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## FALSITIES ON THE SENATE FLOOR \*

*The Honorable John Cornyn* \*\*

Throughout last night's historic round-the-clock session of the United States Senate, a partisan minority of senators defended their filibusters against the President's judicial nominees by making two basic arguments. Both were false.

*First*, they claim that the Senate's record of "168-4"—168 judges confirmed, 4 filibustered (so far)—somehow proves that the current filibuster crisis is mere politics as usual.<sup>1</sup> But, as I explained in an op-ed yesterday, this is not politics as usual; it is politics at its worst.<sup>2</sup>

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1. See, e.g., 149 CONG. REC. S14,533 (daily ed. Nov. 12, 2003) (statement of Sen. Schumer); see also 149 CONG. REC. S14,538–39 (daily ed. Nov. 12, 2003) (statement of Sen. Schumer).

Since November 12, 2003, the Democrats have filibustered six more judicial nominees, to increase the total to ten.

For a recent update on the status of the filibustered nominees and President Bush's resilient efforts to get his qualified nominees confirmed, see Michael F. Fletcher & Helen Dewar, *Bush Will Renominate 20 Judges; Fights in Senate Likely over Blocked Choices*, WASH. POST, Dec. 24, 2004, at A1.

2. John Cornyn, *Commentary: Obstruction and Destruction Plague Judicial Nominees*, L.A. TIMES, Nov. 12, 2003, at B11 ("The attacks on nominees aren't politics as usual, they are politics at its worst."). In this same op-ed I wrote:

Consider another shameful filibuster record in our nation's history—the blockading of civil rights legislation. During the presidency of Franklin Delano Roosevelt, civil rights were denied four times. In that time, Congress enacted, by my count, 4,473 other pieces of legislation. Is "4,473-4" a record to be proud of—one in which "only" four civil rights bills were filibustered?

During Lyndon Johnson's White House tenure, nearly 2,000 bills were enacted. "Only" three civil rights bills were subjected to filibuster (although two

After all, it is wrong for a partisan minority of senators to treat good people like statistics; wrong to mistreat distinguished jurists with unprecedented filibusters and unconscionable character attacks; wrong to hijack the Constitution and seize control of the judicial-confirmation process from the President and a bipartisan majority of the Senate; wrong to deny up-or-down votes to judicial nominees simply because a partisan minority of senators cannot persuade the bipartisan majority to vote against a nominee; and wrong not to play fair, follow tradition, and allow a vote. Once is bad enough, and four unconstitutional filibusters is four too many.<sup>3</sup>

*Second*, they argue that the current filibusters are justified on the basis of precedent.<sup>4</sup> But in fact, the current filibusters are both unconstitutional and unprecedented.<sup>5</sup> Senate Democrats themselves have admitted as much.<sup>6</sup>

The Constitution expressly establishes supermajority voting requirements for authorizing treaties, proposing constitutional amendments, and other specific actions.<sup>7</sup> To confirm judicial nominees, by contrast, the Constitution requires only a majority vote—as the Supreme Court of the United States unanimously held in *United States v. Ballin*.<sup>8</sup>

No wonder, then, that filibusters have been roundly condemned as unconstitutional—by Democratic senators and leaders as well

were eventually overcome). Is “1,931-3” something to be celebrated? Clearly not.

*Id.*

3. See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 194–206 (2003).

4. See, e.g., 149 CONG. REC. S14,557–59 (daily ed. Nov. 12, 2003) (statements of Sen. Schumer); see also 149 CONG. REC. S14,556 (daily ed. Nov. 12, 2003) (statement of Sen. Reid).

5. See, e.g., Cornyn, *supra* note 3, at 194–206.

6. See *id.* at 198–99.

7. U.S. CONST. art. I, § 3, cl. 6 (requiring a two-thirds vote of the Senate for impeachment); U.S. CONST. art. I, § 5, cl. 2 (requiring a two-thirds vote of the Senate to expel members of Congress); U.S. CONST. art. I, § 7, cl. 2 (requiring a two-thirds vote of the Senate to override a presidential veto); U.S. CONST. art. II, § 2, cl. 2 (requiring a two-thirds vote of the Senate to approve treaties); U.S. CONST. art. V (requiring a two-thirds vote of the Senate to propose constitutional amendments).

