice R. Brown (nominated to the D.C. Circuit), David W. McKeague, Richard A. Griffin and Henry Saad (nominated to the Sixth Circuit). *See* Neil A. Lewis, *Bush Tries Again on Court Choices Stalled in Senate*, N.Y. Times, Dec. 24, 2004, at A1.

[5] The Complaint also seeks Senate Rule V declared unconstitutional, as Rule V, which requires a 67 vote majority to changes the Senate's rules,

Amendment rights and 28 U.S.C. § 44.[6] Appellees filed a motion to dismiss Judicial Watch's complaint. On October 7, 2003, Judicial Watch filed its opposition to Appellees' motion to dismiss and cross-moved for summary judgment on the constitutionality of the filibuster rule as applied to judicial nominees. After holding briefing on the constitutionality of Senate Rule XXII in abeyance, the district court dismissed Judicial Watch's complaint on October 6, 2004 for lack of Article III standing. *Judicial Watch, Inc. v. U.S. Senate*, 340 F. Supp. 2d 26, 38 (D.D.C. 2004).

SUMMARY OF ARGUMENT

Judicial Watch has standing in this case as its use of the federal courts and interest in the proper functioning of the federal court system is being harmed by Defendants' unconstitutional use of the filibuster and Senate Rule XXII. As a result of these filibusters, judicial vacancies have remained unfilled for extensive periods of time, causing Judicial Watch a concrete and particularized injury through the diminished functioning of the judicial system and the consequent limit

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exacerbates the harm caused by Rule XXII in that a simple majority of the Senate cannot change Rule XXII.

[6] 28 U.S.C. § 44 plainly states the number of judges required for each federal circuit.

on Judicial Watch's ability to carry out its public interest mission and exercise its First Amendment rights.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING JUDICIAL WATCH'S COMPLAINT FOR LACK OF STANDING.

Consistent with well-established precedent in this Court, Judicial Watch has standing to challenge Senate Rule XXII, as it has been injured in a particular and concrete way. The district court nevertheless dismissed the complaint after concluding that Judicial Watch lacked standing under Article III of the Constitution.

A. Standard of Review.

This Court reviews the district court's grant of a motion to dismiss *de novo*. *National Wrestling Coaches Ass'n v. Dep't of Education*, 366 F.3d 930, 937 (D.C. Cir. 2004). "Because the District Court disposed of appellants' complaint on a motion to dismiss, we must assume that general factual allegations in the complaint embrace those specific facts that are necessary to support the claim." *Id.* at 938. In other words, in analyzing whether Judicial Watch has standing at the dismissal stage, this Court "must assume [Judicial Watch] states a valid legal claim, and must accept the factual allegations in the complaint as true."

Information Handling Services, Inc. v. Defense Automated Printing Services, 338 F.3d 1024, 1029 (D.C. Cir. 2003) (internal citations omitted).

B. Judicial Watch Has Standing To Bring This Suit.

In order to establish Article III standing, a plaintiff must demonstrate that (1) it has suffered an injury that is concrete and particularized, not conjectural or hypothetical; (2) the injury is fairly traceable to the conduct of which it complains; and (3) the injury is likely to be redressed by a court decision in its favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In order to demonstrate each element of standing, a plaintiff need only state "general factual allegations of injury resulting from defendant's conduct . . . [because] we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561.

The allegations of the Complaint, as expanded upon further in the affidavit of Judicial Watch's president, Thomas J. Fitton (J.A. at 19-26), are more than sufficient to establish standing. *See* J.A. at 12-17, ¶¶ 11-31. Under the precedent of this Court, Judicial Watch has standing in this case based on its pattern of use and demonstrated interest in the judicial system – the key forum through which Judicial Watch fulfills its educational mission and exercises its First Amendment rights.

First, Judicial Watch has suffered an injury-in-fact, namely, harm to its ability to use the courts to fulfill its public interest mission and to exercise its First Amendment rights. Because of the unconstitutional filibuster rule, vacancies on the U.S. Courts of Appeals are remaining unfilled for extensive periods of time and the proper functioning of the judiciary is being diminished as a result. This injury is concrete, particularized, and actual; it is not merely a generalized injury that may be suffered by an ordinary litigant because Judicial Watch uses the court system as a means to fulfill its public interest mission, not just to seek redress of individual grievances. These vacancies on the courts are the direct result of the unconstitutional filibuster rule, which is harming the efficient and proper functioning of the federal court system. Because of this diminished judiciary, Judicial Watch has been injured and likely will continue to be injured unless relief is granted.

