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House of Representatives

The House was not in session today. Its next meeting will be held on Monday, April 25, 2005, at noon.

Senate

FRIDAY, APRIL 22, 2005

The Senate met at 9:30 a.m. and was called to order by the Honorable JOHNNY ISAKSON, a Senator from the State of Georgia.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

O God, our Father, You are holy, You are our strength and shield. Let Your presence be felt in our world. Comfort those brought low by sorrow and uncertainty. Lighten the load for those who are burdened beyond their resources. Lift those who are bowed by life's circumstances and sustain those who walk through the valley of shadows. Today, use Your Senators for Your glory. Let Your peace prevail in their hearts. May the work of our lawmakers hasten the day when the nations of the world will live together in dignity and harmony. Teach us creative ways to work for the betterment of humanity. Lord, we will wait for Your mercies in the presence of Your people. We pray in Your holy Name. Amen.

PLEDGE OF ALLEGIANCE

The Honorable JOHNNY ISAKSON led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication

to the Senate from the President pro tempore (Mr. STEVENS).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, April 22, 2005.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JOHNNY ISAKSON, a Senator from the State of Georgia, to perform the duties of the Chair.

TED STEVENS,
President pro tempore.

Mr. ISAKSON thereupon assumed the Chair as Acting President pro tempore.

RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Senator from Utah is recognized.

SCHEDULE

Mr. BENNETT. Mr. President, today we will have a period for morning business to permit Senators to make statements. As announced by the majority leader last night, there will be no rollcall votes during today's session. We hope to begin consideration of the highway bill next week. The majority leader will have more to say on that later. Perhaps we will have information on that schedule by the close of business today.

As a further reminder, there will be no rollcall votes on Monday, which is April 25. On behalf of the leadership, I thank Senator COCHRAN for his work on

the emergency supplemental appropriations bill, which we passed yesterday by a vote of 99 to 0. We will shortly proceed to a conference in order to produce a final product that will be sent to the President.

I thank everyone for their attention this morning, and I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, there will be a period for the transaction of morning business, with Senators permitted to speak for up to 10 minutes each.

The Chair recognizes the Senator from Colorado.

JUDICIAL NOMINATIONS

Mr. ALLARD. Mr. President, I rise this morning to clear up the apparent confusion and misinformation surrounding the confirmation of judicial nominations.

I hope to shed some light on one of our most important obligations and express to the American people the truth about the partisan obstruction of our constitutional duties.

Article II of the Constitution, known as the advice and consent clause, requires Senate approval of judicial nominations. This obligation is only

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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fulfilled when the Senate allows an up or down vote on a nominee.

The vote acts as an expression of the body's "advice and consent," but this expression simply cannot occur if it is blocked by a filibuster.

I strongly believe that the use of a filibuster to block judicial nominations is not only unprecedented minority obstruction but an attack on the Constitution itself.

The decision to vote on a judicial nomination or to obstruct the nominee pits the Constitution against a mere tool of parliamentary procedure; that is the Constitution versus a Senate rule called the filibuster.

I urge my colleagues to put our faith in the founding document, not a filibuster rule. To do otherwise degrades the Constitution and relegates it to the level of an arbitrary rule of procedure. Let me make it clear.

I am not going to stand idly by as parliamentary maneuvers run roughshod over the Constitution and centuries of Senate practices.

The Republican majority is not establishing new precedent. We are simply trying to restore the rights of the Constitution and the practices that this body has observed for over 200 years.

If the Senate allows the filibusters of judicial nominations to continue, it will be acquiescing in a minority's unilateral change to Senate procedure and practices; requiring 60 votes for the confirmation of judges through the rules, undermining the Constitution's requirement for a 50-vote majority.

The practical effect is an amendment to the Constitution without the approval of the American people.

My colleagues on the other side would have everyone believe that the filibuster is being eliminated. But that simply is not the case.

They don't mention that the filibuster never existed on judicial nominations. In fact, it never existed until the Democrats broke with over 200 years of Senate procedure and unleashed the filibuster last Congress to block 10 judges.

It was not a usual way of doing business. It was the first time in the history of the Senate the filibuster was used. The Democrats want to have it both ways. They want to change the history of the Senate by blocking judges with the filibuster, rewrite the Constitution by using the filibuster to thwart the advice and consent clause, and then blame Republicans for simply saying, "let's follow the Constitution and allow votes on judges, let's follow Senate tradition."

They falsely portray our actions to preserve the advice and consent clause as something akin to minority persecution.

But what they don't mention is that the filibuster is not a law. It is not in the Constitution. In fact, the Founding Fathers didn't even envision a filibuster weapon at all.

Even more astonishing is the fact that several of the Democrats who are

now ardent supporters of the judicial filibuster are the same ones who tried to eliminate the filibuster entirely just a few years ago, not only on judicial nominations but on everything, including legislative actions.