8. 144 U.S. 1 (1892). The Court in *Ballin* declared:

The general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the federal constitution, and therefore the general rule of law of such bodies obtains.

*Id.* at 6.

as by prominent Democrats on the bench and in the legal academy.<sup>9</sup>

The current filibusters of judicial nominations are also unprecedented. 168-4? Try 0-4. Until now, every judicial nominee throughout the history of the Senate and of the United States of America, who has received the support of a majority of senators, has been confirmed.<sup>10</sup> Until now, *no* judicial nominee who has enjoyed the support of a majority of senators has ever been denied an up-or-down vote.<sup>11</sup> Indeed, until now, Democrat and Republican senators alike have long condemned *even the idea* of defeating judicial nominees by filibuster.<sup>12</sup>

During Wednesday night's historic session, however, a partisan minority of senators claimed precedent for their filibusters.<sup>13</sup> Embarrassed by public exposure of their destructive acts, this partisan minority would very much like to find support for their actions, no matter how implausible.

But Senate Democrats have already admitted—at least amongst themselves—that their current obstruction is unprecedented. In a November 3, 2003 fundraising e-mail to potential donors, my colleague, Jon Corzine, the chairman of the Democratic Senatorial Campaign Committee, acknowledged—indeed, he boasted—that the current blockade of judicial nominees is “unprecedented.”<sup>14</sup>

It is dishonest for Senate Democrats to tell their donors one thing, and the American people another thing. My colleague from New Jersey is right that the current filibusters are unprecedented. And the alleged precedents now cited by Senate Democrats for the current filibusters are all false.<sup>15</sup>

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9. See, e.g., Cornyn, *supra* note 3, at 198–99; see also Press Release, Senator John Cornyn, Filibusters are Constitutional, Right? Not So, Say Prominent Democrats (May 9, 2003), at [http://www.cornyn.senate.gov/record\\_jc.cfm?id=222194](http://www.cornyn.senate.gov/record_jc.cfm?id=222194) (last visited Feb. 8, 2005).

10. See, e.g., Cornyn, *supra* note 3, at 218–26.

11. See, e.g., *id.* at 223–26.

12. See, e.g., *id.* at 198–211; Press Release, Senator John Cornyn, A Tradition of Restraint: Democrats and Republicans Alike Opposed Judicial Filibusters in the Past (Nov. 13, 2003), at [http://www.cornyn.senate.gov/record\\_jc.cfm?id=225342](http://www.cornyn.senate.gov/record_jc.cfm?id=225342) (last visited Feb. 1, 2005).

13. See *supra* note 4.

14. Email from Senator Jon Corzine, Chairman, Democratic Senatorial Campaign Committee, to potential Democratic Senatorial Campaign Committee donors (Nov. 3, 2003) (on file with author) (“Senate Democrats have launched an unprecedented effort to protect the rights of all Americans by keeping our courts fair and impartial. By mounting filibusters against the Bush Administration’s most radical nominees, Senate Democrats have led the effort to save our courts.”).

15. See, e.g., Cornyn, *supra* note 3, at 218–26.

For example, some say that the current filibusters are justified because of the previous treatment of Stephen Breyer, Rosemary Barkett, H. Lee Sarokin, Richard Paez, and Marsha Berzon.<sup>16</sup>

That is a rather bizarre argument to make. Breyer, Barkett, Sarokin, Paez, and Berzon were *all* confirmed by the U.S. Senate: Breyer became a judge on the United States Court of Appeals for the First Circuit and he was later elevated to the Supreme Court of the United States;<sup>17</sup> Barkett now sits on the Eleventh Circuit,<sup>18</sup> Paez<sup>19</sup> and Berzon<sup>20</sup> are now judges on the Ninth Circuit; and Sarokin served as a judge on the Third Circuit until he retired in 1996.<sup>21</sup>

Indeed, Paez was confirmed only because *Republican senators refused to filibuster his nomination*.<sup>22</sup> Fewer than sixty senators ultimately voted to confirm Paez.<sup>23</sup> But although his opponents could have filibustered him, Paez got a vote—and his judgeship—because Republican senators understood it is wrong to filibuster judicial nominees.<sup>24</sup>

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16. See, e.g., Cornyn, *supra* note 3, at 224–26; see also 149 CONG. REC. S14,556 (daily ed. Nov. 12, 2003) (statement of Sen. Durbin); 149 CONG. REC. S5910–11 (daily ed. May 8, 2003) (statement of Sen. Leahy).

