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The Miguel Estrada Nomination

Denying Mr. Estrada an Up-or-Down Vote Would Set a Dangerous Precedent

> "I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported . . ."
> — *Senator Leahy, Congressional Record, June 18, 1998*

> "I do not want to get [to] having to invoke cloture on judicial nominations. I think it is a bad precedent."
> — *Senator Leahy, Congressional Record, September 16, 1999*

If press reports are to be believed, some Senators are contemplating a dramatic change to the Senate's treatment of the President's judicial nominees — a new requirement that nominees to the nation's courts must receive at least 60 votes in order to be confirmed. If Senators do filibuster Mr. Estrada's nomination to the U.S. Court of Appeals for the D.C. Circuit, and if that filibuster results in the nomination being rejected, Democrats will have forced a permanent change to the political and constitutional landscape. Never again could a President fairly expect a judicial nominee whose nomination reaches the Senate floor to receive an up-or-down vote, and never again would the Senate minority party fear that blocking a judicial nominee by partisan filibuster was unprecedented. If the Estrada nomination is permanently blocked by filibuster, the political baseline shifts forever.

To understand just how stunningly extraordinary this state of affairs is, one needs to examine the Senate's record of confirming judicial nominations. The first filibuster of a judicial nominee that resulted in a cloture vote was in 1968. Since then, the Senate has confirmed approximately 1,600 judicial nominations — the vast majority (nearly 1,500) without even a roll

call vote, as most are confirmed by unanimous consent.[1] Indeed, of those some 1,600 judicial nominations confirmed by the Senate since 1968, ***only fourteen*** underwent a cloture vote. And with the exception of the bipartisan 1968 filibuster of Abe Fortas's nomination to be Chief Justice of the United States, the ***Senate has never blocked by filibuster*** a judicial nominee to any court.

What follows is an account of all past debates over judicial nominees which required cloture votes. The history establishes a consistent, bipartisan resistance to taking the step that some Democrats are contemplating today.

The Bipartisan Fortas Filibuster

Judicial nominations have been especially contentious since the days of the Warren Court (1954-1969). Nowhere has that controversy been more pronounced than for nominees to the nation's highest court. In particular, Supreme Court nominees such as Abe Fortas, William Rehnquist, and Clarence Thomas all faced considerable opposition in the Senate during their confirmations. Yet despite this controversy, only Justice Fortas's nomination to be Chief Justice in the tumultuous summer of 1968 caused the Senate to filibuster and block confirmation.

President Lyndon Johnson nominated Associate Justice Abe Fortas to be Chief Justice in June 1968. A bipartisan coalition of Senators soon formed to oppose Justice Fortas's elevation. The reasons were varied. Some opposed the nomination because Justice Fortas often joined the "progressive" Earl Warren wing of the activist Supreme Court. Other Senators opposed Fortas because of his admission before the Judiciary Committee that he remained involved in White House political affairs even while serving on the Supreme Court, including advising the President regarding the Vietnam War and recent race-riots in Detroit. When it was discovered that Justice Fortas had accepted $15,000 (more than $75,000 in 2001 dollars) from controversial sources to teach a nine-week academic course, support further deteriorated. Yet as the heated 1968 election season continued, some Democrats were wary of defeating Fortas if that meant leaving the nomination to soon-to-be-President-elect Richard Nixon.

Nevertheless, bipartisan opposition to Fortas's elevation was substantial, and a filibuster ensued. The filibuster itself was controversial, as some Republicans such as Nixon himself believed that Fortas should receive an up-or-down vote as a matter of principle. Senators persisted, and an October 1 cloture vote failed by a margin of 45-43. Twenty-four Republicans and nineteen Democrats voted against the cloture motion – with ten Republicans and thirty-five Democrats in favor of cutting off debate. President Johnson then withdrew the nomination.[2]

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[1] Analysis of judicial nominations and confirmations, including those confirmed by roll call vote, conducted by staff of Senate Republican Policy Committee and confirmed with staff of Congressional Research Service.

