

**MATERIALS IN SUPPORT OF
TESTIMONY OF U.S. SENATOR JOHN CORNYN**

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION**

“Hearing on Senate Rule XXII and proposals to amend this rule”

Thursday, June 5, 2003, 2:00 p.m.
Russell Senate Office Building Room 301

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THE SENATE'S UNWRITTEN RULE AGAINST FILIBUSTERS TO BLOCK JUDICIAL NOMINATIONS

Throughout the more than two centuries since the nation's founding, the Senate has consistently obeyed an unwritten rule not to use filibusters to block the confirmation of judicial nominees.

The tradition and practice of the Senate thus requires confirmation so long as a majority of the Senate is prepared to exercise its constitutional power to consent to the President's judicial nominees.

On numerous occasions when a judicial nominee has enjoyed the support of a majority of Senators, but fewer than the 60 votes necessary under the Senate's cloture rule, the Senate has nevertheless acted to confirm the judicial nominee. This Senate tradition and practice has been applied at every level of the federal judiciary:

Judges confirmed with less than 60 votes (97th-108th Congresses)

Judge	Court	Vote	Date of Vote
J. Harvie Wilkinson III	4th Cir.	58-39	Aug. 9, 1984
Alex Kozinski	9th Cir.	54-43	Nov. 7, 1985
Sidney A. Fitzwater	N.D. Tex.	52-42	Mar. 18, 1986
Daniel A. Manion	7th Cir.	48-46	June 26, 1986
Clarence Thomas	S. Ct.	52-48	Oct. 15, 1991
Susan O. Mollway	D. Haw.	56-34	June 22, 1998
William A. Fletcher	9th Cir.	57-41	Oct. 8, 1998
Richard A. Paez	9th Cir.	59-39	Mar. 9, 2000
Dennis W. Shedd	4th Cir.	55-44	Nov. 19, 2002
Timothy M. Tymkovich	10th Cir.	58-42	April 1, 2003
Jeffrey Sutton	6th Cir.	52-41	April 29, 2003

U.S. SENATORS CONSISTENTLY CONDEMN FILIBUSTERS OF JUDICIAL NOMINEES

The Senate has consistently obeyed an unwritten rule not to use filibusters to block the confirmation of judicial nominees, as evidenced by numerous statements made by Senators of both parties on the Senate Floor. For example:

- **Senator Biden:** “[E]veryone who is nominated ought to have a shot, to have a hearing and to have . . . a vote on the floor . . . It is totally appropriate . . . to reject every single nominee if they want to . . . But it is not . . . appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote.” (March 19, 1997)
- **Senator Boxer:** “It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.” (May 14, 1997)
- **Senator Daschle:** “As Chief Justice Rehnquist has recognized: ‘The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.’ An up-or-down vote . . . they deserve at least that much. . . . I find it simply baffling that a Senator would vote against even voting on a judicial nomination.” (October 5, 1999)
- **Senator Feinstein:** “A nominee is entitled to a vote. Vote them up; vote them down.” (September 16, 1999)
- **Senator Hatch:** “I have always, and consistently, taken the position that the Senate must address the qualifications of a judicial nominee by a majority vote, and that the 41 votes necessary to defeat cloture are no substitute for the democratic and constitutional principles that

underlie this body's majoritarian premise for confirmation to our federal judiciary." (October 4, 1999)

- **Senator Hatch:** "Even when I have opposed a nominee . . . I have voted for cloture to stop a filibuster of that nominee. . . At bottom, it is a travesty if we establish a routine of filibustering judges." (March 6, 2000)
- **Senator Kennedy:** "We owe it to Americans across the country to give these nominees a vote. If our . . . colleagues don't like them, vote against them. But give them a vote." (February 3, 1998)
- **Senator Leahy:** "If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that . . . I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty." (June 18, 1998)
- **Senator Lott:** "I do not believe that filibusters of judicial nominations are appropriate." (November 10, 1999)
- **Senator Moseley-Braun:** "[U]nder no circumstance is it appropriate or fair for us to filibuster . . . to avoid having to take up the question of whether or not the President's nominee is qualified to serve." (June 21, 1995)

FALSE PRECEDENTS OF FILIBUSTERS OF JUDICIAL NOMINEES

There is no precedent for the current filibusters of Miguel Estrada, Justice Priscilla Owen, or other judicial nominees. Throughout its history, the Senate has consistently obeyed an unwritten rule not to use filibusters to block the confirmation of judicial nominees – until now.