Second, Judicial Watch's injury is fairly traceable to Defendants. The injury is not the result of any intervening cause or independent third-party action. The facts demonstrate that the only reason more judicial vacancies have not been filled is because of the current fillibusters made possible by Senate Rule XXII. The confirmation process has been usurped by a minority of obstructionist senators that are misusing Senate rules.

Third, the requested relief will redress Judicial Watch's injury. If Senate Rule XXII is declared unconstitutional in the context of judicial confirmation proceedings, the current majority of senators can confirm the currently pending nominees.

Because it has satisfied each element, Judicial Watch has standing to maintain this action. Accordingly, the district court erred in granting Defendants' motion to dismiss.

1. Judicial Watch's Complaint Clearly Establishes An Injury-In-Fact.

The first element of Article III standing requires that the plaintiff demonstrate an injury-in-fact, *i.e.*, the plaintiff must have a "direct stake" in the controversy. *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973) ("SCRAP"); *Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice"). Judicial Watch's allegations of injury fit comfortably within decisions of this Court and the U.S. Supreme Court recognizing that harm to a plaintiff's demonstrated interests and long-standing pattern of use is sufficient to establish an injury-in-fact. *See, e.g., Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 432 (D.C. Cir. 1998) (*en banc*)

("*Glickman*"). These cases, which demonstrate the scope of the injury-in-fact standard, were relied on by Judicial Watch below, but were unaddressed in the district court's opinion.

Glickman involved a challenge to the adequacy of statutorily-mandated regulations promulgated by the U.S. Department of Agriculture under a federal animal welfare statute. *Id.* at 428. This Court, sitting *en banc*, held that the plaintiff had standing to challenge the regulations on the basis that he had suffered injury to his "aesthetic" interest in observing animals, which he alleged were not being treated in accordance with federal law. *Glickman*, 154 F.3d at 431. The plaintiff alleged that he regularly visited a particular zoo to observe the animals and saw conditions to which he objected and believed were inhumane. *Id.* at 429-30. These visits, in addition to his desire and plan to visit the zoo in the future, were sufficient to establish an injury-in-fact. *Id.* at 431-32. The key factor, according to the Court, was that the plaintiff "suffered his injury in a personal and individual way . . . ." *Id.* at 433.

The U.S. Supreme Court employed similar reasoning in an analogous case. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-82 (2000) ("*Friends of the Earth*"), the plaintiffs claimed they were injured by the defendant discharging pollutants into a river, allegedly in violation of

environmental regulations. The Court noted that some of the plaintiffs' members had used the river and its environs for recreational activities in the past, including fishing, picnicking, and bird watching. *Id.* The members complained that, because of the pollution discharged by the defendants, they had not gone back to the river, but would have done so if the discharges ceased. The Court found a sufficient injury in fact to establish standing: the discharges affected the members' "recreational, aesthetic, and economic interests," and the members' conditional statements about visiting the river again could not be dismissed as mere speculation. *Id.* at 184. As in *Glickman*, allegations of injury-in-fact were sufficient because of an established pattern of use by the plaintiffs and plaintiffs' planned future use. *See also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996) (standing to bring challenge to governmental action established by "aesthetic and environmental" interest in limiting forest fires).

Finally, *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994), a case in yet another context, illustrates the same injury-in-fact standard. In *Michel*, the Court held that three individual voters had standing to challenge internal rules of the U.S. House of Representatives that granted voting rights to five territorial "delegates" in the Committee of the Whole. The voters alleged that, because the delegates' votes diluted the voting power of their own respective representatives,

the voters' own voting power had been diluted. Critically, this Court accepted that the voters' injuries were "generalized" and "diffuse," but still found sufficient injury to confer standing on the voters. *Id.* Despite the fact that the alleged reduction in voting power was spread over all voters in the United States, the Court concluded that, even though "all voters in the states suffer this injury . . . [that] does not make it an 'abstract' one." *Id.*

Like the plaintiffs in *Glickman* and *Friends of the Earth*, Judicial Watch has a long-standing pattern of use and demonstrated interest, albeit in the federal judicial system rather than a federally regulated zoo or park. Similarly, like the voters' interest in the proper functioning of Congress in *Michel*, Judicial Watch has an interest in the proper functioning of the judicial system, though Judicial Watch's interest is far less "diffuse" or "generalized" than the interests of the voters in *Michel*.