[2] For information regarding the Fortas nomination, see generally *Congress and the Nation, Vol. II, 1965-68, A Review of Government and Politics*, at 335-336 (Cong. Quarterly Serv. 1969); James A. Thorpe, *The Appearance of Supreme Court Nominees Before the Judiciary Committee*, 18 JOURNAL OF PUBLIC LAW 515 (1969).

The Effect of the Fortas Filibuster on Future Supreme Court Battles

After the Fortas filibuster, the Senate rejected outright two of President Nixon's nominees to the Supreme Court, Clement Haynsworth (45-55) and G. Harold Carswell (48-51). But neither nominee faced a filibuster attempt despite the close votes. The Fortas affair is, therefore, especially important for what it did ***not*** lead to: a pattern of blocking by filibuster controversial judicial nominees.

That refusal to block nominees by filibuster is most dramatic and important in the context of the Supreme Court. The Supreme Court nominations that most divided the Senate since the Haynsworth and Carswell defeats were those of William Rehnquist (1972 and 1986) and Clarence Thomas (1991). Rehnquist's nomination to be Associate Justice provoked considerable controversy and division within the Senate, but he nonetheless received a full Senate vote after but a few days' debate.[3] The same was true in 1986 when he was nominated to become Chief Justice.[4]

During Clarence Thomas's hard-fought nomination battle of 1991, outside activist groups urged Justice Thomas's Senate opponents to filibuster the nomination, but Senate Democrats such as then-Judiciary Committee Chairman Joseph Biden and leading Thomas opponent Senator Howard Metzenbaum balked.[5] Future Judiciary Committee Chairman Patrick Leahy publicly "declared himself 'totally opposed to a filibuster,' adding, 'We should vote for or against [Thomas].'"[6] No filibuster was attempted, and Justice Thomas was confirmed, 52-48.[7]

As is well known, President Clinton's nominations of both Ruth Bader Ginsburg and Stephen Breyer sailed through the Senate with minimal debate and no filibusters. Justice Ginsburg was confirmed by a vote of 96-3 and Justice Breyer was confirmed, 87-9.[8]

Lower Court Nominees Have *Never* Been Blocked by Filibusters

Given the Senate's general unwillingness to filibuster nominees – even Supreme Court nominees – it is unsurprising that ***the Senate has never blocked by filibuster a nominee to any lower court.*** Furthermore, the Senate has ***never blocked — by a partisan filibuster*** — any judicial nominee. (Recall, the only successful rejection-by-filibuster was the aforementioned

[3] Votes 413, 414, and 417, 92nd Cong., 2nd Sess. (Dec. 10, 1972).
[4] Votes 265 and 266, 99th Cong., 2nd Sess. (Sept. 17, 1986).
[5] Hearing of the Senate Judiciary Committee, Testimony of Eleanor Smeal, Sept. 20, 1991; Judy Wiessler, "Split on Thomas expected," HOUSTON CHRONICLE (Sept. 27, 1991); Federal News Service, Press Conference with Sen. Howard Metzenbaum, Sept. 27, 1991.
[6] Ruth Marcus, "Divided Committee Refuses to Endorse Judge Thomas," WASHINGTON POST (Sept. 28, 1991). Senator Biden likewise refused to support any filibuster attempt on the Thomas nomination. James Rowley, "Committee Deadlocks on Thomas," ASSOCIATED PRESS (Sept. 27, 1991).
[7] *Congressional Record* (Oct. 15, 1991).
[8] *Congressional Record* (Aug. 3, 1993 and July 29, 1994).

case of Justice Fortas, which was bipartisan.). Thus, there is no historical example of a filibuster conducted solely by one party that denied the President his judicial nominee.