- **Abe Fortas:** *After just a few days of debate*, Fortas's nomination to be Chief Justice failed to obtain the support of 51 Senators to invoke cloture, due to allegations of ethical improprieties and bipartisan opposition (24 Republicans and 19 Democrats). President Johnson then withdrew the nomination, rather than subject Fortas to further debate. *So, Fortas was denied confirmation not due to a filibuster, but because he lacked the support of 51 Senators.*
- **Every other judicial nomination that has been cited to support the current filibusters resulted in confirmation.** Those examples therefore provide no support for denying confirmation by filibuster.
 - Moreover, **Richard Paez** (9th Circuit) was not only confirmed, *he was confirmed only because his Senate opponents upheld the unwritten rule against filibustering judicial nominees and voted to end debate.* Although only 59 Senators supported Paez's confirmation (less than the 60 necessary to end a filibuster), 85 Senators voted to end debate and to permit a vote on his nomination. Senators also upheld the unwritten rule in the cases of **J. Harvie Wilkinson** (58-39 to confirm), **Sidney Fitzwater** (52-42 to confirm), and **Dennis Shedd** (55-44 to confirm).
- The tradition even extends to **Executive Branch nominees**. Supporters of **Sam Brown** and **Henry Foster** tried (and failed) to invoke cloture, because they wanted to stop debate before it had even begun. *So, Brown and Foster were denied confirmation not due to a filibuster, but because his supporters did not want to debate their nominations.*

FORTAS DID NOT FACE A FILIBUSTER

After just a few days of debate, supporters of Fortas's nomination to be Chief Justice filed for cloture to end debate prematurely. When the cloture vote was taken up two days later, they failed to obtain the support of 51 Senators to invoke cloture, due to allegations of ethical improprieties and bipartisan opposition (24 Republicans and 19 Democrats). Moreover, had there been an actual confirmation vote, Fortas might have been defeated by a vote of 46-49, based on various indications in the *Congressional Record*. President Johnson thus withdrew the nomination, rather than subject Fortas to further debate. (Fortas later resigned under threat of impeachment.)

In other words, **Fortas was denied confirmation not due to a filibuster, but because he lacked the support of 51 Senators.**

Indeed, several Senators who opposed Fortas specifically and repeatedly noted that they were not filibustering, or otherwise trying to prevent a majority from confirming him. They were simply seeking time to debate and expose the serious problems with the nomination:

- “[A]n adequate and full discussion on this great and important issue should not be termed a filibuster.” 114 Cong. Rec. 28,115 (Sep. 25, 1968) (statement of Sen. Griffin).
- “I am certain that, in due time, we will come along, in the extended debate process, to a vote of some kind of some point. The main thing is that this great deliberative body . . . ought to discuss this question.” 114 Cong. Rec. 28,155 (Sep. 25, 1968) (statement of Sen. Hollings).
- “[I]t takes some time to develop these facts. . . . [T]he proponents are just waiting in the aisle, almost, to file a cloture petition at some early time [G]ive us just a little time, Mr. Leader.” 114 Cong. Rec. 28,251-52 (Sep. 26, 1968) (statement of Sen. Stennis).

