



Senate Rules Reform and Republican Obstruction of Judicial Nominees

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Introduction:

The Senate has confirmed far fewer judicial nominees at this point in President Obama's first term than it had for his two predecessors in office, and the percentage of confirmed district court nominees is at historically low levels.ⁱ When President Obama was sworn into office there were 55 district and circuit court vacancies, including 20 seats considered "judicial emergencies" by the administrative office of the U.S. Courts.ⁱⁱ Today, the number of vacancies has risen over 50%, to 83 seats, 34 of which are judicial emergencies.ⁱⁱⁱ This trend stands in stark contrast to President Clinton and President Bush's first four years, when vacancies declined by 65% and 34%, respectively.^{iv} Today, nearly one out of eleven federal judgeships is vacant.

These deplorable facts did not happen by accident—they are mostly due to Republican Senators' abuse of Senate procedure to obstruct even non-controversial nominees.

This short report 1) documents some of the tactics that Republicans have used to block nominees during President Obama's first term, 2) provides historical context to those tactics, and 3) describes several Senate rules reform proposals that may help alleviate some of the problems that the current rules caused in the judicial selection process.

I. Republicans Use Senate Procedure to Obstruct Judicial Nominees

From the beginning of Barack Obama's presidency, Republican Senators have used existing Senate rules to obstruct judicial nominees in an unprecedented manner.

In March 2, 2009, before the president made his first judicial nomination, all of the Republican Senators wrote him a letter stating that "[w]e hope your Administration will consult with us as it considers possible nominations to the federal courts from our states. Regretfully, if we are not consulted on, and approve of, a nominee from our states, the Republican Conference will be unable to support moving forward on that nominee."^v Given expected Republican party unity on procedural matters, this letter constituted a real threat.

But it quickly became apparent that even if the president followed the principles outlined in the letter, the Republicans would not permit his nominees to go forward. For example, on March 17, 2009, President Obama nominated David Hamilton to the U.S. Court of Appeals for the Seventh Circuit. Despite bipartisan support from his home-state senators, Richard Lugar (R-IN) and Evan Bayh (D-IN), Republicans nonetheless filibustered Hamilton's nomination, forcing the Senate to invoke cloture (70-29) on his nomination in mid-November, four months after he was reported out of the Senate Judiciary Committee. Forcing a cloture vote on Hamilton sent a message to Senate Democrats that bipartisan support was not enough to avoid procedural delays on nominees.

That message was again made plain several months later, when in March 2010 Republicans forced a cloture vote on Fourth Circuit nominee Barbara Keenan. Judge Keenan, who had support from both of her home-state Senators and who was voted out of the judiciary committee unanimously five months earlier, won her cloture vote 99-0. Republicans, in an act of pure obstructionism, forced a cloture vote on a nominee, and then unanimously voted to invoke cloture, demonstrating that the filibuster had no basis in principle, but rather was an act of pure obstinance.

In 2009 and 2010, Republicans also employed the use of so-called "secret holds," whereby any Senator could anonymously block any nominee. Democratic Senators would make unanimous consent requests to hold votes on nominees, to which Republicans objected, without revealing the identity of the Senator actually making the objection.^{vi} As evidence of how widespread this practice had become, NPR reported that Republican senators had placed secret holds on *every* judicial nominee pending on the Senate floor—even those who, like Judge Keenan, had received unanimous support in committee.^{vii}

Responding to widespread public condemnation of anonymous obstructionism directed at even uncontroversial nominees, Senate leaders at the start of the current Congress reached a deal to ban "secret holds."^{viii} Despite this positive step, however, Republican delaying tactics actually escalated.

In May 2011, for instance, Republicans attempted what would have been the first successful filibuster of a district court nominee, when they tried to block Jack McConnell's nomination to the District of Rhode Island. Fortunately, they lost a close cloture vote 63-33 and Mr. McConnell was confirmed. Despite their loss, Republicans' newfound willingness to fight over district court nominees, who as a group had previously faced little opposition, marked a significant escalation in fights over nominations.

