

THE ORANGE COUNTY REGISTER

Erwin Chemerinsky: Filibuster action was long overdue

By [ERWIN CHEMERINSKY](#)

2013-11-26 13:42:33



In a long overdue action, the Senate changed its rules to eliminate the filibuster for presidential appointments to federal agencies and to federal court judgeships. Now a nominee will be able to be approved by a majority of the Senators. It's about time the Senate did this.

The general impression of the filibuster is of James Stewart in "Mr. Smith Goes to Washington" standing and talking on the Senate floor until he collapsed of exhaustion. The reality is quite different. Beginning in the 1960s, Senators have been able to filibuster without ever taking the floor and simply by indicating a desire to do so.

Modern filibusters virtually never involve long speeches, all-night sessions or the parliamentary maneuvering that used to draw public attention. A credible threat that 41 senators will refuse to vote for cloture was enough to keep that matter off the floor. The Senate leadership simply delays consideration of the bill or the nomination until it has the 60 votes necessary for cloture. In effect, the stealth filibuster eliminated the distinction between a filibuster and a threat to filibuster; any credible threat to filibuster is a filibuster because the majority leader must regard it as such. Thus, the stealth filibuster is largely silent, invisible and relatively painless for both the majority and minority.

Both Democrats and Republicans have used the filibuster when they have been the minority party in the Senate over the course of American history and with increasing frequency. But there also is no doubt that the filibuster has been used more often during the Obama presidency than any other time in history. It is estimated that in all of United States history, there have been 168 filibusters of presidential nominations and half have been since Barack Obama became president.

The Democrats' choice to end the filibuster for most presidential nominations occurred when Republicans announced that they would filibuster and block all of Obama's nominees to the United States Court of Appeals for the District of Columbia Circuit. Eleven judges are authorized for that court and it currently has four appointed by Democratic presidents and four appointed by Republican presidents.

President Obama nominated three impeccably qualified individuals. Those are Washington lawyer Patricia A. Millett, Georgetown Law Professor Cornelia T. L. Pillard and federal judge Robert L. Wilkins. Republicans filibustered all three.

The filibuster is based not on the Constitution, but on Senate rules. In fact, the filibuster is inconsistent with the basic principle of majority rule embodied in the Constitution for both the House and the Senate. The Constitution assumes that each body will operate by majority rule and specifies those instances in which a super-majority is required. There are seven instances in which the Constitution requires that a house of Congress have a supermajority, such as the requirement that a treaty be approved by two-thirds of the Senate.

The filibuster, though, means that it takes 60 votes in the Senate to accomplish anything. This gives a minority of senators tremendous power. Indeed, 41 senators, representing just 11 percent of the population, can block any nomination or any Senate action.

Republicans protested loudly when the Democrats chose to eliminate the filibuster for executive nominations on Nov. 21. In a stunningly offensive comment, Rush Limbaugh invoked a rape analogy to criticize the reform. But the Republicans came very close to eliminating the filibuster when George W. Bush was

president. Angry over the Democrats use of the filibuster to block judicial nominees, the Republicans were poised to end the filibuster for presidential nominations until the Democrats caved. Democrats agreed to confirm three very conservative federal court of appeals judges – Janice Rogers Brown, Priscilla Owen, and William Pryor – and to use the filibuster only in extraordinary circumstances.

Eliminating the filibuster will now benefit the Democrats. President Obama will be able to have his picks for the federal judiciary and federal agencies easily confirmed. But there will be a time when there is again a Republican president and a Republican Senate and they will then be the beneficiaries of this action. Only when the president and the Senate are of different political parties are there likely to be significant fights over nominations.

But this is as it should be. The Senate's action was a long overdue step in the right direction. Next, the Senate should eliminate the filibuster entirely, including for legislation and nominations to the Supreme Court.

Erwin Chemerinsky is dean of the UC Irvine School of Law.

© Copyright 2013 Freedom Communications. All Rights Reserved.

[Privacy Policy](#) | [User Agreement](#) | [Site Map](#)