- “[I]t is right and proper that the U.S. Senate carefully deliberate this nomination Debate is not a dilatory tactic. . . . I am not willing now to say those of us who oppose Justice Fortas are a minority.” 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Baker).
- “[T]here are a good many more than one—there may be half of the Senate; there may be more than half of the Senate—that share our concern.” 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Holland).
- “[W]e in the Senate of the United States stand ready here and now, today, to discharge fully and completely, not with the undue haste that seems to be counseled by some, but rather with the deliberation that the significance of the occasion requires.” 114 Cong. Rec. 28,254 (Sep. 26, 1968) (statement of Sen. Hansen).
- “I do not rise to defend a filibuster, because I firmly believe that as long as Senators are seeking the floor to speak on the issue before the Senate—and are addressing themselves to that issue without resort to dilatory tactics, then we do not have a filibuster. . . . [W]e do not have to defend a filibuster for we do not have a filibuster.” 114 Cong. Rec. 28,585 (Sep. 27, 1968) (statement of Sen. Griffin).
- “[T]his debate has given some the idea that someone is doing a wrong thing here by debating it a little, even before the motion to take up has prevailed. This is one place where it can be discussed, and for that I make no apologies, if it takes us a little time.” 114 Cong. Rec. 28,748 (Sep. 30, 1968) (statement of Sen. Stennis).
- “[T]hus far, there have been only 4 days of Senate debate on this very important, historic issue. . . . [A] filibuster, by any ordinary definition, is not now in progress.” 114 Cong. Rec. 28,930 (Oct. 1, 1968) (statement of Sen. Griffin).

- “I would not like to see the Senate gag itself . . . there are other things here that need exploration. That requires time.” 114 Cong. Rec. 28,933 (Oct. 1, 1968) (statement of Sen. Dirksen).
- “An examination of the Congressional Record . . . clearly reveals that the will of the majority was not frustrated. . . . [I]f every Senator who made his position known in the Record had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture. . . . It should not be overlooked that the distinguished Senator from Kentucky [Mr. Cooper] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice. On the basis of the Record, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated.” 114 Cong. Rec. 29,150 (Oct. 2, 1968) (statement of Sen. Griffin).

PRECEDENTS FOR FILIBUSTER REFORM

Filibusters are notorious in Senate history. They are not, however, an immutable part of the Senate rules. Quite the contrary:

- 1. The Senate has previously considered at least thirty proposals to eliminate filibusters altogether. Since the first recorded filibuster of 1841, there have been at least thirty proposals to restore a Senate majority's power to end debate: in 1841, 1850, 1869, 1873, 1883, 1890, 1893, 1918, 1925, 1947, 1951-58, 1960-68, 1995 and 2003.**
- 2. There are literally dozens of laws in effect today which prevent a Senate minority from delaying action in certain areas – from the Budget Act of 1974 to the War Powers Resolution, and covering such diverse subjects as international trade, arms control, environmental law, employee retirement law, and nuclear waste.**

The following twenty-six laws limit debate or otherwise eliminate the minority's power to filibuster in the Senate on certain specified matters:

Federal Budget

- Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. §§ 636, 641, 688)
- Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. §§ 907a-d)

War, National Emergency, and National Security

- War Powers Resolution (50 U.S.C. §§ 1544-46)
- National Emergencies Act (50 U.S.C. § 1601)
- International Emergency Economic Powers Act (50 U.S.C. § 1701)
- Defense Base Closure and Realignment Act of 1990 (10 U.S.C. § 2687 note)
- Cuban Liberty and Democratic Solidarity Act of 1996 (22 U.S.C. § 6064)

Arms Control and Foreign Assistance

- International Security Assistance and Arms Export Control Act of 1976 (Pub. L. No. 94-329)
- Arms Export Control Act (22 U.S.C. § 2753 et seq.)
- Atomic Energy Act of 1978 (42 U.S.C. §§ 2153-59h)

International Trade

- Trade Act of 1974 (19 U.S.C. § 2191 et seq.)
- Uruguay Round Agreements Act (19 U.S.C. § 3535)
- Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. § 3803 et seq.)

