



Senator Feinstein Condemns “Nuclear Option”

May 18, 2005

Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.) today delivered a speech on the Senate floor denouncing the Republican threat of eliminating the filibuster for judicial nominations. Click here to watch Senator Feinstein’s speech. Following is the text of Senator Feinstein’s remarks delivered on the Senate floor:

“Last week I came to the floor and discussed the nuclear option. I recognize today that we are now faced with going down this path. I am concerned that once begun, it is going to be hard, if not impossible, to reverse it.

I find it ironic in his statement the majority leader said:

All Members are encouraged to ensure that rhetoric in this debate follows the rules and best traditions of the Senate.

That is exactly what this side of the aisle is fighting for -- the rules and the traditions of the Senate. We are standing up to those in the other party who want to break the rules and precedent of the Senate. So in reality, it is those of us on this side of the aisle who are asking the majority leader to follow all the rules and precedents of the Senate, not just the one he supports or any other group of Members might support.

Some have argued this debate is too inside baseball or, more appropriately perhaps, too inside the beltway and that Americans don't care about it. However, I believe that is wrong. To date, I have received about 16,000 phone calls, and they are running three to one in favor of opposing the nuclear option. The reason is, people are beginning to understand this debate is built on the very foundation of why we are here, why our democracy has been successful over 200 years, and why our Constitution is looked at as a model across the world in emergent democracies.

Let me try to explain, once again, why Senators take their role of advise and consent so seriously and what this nuclear option will mean, not only for the Senate and the judiciary but for our Constitution and our country.

First, Federal judges' decisions impact laws that affect our everyday lives -- privacy protection, intellectual property, laws of commerce, civil rights, environmental regulations, highway safety, product liability, the environment, retirement security. And those are just a few examples. Who we confirm is important because their ability to interpret basic law, based on the Constitution of the United States, is critical to our functioning. Their independence to do that is critical.

Secondly, Federal judges enjoy lifetime appointments. They don't come and go with administrations, as do Cabinet Secretaries. They cannot be removed from the bench, except in extremely rare circumstances. In fact, in our Government's over 200-year history, only 11 Federal judges have been impeached and, of those, only 2 since 1936.

Thirdly, Federal judges are meant to be independent. The Founding Fathers intentionally embedded language in the U.S. Constitution to provide checks and balances. Inherent in our Government is conflict and compromise, and that is the fundamental principle in the structure of our Government. The judiciary is meant to be an independent, nonpartisan third branch.

I think John Adams, in 1776, made it very clear on the point of checks and balances and an independent judiciary, when he said:

The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon on upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checked upon that... [The judges'] minds should not be distracted with jarring interests; they should not be dependent upon any man or body of men.

Now, that is the clearest statement of intent from our Founding Fathers, that the judiciary should be and must be independent. That is what is being eroded with the partisanship and with the nuclear option. The Senate was meant to play an active role in the selection process. The judiciary was not solely to be determined by the executive branch. Last week, I described how, in the Constitutional Convention, the first effort put forward was actually to have the Senate nominate and appoint judges. Then it was later on, with the consideration of others, changed to allow the President to nominate. But the explanation in the Federalist Papers is all centered around the Senate having the real power to confirm, and that power is not a rubber stamp.

Because of these fundamental concerns, for centuries there have been heated and important debates surrounding judicial nominations. Today, rather than utilizing and preserving the natural tension and conflict our Constitution created, some in the Republican Party want to eviscerate and destroy that foundation. Blinded by political passion, some are willing to unravel our Government's fundamental principle of checks and balances to break the rules and discard Senate precedent.

The nuclear option, if successful, will turn the Senate into a body that could have its rules broken at any time by a majority of Senators unhappy with any position taken by the minority. It begins with judicial nominations. Next will be executive appointments, and then legislation.

A pocket card being passed around in support of the nuclear option states this:

The majority continues to support the legislative filibuster.

Yes, they do today, but what happens when they no longer support it tomorrow or the next day? If the nuclear option goes forward and they break Senate rules and throw out Senate precedent, then any time the majority decides the minority should not have the right to filibuster, the majority can simply break the rules again. Fifty-one votes are not too hard to get. Get the Vice President, have a close Senate, and you get it. That will be new precedent again in the

Senate. So once done, it is very hard to undo. That is why precedent plays such a big part in everything we do because we recognize that once you change it, you open that door for all time. It can never be shut again. If this is allowed to happen -- if the Republican leadership insists on enforcing the nuclear option, the Senate becomes ipso facto the House of Representatives, where the majority rules supreme and the party in power can dominate and control the agenda with absolute power.