It is the Democrats who are altering history. It is the Democrats who are unleashing a weapon that threatens to alter the traditions and precedent of the Senate.

It is the Democrats who are revising the history of our Founding Fathers and undermining the three branches of our separate but equal system of Government.

For example, from 1789 until 1806 the Senate had a traditional "motion for the previous question" in its rules. There was no intention to create a Senate where a filibuster was prominent. The filibuster was not used in any significant way at all until the 1840's, and it was never used for judicial nominations.

The Senate's original cloture rule, in 1917, did not even apply to nominations because no Senator had ever used a filibuster to block a nomination.

Let me repeat that, up until 1917 the Senate's original cloture rule didn't even apply to nominations because no Senator had ever used a filibuster to block a nomination.

The rule did not apply, not because the Senate approved of such filibusters but because Senators never contemplated them.

A thorough examination of Senate history clearly demonstrates that there is no precedent for the Democrats' use of the filibuster to permanently block the confirmation of judicial nominations.

Some Democrats claim that Republicans want to destroy the filibuster for all matters. This is simply not true.

What is true is that the only sitting Members of the Senate on record supporting the elimination of the filibuster are Democrats.

In 1995, 19 Senators all Democrats, not one Republican, voted to eliminate the filibuster for all matters, not only judicial but also legislature. Nine of the 19 Democrats who voted for the Harkin-Lieberman rule change remain in this body today.

And all of those Senators now support the filibustering of judicial nominations. If it was ok to end the filibuster rule in 1995, why is it not ok today?

Let me just share some of the comments made by those Democratic Senators in 1995:

For too long, we have accepted the premise that the filibuster rule is immune. Yet, Mr. President, there is no constitutional basis for it. We impose it on ourselves. And if I may say so respectfully, it is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by the rules of the U.S. Senate.

The Democrats also said:

[A] filibuster ought to be used to slow down, temper legislation, alert the public, change minds, but should not be used as a measure whereby a small minority can to-

tally keep the majority from voting on the merits of a bill.

Now 10 years later, evidently what is good for the goose can forget about the gander.

Turning to the issue of Senate rules, the Democrats claim that changing the rules of the Senate is unprecedented, that using the Constitution to end the filibuster is tyranny.

Again, let me point out another instance where the goose has left the gander.

The constitutional option is grounded in Article I, Section 5 of the U.S. Constitution that empowers the Senate to "determine the Rules of its Proceedings."

The Senate has repeatedly exercised the constitutional option to define minority rights, as long ago as 1977, and it has done so in a Democratic-led majority.

The use of a simple majority vote to set precedents is as old as the Senate. In fact, the constitutional option has been exercised in 1977, 1979, 1980, and 1987.

It was used in 1977 to end post-cloture filibusters; in 1979 to limit amendments to appropriations bills; in 1980 to govern consideration of nominations; and again in 1987 to govern voting procedures.

In every instance, the Senate acted independently of the Senate rules in order to change Senate procedures in the face of obstruction or abuse by a minority of Senators.

History clearly shows that it is the constitutional option that has been used before. It is the use of the filibuster that is an unprecedented expansion of minority obstruction.

An exercise of the constitutional option under the current circumstances would return the Senate to the historic and constitutional confirmation standard of a simple majority for all judicial nominations.

Employing the constitutional option here would have no effect on the legislative filibuster, and this is very important. Senators would still have the ability to filibuster any bill, any time.

The Constitution calls upon the Senate collectively to determine whether or not a particular nominee is qualified to serve. This determination is made in one vote, the approval or disapproval of the nomination itself. Advice and consent does not mean avoiding a vote on a judicial nominee entirely by employing a filibuster.

If a Member of the Senate disapproves of a judge, then let them vote against the nominee.

But a filibuster should never be used to deprive the people of the choice selected by their elected representatives.

It is the Senate's duty to collectively participate in a show of "advice and consent" to the President by voting. It is this act that exercises what James Madison referred to as the remote choice of the people.

I sincerely hope we can work through the impasse on judicial nominations.

I hope those opposed to the President's nominees will be given the opportunity to vote against them and that they will speak their mind about it.

But I also hope that we will be allowed to provide the guidance we are required to provide under the Constitution.

The basic decision the Senate must make is this: Either constitutional advice and consent prevails or the filibuster is allowed to change the Constitution. I believe in the Constitution. I believe we should vote on the nominations.

As I have said so many times before, "vote them up, or vote them down, but just vote.

Mr. President, I yield the floor and suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BENNETT. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BENNETT. Mr. President, I ask unanimous consent that I be allowed to continue in morning business for 20 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

JUDICIAL NOMINATIONS

Mr. BENNETT. Mr. President, the Senator from Colorado talked about the ongoing conversation with respect to the filibuster in the Senate. If I may, I would like to reminisce for a little while because I have something of a history in the Senate. I have clearly not been here nearly as long as many of my colleagues, but I first came into this Chamber when I was a teenager. My father was a Senator. I was a summer intern in his office. I suppose there was something strange about me as a teenager because I was more interested in the Senate than I was in sports or cars, the two subjects that young boys are supposed to be paying attention to.