Energy and Environment

- Department of Energy Act of 1978 (22 U.S.C. § 3224a)
- Energy Policy and Conservation Act (42 U.S.C. § 6421)
- Power Plant and Industrial Fuel Use Act of 1978 (42 U.S.C. § 8374)
- Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10131 et seq.)
- Public Utility Regulatory Policies Act of 1978 (43 U.S.C. § 2008)
- Outer Continental Shelf Lands Act (43 U.S.C. § 1337)
- Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. § 719f)
- Alaska Nat'l Interest Lands Conservation Act (16 U.S.C. §§ 3232-33)

Employment Retirement Security

- Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1322a)
- Pension Reform Act of 1976 (29 U.S.C. § 1306)

General Government

- Congressional Review Act (5 U.S.C. § 802)
- Executive Reorganization Act (5 U.S.C. § 912)
- District of Columbia Home Rule Act (Section 604)



ROBERT P. GRIFFIN
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June 2, 2003

The Honorable John Cornyn, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. Senate

Dear Mr. Chairman:

An Associated Press piece which appeared yesterday in many of the Sunday newspapers (copy attached) speculated that Chief Justice Rehnquist and/or Justice O'Connor might retire this year or next, and concluded with this comment:

"Presidents have not had much success in appointing Supreme Court justices in election years . . . The last person to try it was Lyndon Johnson in 1968, when he failed to elevate Justice Abe Fortas to replace Chief Justice Earl Warren. Republicans filibustered the nomination and Johnson backed off. (Emphasis added)

Whether intended or not, the inference read by many would be: Since the Republicans filibustered to block Justice Fortas from becoming Chief Justice, it must be all right for the Democrats to filibuster to keep President Bush's nominees off the appellate courts. 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.

First of all, four days of debate on a nomination for Chief Justice is hardly a filibuster. As I said in closing remarks,

"When is a filibuster, Mr. President? . . . There have been no dilatory quorum calls or other dilatory tactics employed. The speakers who have taken the floor have addressed themselves to the subject before the Senate, and a most interesting and useful discussion has been recorded in the Congressional Record.

"Those who are considering invocation of cloture at this early stage on such a controversial, complex matter should keep in mind that Senate debate last year on the investment tax credit bill lasted 5 weeks; that the Senate debated the Congressional reorganization bill for 6 weeks; and that we spent 3 weeks earlier this year on the crime bill." 10-1-68 Cong. Record p.28930.

While a few Senators, individually, might have contemplated use of the filibuster, there was no Republican party position that it should be employed. Indeed, the Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Opposition in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; and some Democrats opposed him.

When, on October 1, 1968, a vote was taken on the first and only cloture motion, the count was: 45 in favor of the motion; and 43 against. Of course, those opposed to the nomination were jubilant, not only because the count fell far short of the 2/3 then required to impose cloture but, after reviewing the leanings of the absentees, we were more confident than ever that we had, or would achieve, majority support for our position. Of course, it also demonstrated that the White House could not produce the showing of a majority in favor of the nomination. Even if four days of debate were to be characterized as a filibuster, it could not be claimed that our debate was thwarting the will of a majority. Needless to say, that picture stands in stark contrast with the tactics employed these days by Senate Democrats.

Apparently, President Johnson and Justice Fortas at the White House could not come up with better numbers from their point of view. On the very next day, at the request of Justice Fortas, the President announced withdrawal of the Fortas nomination for Chief Justice.

Although Senate Democrats block confirmation of well qualified nominees simply because they are conservative, I wish to register my strong belief that Mr. Fortas would have been confirmed as Chief Justice if the only basis for opposition had been his liberal judicial philosophy. After all, he was known as a liberal in 1965, when he was easily confirmed as an Associate Justice. I believe the Fortas nomination for Chief Justice was rejected for two reasons: (1) the appearance of political manipulation in an exchange of letters between President Johnson and Chief Justice Warren to "create" a vacancy which did not exist until and unless Mr. Fortas was confirmed as Chief Justice, giving rise to the argument eloquently advanced by Senators Ervin and Baker that, really, there was no vacancy to be filled; and (2) the fact that, while sitting on the Supreme Court bench, and with little or no regard for the doctrine of separation of powers, Justice Fortas continued, on almost a daily basis, to serve as policy counsel and lawyer for President Johnson in the White House, a client whom he had served for many years reaching back to 1948 when Johnson first ran for the Senate and won by a margin of 87 votes. (For documentation of the extent of Justice Fortas' extrajudicial work in and for the White House, see: Fortas, the Rise and Ruin of a Supreme Court Justice, by Murphy.)