The Senate is meant to be different. In my talks, I often quote George Washington and point out how the Senate and House are often referred to as a cup of coffee and a saucer. The House is a cup of coffee. You drink your coffee out of the cup. If it is too hot, you pour it into the saucer -- the Senate -- and you cool it. The Senate is really formed on the basis that no legislation is better than bad legislation and that the debates and disagreements over judicial nominations ensures that the Senate confirms the best qualified candidates.

So the Senate is meant to be a deliberative body, and the rights of the minority, characterized by the filibuster, are purposely designed to be strong. Others describe the Senate as a giant bicycle wheel with 100 spokes. If one Senator -- one spoke -- gets out of line, the wheel stops and, in fact, that is true. In our rules, any Senator can put a hold on a piece of legislation and essentially force the majority to go to a cloture vote -- essentially, force a 60-vote necessity for any matter to be brought to the floor. This distinguishes us from the House.

Because we know it is such a strong right, we are very reluctant and very reserved in the use of that right. This is what has produced comity in this House, the collegiality. Everybody knows if you put a hold on something too often, you are going to jeopardize things you want. So what goes around comes around and comity, such as it may be, exists.

Now, when one party rules all three branches, that party rules supreme. But now one party is saying that supreme rule is not enough, that they must also completely eliminate the ability of the minority to have any voice, any influence, any input.

This is not the Senate envisioned by our Founding Fathers. It is not the Senate in which I have been proud to serve for the last 12 years. And it is not the Senate in which great men and women of both parties have served with distinction for over 200 years. We often refer to the longest filibuster in history, which was conducted by Senator Strom Thurmond and lasted for more than 24 hours. That was an actual filibuster, standing on the floor and orating, or asking the clerk to read the bill, or reading the telephone directory, and doing it hour after hour after hour, sending the message that you are stopping debate, that on the great wheel of comity one spoke is sticking out and stopping it. People listen because, unlike the House, debate and discussion has been important. It has been fundamental in our being, and our ability to stand up on the floor of the Senate and discuss issues of import before the world on television, for the Congressional Record, for all of the people who watch on closed circuit television, becomes a signal, I think, on Capitol Hill.

When Democrats were in the White House -- I will talk for a moment on Senate procedure -- Republicans used the filibuster and other procedural delays to deny judicial nominees an up-or-down vote. So denying a judicial nominee an up-or-down vote is nothing new. It has been done over and over and over again. I speak as a member of the Judiciary Committee for 12 years, and I have seen it done over and over and over again.

So why suddenly is an up-or-down vote now the be all and end all?

Last administration, Republicans used the practice of blue slips or an anonymous hold, which I have just described, to allow a single Senator -- not 41 Senators, but 1 -- to prevent a nomination from receiving a vote in the Judiciary Committee, a 60-vote cloture vote on the floor, or an up-or-down vote on the floor of the Senate. This was a filibuster of one, and it can still take place within the Judiciary Committee.

The fact is, more than 60 judicial nominees suffered this fate during the last administration. In other words, over 60 Clinton judges were filibustered successfully by one Senator, often anonymous, often in secret, no debate as to why. It was an effective blackball.

This is not tit-for-tat policy, but it is important to recall that Senate rules have been used throughout our history by both parties to implement a strong Senate role and minority rights, even the right of one Senator to block a nomination.

Republicans have argued that the nominations they blocked are different because in the end, some, such as Richard Paez and Marsha Berzon, were confirmed. This ignores that it took over 4 years to confirm both of them because of blue slips and holds.

In addition, if a party attempts to filibuster a nomination and a nominee is eventually confirmed, that does not mean it is not a filibuster. Failure does not undo the effort. I pointed out earlier where, in 1881, President Hayes nominated a gentleman to the Supreme Court. That was successfully filibustered throughout President Hayes' term. When President Garfield then came into office, he renominated the individual, and the Senate then confirmed that individual. But that does not negate the filibuster. It was the first recorded act of a filibuster of a judicial nominee, and it, in fact, took place and was successful for the length of President Hayes' term.

More importantly, while some of Clinton's nominations eventually broke through the Republican pocket filibuster, 61 of President Clinton's judicial nominations were not confirmed because of Republican opposition. Not only were they not confirmed, they were not given a committee vote in Judiciary. They were not given a cloture vote here or an up-or-down vote on the floor. So these are really crocodile tears.

