

Hatch Ornstein Filibuster Exchange in *Roll Call*

GOP Should Handle Filibusters the Old-Fashioned Way

By Norman Ornstein

November 17, 2004 Wednesday

Some things just keep coming back, like Rasputin after being stabbed, poisoned, shot and defenestrated, or like *Scream II* and *III*. The Congressional equivalent is the filibuster.

I didn't want to address the issue again, but Senate Majority Leader Bill Frist (R-Tenn.) made me do it. And while I have written on this subject before, there are enough new Members and staffers around that a new education effort is in order.

Frist made me do it, of course, because of his multipronged effort during the past week to fire warning shots on judicial nominations across the bow of the Democrats' Senate ship.

He began with an address to the Federalist Society last Thursday evening, and followed that up with appearances on Fox News Sunday and other television shows. Frist called filibustering judicial nominations "radical" and "dangerous" and said it "must be overcome." He openly discussed the so-called "nuclear option" in which Senate Republicans would, in effect, unilaterally change the Senate rules to bar such filibusters. (How far they would go is not clear: The White House has many executive nominations ahead as well.)

Now for some straight talk on the filibuster. First, frustration over extended debate in the Senate - and the ability of an intense minority to block the will of the majority - is as old as the Senate itself. Presidents hate filibusters; so do Senate Majority Leaders.

Why do they hate it? Because cloture, which requires a supermajority to stop debate and force action, is a fundamentally conservative tool to block or retard activist government. By and large, presidents are activists, and Senate Majority Leaders want action.

Ironically, the filibuster as we know it - and the supermajority requirement for cloture - was a reform to expedite action, not to block it. Prior to 1917, there was, in effect, no limit on debate in the Senate. Any one Senator, or any small group of Senators, could keep debate going indefinitely.

That ability was a part of the unique role of the Senate, which was designed by the Framers to slow the process and add to its deliberative nature. Just as the Senate itself is not representative of the majority of the country - Senators from small states, which collectively represent a fraction of the overall population of the country, command a majority of votes in the body - the Senate's unique legislative procedures, including its reliance on unanimous consent and its tradition of sensitivity to minority viewpoints via unlimited debate, are extensions of the Framers' conservative views on governance.

The rules change that provided some limits on debate - creating a bar of two-thirds of Senators present and voting - was urged upon the Senate by then-President Woodrow Wilson and instituted after a handful of Senators blocked action to arm merchant ships prior to American entry into World War I.

The two-thirds rule remained in effect until 1975, when frustration over the use of filibusters led to a lowering of the bar to 60 Senators. That is where it stands today.

Frist wants action on President Bush's nominees to appeals courts, and he fears a filibuster led by Democrats against a controversial Supreme Court nomination. So he is making the case that filibusters against court nominees are unconstitutional.

It is a tough case to make, but that hasn't stopped his friends in the Federalist Society, who are using arguments wielded originally by the anti-Federalists. They contend that since the Constitution specifies areas in which supermajorities are required, we can infer that in all other areas, simple majorities will do.

One might think that strict constructionists would look to the direct language of the Constitution, rather than inferences from it. But one can infer from their legal reasoning that, for them, the ends justify the means. Otherwise, we would have howls of outrage from Stephen Calabresi and other Federalist Society members over the House's efforts to unilaterally change the quorum requirement in their rules - something that goes against the clear, expressed, direct language of Article I, which makes crystal clear when a number other than a majority can constitute a quorum.

Of course, the Framers knew all about unlimited debate and its tradition in parliaments and earlier American legislatures. They saw, as George F. Will pointed out many years ago, that there was a filibuster in the very First Congress. When Republicans successfully led a filibuster in 1968 against President Lyndon Johnson's nominee for chief justice to the Supreme Court, Abe Fortas, they and their strict constructionist friends somehow did not see that action as unconstitutional.

But that was then. Now, with 55 Republicans in the Senate, Frist is ready to act to change the rules. Here is the likely option. At some point early next year, as Senate Democrats are blocking action on a Bush judicial nominee and the Republicans have another cloture vote that falls short of the 60 needed to end debate, Frist will raise a constitutional point of order, saying that a supermajority requirement for confirmation of a judicial nominee is unconstitutional. The vice president, sitting in the chair, will agree.

The issue will be brought to a vote, in which a simple majority can affirm the ruling of the chair. But - here's the rub - a constitutional point of order in the Senate is itself debatable, and can itself be filibustered. That issue will undoubtedly be raised by Sen. Harry Reid of Nevada, the Minority Leader, and any honest Parliamentarian will agree.