I hope this brief overview may provide the staff and the subcommittee with a bit of information and perspective that could be helpful. If you wish to contact me at any time, my phone number is 231 947-5002. My e-mail address is: rpgriffin@aol.com.

Sincerely,

Robert J. Griffin

NATION

Sunday, June 1, 2003

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U.S. SUPREME COURT

Justices O'Connor, Rehnquist mull retirement

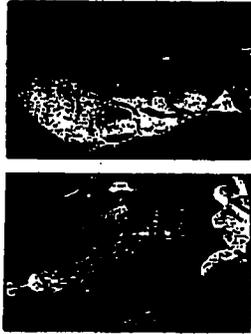
Political rancor means openings could go unfilled

WASHINGTON (AP) — Supreme Court Justice Sandra Day O'Connor can look out on the Capitol from her chambers. Chief Justice William H. Rehnquist's morning constitutional takes him past it every day. The two justices have reason to keep a close eye on Congress' home. What they see could help determine whether either or both leave the bench this year.

There has been intense partisan acrimony in the Senate over some of President Bush's choices to fill federal judgeships. If a justice steps down this summer, there is a very real possibility of a political stalemate that would leave the job unfilled for months.

None of the nine current justices has announced plans to retire, but for reasons of age and politics Rehnquist, 78, and O'Connor, 73, are considered the most likely candidates.

Each has served decades



O'Connor

Rehnquist

on the court and would prefer to leave while they have their health. Rehnquist was named to the court by President Nixon and O'Connor by President Reagan.

Both justices are part of the court's conservative wing and would prefer that

a Republican president pick a successor.

As a practical matter, any justice thinking of leaving has a choice of going now and risking leaving the court short-handed as the Senate fights over Bush's chosen replacement. They also could hang on for another court session, but 2004 is an election year and that surely would raise the partisan rancor during the confirmation process.

Or they could wait until 2005, hopeful that Bush has swept to a second term and Republicans have built on their tenuous 51-48 advan-

tage in the Senate.

"The window is closing," said David Yalof, a political science professor at the University of Connecticut who specializes in the judicial selection process.

"Presidents have not had much success in appointing Supreme Court justices in election years," Yalof said. The last president to try it was Lyndon Johnson in 1968, when he failed to elevate Justice Abe Fortas to replace the retiring Chief Justice Earl Warren.

Republicans filibustered the nomination and Johnson backed off.

that Congressmen can develop a substantial national constituency and win local votes on the basis of enlightened foreign policy leadership. Even in the present disillusioned Congress, Representatives Morgan, Zablocki, Morse and Frazer are sustaining their political careers while devoting much of their attention to the U.S. relationships with the underdeveloped countries.

The problems of foreign aid are not hopeless. But if anything is certain in unpredictable 1968, it is that these problems, at least, will not solve themselves. Progress in technology and economics has been generally encouraging but in politics most of the progress has been in reverse. Experts cannot readjust these factors; only citizens and their representatives can.

MINORITY RULE?

Mr. GRIFFIN, Mr. President, after only 4 days of debate, the Senate refused yesterday by a vote of 45 to 43—far short of the necessary two-thirds majority—to invoke cloture on a motion to take up the nomination of Mr. Fortas as Chief Justice.

An editorial in this morning's Washington Post characterized the vote as a defeat for the majority by a "willful minority."

An examination of the CONGRESSIONAL RECORD of October 1, beginning at page S11688, clearly reveals that the will of the majority was not frustrated.

It will be noted that the votes of 12 Senators were not recorded. It appears in the CONGRESSIONAL RECORD that seven of that number sent word and indicated how they would have voted had they been present.

