this rule, thereby invalidating at the same time the rule of self-limitation observed by courts "where such an issue is tendered."[411]

The procedure by which appointments are made has been a point of controversy. The Appointments Clause provides 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, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ."[412] The Constitution provides that "Each House may determine the Rules of its Proceedings,"[413] and the Senate has enacted a cloture rule[414] requiring a supermajority vote (60 votes) to close debate on any matter pending before the Senate. Absent the invocation of cloture or some other means of ending debate, matters can remain before the Senate indefinitely. The practice of preventing cloture is known as a filibuster.

Although no provision of the Constitution expressly requires that the Senate or House act by majority vote in enacting legislation or in exercising its other constitutional powers, the framers of the Constitution were committed to majority rule as a general principle.[415] These facts have given rise to disagreement as to the constitutionality of the filibuster as applied to judicial nominees—disagreement over whether the "Advice and Consent" of the Senate means the majority of the Senate and not a supermajority. The constitutionality of the filibuster has twice been challenged in court, but both times the challenge was dismissed for lack of standing.[416] More recently, the Senate established a new precedent by which it reinterpreted its rules to require only a simple majority to invoke cloture on most nominations.[417]

### Punishment and Expulsion of Members

Congress has broad authority to judge the conduct of its Members. For instance, Congress has the authority to make it an of-

---

[411] 338 U.S. at 92–95.

[412] Art. II, § 2, cl. 2.

[413] Art. I, § 5, cl. 2.

[414] Rule XXII, par. 2.

[415] *See*, *e.g.*, Federalist No. 58, p. 397 (Cooke ed.; Wesleyan Univ. Press: 1961) (Madison, responding to objections that the Constitution should have required "more than a majority . . . for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision," asserted that such requirements would be inconsistent with majority rule, which is "the fundamental principle of free government"); id., No. 22, p. 138–39 (Hamilton observed that "equal suffrage among the States under the Articles of Confederation contradicts that fundamental maxim of republican government which requires that the sense of the majority should prevail").

[416] Judicial Watch, Inc. v. U.S. Senate, 340 F. Supp. 2d 26 (D.D.C. 2004); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998).

[417] 159 CONG. REC. S8416–S8418 (daily ed. Nov. 21, 2013).