



Coalition for a Fair Judiciary

TO: Journalists, Editors

FROM: Kay Daly, President, Coalition for a Fair Judiciary

THE CASE FOR FILIBUSTER REFORM

A Rebuttal to People for the American Way

February 23, 2005



Coalition for a Fair Judiciary

In the 108th Congress, the minority party leadership led an effort to filibuster ten of President Bush's judicial nominees and threatened filibusters against six others. Two hundred year-long Senate traditions against floor filibusters of judicial nominees were broken.

These tactics prompted discussion about forestalling future judicial filibusters through changes to Senate procedure. Consideration is being given to exercise of the constitutional option, dubbed by some of its opponents as the "nuclear" option, in which the Senate's constitutional power to govern itself would be used to change the text of Senate rules or create new precedents.

In the Fall issue of the Harvard Journal of Law and Public Policy, Martin Gold and Dimple Gupta, published an article entitled "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster". The article is not an advocacy piece; rather, it provides a balanced review of the historical arguments for and against the use of the constitutional option. The article concludes the constitutional option has been credibly threatened or actually used on numerous occasions to force changes in Senate procedure.

Recently People for the American Way, one of the principal instigators of the judicial filibuster, offered a rebuttal, claiming that substantial precedent exists for the judicial filibusters of the 108th Congress and that the Gold-Gupta article fails to offer an historical foundation for changing Senate procedures to control such filibusters.

To argue that the filibusters are not unprecedented, PFAW seizes on a footnote in which a Senate historian offers alternative concepts of the word "filibuster." However, this ignores the traditional definition of a filibuster – tactics by the minority to prevent a majority from taking a floor vote. Under that traditional definition, filibusters organized, whipped, and sustained by a party leadership to block judicial confirmation votes were absolutely unprecedented prior to the last Congress. Although filibusters of judicial nominees were attempted on rare occasions in previous years, they were not orchestrated by party leadership and did not prevail. Prior to the 108th Congress, no judicial nomination that had clearly demonstrated support by a majority of Senators had ever died by filibuster.

Beginning in the 108th Congress, the Democratic minority organized and sustained 10 judicial filibusters and threatened six others as a matter of party policy. Venerable

traditions were shattered. These traditions were important not because they were longstanding, but because they served to support the principle that filibusters would not impede the exercise of Article II confirmation powers and that a majority of Senators could vote to confirm or reject a nominee brought to the floor.

There is an important qualitative and constitutional distinction between filibusters to impede the exercise of Article I legislative powers and those to impede Article II confirmation powers. Senate tradition prior to the 108th Congress clearly recognizes such distinctions.

The unprecedented filibuster tactics represented a power grab by a Senate minority to disturb two centuries of Senate tradition in which floor filibusters were not used to impede the duty to advise and consent. For 70% of the twentieth century, the same party controlled the White House and the Senate, but the minority party leadership exercised restraint and refused to filibuster judicial nominees. That restraint, exercised by diverse minority leaders such as Dirksen (R-IL), Baker (R-TN), Byrd (D-WV), and Dole (R-KS), has vanished and been replaced by a blockade of the confirmation process and a tyranny by the minority.

To require an extra-constitutional threshold of 60 votes for confirmation disturbs a fundamental balance between the Executive and the Senate and creates a strong potential for tyranny by the minority. A minority may hold hostage the nomination process, threatening to filibuster any appointment that does not meet particular ideological or litmus tests. The concept that a duly elected Executive shall nominate, subject to majority consent and general political accountability, will be turned on its head by allowing the minority a filibuster-veto in the confirmation process.

In the event of a legislative filibuster, the potential for tyranny by the minority is less absolute. Non-germane amendments on must-pass vehicles, House action or conference action, and the Presidential veto threat all serve as safety valves or safeguards against absolute veto by filibuster. Not so on nominations. The House is not involved. There are no conferences. There are no amendments. Absent cloture, judicial filibusters are fatal and the potential for tyranny by the minority is exponentially higher.

The Constitutional Option: A Possible Antidote

Article I, Section 5 of the Constitution accords the Senate the power to make procedures to govern itself. The 109th Congress can avail itself of this power just as readily as the first Congress did. Broadly speaking, the constitutional option has two variants. The first variant is a change in Senate rules notwithstanding procedures that carryover from a prior Congress that purport to impose procedural barriers to rules amendments. The second variant is adjustment to Senate precedents, such changes not being subject to carryover procedures at all. Very briefly, each variant will be discussed in turn.