The Senator from Oregon [Mr. MORSE] and the Senator from Idaho [Mr. CHURCH] would have voted "yes," raising the total of those in favor of invoking cloture from 45 to 47.

The RECORD reflects that the Senator from Vermont [Mr. Aiken]; the Senator from Nevada [Mr. BIBLE]; the Senator from Louisiana [Mr. ELLENDER], the Senator from Alaska [Mr. GRUENING], and the Senator from Maine [Mrs. SMITH] would have voted "nay," raising the total of those opposed to cloture from 43 to 48.

Accordingly, if every Senator who made his position known in the RECORD had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture.

There is no indication in the RECORD how the other five absent Senators would have voted.

It should not be overlooked that the distinguished Senator from Kentucky [Mr. COOPER] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice.

On the basis of the RECORD, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated.

THE CONFERENCE REPORT ON HIGHER EDUCATION AMENDMENTS OF 1968

Mr. WILLIAMS of New Jersey. Mr. President, late yesterday afternoon the Senate approved the conference report

on the Higher Education Amendments of 1968.

The Higher Education Amendments of 1968 represent another step toward full educational opportunity for all Americans. The bill which we have sent to the President extends the educational opportunity grant and insured student loan programs; makes assistance available for 5 more years under the national defense student loan program; and extends the provisions of the developing institutions program and the education professions development program.

There are three other important provisions in the conference report which reflect a growing commitment on the part of Congress to make education a realistic goal—and not just a promise—for all Americans, regardless of race or social status.

First, the report provides that no student financial aid can be considered as family income for the purpose of computing welfare eligibility. Under present regulations, college financial aid officers are precluded from offering assistance which would boost family income over the allowable welfare limits. This negates the very purpose of student financial assistance, which is to guarantee that educational opportunities are available regardless of family finances.

Second, the report directs the U.S. Office of Education to collect data on college admissions policies, with the intention of discovering new and more flexible admissions practices. Many college admissions officers feel bound by existing procedures and requirements, and many potentially successful students are blocked from further study by these same requirements. This provision in the conference report would open the door to methods and materials for a more flexible, and more workable, college admissions policy.

College and university admissions procedures have been governed by an inflexible attention to past performance, rather than future potential. Admissions directors are the first to acknowledge that the devices like the college entrance examination board and scholastic aptitude tests are often arbitrary and inadequate measurements of an individual student's potential. Tests and other admissions materials are characteristically achievement oriented. As a result, students who do not measure up in these arbitrary tests, lose.

Although the conferees disagreed on the need to create a special program, with its own appropriation, to provide for demonstration grants to experiment and innovate with admissions procedures and policies, they did agree that research needed to accomplish this purpose can be conducted under title IV of the Cooperative Research Act. When the Commissioner of Education gathers all available data—including experiments now being conducted by individual institutions aimed at a more flexible admissions policy—we will be able to determine what direction the Federal Government should take to institute this long overdue objective of flexible admissions criteria.

However, if there is a need for further and more comprehensive research, based

on the data accumulated by the Commissioner, research can and should be conducted under title IV of the Cooperative Research Act. Whatever steps are taken, it is hoped that the final package of information which will be developed will provide new materials, new techniques, and new attitudes directed toward drastically increasing the admissions rate of so-called high-risk students and others who, for sociological, geographical or other reasons, are arbitrarily disadvantaged by current admissions procedures.

Third, the report indicates that there is a role for students in locating and assisting other students who need advice on higher education—a role commonly assigned to a recruiter from the college administration. Colleges and universities, and local education agencies, will be able to use funds under the talent search program to carry out demonstration programs of student involvement in the recruiting processes.