Judicial Watch's clear harm and injury-in-fact resembles – and is, in fact, far stronger – than the plaintiffs' interests in *Glickman* and *Friends of the Earth*. Judicial Watch's mission is to increase public understanding of the operations of government. *See* Compl. ¶5, J.A. at 11; *Glickman*, 154 F.3d at 432. To achieve this public interest mission, Judicial Watch routinely utilizes the litigation process to obtain and disseminate information about the operations of government and to

exercise its First Amendment rights. *Id.*; J.A. at 19-21 ¶¶ 4-8; J.A. at 11, ¶ 6. It has every intention of continuing to do so in the future. J.A. at 23, ¶ 10. Hence, Judicial Watch has a long-standing pattern of using the federal court system and a well-established, demonstrable interest in the proper and efficient functioning of that system, which is mandated by 28 U.S.C. § 44 to have a fixed number of judges.

This pattern of use and demonstrable interest is comparable to, if not far more significant than, the interests of the plaintiffs in *Glickman* and *Friends of the Earth*. If the law protects fishing, picnicking, and looking at animals, it surely protects engaging in public interest litigation. Judicial Watch's use of the federal courts and interest in the proper functioning of the federal court system is being harmed by Defendants' unconstitutional use of the filibuster and Senate Rule XXII, which is causing judicial vacancies to remain unfilled for extensive periods of time. As a result, Judicial Watch is suffering a concrete and particularized injury as a result of the diminished functioning of the judicial system and the consequent limit on its ability to carry out its public interest mission and exercise its First Amendment rights. J.A. at 13-14, ¶¶15, 16, 31.

2. Judicial Watch's Injury Qualifies As A Legally Protected Interest.

Contrary to the district court's finding, Judicial Watch's asserted injury-in-fact qualifies as a "legally protected interest." 340 F. Supp. 2d at 32-34. That interest is rooted in the First Amendment right to petition.

The right to petition is "one of the most precious of the liberties safeguarded by the Bill of Rights, by the very idea of government, republican in form." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002). The U.S. Supreme Court has stated unambiguously that litigation is a "form of political expression," *NAACP v. Button*, 371 U.S. 415, 429 (1963), and a right "protected under the First Amendment's guarantee of free speech and the right to petition." *Laker Airways Ltd. v. Pan Am. World Airways, Inc.*, 604 F. Supp. 280, 288 n. 32 (D.D.C. 1984) (citing *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam)). Harm to the proper functioning of the judiciary clearly implicates Judicial Watch's right to petition under the First Amendment.

Despite this well-established precedent, the district court disagreed that Judicial Watch's right to petition under the First Amendment is implicated by

harm to the proper functioning of the judiciary. 340 F. Supp. 2d at 33. The district court found that, because Judicial Watch had not been denied "access" to the courts, it had not demonstrated a legally protected interest. *Id.*

This assertion misses the point, however. At issue is not just the right to petition the federal court, but what that right actually means. The right to petition would be meaningless if there were no courts to petition or if those courts were so overburdened that the act of petitioning was rendered futile. Section 44 gives meaning and structure to the right to petition by mandating the specific number of active, full-time judges who shall sit on each U.S. Court of Appeals. For example, the law mandates that the D.C. Circuit "shall" have 12 judges and the Fifth Circuit "shall" have 17 judges to maintain the timely and efficient administration of justice in these Circuits. 28 U.S.C. § 44 (emphasis added). This is no different from how the animal welfare statute at issue in *Glickman*, which regulates the treatment of animals in confinement, or the environmental statute at issue in *Friends of the Earth*, which regulates the discharge of pollutants into groundwater, gives definition and meaning to the legally protected rights of the plaintiffs in each of those cases. It is Judicial Watch's underlying right to petition, as shaped and defined by 28 U.S.C. § 44, that is the legally protected interest at issue, just like the animal welfare statute at issue in *Glickman* shaped and defined the plaintiff's

protected right to observing animals in that case and the environmental statute at issue in *Friends of the Earth* shaped and defined the plaintiffs' protected right to make use of rivers and parklands in that lawsuit.