The vice president will overrule the Parliamentarian and recognize a motion to table, which is not debatable. Over the howls of outrage of Democrats - led no doubt by West Virginia Sen. Robert Byrd - the Republicans will vote, affirm the ruling of the chair, and pass the judicial nomination by a simple majority.

This set of actions is something Frist seriously contemplated last year. He didn't act for several reasons. One is the damage that would come to Senate comity. Another is that he likely didn't have the votes among his 51 Republicans (and his surrogate 52nd, Democrat Zell Miller of Georgia).

Now, he may well have the votes, but it is not a slam dunk. Republican Sens. John McCain (Ariz.), Chuck Hagel (Neb.), Lincoln Chafee (R.I.), Susan Collins (Maine), Olympia Snowe (Maine), Arlen Specter (Pa.) and Dick Lugar (Ind.), among others, have to be agonizing over the whirlwind that they and everybody else may reap from this action. Other veteran Republican Senators, with a longer view of history, also have to know that there will come a time when activist liberal Democrats are back in the saddle, and that this precedent, which can be extended effortlessly to various and sundry policy matters, will come back to haunt conservatives.

Still, given the presidential ambitions several of these Senators have, the loyalty Republicans feel toward the president, and the squeeze being put on Specter, the votes are probably there.

Still, Frist should think twice, three times and even four, before he acts. Rule XXII, the cloture rule, is not the only tool in the kit for Senators to block action. Consider Rule XIX, which says in part, "No Senator shall interrupt another Senator in debate without his consent." Consider that basically nothing happens in the Senate without unanimous consent - and that in the past, single Senators such as James Allen (Ala.), Jesse Helms (N.C.) and Howard Metzenbaum (Ohio) have been able to tie the Senate in knots repeatedly on their own. Now imagine if the Republicans' action enrages 40 or more Allens and Metzenbaums.

What is most ridiculous here is that Frist has his finger on the nuclear trigger - and is ready to risk Mutually Assured Destruction - without even beginning to use the traditional tools available to him to break these filibusters.

Back in the 1950s, when filibusters against civil rights bills were almost routine, the Senate would force the filibusterers to take to the floor and go around the clock, bringing the Senate to a halt and letting the public see what was going on. The way to overcome intense minorities is to do just that. If anything, the live television feeds on C-SPAN would make the images even more resounding today. If the filibusterers' actions are outrageous and unsupportable, let the public react. Their resolve will eventually be broken.

Last year, Senate Republicans took a faux step in this direction with a 35-hour debate to highlight the issue. But it wasn't serious.

So get serious. When Democrats filibuster Miguel Estrada or Priscilla Owen, make them take to the Senate floor around the clock. Stop every other Senate action. Set up cots outside the Senate floor, just as Johnson, then-Majority Leader, did in 1957 and 1958. The press will eat up the drama.

If the American public believes the president has every right to get votes on his appeals court nominees, and if it believes the Democrats are unfairly blocking action on Social Security, the budget or tort reform, there will be enough of a public reaction that Democrats will eventually defer.

The pampered, prissy, protected Senate apparently does not have the stamina or cojones to do what historically and traditionally has been done to force action in a body where minority rights and power are zealously guarded. So this conventional action is soon to be supplanted by the nuclear bomb. Not smart.

December 6, 2004 Monday

Wrong Diagnosis

By Senator Orrin Hatch (R-Utah)

December 6, 2004 Monday

My friend Norman Ornstein's Nov. 17 column opposing a solution to the judicial nomination filibuster crisis got both the diagnosis and prescription wrong ("GOP Should Handle Filibusters the Old-Fashioned Way"). The recent filibusters, which use Rule 22 to prevent up-or-down votes on majority-supported judicial nominations, are unprecedented and unconstitutional.

Before 2003, no majority-supported judicial nomination had ever been defeated by a filibuster. Ornstein cites the only judicial nomination subject to a cloture motion that was not confirmed - Abe Fortas' 1968 nomination to be chief justice - but President Lyndon Johnson withdrew it because, as the cloture vote proved, it did not have majority support and would have been defeated outright. In contrast, the 10 appeals court nominees blocked during the 108th Congress each had majority support and would have been confirmed. The Fortas cloture vote is no precedent for these filibusters.

Neither the Constitution, which gives the Senate authority to determine its procedural rules, nor Rule 22, enacted to address legislative gridlock, was intended to prevent confirmation of majority-supported judicial nominations. In the very same sentence, the Constitution's Article II requires a supermajority when the Senate ratifies a treaty but not when it gives "advice and consent" on nominations. Using the cloture supermajority in Rule 22 to create a confirmation supermajority not in the Constitution amounts to, as Sen. Joe Lieberman (D-Conn.) once put it, "an amendment of the Constitution by rule of the U.S. Senate." This abuse of the advice and consent role tries to hijack what the Constitution assigns to the president.