I am hopeful that the Commissioner of Education will follow the intent of the Senate to use a portion of the money allotted for talent search to provide for several low-cost experimental demonstration grants, for involvement of students in recruiting of other students. These grants should be a part of, or in addition to, college and university requests for talent search programs, but should only be limited to the expenses of the students, or student organizations that plan and implement these programs through the participating institutions. Young people need to be made working partners in the educational process. In many cases they have not been asked to take part, and in their frustration to participate, they have demonstrated. Students have much to contribute to the growth of higher education. In this vital area of admissions and recruitment, they can be an invaluable resource in selecting other students who will complement the purposes of higher education. Through these low-cost demonstration programs, with the encouragement and assistance of Federal money, colleges can channel student energies and resources into a working partnership with the administration, and the participating college, or university can thereby provide a mechanism for student involvement in its functions.

While these provisions offer no quick or easy answer to the problems that plague higher education, they do provide new ways for greater participation. The conference report on the Higher Education Amendments of 1968 is a major contribution to a better, stronger educational system in America.

RESEARCH AND DEVELOPMENT

Mr. SYMINGTON, Mr. President, in its report of September 19, 1968, on the Department of Defense appropriations bill, the Senate Appropriations Committee recommended that the funds requested by the Pentagon for research and development for the fiscal year 1968, some \$8 billion, be reduced to \$7,587,393,000.

I strongly support this reduction; and in that connection, believe it appropriate at this time to look at just what the vast

By John Cornyn

The current struggle to establish democracy in Iraq reminds us that no society can be either just or prosperous without the rule of law. New and old nations alike need independent and impartial courts as the foundation of government, and civilized nations must vigilantly maintain, not undermine, these institutions.

Today, the Senate Rules Committee will discuss whether the current filibusters of judicial nominations pose a threat to our own independent judiciary. I welcome today's discussion because I believe we need reform: Indeed, senators from both sides of the aisle agree that our process for confirming judges is broken and needs to be fixed.

The American people need the courts to be fully staffed. Our judicial selection process should focus simply on identifying and confirming well-qualified jurists committed to enforcing the law, not their will or agenda.

For too long, this process has been caught in a downward spiral of politics and delay. During the administrations of former Presidents Bush and Clinton, for example, too many appeals court nominees were never voted on at all.

The problem is even worse today. For months, a bipartisan Senate majority has tried to hold up-or-down votes on a number of judicial nominees. A partisan minority of senators, however, is blocking the Senate from holding those votes. As one leader of the current filibusters has said, "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees.

A broken tradition Time to reform Senate rules on filibusters

The result: vacant judgeships and empty courtrooms, compelling the U.S. Judicial Conference to declare "judicial emergencies" across the country. People seeking redress for their injuries wait years for their cases to be tried and appealed, while judicial nominees languish in the Senate waiting for an up-or-down vote. The broken confirmation process translates into denial of access to justice in our nation's most important courts.

The use of filibusters — not to ensure adequate debate, but to block a Senate majority from confirming judges — is unprecedented and wrong. This indefinite, needless and wasteful delay distracts the Senate from other important business. And it leaves would-be judges in limbo, along with thousands of litigants. President Bush has rightly called the situation "a disgrace."

It doesn't have to be this way. As all 10 freshman senators detailed in a bipartisan letter to Senate leadership on April 30, it is time for a fresh start. The ill will of the past should not dictate the terms and direction of the future. And 12 senators have proposed a bipartisan reform to guarantee full debate on nominees, while ensuring the ability of a Senate majority to hold up-or-down votes. This proposal deserves wide support.

More than 175 newspaper editors representing the home states of

70 senators condemn the current filibusters of judicial nominees. Law professor and former Clinton adviser Michael Gerhardt has condemned supermajority requirements for confirming nominees, saying they "would be more likely to frustrate rather than facilitate the making of meritorious appointments." And last month, legal scholars told the Senate Constitution Subcommittee that filibusters of judicial nominations are uniquely offensive to our nation's constitutional design.

Proposals like the one being debated today in the Rules Committee have been endorsed by congressional experts from think tanks as diverse as the American Enterprise Institute, Brookings and Cato. An even more aggressive reform proposal in 1995 was endorsed by 19 Senate Democrats, as well as the New York Times, which editorialized that, "now is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose."