Recent Quasi-Filibusters of President Bush's Judicial Nominees

During Democrat control of the Senate in 2001-2002, only 17 Bush circuit court nominees reached the floor for votes. In three of the cases where they did — the nominations of Julia Smith Gibbons, Richard B. Clifton, and Lavenski R. Smith — cloture petitions were filed and the motions easily carried. However, none of those cloture votes was responding to a genuine effort to filibuster a nominee. Rather, cloture petitions were filed as a Senate time-management device (Gibbons, Clifton) or in response to a small number of Senators who wished to force the cloture vote to draw attention to another issue unrelated to the nominee (Smith).[9]

Floor Debates for President Clinton's Judicial Nominees

Despite a Republican majority during six years of President Clinton's term, no judicial nominee was ever deprived of a vote on the Senate floor due to a floor filibuster of the nomination.

Many Senators may recall the controversy over President Clinton's nominations of Martha Berzon and Richard Paez to the U.S. Court of Appeals for the Ninth Circuit. Although most Republican Senators opposed their confirmations, the majority of Republican Senators also opposed any effort to prevent the full Senate from voting on their nominations. Debate on each nomination lasted only one day, and a majority of Republicans joined all Democrats in supporting cloture petitions for debate on each nomination — including over 20 Republicans who eventually would vote against confirmation, and a majority of the Republican members of the Judiciary Committee.[10] In neither case did Republicans mount a party-line filibuster effort to prevent voting on a nominee. Indeed, Majority Leader Lott filed the cloture petitions for the above debates.

The situation was similar in 1994 when some Republicans voiced objections to President Clinton's nomination of H. Lee Sarokin to the U.S. Court of Appeals for the Third Circuit. A majority of Republicans supported a cloture petition after a relatively brief period of debate, and

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[9] Vote 193, 107th Cong., 2nd Sess. (July 26, 2002) (Gibbons cloture motion passing 89-0); Vote 183, 107th Cong., 2nd Sess. (July 18, 2002) (Clifton cloture motion passing 97-1); Vote 177, 107th Cong., 2nd Sess. (July 15, 2002) (Smith cloture vote passing 94-3). In the case of Judge Smith, Senator Feingold stated on the floor that he opposed cloture in order to slow down the confirmation of nominees whom Republicans supported until a nominee to the Federal Election Commission was confirmed. *Congressional Record* (July 15, 2002).

[10] Compare for Berzon Votes 36 and 38, 106th Cong., 2nd Sess. (March 8-9, 2000); compare for Paez Votes 37 and 40, 106th Cong., 2nd Sess. (March 8-9, 2000). Those opposing cloture for the Berzon debate were Senators Allard, Brownback, Bunning, Craig, DeWine, Enzi, Gramm, Helms, T. Hutchinson, Inhofe, Murkowski, Shelby, and B. Smith. Senator Frist joined the same group in opposing cloture for Paez.

cloture was invoked by a vote of 85-12.[11] Judge Sarokin was then confirmed by a vote of only 63-35.[12]

The only judge nominated by President Clinton who faced a partisan filibuster was Brian Theadore Stewart, a nominee to the federal district court in Utah. However, it was Senate ***Democrats*** who filibustered the nominee in protest over purported delays in bringing other judicial nominees to the floor. The cloture vote on September 21, 1999 failed (by falling short of 60 votes) by a vote of 55-44, with all Democrats except Senator Moynihan opposing cloture.[13] But once again, Democrats' objection was not to Judge Stewart himself, and on October 5, 1999, the Senate confirmed him by a vote of 93-5.[14]

For all the hand-wringing about the "treatment" of President Clinton's nominees, one thing is clear: ***every*** nomination taken up for debate on the floor received an up-or-down vote.

Democrats' Failed Filibusters of Reagan and Bush Judges

Even when Democrats attempted to filibuster Republican Presidents' judicial nominees, those efforts were still unsuccessful, as a substantial majority of Senators resisted using the partisan filibuster as a means to block judicial nominations.

