

Mend, Don't End, The Filibuster

The continuing battle in Washington between President Bush and Senate Democrats over appointments to the federal judiciary is likely to become even uglier over the next few years. In addition to the inevitable openings on the federal trial and appellate courts, many observers expect at least two Supreme Court justices to step down from the bench in the current presidential term—Chief Justice William Rehnquist is widely expected to retire due to his illness this June, at the end of the Court's current session, while justices Sandra Day O'Connor and John Paul Stevens may also be nearing the end of their service on the Court.

In past decades, the replacement of up to three Republican-appointed justices by a Republican president would not have been as likely to lead to conflict, but given Stevens' alignment with the Supreme Court's liberal wing (along with David Souter, appointed by the elder Bush, and Clinton appointees Ruth Bader Ginsburg and Stephen Breyer) and O'Connor's frequent position as the swing voter on the court on abortion, an effort by President Bush to replace either justice with a socially-conservative candidate is likely to be controversial. Even replacing Rehnquist with another conservative may become acrimonious.

Given the likelihood of an escalation of the conflict, battle lines are already being drawn. A key source of the conflict is a Senate tradition known as the *filibuster*, which is used by senators to continue debate on motions until their colleagues agree to their demands, usually by amending or withdrawing the bill or nomination in question. A filibuster can only be ended by having a *cloture* vote, which requires three-fifths of the Senate to vote to end the debate; if a cloture vote fails, under Senate rules the debate can continue indefinitely.

In today's Senate, even a secret threat of a filibuster—referred to as a “hold”—is sufficient to derail a nomination or piece of legislation. Such threats have already derailed the nomination of Charles Pickering to the Sixth Circuit Court of Appeals, and may claim more nominations in this congressional session.

To break the nominations impasse, Senate Republicans, including majority leader Bill Frist (Tenn.), have threatened to use the “nuclear option,” a parliamentary gambit to limit the use of the filibuster by Democrats by requiring cloture motions to only receive a simple majority vote. On the other hand, Robert Byrd (D-W.Va.) has recently likened such a procedural move to Adolph Hitler's takeover of the German parliament in the early 1930s.

Byrd himself is no stranger to the filibuster: he joined with segregationists like Strom Thurmond, James Eastland, and John Stennis in using the procedure to block passage of civil rights legislation during the 1950s and 1960s, until a bipartisan coalition of northern and western senators invoked cloture and passed the Civil Rights Act of 1964.

Despite the sometimes-unsavory past of the filibuster, however, ensuring that there is full and meaningful debate on proposed legislation is important, and the use of rhetoric by

both parties likening rules changes to nuclear war and Nazi Germany is unhelpful. Instead, senators should consider adopting a compromise that retains the filibuster while ensuring that it is used sparingly and responsibly. To borrow President Clinton's famous phrase about affirmative action, the Senate should mend, not end, the filibuster.

One compromise that could gain bipartisan support is to change the cloture rule to require senators to vote to continue debate more than four hours; in keeping with the existing cloture rule, if two-fifths of the Senate voted to continue debate, the debate would be extended another four hours; this procedure would repeat until either a motion to continue debate failed or the motion was withdrawn.

This proposal would properly put the onus on those senators who want to continue to debate; after all, if stopping a nomination isn't important enough for a senator to put a cot in his or her office, it probably wasn't that important in the first place. It should also satisfy both Democrats, who want a meaningful public debate over the president's picks for the federal bench, and Republicans, who want a final vote on all nominees.

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