Henry Adams: “The true task of any reformer is to return the Senate to decency.” Plus ca change?

The DC Circuit’s outrageous opinion on Friday essentially banning recess appointments has brought further chaos to the Age of Dysfunction. Now, President Obama will confront potentially dozens of new filibusters without recourse; it didn’t help that less than 24 hours beforehand, the Senate scotched the efforts at meaningful filibuster reform. So what to do now?

It seems too late for this session, but you don’t win political battles by giving up after one round. For the environment, the stakes could not be greater: at issue are a whole series of critical executive branch posts in key Cabinet agencies, not to mention the judges who will construe the Constitution, administrative, and environmental law.

Perhaps the most important thing to understand is that the interests of the Senate as a body do not dovetail with the interests of individual Senators. For the Senate to work, it needs to be able to pass legislation and confirm (or reject) President appointments. But for an individual Senator to exert power, she needs to block action so as to get more leverage. But that, in turn, poses a question: is there any way for Senators to both lose *and* gain power in a reform? I believe so. Here’s how it would work.

Not all filibusters of appointments are created equal. It is one thing to filibuster the nomination of an Article III judge, who has life tenure. It is quite another to filibuster an Article II executive branch appointment, which by definition is temporary and an extension of a President (who usually has been elected by the people). Since 1995, the judicial confirmation process has slowly ground to a halt, as Movement Conservatives have sought to block Democratic appointments and Democrats have retaliated. This simply cannot continue: there is a growing crisis of vacancies on the federal bench that will severely erode the administration of justice if it has not done so already.

My solution, which I believe could ameliorate both the executive and judicial confirmation process, is to give individual Senators *more* power over judges and

less power over Article II positions. I continue to believe that Article II filibusters are unconstitutional intrusions into Presidential power, but in any event, the rules must be changed to forbid filibusters for executive branch appointments. And yes — this should be the case with either Hillary Clinton or Marco Rubio (say) in the White House.

Senators, of course, will balk at this erosion of their power. But in exchange, we would give them more power over judges — which might even get more judges confirmed. First, we would reinstate the late 1990's Republican rule that allowed even one Senator to block a nomination in his or her home state — the so-called "One Blue Slip" rule that the GOP invented to block Bill Clinton's appointments and then removed once George W. Bush became President. This would force the President to negotiate with an individual Senator over judicial appointments.

If carried into effect by a President who cared about filling the federal judiciary, this would lead to potentially widely divergent jurisprudence in different circuits — the 5th and the 11th would be extremely conservative, and the 1st and 2nd would be very liberal. But at least the slots would get filled.

What if, however, there was a President who didn't about filling the federal judiciary per se, but only in those areas where she had ideologically congenial Senators? Here is where individual Senatorial prerogative would really increase. If, after a set period of time (say, 18 months), the President had not submitted an acceptable nomination for a judicial position in a Senator's home state, that Senator would have the right to place an indefinite hold on any other judicial nomination. One Senator could bring the whole process to a screeching halt. One Senator could force the President to act. One Senator could block judicial replacements for the rest of the country. She wouldn't *have* to, of course: and that could constitute considerable leverage.

Note that this kind of hold power is substantially greater than what are considered "holds" nowadays. As I understand it, a Senatorial hold is essentially one Senator refusing unanimous consent unless he or she gets his way. The Senate could get around it by invoking cloture, which now could take several days to get around. But you can beat this sort of hold. In my proposal, you couldn't: it's indefinite until the Senator returns the blue slip.

I believe that this could actually *speed up* the judicial nominations process because it would place much more power in the hands of individual Senators, and take them

out of the hands of groups pressuring the President. Besides, it is a basic straightforward deal: you get your guy, and I get mine. And of course, combined with the abandonment of filibusters for executive branch appointments, it could improve general governance.

“The true task of any reformer,” remarked Henry Adams in 1908, “is to bring the Senate back to decency.” My idea satisfies the Senate as a body because it makes it more effective, individual Senators because it enhances their individual power, and the President because it allows her to fill executive branch appointments. Given the current downward spiral on judges and executive branch appointments, something needs to be done soon. I haven’t seen anything better yet.