

Filibusters on Judicial Nominations: Myth and Fact

Myth: U.S. Senate Republicans are attempting to abolish all filibusters.

Fact: Republicans are seeking to restore the advice and consent constitutional obligations of the Senate for judicial nominees -- not eliminate the legislative filibuster (filibusters on bills or amendments) -- even though Democrats have supported in the past abolishing all forms of filibusters.

In 1995, Democrats (Bingaman, Boxer, Feingold, Harkin, Kennedy, Kerry, Lautenberg, Lieberman, and Sarbanes) wanted to end the legislative filibuster. In 1995, the only senators on record supporting the end of the legislative filibuster were all Democrats, nine of whom are still serving in the Senate. (Karen Hosler, "Senators Vote 76-19 to Maintain Filibuster," *The [Baltimore] Sun*, 1/6/95; S.Res. 14, CQ Vote #1: Motion Agreed To 76-19; R 53-0; D 23-19, 1/5/95, Bingaman, Boxer, Feingold, Harkin, Kennedy, Kerry, Lautenberg, Lieberman, and Sarbanes Voted Nay on a motion to table the rules change; Frist Voted Yea)

- **The Harkin-Lieberman proposal would have amended the Senate rules to allow a simple majority to overcome "any" filibuster, legislative or executive.** (Karen Hosler, "Senators Vote 76-19 To Maintain Filibuster," *The [Baltimore] Sun*, 1/6/95; S.Amdt. 1, Motion To Table Agreed To, 1/5/95)

Sen. Bill Frist (R-TN) is proposing to change the rule on filibusters of judicial nominees only.

"Majority Leader Frist is threatening to use an obscure parliamentary maneuver -- dubbed by some 'the nuclear option' -- to change Senate rules and forbid filibusters against judicial nominees." (John Yang, op-ed, "Filibuster," *The Washington Post*, 1/16/05)

In fact, Senator Frist's first Senate vote, on January 5, 1995, was to preserve legislative filibusters.

As Majority Leader, Sen. Robert Byrd (D-WV) initiated four precedents that allowed a simple majority to change Senate procedures without altering the Standing Rules, thereby undermining minority rights to filibuster and use related tactics. (Sen. Robert Byrd, *Congressional Record*, 1977, pp. S31916-27; Sen. Robert Byrd, *Congressional Record*, 1980, pp. S4729-32; Sen. Robert Byrd, *Congressional Record*, 1979, pp. S31892-94; Sen. Robert Byrd, *Congressional Record*, 1987, pp. S12252-60)

Myth: Democrats' treatment of Bush's nominees is analogous to Republicans' treatment of Clinton's nominees.

Fact: President Clinton's judicial nominees were not filibustered and never before has a judicial nominee with clear majority support been denied an up or down vote in the Senate by a filibuster.

"[Harry] Reid and company have used the Senate filibuster rule to permanently deny votes to nominees with clear majority support. That's never been done before." (David Reinhard, op-ed, "Judge Not Lest Ye Be ... Filibustered," *The Oregonian*, 3/17/05)

President Bush's confirmation rate for appellate judges is the lowest of any modern President. "A better figure would compare Bush's four-year appellate confirmation rate to recent presidents. According to the American Enterprise Institute's John Lott Jr., Bush's four-year rate was 69 percent, the lowest of any modern president. Bill Clinton's rate was 74 percent." (David Reinhard, Op-Ed, "Judge Not Lest Ye Be ... Filibuster," *The Oregonian*, 3/17/05)

- **In 1994, when the Democrats controlled both the Senate and the Executive Branch, President Clinton confirmed a record number of federal judges -- 54 of these nominees were pushed through in the 3 months immediately prior to the 1994 elections.** "President Clinton has gotten 129 federal judges confirmed by the Senate, more than any previous president during the first two years in office... 101 of his 129 judges were confirmed in 1994. That was the highest one-year total since Jimmy Carter won approval of 135 in 1979." (Michael J. Sniffen, "Clinton Outdoes Predecessors In Filing Judicial Vacancies," *The Associated Press*, 10/12/94)
- **While Democrats claim they have confirmed more than 200 of President Bush's judicial nominees, 10 of the 52 nominees to the circuit courts of appeals were filibustered.** (Jesse J. Holland, "Senate Confirms First Judge Of Bush's Second Term," *The Associated Press*, 4/11/05)

