

# Judicial Appointments

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## TALKING POINTS

To: Interested Parties  
From: Thomas L. Jipping, J.D.  
Re: Filibusters Against Judicial Nominees  
Date: January 31, 2003

Senate Democrats will filibuster judicial nominees in the 108<sup>th</sup> Congress. In the 1980s, they filibustered Republican nominees to all three levels of the federal judiciary.<sup>1</sup> Nearly three times as many Democrats as Republicans vote to sustain their filibusters.<sup>2</sup> In February 2001, Sen. Tom Daschle (D-SD) vowed Democrats would use “whatever means necessary” to block undesirable nominees.<sup>3</sup> They have already assembled against several Bush nominees enough negative votes to sustain a filibuster.<sup>4</sup> This memo suggests two types of response.

***First, the Senate has defeated only one judicial nominee by filibuster.*** In fact, the Senate has voted on only 15 motions to invoke cloture, or stop a filibuster, on 14 different judicial nominees.<sup>5</sup> Twelve of those votes succeeded and the Senate confirmed all 12 nominees.<sup>6</sup> These three cloture votes failed:

- Abe Fortas, nominated to be Chief Justice of the U.S. Supreme Court (1968): President Johnson withdrew the nomination after a cloture vote failed (45-43).
- J. Harvie Wilkinson, nominated to the U.S. Court of Appeals (1984): One cloture vote failed (57-39), a second succeeded (65-32), and the Senate approved the nomination.
- B. Theodore Stewart, nominated to the U.S. District Court (1999): A cloture vote failed (55-44) and, after further negotiations, the Senate approved the nomination.

***Second, Senate Democrats opposed nominee filibusters under President Clinton.***

- Sen. Patrick Leahy (D-VT): “I have stated over and over again ... that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported.”<sup>7</sup>
- Sen. Patrick Leahy: “I also took the floor ... to oppose filibusters to hold them up and believe that we should have a vote up or down.”<sup>8</sup>
- Sen. Edward Kennedy (D-MA): “Senators who feel strongly about the issue of fairness should vote for cloture, even if they intend to vote against the nomination itself. It is wrong to filibuster this nomination, and Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate.”<sup>9</sup>
- Sen. Dianne Feinstein (D-CA): “A nominee is entitled to a vote.”<sup>10</sup>
- Sen. Tom Harkin (D-IA): “So I would say to my friends on the other side of the aisle, do not hide. Do not hide behind this procedure. Have the guts to come out and vote up or down .... And for once and for all, put behind us this filibuster procedure on nominations.”<sup>11</sup>
- Sen. Barbara Boxer (D-CA): “[The nominee] deserves his day. And filibustering this nomination is keeping him from his day.”<sup>12</sup>

- Sen. Patty Murray (D-WA): “A ‘yes’ vote [for cloture] says this body is fair and will allow the vote on [the nominee] to come before this body.”<sup>13</sup>
- Sen. Frank Lautenberg (D-NJ): “It is pitiful. Talking about the fairness of the system and how it is equitable for a minority to restrict the majority view, why can we not have a straight up-or-down vote on this without threats of a filibuster?”<sup>14</sup>
- Sen. James Jeffords (I-VT): “To deny [the nominee] the ability to have his nomination debated is indefensible.... We are having this cloture vote, because there are at least 51 votes that will support [the nominee]. This is an attempt to use cloture ... to try and prevent or even avoid having that opportunity to vote.”<sup>15</sup>

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<sup>1</sup> District court nominee Sidney Fitzwater, appeals court nominee J. Harvie Wilkinson and Chief Justice nominee William Rehnquist.

<sup>2</sup> Since 1980, an average of 36 Democrats voted against cloture on six nominees: J. Harvie Wilkinson in 1984 (39 and 32 votes), Sidney Fitzwater (33 votes) and William Rehnquist (31 votes) in 1986, Edward Carnes in 1992 (30 votes), and B. Theodore Stewart in 1999 (44 votes). An average of 13 Republicans voted against cloture on three nominees: Marsha Berzon (13 votes) and Richard Paez (14 votes) in 2000 and H. Lee Sarokin (12 votes) in 1994.

<sup>3</sup> Quoted in Fagan, “Democrats Vow That Ashcroft Vote is a Sign of Things to Come,” *Congressional Quarterly Daily Monitor*, February 1, 2001; Editorial, “Vilification of Nominees Unacceptable,” *Atlanta Journal and Constitution*, February 2, 2001, at 18A.

<sup>4</sup> Cloture could not be invoked on nominations until 1949 and then required the vote of two-thirds of senators present and voting. Since 1975, a cloture vote requires three-fifths of the full Senate membership (60 votes). See Beth, “Cloture Attempts on Nomination,” *CRS Report for Congress* (February 2, 2001), at 1,3. The nomination of John Ashcroft to be Attorney General received 42 negative votes on February 1, 2001; the nomination of Ted Olson to be Solicitor General received 47 negative votes on May 24, 2001; and the nomination of Dennis Shedd to the U.S. Court of Appeals received 44 negative votes on November 19, 2002.

<sup>5</sup> A motion to invoke cloture was filed regarding three appeals court nominees, Daniel Manion (Seventh Circuit) in 1986, Rosemary Barket (Eleventh Circuit) in 1994, and Dennis Shedd (Fourth Circuit) in 2002, but withdrawn or vitiated before the Senate voted.

<sup>6</sup> The Senate voted so overwhelmingly for some of these cloture motions, and the related nominations, that their inclusion in a discussion of filibusters seems almost inappropriate. The Senate, for example, voted 89-0 to invoke cloture on the appeals court nomination of Julia Smith Gibbons on July 26, 2002, and three days later voted 95-0 to confirm the nomination. The Senate voted 97-1 to invoke cloture on the appeals court nomination of Richard Clifton on July 18, 2002, and the same day voted 98-0 to confirm the nomination. The Senate voted 94-3 to invoke cloture on the appeals court nomination of Lavenski Smith on July 15, 2002, and the same day confirmed the nomination by unanimous consent without even taking a roll call vote.

<sup>7</sup> *Congressional Record*, June 18, 1998, at S6521.

<sup>8</sup> *Congressional Record*, September 16, 1999, at S11014.

<sup>9</sup> *Congressional Record*, June 21, 1995, at S8807.

<sup>10</sup> *Congressional Record*, September 16, 1999, at S11014.

<sup>11</sup> *Congressional Record*, June 22, 1995, at S8861.

<sup>12</sup> *Congressional Record*, June 21, 1995, at S8733.

<sup>13</sup> *Id.* at S8740.

<sup>14</sup> *Id.* at S8739.

<sup>15</sup> *Id.* at S8739.