As further evidence of this escalation, in March of this year Senate Majority Leader Harry Reid was forced to file for cloture on 17 uncontroversial district court nominees after Republicans refused to consent to allow votes to be scheduled on their nominations. Amazingly, ten of these nominations had been pending since 2011 and many would have filled judicial emergencies. Senator Reid's action, while laudatory, reveals a chamber in the grip of unprecedented dysfunction, as cloture had only been filed on four other district court nominations in the long history of the Senate prior to his 2011 action.

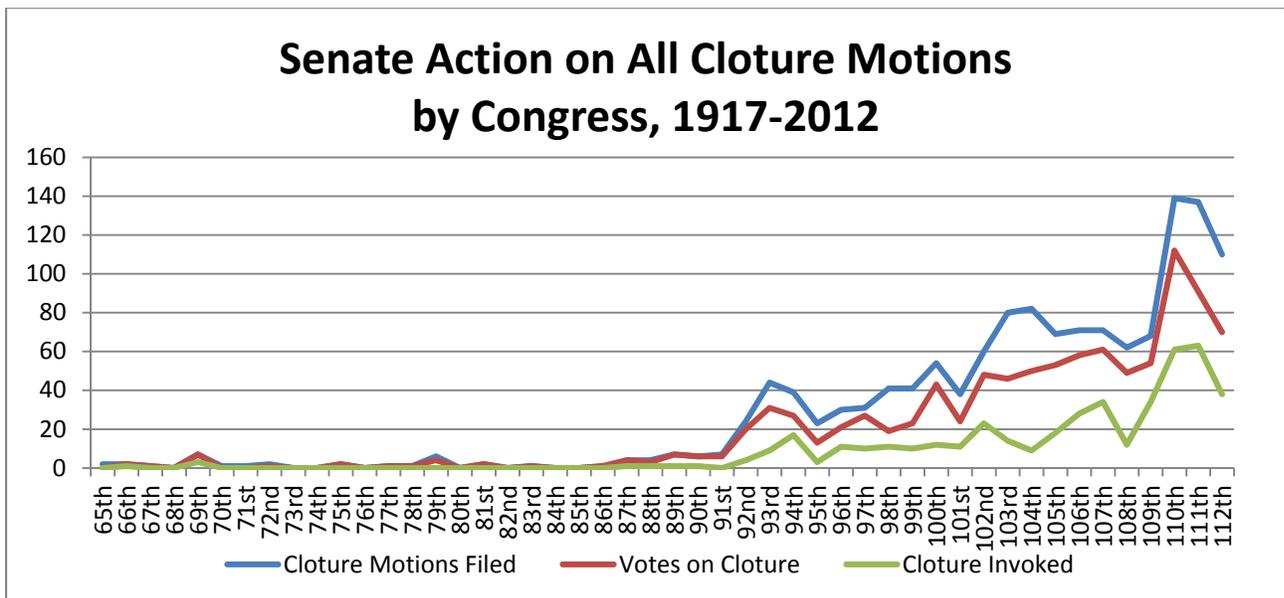
District court confirmation data reflects Republicans' newfound willingness to block previously uncontroversial nominees. For instance, while President Obama has made only one fewer district court nomination than President George W. Bush had made at a comparable point in his presidency (173 to 174, respectively), the Senate has confirmed only 128 of President Obama's district nominees, whereas it had confirmed 167 of President Bush's. Put another way, in a comparable period the Senate confirmed 96% of President Bush's nominees and only 74% of President Obama's nominees.^{ix}

Recent Republican obstructionism was not limited to district court nominees, of course. In July of this year, for example, Republicans successfully filibustered Magistrate Judge Robert Bacharach's nomination to a Tenth Circuit seat based in Oklahoma. This marked the first time that a circuit court nominee who had been reported to the floor with bipartisan support was successfully filibustered. Oklahoma Republican Senators Tom Coburn and Jim Inhofe strongly supported Bacharach's nomination, with Senator Coburn even criticizing the Senate for stalling on the nomination. On Bacharach's cloture vote, however, both merely voted 'present,' which was effectively the same as voting 'no.'^x Bacharach's nomination is still pending.

In sum, Republicans have a sustained record of using senate procedure to block even uncontroversial nominees throughout the Obama presidency.