During the 108th Congress (2003-2004), the Senate voted on 20 motions to invoke cloture, or end debate on 10 different judicial nominees. The average vote to end debate was 53-43 -- enough support to confirm each nominee but fewer than the 60 votes required to end debate. (CQ Vote #40: Motion Rejected 55-44: R 51-0; D 4-43; I 0-1, 3/6/03; CQ Vote #53: Motion Rejected 55-42: R 51-0; D 4-41; I 0-1, 3/13/03; CQ Vote #56: Motion Rejected 55-45: R 51-0; D 4-44; I 0-1, 3/18/03; CQ Vote #114: Motion Rejected 55-44: R 51-0; D 4-43; I 0-1, 4/2/03; CQ Vote #137: Motion Rejected 52-44: R 50-0; D 2-43; I 0-1, 5/1/03; CQ Vote #140: Motion Rejected 52-39: R 49-0; D 3-38; I 0-1, 5/5/03; CQ Vote #143: Motion Rejected 54-43: R 50-0; D 4-42; I 0-1, 5/8/03; CQ Vote #144: Motion Rejected 52-45: R 50-0; D 2-44; I 0-1, 5/8/03; CQ Vote #308: Motion Rejected 53-43: R 51-0; D 2-42; I 0-1, 7/29/03; CQ Vote #312: Motion Rejected 55-43: R 51-0; D 4-42; I 0-1, 7/30/03; CQ Vote #316: Motion Rejected 53-44: R 51-0; D 2-44; I 0-0, 7/31/03; CQ Vote #419: Motion Rejected 54-43: R 51-0; D 2-43; I 1-0, 10/30/03; CQ Vote #441: Motion Rejected 51-43: R 49-0; D 2-42; I 0-1, 11/6/03; CQ Vote #450: Motion Rejected 53-42: R 51-0; D 2-41; I 0-1, 11/14/03; CQ Vote #451: Motion Rejected 53-43: R 51-0; D 2-42; I 0-1, 11/14/03; CQ Vote #452: Motion Rejected 53-43: R 51-0; D 2-42; I 0-1, 11/14/03; CQ Vote #158: Motion Rejected 53-44: R 51-0; D 2-43; I 0-1, 7/20/04; CQ Vote #160: Motion Rejected 52-46: R 51-0; D 1-45; I 0-1, 7/22/04; CQ Vote #161: Motion Rejected 54-44: R 51-0; D 3-43; I 0-1, 7/22/04; CQ Vote #162: Motion Rejected 53-44: R 50-0; D 3-43; I 0-1, 7/22/04)

- **Numerous Clinton nominees that were confirmed received less than 60 votes, and none of these were kept off the bench by partisan filibusters (e.g., Judge Richard Paez, with 59-vote support; Judge William Fletcher, with 57-vote support; and Judge Susan Mollway, with 56-vote support).** (Sen. John Cornyn, "President's Nominees Deserve Up-Or-Down Vote, Sen. Cornyn Says," Press Release, 2/14/05; CQ Vote #40, Confirmed 59-39; R 14-39; D 45-0, 3/9/00; CQ Vote #309, Confirmed 57-41; R 14-41; D 43-0, 10/8/98; CQ Vote #166, Confirmed 56-34; R 14-34; D 42-0, 6/22/98)

Myth: Filibusters of judicial nominations are part of Senate tradition.

Fact: Having to overcome a filibuster (or obtaining 60 votes) on judicial nominees is unprecedented and has never been the confirmation test for a nominee -- and in the past, even Democrats have called for up or down votes.

Congressional Quarterly: "Indeed, as Daschle's whip, Reid helped orchestrate an unprecedented filibuster of some of President Bush's more conservative judicial nominees." (Allison Stevens, "Senate Democrats Set A Daschle-Like Tone for 2005," *Congressional Quarterly*, 11/16/04)

National Review's Mark Levin: "Each of these candidates reportedly has enough votes for confirmation, but for the unprecedented use or threat of filibusters. The majority has every right and reason to change the rule." (Mark R. Levin, Op-Ed, "Will On Filibusters," *National Review Online*, 3/21/05)

In 1999, Sen. Patrick Leahy (D-VT) declared: "Vote them up, vote them down." "But I think they have given the President of the United States the benefit of the doubt, and if the person is otherwise qualified, he or she gets the vote. ... That is what the Constitution speaks of in our advise and consent capacity. That is what these good and decent people have a right to expect. That is what our oath of office should compel

Members to do – to vote for or against. ... Vote them up, vote them down.” (Sen. Patrick Leahy, *Congressional Record*, 9/21/99, p. S11102)

- **In 1998, Leahy called filibustering judicial nominations “improper.”** “[E]arlier this year ... I noted how improper it would be to filibuster a judicial nomination.” (Sen. Patrick Leahy, *Congressional Record*, 10/14/98)

In 1998, Sen. Ted Kennedy (D-MA) said that voting on judicial nominees was something that the Senate owed to all Americans. “We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don’t like them, vote against them. But give them a vote.” (Sen. Edward Kennedy, *Congressional Record*, 2/3/98, p. S295)

Myth: Filibusters of judicial nominees are based on the Constitution

Fact: Senate debate is governed by Senate rules, not by the Constitution. The Senate’s Constitutional role to advise and consent is in fact being impaired by the unprecedented use of partisan filibusters to block confirmation votes.

