COURT DISMISSES SUIT ON CONSTITUTIONALITY OF FILIBUSTER

Among the hottest issues looking forward to the beginning of the 113th Congress is the status of the filibuster. Will it remain in the status quo of recent decades, the 60 vote Senate roadblock, or will there be movement to return, or at least move closer towards, a majority vote Senate?

One of the more interesting tacts in the filibuster reform fight has been an effort by a group of people, led by Common Cause, and including members of Congress such as Representatives John Lewis, Keith Ellison, Michael Michaud and Hank Johnson, to have the filibuster declared unconstitutional by a federal Article III court. They filed their complaint on May 15th of this year and issued a press release describing their effort.

Very early this morning, the effort came to a screeching halt with an order from the DC District Court dismissing the case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. This decision was, quite unfortunately, absolutely certain to have been made, and today was so ordered by Judge Emmet Sullivan.

The plaintiffs' goal was described by the court thusly:

> They bring this suit against representatives of the United States Senate seeking a declaratory judgment

> that Rule XXII (the "Cloture Rule" or the "Filibuster Rule") – which requires a vote of sixty senators to proceed with or close debate on bills or presidential nominations and a two-thirds vote to proceed with or close debate on proposed amendments to the Senate Rules – is unconstitutional because it is "inconsistent with the principle of majority rule." In the alternative, Plaintiffs challenge Senate Rule V, which provides that the Senate's rules continue from one Congress to the next, unless amended.

An admirable goal if there ever was one, but, alas, of the Don Quixote nature perhaps. And so the court found. The first cut was on standing, and none of the plaintiffs made it:

> First, the Court cannot find that any of the Plaintiffs have standing to sue. Standing is the bedrock requirement of an Article III court's jurisdiction to resolve only those cases that present live controversies. While the House Members have presented a unique posture, the Court is not persuaded that their alleged injury – vote nullification – falls into a narrow exception enunciated by the Supreme Court in Raines v. Byrd. And none of the other Plaintiffs have demonstrated that this Court can do anything to remedy the alleged harm they have suffered.

But standing was, by traditional justiciability analysis, the least of the plaintiffs' concerns; the real problem lay in Separation of Powers between the branches and the historical refusal of federal courts to intrude on the Article I legislative prerogative. And so it was viewed by Judge Sullivan:

> Second, and no less important, the Court is firmly convinced that to intrude into

> this area would offend the separation of powers on which the Constitution rests. Nowhere does the Constitution contain express requirements regarding the proper length of, or method for, the Senate to debate proposed legislation. Article I reserves to each House the power to determine the rules of its proceedings. And absent a rule's violation of an express constraint in the Constitution or an individual's fundamental rights, the internal proceedings of the Legislative Branch are beyond the jurisdiction of this Court.

For those reasons, Judge Sullivan dismissed the complaint. There has been no announcement yet made as to appeal by Common Cause et. al, but honesty dictates the conclusion that if you cannot get past Emmet Sullivan, you stand no chance whatsoever in the ultra conservative DC Circuit. By the way, by the time this case could hit the DC Circuit, it will be down and vacant four judges, from a slated eleven seats to only seven filled seats, due to the taking of senior status by Chief Judge David Sentelle, and there is little to no movement or concern by Barack Obama on ameliorating the situation.

The concerns of the DC Circuit health aside, the filibuster lawsuit is going nowhere. Remedy for the Senate blockage will have to come from within the Senate itself, pursuant to Senate Rules modification. As Joan McCarter at Daily Kos reported on Monday, there is some evidence Harry Reid would have the 51 votes necessary to get it done.

Let's hope Harry Reid has the famed pugilistic cajones he likes to claim, and sees to it that the Senate is returned to a functioning body. There are not just the legislative goals that hang in the lurch, but also a full slate of critical Executive Branch nominations for the coming new term for Obama and, of course, the state of emergency in the Federal Judiciary.

Harry Reid and the Senate Democrats can solve that if they have the guts. They can expect nothing but spiteful obstructionism from the Senate Republicans after the election and the “fiscal cliff” showdown.

The Democrats need to govern in the absence of a responsible GOP effort to do so. It starts with fixing the filibuster problem.