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From: Sean Rushton <SRushton@CommitteeforJustice.org> (Sean Rushton
<SRushton@CommitteeforJustice.org> [UNKNOWN])
To: SRushton@CommitteeforJustice.org (SRushton@CommitteeforJustice.org [UNKNOWN])
Bcc: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Subject: : Supermajority.
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<SRushton@CommitteeforJustice.org> [UNKNOWN])
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READ:UNKNOWN
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READ:UNKNOWN
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NY Times

June 11, 2003

Supermajority Rule

By JUDITH RESNIK

NEW HAVEN - The appointment of judges with life tenure is a unique event in the American democratic system. Members of Congress and the president stay in power only if they convince voters to re-elect them - and even popular presidents have to quit after two terms. But life-tenured federal judges serve for decades.

Partly for this reason - and because of the federal judiciary's ever-growing importance in American life - the Senate should strive for more agreement, not less, in approving judicial appointments. How many senators should it take to approve a judicial nominee? The Senate majority leader, Bill Frist, is urging the Senate to revisit its filibuster rules to make it easier for a bare majority to install a judge for life. Instead, the Senate should leave those rules in place and add a requirement that 60 votes are needed for life-tenured appointments to the federal courts.

We have become accustomed to protracted debates about who should serve on the Supreme Court. Appointments to the lower federal courts deserve

comparable attention. For most people in the United States, federal judges in the lower courts are the only federal judicial officials they will see. More than 340,000 cases were filed last year in federal trial courts, and almost 60,000 appeals brought. In contrast, the Supreme Court issued 76 signed opinions in its most recent term. The volume is small compared to the millions of cases decided by the states, but large compared to the federal dockets of only a few decades ago.

The Constitution says relatively little about the federal court system - providing directly for the Supreme Court and giving Congress the power to "ordain and establish" such lower courts as it deems necessary. While the lower federal courts are almost as old as the Constitution, in the last 100 years the number of judgeships has grown substantially.

In 1901, only about 100 people held federal judgeships, from the trial courts through the Supreme Court. Sometimes, one district judge served a whole state. There were fewer than 30 intermediate appellate judges. In contrast, almost 800 people hold life-tenured judgeships today, and a few hundred serve as senior judges.

Moreover, life-tenured judges are not the only judicial officers in the more than 500 federal courthouses across the United States. Congress has given judges the power to appoint two other sets of judges, magistrate and bankruptcy judges, who serve for fixed, renewable terms and who add another 800 judges to the ranks. These judges in turn hear the cases of yet other Americans - including the more than 1.5 million people and companies who filed for bankruptcy protection last year. Still more federal judicial officers serve outside courts as administrative law judges in federal agencies.

The growth of judgeships reflects the growth of federal jurisdiction. In the last century, Congress has created securities law, environmental law, civil rights law, consumer law. We all now have federal rights that affect our lives in many ways - from taxes and pensions to the water we drink and our personal security.

Congress and the courts, working together, have done a remarkable job creating a substantial, important judicial system. At the top of this hierarchy sit life-tenured judges. Careful deliberation over nominees to these judgeships is crucial. Especially when the Senate is almost evenly divided, a supermajority requirement is one good way for the Senate to fulfill its constitutional duty to give advice and consent on judicial appointments.

This approach is not likely to be popular with the party in power, since supermajority requirements empower minorities. But given the large

number of federal judgeships, the minority party will be reluctant to expend political energy or capital too often. When it does - when 41 senators say a particular person is ill suited for an appointment to the bench - it is time to pause.

By constitutional design, Congress is periodically reauthorized through elections. It ought to take a supermajority of the Senate to confer power on judges who will exercise it for their rest of their lives.

Judith Resnik is a professor at Yale Law School.

Sean Rushton

Executive Director

Committee for Justice

1275 Pennsylvania Avenue, NW

Tenth Floor

Washington, DC 20004

202-481-6850 phone

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