When President Bush nominated Edward Carnes to be a judge on the U.S. Court of Appeals for the Eleventh Circuit in 1992, many Democrats opposed the nomination on the merits, in particular because of his past prosecution of death penalty cases. Aware of this opposition, the Senate agreed by unanimous consent to two days of debate with a cloture vote to follow.[15] The debate proceeded, the cloture motion carried by a vote of 66-30, with 24 Democrats joining 42 Republicans to close the debate.[16] The Senate proceeded immediately to confirm Judge Carnes by a vote of 62-36.[17]

A similarly close cloture vote occurred in March of 1986 when the Senate considered President Reagan's nomination of Sidney Fitzwater to be a federal district court judge in Texas. Many Democrats opposed Judge Fitzwater on the merits and after a few days' debate, Majority Leader Dole filed a cloture motion which, by unanimous consent, was to be voted on the next day the Senate was in session.[18] That cloture petition prevailed, 64-33, with the support of 12

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[11] Vote 318, 103rd Cong., 2nd Sess. (Oct. 4, 1994). Republicans opposing cloture were Senators Coverdell, D'Amato, Gorton, Gramm, Helms, McCain, Nickles, Thurmond, and Wallop, joined by Democrats Ford, Sasser, and Shelby.
[12] Vote 319, 103rd Cong., 2nd Sess. (Oct. 4, 1994).
[13] Vote 281, 106th Cong., 1st Sess. (Sept. 21, 1999).
[14] Vote 308, 106th Cong., 1st Sess. (Oct. 5, 1999).
[15] *Congressional Record* (Aug. 7, 1992).
[16] Vote 192, 102nd Cong., 2nd Sess. (Sept. 9, 1992). Four of those Democrats — Senators Daschle, Kerrey, Leahy, and Simon — later voted against confirmation.
[17] Vote 193, 102nd Cong., 2nd Sess. (Sept. 9, 1992).
[18] *Congressional Record* (March 14, 1986).

Democrats.[19] The Senate proceeded immediately to confirm Judge Fitzwater by a vote of 52-42.[20]

The only other judicial nominee of President Reagan's to face a cloture vote was J. Harvie Wilkinson to the U.S. Court of Appeals for the Fourth Circuit. Many Democrats opposed the nominee and filibustered the nomination. An initial cloture motion *failed* on July 31, 1984 (57-39) because some Senators argued that additional information had arisen since Judge Wilkinson's original Judiciary Committee hearings and that further investigation was necessary. Judge Wilkinson returned to the Judiciary Committee on August 7, his nomination was returned to the floor of the Senate, and a second cloture motion prevailed on August 9 by a vote of 65-32. The Senate then proceeded immediately to confirm Judge Wilkinson by a vote of 58-39.[21]

It is apparent that Democrats historically have been more willing than Republicans to vote against cloture petitions and to attempt to prevent votes on Republican judicial nominees. However, it is important to note that even in the cases above, many Democrats found the filibuster process inappropriate in the judicial nominee context and insisted upon up-or-down Senate votes.

Stephen Breyer's 1980 Nomination

Senators, led by Republican Gordon Humphrey and Democrat Robert Morgan of North Carolina, filibustered the nomination of Stephen Breyer to be a judge on the U.S. Court of Appeals for the First Circuit in late 1980. Their objection was not to Mr. Breyer's qualifications — indeed, this is the same Stephen Breyer currently serving as a Supreme Court Justice — but to the process by which he was nominated and reported to the full Senate. The Senators argued that the Judiciary Committee had improperly reported out Mr. Breyer's nomination without proper committee approval and without regard to many other earlier-nominated persons waiting for hearings. After forcing the Judiciary Committee to reconvene and approve the nominee through proper procedures, the Senate invoked cloture, 68-28, and confirmed Mr. Breyer, 80-10.[22]

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This history demonstrates that while some nominees have been filibustered and cloture petitions filed in those and other situations, the only nominee ***ever*** to have been defeated or withdrawn after a filibuster was Abe Fortas in 1968. Even key Democrats who opposed Republican nominees voted for cloture. So, if a partisan filibuster of Miguel Estrada resulted in his nomination being defeated, it would be unprecedented.