For nearly its first two decades, a Senate majority had the explicit power under the rules to call for votes. And since that time, senators have consistently obeyed an unwritten rule not to block the confirmation of judicial nominees by filibuster.

As renowned former Senate parliamentarian Floyd Kiddick once said, senators are expected to "restrain themselves" and "not abuse

the privilege" of debate. Out of respect for an independent judiciary, senators have historically and consistently exercised such restraint.

But this Senate tradition has now been broken. The Rules Committee and the Senate must respond. Reforming filibusters in the judicial nominations context would restore both majority rule and Senate tradition.

There is precedent for such action: The Senate has previously considered at least 30 proposals to eliminate filibusters altogether. In fact, there are dozens of laws on the books that prevent a minority of senators from delaying action in certain areas — from the Budget Act of 1974 to the War Powers Resolution, and covering such diverse subjects as international trade, arms control, environmental law, employee retirement protection and nuclear waste. Judicial confirmations should likewise be immunized from filibuster abuse.

For far too long, our judicial selection process has been tainted by coarse politics and hampered by wasteful delay. The Senate needs a fresh start.

Sen. John Cornyn is chairman of the Senate Subcommittee on the Constitution. He served previously on the Supreme Court of Texas and as the state's attorney general.



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CORNYN TO SENATE RULES COMMITTEE: UNWRITTEN RULE NOT TO FILIBUSTER JUDICIAL NOMINEES HAS BEEN BROKEN

“The current filibusters of judicial nominees are unprecedented and wrong.”

WASHINGTON – The longstanding unwritten rule not to filibuster judicial nominees has been broken and the Senate must find a way to break the impasse over President Bush’s nominees, U.S. Senator John Cornyn told a hearing of the Committee on Rules and Administration Thursday.

“The current filibusters of judicial nominees, done not to ensure adequate debate, but to block a Senate majority from confirming judges, are unprecedented and wrong,” Sen. Cornyn, Chairman of the Judiciary Committee’s Subcommittee on the Constitution, said at the hearing. “Until now, members of this distinguished body have long and consistently obeyed an unwritten rule not to block the confirmation of judicial nominees by filibuster. But, this Senate tradition, this unwritten rule has now been broken and it is crucial that we find a way to ensure the rule won’t be broken in the future.”

Currently, in an unprecedented move, a minority of senators is blocking an up-or-down vote for Justice Priscilla Owen of Texas, nominated to the U.S. Court of Appeals for the Fifth Circuit, and Miguel Estrada, nominated to the U.S. Court of Appeals for the D.C. Circuit. “There has never been a filibuster of a judicial nominee, now there are two,” Sen. Cornyn said. “Further nominees are threatened to be filibustered and we must do something soon.”

Senate Resolution 138, the bipartisan proposal discussed at the hearing, would still guarantee full debate on nominees, while enabling a Senate majority to eventually hold up-or-down votes. “This resolution is a reasonable, common-sense proposal with a lot of precedent to support it,” Sen. Cornyn said. “There are 26 laws that prohibit a minority of senators from filibustering certain kinds of measures. The judicial confirmation process should surely be added to this list.” The resolution, introduced by Majority Leader Frist with Sen. Cornyn as an original co-sponsor, would gradually reduce the 60-vote requirement on successive cloture votes until a filibuster could eventually be ended by a simple majority, preventing endless delay of judicial nominees.

At the hearing, Cornyn noted that an independent judiciary is the foundation of government and that no society can be just or prosperous without the rule of law. “To protect the independence of our judiciary and to restore the unwritten rules long respected by the Senate until now, we should immunize the Senate’s process of confirming judges from filibuster abuse and approve S. Res. 138.”

Following the hearing, S. Res 138 could be marked-up by the Rules Committee and sent to the full Senate for a vote. A majority of the Senate is sufficient to approve a rules change. Under Senate Rule 22, debates on a rule change can be ended by a two-thirds vote.