Ornstein improperly accuses Majority Leader Bill Frist (R-Tenn.) of firing "warning shots on judicial nominations across the bow of the Democrats' Senate ship." or Frist, however, is responding to shots already fired. The Democrats' filibusters are implementing Minority Leader Tom Daschle's (D-S.D.) February 2001 vow to use "whatever means necessary" to stop judicial nominees. Democrats called the 42 votes against John Ashcroft's nomination to be attorney general a "shot across the bow" regarding future judicial nominations.

If, as Ornstein suggests, the Senate handled judicial nominations "the old-fashioned way," every one reaching the Senate floor would receive a final confirmation decision. That's what Republicans did for President Bill Clinton's nominees; the Senate took cloture votes on just four Clinton nominations, and all were confirmed. This should be the standard no matter which party controls the Senate or White House.

Unprecedented crises sometimes require extraordinary solutions, and that applies to this filibuster crisis. The Senate has changed its procedures when the minority's right to debate improperly undermined the majority's right to decide. We must do so again.

Sen. Orrin G. Hatch (R-Utah)

Ghost of Abe Fortas Hangs Over Discussion Of Judicial Filibusters

By Norman Ornstein

December 6, 2004 Monday

Time for a history lesson, boys and girls. The lesson is about the filibuster, and in particular about the filibuster against the nomination of Abe Fortas to be chief justice of the Supreme Court in 1968. The lesson is precipitated by Sen. Orrin Hatch's (R-Utah) letter to Roll Call last Monday.

First, let us look at the basics of what happened in 1968. On June 13 that year, Chief Justice Earl Warren informed President Lyndon Johnson of his intention to retire, subject to the confirmation of his successor. Two weeks later, LBJ nominated Associate Justice Abe Fortas for the post, also nominating Judge Homer Thornberry of Texas to fill Fortas' seat on the court. Before his confirmation to the court earlier in Johnson's presidency, Fortas had been one of Johnson's closest friends and advisers.

As soon as the nomination was made, sharp opposition arose, driven especially by Sen. Robert Griffin (R-Mich). He challenged the legality of a nomination when there was no vacancy, and accused Johnson of "cronyism." Other Republicans joined in the effort, which also was driven by the fact that the vacancy occurred late in the presidential term. Many Republicans saw a benefit in waiting until after the election to confirm a new justice, on the hope that GOPnominee Richard Nixon would win in November.

Whatever the motives, as hearings on the Fortas nomination proceeded during the summer, more questions arose about his ethics and his continued involvement, while on the court, in White House political matters. Other opposition, including from several Southern Democrats, built because of Fortas's left-of-center ideology. But at the time, it was clear that Fortas had majority support in the Democratic Senate, and it was equally clear that Griffin, to prevail, would filibuster.

During the hearings, Griffin was challenged by Democrat George Smathers of Florida on his intention to filibuster the nomination, saying it would prevent the Senate from fulfilling its constitutional advise-and-consent duties. Griffin angrily responded that presidents did not have the sole authority in this area. "He's only got half the power, he said. "We've got the other half and it's time we asserted ourselves."

When the nomination came up on the Senate floor in late September, a filibuster ensued. After five days of extended debate, there was a vote on a cloture motion. It failed, 45-43 with 59 votes (two-thirds of those present and voting) needed to pass it. The next day, Fortas withdrew. Johnson termed the behavior of the Senate "tragic."

At its heart, Hatch's recent letter suggested a sharp difference between how Fortas was treated (primarily by Republicans) and how appeals court nominees have been treated by Democrats in the past two years - all part of an effort to boost the idea of declaring filibusters against judicial nominees unconstitutional on their face.

The argument that Hatch makes, first articulated by former White House Counsel C. Boyden Gray, is essentially that there was no real filibuster against Fortas, because he didn't have the votes to get confirmed in the end. I must confess, I find the distinction between "majority-supported filibusters" and "non-majority-supported filibusters" to be, shall we say, a strain.

The logic that Gray has used - trying to suggest that in the public statements of Senators on Fortas, a minority offered support - is flawed. Why filibuster if you have the votes to block a nomination? Besides, I am waiting for someone to show me where in Rule XXII it makes any distinction between filibusters that have majority support or lack it.