Moreover, access by itself – making it through the courthouse door – is not meaningful if there are too few judges inside the courthouse to give due consideration to the cases that filed. *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 707 (9th Cir. 1992) ("we do not discount the possibility that litigation delays in certain circumstances could effectively deprive individual litigants of the ability to vindicate fundamental rights"). A litigant in the federal courts does have a fundamental right to the proper administration of justice. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (*en banc*) ("The federal litigant has a personal right, subject to exceptions in certain classes of cases, to demand Article III adjudication of a civil suit."); *see also Los Angeles County Bar Ass'n*, 979 F.2d at 707. Fundamental due process requires that, having created the federal court system to administer justice, the Senate – much less an obstructionist minority of the Senate – cannot sabotage the proper functioning of the court system by depriving it of the full complement of judges. *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (holding that although state had no responsibility to confer property interest in government employment, it was

obligated to follow constitutionally mandated procedures to terminate right once it was created). Section 44 clearly defines the number of judges that plaintiffs like Judicial Watch have the right to expect when they petition the federal judiciary.[7]

The district court also erred in interpreting 28 U.S.C. § 44 as permissive rather than mandatory in nature. 340 F. Supp. 2d at 32-33. Without citing any basis in the statute or any legislative history, the district court chose to ignore the plain meaning of the word "shall" in 28 U.S.C. § 44 and concluded that Congress did not actually mean the word "shall" to have its demonstrably plain meaning. *Id.* On the contrary, 28 U.S.C. § 44 sets forth Congress' clear intention as to the proper number of judgeships in the respective circuits. This plain statement by Congress that a certain number of judges "shall" be appointed to the Circuits Courts leaves no room for interpretation by the district court. It is, of course, a "cardinal" canon of statutory construction that "Courts must presume that [the Congress] says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted); *Id.* at 254 ("When the words of a statute are unambiguous, then, this first

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[7] This is not to say that Judicial Watch ever claimed that it had a "statutory right" under 28 U.S.C. § 44. Judicial Watch has never claimed that its rights flow from this statute, only that the statute gives definition and meaning to the right to petition.

canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Moreover, the legislative history of the statute confirms that the number of judges that "shall" be appointed has been modified over time, thus demonstrating that the specific number set in the statute is both purposeful and meaningful. *See, e.g.*, Pub. L. 101-650 § 202(a) ("The President shall appoint, by and with the advice and consent of the Senate, (1) 2 additional circuit judges for the third circuit court of appeals; (2) 4 additional circuit judges for the fourth circuit court of appeals; . . . ."); Pub. L. 98-353 § 201(a) , Pub. L. 90-347 § 1. The directive of 28 U.S.C. § 44 is very clear in its requirements.

3. Judicial Watch's Injury Is Actual And Particularized.

Judicial Watch's injury is actual, particularized, and concrete, as the unfilled vacancies in various U.S. Courts of Appeals remain. The harm caused by the unconstitutional acts of a minority of obstructionist senators has injured Judicial Watch already and will likely continue to injure Judicial Watch unless relief is granted. The Judicial Watch's complaint clearly sets forth these specific injuries resulting from the harm to the proper functioning of the judiciary. J.A. at 11, ¶¶ 5-8, 15; *cf. Michel*, 14 F.3d at 626 ("that an injury is widespread, however, does not

mean that it cannot form the basis for a case in federal court so long as each person can be said to have suffered a distinct and concrete harm.").

The Estrada and Brown nominations in particular help to demonstrate the actual injury to Judicial Watch. Many of Judicial Watch's cases are brought in the U.S. District Court for the District of Columbia and are appealed to this Court. Because of the unconstitutional filibusters against Mr. Estrada and Justice Brown, the seats on this Court that these nominees were to have occupied remain vacant, and will continue to remain vacant for many months, if not years. Because of these vacancies, the administration of justice is harmed (fewer arguments heard, fewer opinions written, less ability to supervise the trial courts, *etc.*), injuring Judicial Watch in a concrete way.

C. Judicial Watch's Injury Is Fairly Traceable To Defendants.

The district court ruled that Judicial Watch lacks an injury fairly traceable to Senate Rule XXII. 340 F. Supp. 2d at 36. The district court stated that it was "skeptical" that, but for Senate Rules XXII, the filibustered nominees would have been confirmed, or that there was no causal connection between judicial vacancies and "delay" in the adjudication of cases. *Id.* at 36-37. Because Judicial Watch has clearly alleged that these rules are causing it actual injury and affecting it in a particular harmful way, the district court erred.