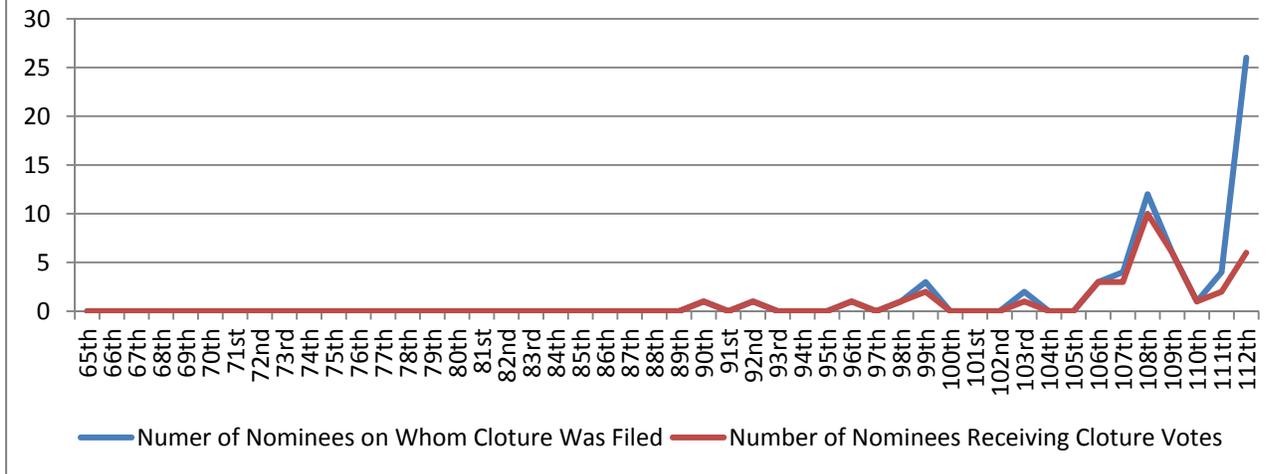
II. Historical Context for Cloture Filings and Votes

As illustrated in the following chart, Senators' use of the filibuster to block legislative and executive action has risen steadily over time.^{xi}



If only judicial nominees are considered, the trend is similar, reflecting the escalation of the use of procedural tactics in fights over judicial nominees, particularly since the beginning of the Clinton presidency.^{xii}

Senate Action on Judicial Cloture Motions by Congress, 1917-2012



III. Rules Reforms

The Senate is currently considering a number of changes to its rules that would help alleviate the judicial confirmation crisis, including: banning the filibuster on a motion to proceed; forcing Senators to continuously debate in order to sustain a filibuster; forcing 41 Senators to affirmatively vote to continue debate, rather than forcing 60 senator to end debate; and reducing the current 30 hours of post-cloture debate on nominees to two hours. This last proposal on reducing post-cloture debate hours would do the most to facilitate confirmations of judicial nominees.

These common-sense rules changes would likely dramatically increase the speed and rate at which judicial nominations were confirmed by forcing public accountability for those members who wish to block nominees, and by freeing up precious floor time for use on nominations or other Senate business. The Senate should implement these important changes without delay.

ⁱ <http://www.afj.org/judicial-selection/state-of-the-judiciary.html>

ⁱⁱ *Id.*

ⁱⁱⁱ <http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf>

^{iv} See supra note i.

^v http://republican.senate.gov/public/index.cfm?FuseAction=blogs.view&blog_id=3c522434-76e5-448e-9ead-1ec214b881ac

^{vi} <http://www.fas.org/sgp/congress/2010/holds.html>

^{vii} <http://www.npr.org/templates/story/story.php?storyId=126528338>.

^{viii} <http://politicalticker.blogs.cnn.com/2011/01/27/senate-bans-secret-holds-makes-other-rule-changes/>

^{ix} <http://www.afj.org/judicial-selection/judicial-selection-snapshot.pdf>

^x http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20120731_16_A5_WASHIN221017

^{xi} Data gathered from: http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm

^{xii} Data gathered from:

http://www.senate.gov/CRSReports/crspublish.cfm?pid=%270E%2C*P%2C%3B%3C%20P%20%20%20%0A and http://www.senate.gov/pagelayout/reference/cloture_motions/112.htm.