The delay caused by the filibuster in 1968 did allow time for opposition to Fortas to build, to a point where Johnson withdrew the nomination. But if Republicans were confident that Fortas would fail on a vote, they would have allowed the vote. And of course, to argue that a filibuster is not a filibuster - or to argue that one is legitimate when others are not because there was not a majority for the nominee in the first place - is like arguing, "Yes, I shot him, but I can't be charged with murder because he would have died of cancer anyhow."

In any event, the best way to interpret the actions of Senators in 1968 is to look at what they said then - in particular, what was said by Griffin, who was not just some crazy maverick but a card-carrying member of the Republican Senate establishment (and subsequently Republican Whip in the Senate). So here are a few quotes from Griffin on the Senate floor from that September debate:

"It is important to realize that it has not been unusual for the Senate to indicate its lack of approval for a nomination by just making sure that it never came to a vote on the merits. As I said, 21 nominations to the Court have failed to win Senate approval. But only nine of that number were rejected on a direct, up-and-down vote.

...

"As more senior members of this body know so well, the Senate works its will in various ways. In the situation confronting us now, there are good and sufficient reasons for refusing to take up the nomination. ...

"If ever there is a time when all Senators should be extremely reluctant to shut off debate, it is when the Senate debates a Supreme Court nomination. If Congress makes a mistake in the enactment of legislation, it can always return to the subject matter and correct the error at a later date. But when a lifetime appointment to the Supreme Court is confirmed by the Senate, the nominee is not answerable thereafter to the Senate or to the people, and an error cannot be easily remedied. ...

"Whatever one's view may be concerning the practical effect of Senate rules with respect to the enactment of legislation, there are strong reasons for commending them in the case of a nomination to the Supreme Court."

Cloture, the ability to shut off debate in the Senate, first was put into the rules in 1917. Until 1949, it could not be invoked on nominations (meaning they could be talked to death without challenge.) As Congressional Research Service analyst Richard Beth has pointed out in a superb paper, it was attempted only twice before 1980. Between 1980 and 2000, cloture motions were filed and votes were held on 14 appeals court nominations, including against several Clinton nominees who were being held up by Republicans.

Many Republicans now arguing that filibusters against judicial nominations are unconstitutional on their face voted at least once against cloture (and thus for talking a nomination to death.) And, as I mentioned in an earlier column, many appeals court nominations were killed by never bringing them to hearings and votes at all.

Some of my most memorable and pleasant experiences in Congress have been testifying before Hatch in the Senate Judiciary Committee, often on constitutional amendments that he supported and I opposed, but also often in areas where we were in accord. He was invariably polite, engaged and thoroughly knowledgeable with the material, and the questions were smart, penetrating and always to the point. He is a great Senator and a good guy (and by the way, would make a great chief justice).

But on this one, he is wrong on the facts, wrong on the history, and wrong on the strategy. I hope he and Majority Leader Bill Frist (R-Tenn.) think longer and harder before they take the plunge down this slippery slope.

Hatch vs. Ornstein, Cont'd.

By Senator Orrin Hatch (R-Utah)

January 10, 2005 Monday

One sentence in my Dec. 6, 2004, letter to the editor precipitated Norman Ornstein's entire Dec. 13 column ("Ghost of Abe Fortas Hangs Over Discussion of Judicial Filibusters"). I responded to his Nov. 17 column, in which he said that the judicial nomination filibuster crisis is nothing new and needs no solution. I made a passing reference to the fact that, after a failed cloture vote, President Lyndon Johnson withdrew the 1968 nomination of Abe Fortas because it did not have clear majority support. That's all I said about it, and what I said remains true.

Ornstein wrote that then-Sen. Robert Griffin (R-Mich.) led opposition to Fortas and that "the best way to interpret the actions of Senators in 1968 is to look at what ... was said by Griffin." Well, Griffin spoke specifically to the Fortas situation in a letter to the Judiciary subcommittee on the Constitution examining the filibuster crisis. Since Griffin's words matter, let me quote him at a little length:

"While a few Senators, individually, might have contemplated use of the filibuster, there was no Republican party position that it should be employed. ... Opposition in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; and some Democrats opposed him. ... 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."

So what I said in my Dec. 6 letter is true. The evenly bipartisan votes against cloture on the Fortas nomination showed it did not have clear majority support. Johnson withdrew the nomination the next day to avoid outright defeat. The completely partisan votes against cloture on Bush appeals court nominees showed they did have majority support. Before Democrats began their filibuster campaign in March 2003, no majority-supported judicial nomination had ever been defeated by a filibuster. The controversy over the Fortas nomination provides no precedent for the current filibuster campaign. This confirmation crisis demands a solution.

Sen. Orrin Hatch (R-Utah)

Chairman

Judiciary Committee

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