17. See 126 CONG. REC. 33,013 (1980) (showing that on December 9, 1980, Stephen Breyer was confirmed by the United States Senate to be a judge on the United States Court of Appeals for the First Circuit by a vote of 80-10); 140 CONG. REC. 18,704 (1994) (showing that on July 29, 1994, Stephen G. Breyer was confirmed by the United States Senate to be an Associate Justice of the Supreme Court of the United States by a vote of 87-9).

18. See 140 CONG. REC. 7539–40 (1994) (confirming Rosemary Barkett to the United States Court of Appeals for the Eleventh Circuit by a vote of 61-37).

19. See 146 CONG. REC. 2422 (2000) (confirming Richard Paez to the United States Court of Appeals for the Ninth Circuit by a vote of 59-39).

20. See 146 CONG. REC. 2422 (2000) (confirming Marsha Berzon to the United States Court of Appeals for the Ninth Circuit by a vote of 64-34).

21. See 140 CONG. REC. 27,538 (1994) (confirming H. Lee Sarokin to the United States Court of Appeals for the Third Circuit by a vote of 63-35).

22. See, e.g., Cornyn, *supra* note 3, at 224–25; see also 146 CONG. REC. 2422 (2000). When Senator Trent Lott brought up the appeals court nominations of Richard Paez and Marsha Berzon for a vote, he said: “I do not believe that filibusters of judicial nominations are appropriate and, if they occur, I will file cloture and I will support cloture on the nominees.” 146 CONG. REC. 14,503 (1999) (statement of Sen. Lott). When the Senate eventually considered the nominations, Senator Orrin Hatch made the same argument. See 146 CONG. REC. S1296 (daily ed. Mar. 8, 2000) (statement of Sen. Hatch) (“It is quite another story, however, for members of [the Senate] to frustrate a majority vote on these nominees by forcing a super-majority cloture vote.”).

23. See, e.g., Cornyn, *supra* note 3, at 225; see also 146 CONG. REC. 2422 (2000) (showing that Judge Paez was confirmed by a vote of 59-39).

24. See, e.g., Cornyn, *supra* note 3, at 224–26; see also *supra* notes 22–23 and accompanying text.

I would love to see Pryor, Owen, Pickering, and Estrada “mis-treated” the same way Breyer, Barkett, Sarokin, Paez, and Berzon were treated. If you take the Democrats’ argument seriously, then Pryor, Owen, Pickering, and Estrada must be confirmed.

Some argued that the current filibusters are justified because of the failed 1968 nomination of then-Justice Abe Fortas to be Chief Justice.<sup>25</sup>

This claim is also unfounded. *The Congressional Record* makes clear that a confirmation vote would have likely failed by a vote of 46-49.<sup>26</sup> Moreover, Fortas’s opponents explained repeatedly that they were *not* filibustering—they just wanted adequate time to debate and expose serious problems with his nomination.<sup>27</sup> So Fortas was not denied confirmation due to a filibuster; he was denied confirmation due to the opposition of a bipartisan majority of senators.<sup>28</sup> (Indeed, shortly thereafter, Fortas resigned from the Court altogether, under threat of impeachment.)<sup>29</sup>

Finally, some say that the current filibusters are justified because some of President Clinton’s nominees were held in committee.<sup>30</sup>

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25. See, e.g., Cornyn, *supra* note 3, at 218–23.

26. See, e.g., *id.* at 220–22; see also 114 CONG. REC. 28,929, 28,933, 29,150 (1968) (providing statements of various senators indicating that the confirmation of Justice Fortas likely would have failed by a vote of 46-49).