First, the district court's "skepticism" aside, 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. Not even Defendants contested this point below. It is undisputed that a majority of the Senate voted repeatedly, albeit unsuccessfully, to invoke cloture on, among others, the Estrada nomination and the Owen nomination, demonstrating clear support for their confirmation. Def. Mot to Dismiss at 7. It is thus completely reasonable to conclude that, but for Senate Rule XXII, filibustered nominees including Mr. Estrada and Ms. Owen would have long since been confirmed. Hence, the origin of the Judicial Watch's injury – a clear minority of the Senate blocking confirmation – is apparent.

In addition, the harm being suffered by Judicial Watch goes far beyond mere "delay." If these nominees had been confirmed, fewer judicial vacancies would exist, thereby improving the efficiency and proper functioning of the judiciary. Instead, the ongoing filibusters of judicial nominees are aggravating the burden on the judiciary: vacancies remain unfilled, caseloads mount and additional burdens are placed on sitting circuit judges, more opinions are unpublished rather than published, and the circuit courts are unable to exercise their supervisory role over the district courts. This results in tangible harm to

parties and lawyers who litigate before the courts – especially a frequent litigator like Judicial Watch.[8] Hence, the chain of causation is reasonable and clear.

D. Judicial Watch's Injury Is Likely To Be Redressed By A Favorable Decision.

Judicial Watch's complaint seeks specific relief – that the district court declare Senate Rule XXII unconstitutional as applied to judicial nominees and enjoin further use of this rule to block the confirmation of judicial nominees. J.A. at 9, ¶ 31 . The requested relief remedies the source of Judicial Watch's injury, which is a result of the ongoing application of Senate Rule XXII to filibuster the President's judicial nominees. A majority of Senators have indicated that they support the President's nominees as demonstrated by repeated majority votes to invoke cloture.

By declaring Senate Rule XXII unconstitutional as applied to judicial nominations and enjoining the Senate from further application of the rule to the

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[8] Another perhaps less tangible but no less significant harm of judicial filibusters is the effect on the caliber of potential judicial candidates. Nominees now must be willing to subject themselves to not just a pay cut but a taxing, and even interminable, confirmation process. *See Hearing on Senate Rule XXII Before the Senate Committee on Rules and Administration*, 108th Cong. (June 5, 2003) (statement of Dean Douglas Kmeic). The "withdrawal" of Miguel Estrada – more than two years after his nomination and seven failed cloture votes – was not a surrender by the nominee, but a triumph through exhaustion by a small Senate minority. Highly qualified potential nominees – from both sides of the aisle – may now decline the opportunity to be subjected to a similar ordeal.

confirmation proceedings of judicial nominees, the Senate majority supporting the filibustered nominees will then be able to vote for confirmation, helping to restore the circuit courts to the full complement of judges specified in 28 U.S.C. § 44.[9]

This Court has found relief to be redressible even where the relief is not guaranteed or is only partial. *See, e.g., International Ladies' Garment Workers Union v. Donovan*, 722 F.2d 795, 809 (D.C. Cir. 1983) ("slight beneficial indicia will be sufficient to sustain a party's assertion of standing"). In *Donovan*, the Court stated, "the appellants need not negate every conceivable impediment to effective relief no matter how speculative, nor are they required to prove that granting the requested relief is certain to alleviate their injury." *Id.* (emphasis in original) (citations omitted); *see also Natural Resources Def. Council v. Abraham*, 223 F.Supp.2d 162, 180 (D.D.C. 2002); *Bryant v. Yellent*, 447 U.S. 352, 368 (1980).

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[9] Not only is Judicial Watch's injury redressible, but this precise situation was anticipated in another case challenging a "supermajority" rule, albeit in the U.S. House of Representatives. *See Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997) (Edwards, C.J., dissenting). The majority in *Skaggs* did not reach the merits, but, in his dissent, Judge Edwards specifically suggested that the Constitution would forbid the Senate from imposing a supermajority rule for confirmation of nominees. *Id.* at 847.

While the district court speculated that striking down Rule XXII would not end the filibusters of judicial nominees, as the Senate would then have no procedure to limit debate absent the current rule, this concern is misplaced. 340 F. Supp. 2d at 38-39. If Rule XXII is declared unconstitutional, the Senate will not be locked in perpetual filibusters over judicial nominess, but will be able to cut off unlimited debate based on a simple majority vote. The Senate will have received guidance that it cannot adopt an unconstitutional rule which allows filibusters of judicial nominees and will be in a position, using whatever procedural steps appropriate, to adopt a new and constitutional rule that both limits debate on judicial nominees and allows the Senate to fulfill its "advice and consent" duty.

