Received(Date): 6 MAY 2003 01:01:23
From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
To: "Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> ("Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> [UNKNOWN])
Subject: : Re: John Cornyn: The Constitution and the Judiciary: Where's thecheck on Senate filibusters?
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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 6-MAY-2003 01:01:23.00
SUBJECT:: Re: John Cornyn: The Constitution and the Judiciary: Where's the check on Senate filibusters?
TO:"Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> ("Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> [UNKNOWN])
READ:UNKNOWN
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Judge's letters to Schumer and Feinstein will be FAXed and emailed around in mid-morning.

"Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov>
05/06/2003 12:21:40 AM
Record Type: Record

To:
cc:
Subject: John Cornyn: The Constitution and the Judiciary: Where's the check on Senate filibusters?

http://www.opinionjournal.com/extra/?id=110003456

BALANCE OF POWER

The Constitution and the Judiciary

Where's the check on Senate filibusters?

BY JOHN CORNYN

Tuesday, May 6, 2003 12:01 a.m. EDT

This week, the Senate marks a dismal political anniversary: Two years of partisan obstruction of President Bush's judicial nominees, culminating in two unprecedented filibusters. More are threatened. Never before has the judicial confirmation process been so broken, and the constitutional principles of judicial independence and majority rule so undermined.

It's time for a fresh start.

In that spirit, the Senate Subcommittee on the Constitution will hold a hearing today to consider proposals to restore both the confirmation process and our most cherished constitutional values.

The essence of our democratic system of government is beautiful in its simplicity: Majorities must be permitted to govern. As our nation's Founders explained in Federalist No. 22, "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." And as the Supreme Court has unanimously held, our Constitution is premised on the democratic doctrine of majority rule.

Today, a minority of obstructionist senators are forcing upon the confirmation process a supermajority requirement of 60 votes. They are using the filibuster not simply to ensure adequate debate, but actually to block many of our nation's numerous judicial vacancies from being filled.

The public's historic aversion to abusive filibusters is well grounded. These tactics not only violate democracy and majority rule, but arguably offend the Constitution as well. Indeed, prominent Democrats such as Lloyd Cutler and Sens. Tom Daschle, Joe Lieberman and Tom Harkin have condemned filibuster misuse as unconstitutional.

Moreover, abusive filibusters against judicial nominations uniquely threaten both presidential power and judicial independence--and are thus more dubious than filibusters of legislation, an area of pre-eminent congressional power.

Harry Edwards, a respected Carter-appointed appeals judge, wrote that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. Otherwise, "the Senate, acting unilaterally, could

thereby increase its own power at the expense of the President" and "essentially take over the appointment process from the President." He concluded: "the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes." (He expressed less concern with legislative filibusters.)

History confirms Judge Edwards's constitutional interpretation. A Senate majority has never been denied its constitutional right to confirm judicial nominees--until now. The obstruction is as unprecedented as it is harmful.

Some have cited, to justify the current filibusters, the example of Abe Fortas, whom President Lyndon Johnson nominated to be chief justice in 1968. But majority rule was not under attack in that case. Dogged by allegations of ethical improprieties and bipartisan opposition, Fortas was unable to obtain the votes of 51 senators to prematurely end debate. Three days later, Johnson withdrew the nomination altogether.

* * *

That is a far cry from the present situation. After extensive debate, Miguel Estrada, Priscilla Owen and countless others enjoy enthusiastic, bipartisan majority support, yet they face an uncertain future of indefinite debate. By brazenly insisting, as Nevada's Harry Reid--the Senate's second-ranking Democrat--has said, that "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees, Democrat leaders admit they are using the filibuster not to ensure adequate debate, but to change the Constitution by imposing a supermajority requirement for judicial confirmations.

Whether unconstitutional or merely destructive to our political system, the current confirmation crisis cries out for reform. As all 10 freshman senators, myself included, stated last week in a letter to Senate leadership, "we are united in our concern that the judicial confirmation process is broken and needs to be fixed." Veteran senators from both parties express similar sentiments.

Accordingly, today's hearing will explore various reform proposals:

* Sen. Zell Miller suggests--as did Sens. Harkin, Lieberman and 17 other Democrats in 1995--that the 60-vote rule for ending debate be reduced

incrementally with each succeeding vote, until the rule reaches 51 votes.

* President Bush and Sens. Arlen Specter and Patrick Leahy have urged the imposition of strict time deadlines for the Senate to hold hearings and vote on judicial nominees.

* Sen. Charles Schumer advocates an overhaul of the nomination process by eliminating the president's appointment power and instead giving President Bush and Sen. Daschle "equal roles in picking the judge-pickers."

These proposals will be debated. What's important is that these public officials acknowledge the crisis and urge reform.

* * *

The judicial confirmation process has reached the bottom of a decades-long downward spiral. Our current state of affairs is neither fair nor representative of the bipartisan majority of this body. For democracy to work, and for the constitutional principle of majority rule to prevail, this obstructionism must end, and we must bring matters to a vote. As Sen. Henry Cabot Lodge famously said of filibusters: "To vote without debating is perilous, but to debate and never vote is imbecile." Two years is too long. The Senate needs a fresh start.

Mr. Cornyn is a senator from Texas and chairman of the Senate Subcommittee on the Constitution. He served previously on the Supreme Court of Texas, and as the state's attorney general.

James C. Ho

Chief Counsel

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U.S. Senator John Cornyn, Chairman

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BY JOHN CORNYN

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