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[19] Vote 40, 99th Cong., 2nd Sess. (March 18, 1986).

[20] Vote 41, 99th Cong., 2nd Sess. (March 18, 1986). Nine Democrats and three Republicans who had supported cloture voted against confirmation.

[21] Votes 208, 225 and 226, 98th Cong., 2nd Sess. (1984).

[22] Votes 512 and 513, 96th Cong., 2nd Sess. (1980). This controversy was complicated by the fact that Mr. Breyer was Chief Counsel to the Senate Judiciary Committee at the time.

Senate Democrats Voice Opposition to Filibusters of Judicial Nominees

A partisan attempt to block Mr. Estrada's nomination by filibuster would contradict the repeated and emphatic statements of Democrats who have served for a long time in positions of special responsibility. Consider the past comments by Senators regarding judicial and executive nominees:

- Senator Leahy (past Judiciary Chairman and current Ranking Member): "If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that I would . . . object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty." (*Congressional Record*, June 18, 1998.)

- Senator Leahy: "I have said on the floor, although we are different parties, I have agreed with Gov. George Bush, who has said that in the Senate a nominee ought to get a [floor] vote, up or down, within 60 days." (*Congressional Record*, October 11, 2000.)

- Senator Daschle (Minority Leader): "As Chief Justice Rehnquist has recognized: 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' An up-or-down vote, that is all we ask for [Clinton judicial nominees] Berzon and Paez." (*Congressional Record*, October 5, 1999.)

- Senator Biden (past Judiciary Chairman): "But I also respectfully suggest that everyone who is nominated ought to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor. . . . It is totally appropriate for Republicans to reject every single nominee if they want to. That is within their right. But it is not, I will respectfully request, Madam President, appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote . . ." (*Congressional Record*, March 19, 1997.)

- Senator Kennedy (past Judiciary Chairman): "The Chief Justice of the United States Supreme Court said: 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' Which is exactly what I would like." (*Congressional Record*, March 7, 2000.)

- Senator Kennedy: "We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. But give them a vote." (*Congressional Record,* February 3, 1998.)

- Senator Feinstein (Judiciary Committee member): "A nominee is entitled to a vote. Vote them up; vote them down." (*Congressional Record*, September 16, 1999.)

Absent from any of the current debate over Miguel Estrada is any explanation as to why he should be denied the floor vote that every one of President Clinton's judicial nominees who reached the floor received.

This Nomination Does Not Justify Escalating the Nomination Conflict

The rejection of Abe Fortas to serve as Chief Justice of the United States marked the first and only time the Senate has rejected a President's judicial nominee by way of a filibuster. Yet, Miguel Estrada presents none of the concerns that caused a ***bipartisan*** coalition of Senators to block Justice Fortas's elevation to Chief Justice. Mr. Estrada is an outstanding nominee fully qualified for this judgeship who has committed to enforce the Constitution as interpreted by the Supreme Court, not to interpose his personal political views into his jurisprudence. The American Bar Association unanimously gave him its highest rating of "well-qualified;" and Democrats such as President Clinton's Solicitor General, Seth Waxman, and Vice President Gore's attorney, Ron Klain, have praised his intellect, judgment, and integrity.

The stakes here are much greater than the fate of a single judicial nominee. At issue is whether the Senate should reinterpret its constitutional advise and consent obligation to require 60 rather than 51 votes to confirm a judicial nominee. This is a position that the Senate has never taken in the context of lower court nominees, and Republicans especially have eschewed. To adopt this new standard would fundamentally alter the balance of power between the Executive and the Senate in the judicial confirmation process and would seriously erode the comity that generally has existed between the two branches in the past.

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