Finally, the district court suggested that, if Judicial Watch has standing here, then any party could challenge an unfilled judicial vacancy, or even potentially have an action against the president, if he failed to nominate candidates to fill judicial vacancies. 340 F. Supp. 2d at 33. This additional concern is also unfounded. In this case, as explained above, Judicial Watch is different from most litigants, not just in the number of cases it brings, but in its reliance on the proper functioning of the judiciary to fulfill its educational mission and exercise its First Amendment rights. As for the district court's hypothetical that a party might challenge a president's failure to make nominations, this would raise numerous

causation and redressibility issues not present here, as the chain of causation and relief is much more clear and there is no indication, unlike here, that these as of yet unnamed nominees would be confirmed. In any event, the district court's hypothetical case is not before the Court.

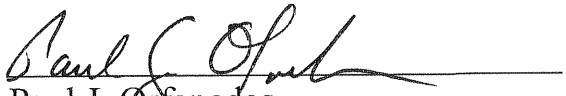
CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal and remand this case for expedited consideration of Judicial Watch's cross-motion for summary judgment.

May 2, 2005

Respectfully submitted,

JUDICIAL WATCH, INC.



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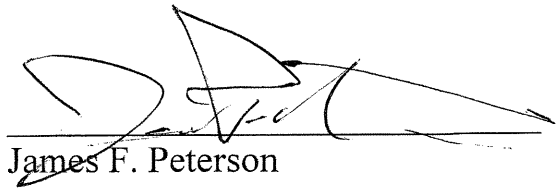
CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32(a)(2)

I certify that pursuant Fed. R. App. P. 32(a)(7)(C) and District of Columbia Circuit Rule 32(a)(2) that the attached Brief of Appellant is proportionally spaced, as a typeface of 14 points or more and contains 7002 words.



James F. Peterson

ADDENDUM

Standing Rules of The Senate

RULE XXII

PRECEDENCE OF MOTIONS

1. When a question is pending, no motion shall be received but

To adjourn.

To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.

To take a recess.

To proceed to the consideration of executive business.

To lay on the table.

To postpone indefinitely.

To postpone to a day certain.

To commit.

To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

2. Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

"Is it the sense of the Senate that the debate shall be brought to a close?" And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn -- except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting -- then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the measure, motion, or other matter pending before the Senate, or the unfinished business, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be proposed after the vote to bring the

debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

After no more than thirty hours of consideration of the measure, motion, or other matter on which cloture has been invoked, the Senate shall proceed, without any further debate on any question, to vote on the final disposition thereof to the exclusion of all amendments not then actually pending before the Senate at that time and to the exclusion of all motions, except a motion to table, or to reconsider and one quorum call on demand to establish the presence of a quorum (and motions required to establish a quorum) immediately before the final vote begins. The thirty hours may be increased by the adoption of a motion, decided without debate, by a threefifths affirmative vote of the Senators duly chosen and sworn, and any such time thus agreed upon shall be equally divided between and controlled by the Majority and Minority Leaders or their designees. However, only one motion to extend time, specified above, may be made in any one calendar day.

If, for any reason, a measure or matter is reprinted after cloture has been invoked, amendments which were in order prior to the reprinting of the measure or matter will continue to be in order and may be conformed and reprinted at the request of the amendment's sponsor. The conforming changes must be limited to lineation and pagination.

No Senator shall call up more than two amendments until every other Senator shall have had the opportunity to do likewise.

Notwithstanding other provisions of this rule, a Senator may yield all or part of his one hour to the majority or minority floor managers of the measure, motion, or matter or to the Majority or Minority Leader, but each Senator specified shall not have more than two hours so yielded to him and may in turn yield such time to other Senators.

Notwithstanding any other provision of this rule, any Senator who has not used or yielded at least ten minutes, is, if he seeks recognition, guaranteed up to ten minutes, inclusive, to speak only.

After cloture is invoked, the reading of any amendment, including House amendments, shall be dispensed with when the proposed amendment has been identified and has been available in printed form at the desk of the Members for not less than twenty four hours.

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2004, two true and attested copies of the foregoing BRIEF OF APPELLANTS was served, via first-class mail, postage prepaid, on the following:

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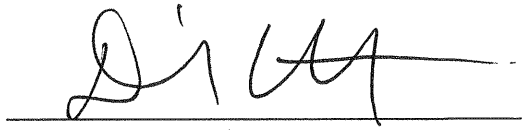

David Rothstein