The Constitutional Option and Rules Changes

While all amendments to the text of Senate rules have ultimately occurred through the regular order, on four important occasions the credible and looming threat of the constitutional option resulted in rules changes that almost certainly would not have happened otherwise. PFAW vigorously asserts the first point while conveniently ignoring the second. The article sets forth the following history, which PFAW appears to dismiss:

Prior to 1917, legislative filibusters reigned supreme, with no capacity in Senate rules to control them. In 1917, fed up with threatened or actual filibusters that blocked establishment of a cloture rule, Senator Thomas J. Walsh (D-MT) exercised the constitutional option to propose imposing general parliamentary law while the Senate adopted new rules. Use of general parliamentary law would give proponents of a cloture rule access to debate-ending procedures, so that the rules change could not be filibustered. In that climate, the first cloture rule was quickly adopted. Having achieved his end, Walsh did not need to press the matter further.

Beginning in 1953, Senator Clinton Anderson (D-NM) and allies, including John F. Kennedy (D-MA), Hubert Humphrey (D-MN) and Mike Mansfield (D-MT), agitated for cloture reform. Their resort to the constitutional option met with little initial success, gaining only 21 votes. Four years later, with no reform in sight, they were back again and secured 38 votes. Their momentum was further fueled by the 1958 election, which brought to the Senate many new supporters of filibuster reform. Faced with the certainty that Anderson would mount his effort again, Majority Leader Johnson acted in 1959 to preempt that reform with a more modest reform of his own. Closely allied in those years with reform opponents, Johnson was extremely unlikely to propose any reform but for the credible threat that reform would come via the constitutional option.

In 1975, Senators Walter Mondale (D-MN) and James Pearson (R-KS) took by the cause of reform. The proposed changing Senate rules via the constitutional option. By this time, Senator Mansfield had switched sides and so offered three separate tabling motions against Mondale-Pearson procedures. After each of these motions failed, the Democratic Leadership offered a compromise reform package that satisfied many reform advocates and was therefore adopted. There is no evidence this reform package would have been proposed, but for the Senate's clear willingness to choose the constitutional option over no reform at all.

In 1979, Majority Leader Robert Byrd (D-WV) proposed a rules change to curtail the phenomenon of the "post-cloture" filibuster that had evolved since 1975. He expressly threatened use of the constitutional option unless the minority entered into a time agreement concerning his reforms. A time agreement was made, providing that if a vote on cloture reform did not occur by February 22, 1979, Byrd would press reforms by the constitutional option. The rules reform was adopted on February 22.

The Constitutional Option and Precedents

The second use of the constitutional option is change of Senate procedures by precedent. The article sets forth four illustrations, established during Senator Byrd's tenure as Majority Leader. The example most closely related to the judicial filibusters is the precedent of April 5, 1980 that ended debate entirely on a motion to proceed to a nomination or treaty. On that day, and over the objections of the minority and on appeal from the ruling of the Chair, Senator Byrd established that a non-debatable motion to proceed to Executive Session could thereafter specify the business to be addressed. Without Byrd's new procedure, a motion to reach a particular nomination would have to be made once the Senate was in Executive Session, would have been debatable and could have been filibustered.

The three remaining examples all restricted minority operations and strategy, sometimes in direct contradiction of the text of Senate rules. These included:

1977 - empowering the Chair post-cloture to rule amendments out of order without need for a point of order from the floor. At that time, this meant precluding the reading of amendments, which had to precede making a point of order and which reading could only be waived by unanimous consent. Reading lengthy amendments as a post-cloture filibuster tactic was ended.

1979 - empowering the Chair to refuse to submit for Senate determination certain questions as to whether amendments to appropriations bills were germane. Senate Rule XVI expressly states that all such questions must be submitted.

1987 - empowering the Chair to declare dilatory a Senator's refusal to vote on a motion to approve the Journal. Never before had tactics been ruled out of order as dilatory before cloture had been invoked.

For more than two centuries, two great Senate traditions comfortably coexisted: A general respect for the filibuster and a consensus that a majority of Senators could exercise their obligation to advise and consent on a Presidential nomination.

By reason of the judicial filibusters launched during the last Congress, these traditions no longer coexist, they collide. Either the power to advise and consent will give way to the filibuster or the filibuster will give way to advice and consent.

Better for the Senate to resolve this dilemma by mutual self-restraint, in which the minority no longer imposes party discipline to organize and sustain the filibusters and the majority does not seek a change in Senate procedures. But if the filibusters persist, they represent a direct and ominous challenge to the advice and consent power. The majority may acquiesce to this approach, giving primacy to the filibuster, or it may seek change via exercise of its constitutional power over Senate procedure. There is a long history, set forth in the article and summarized here, to afford them a foundation to do so.