27. See, e.g., Cornyn, *supra* note 3, at 220; Letter from Robert P. Griffin, former U.S. Senator, to Senator John Cornyn, Chairman, Senate Subcommittee on the Constitution (June 2, 2003), in *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 220–21 (May 6, 2003), available at <http://www.gpoaccess.gov/databases.html> (last visited Feb. 4, 2005); see also Press Release, Senator John Cornyn, Fortas Was Not Filibustered (Nov. 13, 2003), at <http://cornyn.senate.gov/111303quotes.html> (last visited Dec. 29, 2004).

28. See *supra* notes 26–27 and accompanying text.

29. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 218–19 (rev. ed. 1999). As Professor Abraham describes in his book, Justice Fortas engaged in a series of potentially improper activities while serving as a Justice on the Supreme Court of the United States. Among other things, Justice Fortas is known to have engaged in “extrajudicial active counseling of [President Lyndon Johnson]” and charges of judicial impropriety also arose after evidence surfaced that Justice Fortas had accepted generous lecture and consulting fees. *Id.* at 219. On May 4, 1969, Justice Abe Fortas resigned from the Supreme Court of the United States under pressure from the recently-elected President Richard Nixon and Attorney General John N. Mitchell. *Id.*

30. See 148 CONG. REC. S7017 (daily ed. July 18, 2002) (statement of Sen. Leahy) (“Large numbers of vacancies continue to exist on many Courts of Appeals, in large measure because the recent Republican majority was not willing to hold hearings or vote on more than half—56 percent—of President Clinton’s Courts of Appeals nominees in 1999 and 2000.”).

But there is nothing new—or relevant—about a judicial nominee who is not confirmed due to lack of support from a Senate majority. At the end of the first Bush Administration, there were fifty-four judicial nominees who had not mustered majority support and thus were not confirmed.<sup>31</sup> At the end of the Clinton Administration, there were forty-one such nominees.<sup>32</sup> If a majority of senators chooses to defer to a committee's decision not to bring someone to a vote, that is the majority's right under our constitutional system for confirming judges.

The current situation is precisely the *opposite*. Today, an enthusiastic bipartisan majority wants to confirm judicial nominees, yet for the first time in our nation's history, a minority is stopping them.

That's why Georgetown Law Professor Mark Tushnet—no shill for President Bush's judicial nominees—has written that filibusters are clearly different from the holds and committee delays used against nominees from the earlier Bush and Clinton administrations. He has written that

there's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules—on scheduling, on not having a floor vote without prior committee action, etc.—to do so. All those other rules . . . can be overridden by a majority vote of the Senate . . . whereas the filibuster rule can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.<sup>33</sup>

He has also written that “[t]he Democrats' filibuster is . . . a repudiation of a settled pre-constitutional understanding.”<sup>34</sup>

The arguments being peddled in defense of the filibusters resemble the arguments against the nominees themselves. They are baseless and outcome-oriented. They have been rejected by a bipartisan majority of senators and they are offensive to basic principles of democracy, including majority rule and the right to vote.

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31. See Cornyn, *supra* note 3, at 192 n.39.

32. *Id.* (stating that “there were 41 nominees pending in the Senate as of December 31, 2000—near the close of President Clinton's second and final term in office”).

33. *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 72–73 (May 6, 2003) (testimony of Dr. John Eastman, Professor of Law, Chapman University School of Law) (quoting an e-mail from Professor Tushnet), available at <http://www.gpoaccess.gov/databases.html> (last visited Feb. 4, 2005); see also Cornyn, *supra* note 3, at 226.

34. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 526 (2004).

Senator Zell Miller, a long-time Democrat from the state of Georgia, recently published a book about the demise of his party, entitled *A National Party No More*.<sup>35</sup> Perhaps that is because the Democratic Party is a democratic party no more.

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35. ZELL MILLER, *A NATIONAL PARTY NO MORE: THE CONSCIENCE OF A CONSERVATIVE DEMOCRAT* (2003). Senator Miller's book contains a chapter specifically critical of the Democratic filibuster of judicial nominations. *Id.* at 81–88.



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