In 1998, Sen. Leahy said promptly confirming judges was Senate’s “constitutional responsibility.” “We must redouble our efforts to work with the President to end the longstanding vacancies that plague the federal courts and disadvantage all Americans. That is our constitutional responsibility.” (Sen. Patrick Leahy, *Congressional Record*, 9/8/99, p. S10544)

- **Leahy In 1998: “Acting to fill judicial vacancies is a constitutional duty that the Senate – and all of its members – are obligated to fulfill. In its unprecedented slowdown in the handling of nominees in the 104th and 105th Congresses, the Senate is shirking its duty. This is wrong and should end.”** (Sen. Patrick Leahy, *Congressional Record*, 7/17/98, p. S8477)

Sen. Charles Schumer (D-NY) said government does not fulfill its “constitutional mandate” when judicial nominees do not receive a vote. “The basic issue of holding up judgeships is the issue before us, not the qualifications of judges, which we can always debate. The problem is it takes so long for us to debate those qualifications. It is an example of Government not fulfilling its constitutional mandate because the President nominates, and we are charged with voting on the nominees.” (Sen. Charles Schumer, *Congressional Record*, 3/7/00, p. S1211)

- **Schumer in 2000: “[W]e are charged with voting on the nominees. The Constitution does not say if the Congress is controlled by a different party then the President there shall be no judges chosen.”** (Sen. Charles Schumer, *Congressional Record*, 3/7/00, p. S1211)

Myth: The nomination of Abe Fortas was filibustered by Senate Republicans.

Fact: Abe Fortas’s nomination was opposed by a bipartisan effort in the U.S. Senate. There was no evidence he would have received a majority vote and some say Fortas’s nomination was not filibustered.

Twenty-four Republicans and nineteen Democrats voted against cloture. (CQ Vote #255: Motion Rejected 45-43: R 10-24; D 35-19; 10/1/68)

The Fortas case was an isolated incident in 1968 that cannot be compared to Leadership-driven, wholly partisan filibusters that have been used as an instrument of party policy to block Bush nominees.

***The Washington Times:* “There is no evidence that Fortas would have received majority support in the Senate on an up-or-down vote.”** “Only Associate Supreme Court Justice Abe Fortas, whose 1968

nomination to be chief justice was briefly subjected to a bipartisan filibuster before it was withdrawn after a single cloture vote, failed to be confirmed. And with 19 Democratic senators voting against cloture, there is no evidence that Fortas would have received majority support in the Senate on an up-or-down vote." (Editorial, "A Senatorial Bottleneck," *The Washington Times*, 2/20/05)

Former Senator Robert Griffin (R-MI), who was a leading Republican opponent of the Fortas nomination, asserted the day after the cloture vote that cloture was opposed because of clearly insufficient time for debate, that more Senators were on the record against Fortas than were for him, and that the nomination would not have commanded majority support. *Congressional Record*, October 2, 1968, page 29150

- **Sen. Larry Craig (R-ID) quoted a letter from former Sen. Griffin which stated that "four days of debate on a nomination for chief justice is hardly a filibuster."** "Having been on the scene in 1968, and having participated in that debate, I see a number of very important differences between what happened then and the situation that confronts the Senate today." (Sen. Larry Craig, *Congressional Record*, 11/12/03, p. S14560)

Myth: The constitutional option is unprecedented.

Fact: Senate Democrats have used the constitutional option in the past.

- **As Majority Leader in 1979, Senator Byrd expressly threatened to use the constitutional option in order to leverage successfully a time agreement on a rules change resolution :** "Let the Senate vote on amendments, and then vote up or down on the resolution. ... If I have to be forced into a corner to try for a majority vote , I will [changed the rules] because I am going to do my duty as I see my duty, whether I win or lose." (Sen. Robert Byrd, *Congressional Record*, 1979, pp. S144-45)
- **Byrd led the creation of precedents in 1977, 1979, 1980 and 1987 to stop filibusters and other delaying tactics previously allowed under Senate rules or precedents.** "Mr. Byrd led the charge to change the rules in 1977, 1979, 1980 and 1987, and, in some cases, to do precisely what Republicans are now proposing." (Editorial, "Sen. Byrd On Filibuster-Busting," *The Washington Times*, 3/7/05)

MYTH: Democrats merely want to express their opinions on the judicial nominations.

FACT: Democrats are filibustering nominees in order to block them permanently -- not to preserve free speech.

When asked how many hours were necessary to debate the nomination of Priscilla Owen, Sen. Harry Reid (D-NV) answered, "There is not a number in the universe that would be sufficient." (Sen. Harry Reid, *Congressional Record*, 4/8/03, p. S4949)

By September 2004, the Senate had spent more than 150 hours debating judicial nominations -- more than any previous Congress. (U.S. Senate Republican Policy Committee, "The Assault on Judicial Nominations in the 108th Congress," 9/28/04)

The Senate had 28 months to debate the nomination of Miguel Estrada before it was withdrawn. "After remaining in limbo for 28 months while Democrats filibustered to block his approval, Estrada ... withdrew his name in September 2003." (Tim O'Brien, "Hispanic Lawyers Line Up Behind Nominee for AG," *The Legal Intelligencer*, 11/16/04)

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