

Why Not Go 24/7 on Judges?

The Issue: Republicans are permitting Democrats to get away with a “gentlemen’s filibuster” on the judicial confirmations. But to win, Republicans must force Democrats to talk 24/7 until they break.

Response: Despite conventional wisdom “Mr. Smith Goes to Washington,” a “bring-in-the-cots” counter-measure has never been successful in breaking a filibuster. This is true even in their hey-day, when Democrat Majority Leaders fought southern Democrats. Only compromise has stopped a filibuster, and, in other cases, those who filibustered prevailed. Moreover, the 24/7 counter-measure is not what many think it would be under the Senate rules. It is impossible to force Democrats to “talk till they drop” or “read from the phone book.”

1. It’s impossible to force Democrats to talk about a nominee beyond the first three hours of the legislative day. After that, they can talk about the war, the economy, or anything they want.
2. If Democrats tire of talking, they can simply suggest the absence of a quorum, which requires 51 Senators to show up to continue conducting business. If a quorum does not appear, the Senate must adjourn or at least suspend its proceedings until a quorum is established.

Consider this scenario: Democrats run out of things to say about a judge at 11 p.m. The Minority Leader suggests the absence of a quorum:

- **Option A:** Not enough Senators respond. The Senate is “stuck,” and it must adjourn. Under this scenario, both parties sleep soundly through the night.
- **Option B:** A quorum is produced because all Republicans show up (Democrats can keep sleeping) and then debate on judges resumes. Under this scenario, Republicans are awake, and Democrats sleep. This works to the advantage of the filibustering Senators, so the burden rests on the Majority to ensure that the constitutional quorum requirement always can be met.
- **Option C:** Not enough Senators respond and the Sergeant At Arms is dispatched to bring absent Senators to the Chamber to vote. Once the quorum is produced, debate resumes. But at 2 a.m., the Democrats again note the absence of a quorum and once again the Republicans are back to Options A, B, or C.

According to Stan Bach of the Congressional Research Service (*Filibusters and Cloture in the Senate*, 1/17/01):

“... late-night or all-night sessions put as much or more of a burden on the proponents of the question being debated than on its opponents. The Senators participating in the filibuster need only ensure that at least one of their number always is present on the floor to speak. The proponents of the question, however, need to ensure that a majority of the Senate is present or at least available to respond to a quorum call or roll call vote. . . . This works to the advantage of the filibustering Senators, so the burden rests on their opponents to ensure that the constitutional quorum requirement always can be met.”

Therefore, all-night counter-filibuster measures, while possibly great drama, are, in truth, maintained by the Majority, not the filibustering minority. Democrats may not show up for quorum calls, but Republicans need to stay up for nights on end to keep the Senate in session around the clock. Additionally, there may be long, drawn-out quorum calls in the middle of the night rather than Democratic Senators reading from the phone book and laboring to stay on their feet. So it doesn’t look as dramatic as what Hollywood did with “Mr. Smith.”

24/7 is a tactic for a sprint strategy, not a long distance run. Of course, a sprint sometimes has its purposes in the middle or at the end of even the longest races...