I remember sitting in the family gallery one evening listening to the debates. In those days, there were debates. There was not the situation we find now where Senators come to the floor to posture for the television cameras. They came to the floor to have a clash of ideas. I remember a particular debate where a Senator on the Democratic side of the aisle was holding forth. He seemed to be winning the argument and the Senators on the Republican side of the aisle sent up the call for the chairman of the Finance Committee, who entered the back of the Chamber. I remember the Democratic Senator saying, I see the Republicans have brought up their heavy artillery. Then there was an exchange be-

tween these two Senators which the chairman of the Finance Committee clearly won.

The Democratic Senator got a little flustered and a little angry at being bested in the debate and so he started to complain about the fact that Colorado, a small State, had as many Senators as Illinois, the big State, which he represented. Whereupon the chairman of the Finance Committee from Colorado then said, the Senator is no longer opposed to the bill. He is now opposed to the Constitution. I must say, I am not surprised. And he turned on his heel and walked out and the debate was over. It was an exciting thing to watch for those of us who were political junkies.

We have come a long way from that. I don't think it is a long way forward. We have come a long way from the give and take of debate into an atmosphere where this Senate has become the platform for people to express harsh views, strong political rhetoric, and occasionally, in my view, go over the line of that which is appropriate. We have become a sounding board for partisanship rather than a deliberative body for debate.

I am not quite sure when we started in that direction or what brought us from that old time to this present time. One of the moments might have been the debate over the nomination of Robert Bork to the Supreme Court. Robert Bork is the only nominee I know of whose name has turned into a verb. We now hear groups, as they talk about a nominee, say "we're going to Bork him." Look back at what was done with respect to the nomination of Robert Bork and it was nothing short of character assassination; or, to use a phrase that was popular in the last administration, the politics of personal destruction.

We have seen that activity poison the comity of the Senate on both sides of the aisle because when it was done to Robert Bork on behalf of those who were opposed to the nomination made by President Reagan, those who were Reagan supporters began to say, we will do the same thing. When Democratic Presidents came along, their nominees began to be attacked on a personal basis rather than on the merits of the situation, much as Robert Bork had been. Now it becomes a standard tactic on both sides of the aisle.

Why do I raise that with respect to the controversy over whether the Senate has the right by majority vote to change its rules? I raise it because too much of the current debate over that question has gone in the direction of "Borking"—Senators on both sides of the aisle, the process on both sides of the aisle and, if you will, the institution itself.

I have great reverence for this institution and I am distressed at what I see as I look over the landscape with respect to this particular debate. I see on one side e-mails and press releases

saying we must stop George W. Bush from packing the courts with right-wing whackos. That is what this debate is about. The filibuster is our tool to prevent right-wing whackos from getting on the court.

The first circuit court judge ever prevented from gaining a vote by virtue of the filibuster in the history of the American Republic was a man named Miguel Estrada. Miguel Estrada is an immigrant to this country. He came here not speaking English. He graduated from the Harvard Law School as the editor of the Harvard Law Review. He served in the Justice Department under the first President Bush in the Solicitor's Office and received glowing recommendations and reports from every one of his superiors. Indeed, his performance was sufficiently outstanding that he remained in the Justice Department in the Solicitor's Office for 2 years while Janet Reno was the Attorney General. Janet Reno is not known for harboring right-wing whackos.

The American Bar Association gave him their highest recommendation for this position and they are not known for harboring right-wing whackos.

Yet the level of debate has followed to the point that those who decided they must oppose Miguel Estrada for whatever reason stand mute while he and others like him are attacked as right-wing whackos. Unfortunately, this kind of attack does not stay on one side or the other. Today there are radio ads being run in the home states of Senators who have still not made up their mind how they are going to vote, radio ads that attack these Senators' integrity and suggest if they do not vote as the majority leader would like them to vote, they are not people of faith. They are attacking their integrity and their religion. To me, that is as repugnant as attacking the President's nominees as right-wing whackos.

This kind of vilification must stop, but I don't know how to stop it. The first amendment gives us all a right to say whatever we want to say, however ridiculous it may be, however offensive it may be. But it is ridiculous and it is offensive to have the kind of debate going on over this issue. This is a legitimate issue on which Senators can have legitimately differing views. It should not become a vehicle for practicing the politics of personal destruction. But it is going on.

I simply raise my voice in the hope that on both sides, the temperature of the rhetoric can come down, and we can discuss the issue on its merits. Let me do my best to discuss the issue on its merits in the time I have.

First, what are we talking about? We are talking about changing a Senate tradition. We are also talking about changing a Senate rule. I want people to understand the two are not the same. Indeed, we have formal rules in the Senate governing the way we do business. We have created traditions