Republicans have also argued that the reason the nuclear option is needed now is because the Clinton nominees were not defeated by a cloture vote. In essence, because different procedural rules were used to defeat a nominee, it does not count.

On its face, this argument is absurd. To the nominee, whatever rule was used, their confirmation failed and the result is the same: They did not get a vote, and they are not sitting on the Federal bench.

As I said, 61 Clinton nominees, in the time I have sat on the Senate Judiciary Committee -- so I have seen this firsthand -- were pocket filibustered by as little as one Senator in secret and, therefore, provided no information about why their nomination was blocked. There was no opportunity to address any concern or criticism about their record and qualifications.

Just to straighten out the record because I debated a Senator yesterday: 23 of these were circuit court nominees and 38 were district court nominees. In addition, unlike what some have

argued, this practice was implemented throughout the Clinton administration when Republicans controlled the Senate, not just in the last year or final months of the tenure of the President.

The reason I mention this is because there is sort of an informal practice in the Judiciary Committee – it is called the Thurmond rule – that when a nominee is nominated in the fall of year of a Presidential election, that nominee does not generally get heard. But I am not only talking about nominees at the tail end; I am talking about nominees who were nominated in each of the 6 years of the Clinton Administration in which the Republican party controlled the Senate.

The following is a list of President Clinton’s judicial nominees who were blocked:

Circuit Court Nominee	Court Nominated To	Date Nomination First Submitted to Senate
Charles R. Stack	Eleventh Circuit	10/27/95
J. Rich Leonard	Fourth Circuit	12/22/95
James A. Beaty, Jr.	Fourth Circuit	12/22/95
Helene N. White	Sixth Circuit	01/07/97
Jorge C. Rangel	Fifth Circuit	07/24/97
Robert S. Raymar	Third Circuit	06/05/98
Barry P. Goode	Ninth Circuit	06/24/98
H. Alston Johnson, III	Fifth Circuit	04/22/99
James E. Duffy, Jr.	Ninth Circuit	06/17/99
Elena Kagan	DC Circuit	06/17/99
James A. Wynn, Jr.	Fourth Circuit	08/05/99
Kathleen McCree Lewis	Sixth Circuit	09/16/99
Enrique Moreno	Fifth Circuit	09/16/99
James M. Lyons	Tenth Circuit	09/22/99
Allen R. Snyder	DC Circuit	09/22/99
Robert J. Cindrich	Third Circuit	02/09/00
Kent R. Markus	Sixth Circuit	02/09/00
Bonnie J. Campbell	Eighth Circuit	03/02/00
Stephen M. Orlofsky	Third Circuit	05/25/00
Roger L. Gregory	Fourth Circuit	06/30/00
Christine M. Arguello	Tenth Circuit	07/27/00
Andre M. Davis	Fourth Circuit	10/06/00
S. Elizabeth Gibson	Fourth Circuit	10/26/00
John D. Snodgrass	Northern District of Alabama	09/22/94
Wenona Y. Whitfield	Southern District of Illinois	03/23/95
Leland M. Shurin	Western District of Missouri	04/04/95
John H. Bingler, Jr.	Western District of Pennsylvania	07/21/95
Bruce W. Greer	Southern District of Florida	08/01/95
Clarence J. Sundram	Northern District of New York	09/29/95

Sue E. Myerscough	Central District of Illinois	10/11/95
Cheryl B. Wattle	Northern District of Texas	12/12/95
Michael D. Schattman	Northern District of Texas	12/19/95
Anabelle Rodriguez	District of Puerto Rico	01/26/96
Lynne R. Lasry	Southern District of California	02/12/97
Jeffrey D. Colman	Northern District Of Illinois	07/31/97
Robert A. Freedberg	Eastern District of Pennsylvania	04/23/98
Legrome D. Davis	Eastern District of Pennsylvania	07/30/98
Lynette Norton	Western District of Pennsylvania	04/29/98
James W. Klein	District of Columbia	01/27/98
J. Rich Leonard	Eastern District of North Carolina	03/24/99
Frank H. McCarthy	Northern District of Oklahoma	04/30/99
Patricia A. Coan	District of Colorado	05/27/99
Dolly M. Gee	Central District of California	05/27/99
Frederic D. Woocher	Central District of California	05/27/99
Gail S. Tusan	Northern District of Georgia	08/03/99
Steven D. Bell	Northern District of Ohio	08/05/99
Rhonda C. Fields	District of Columbia	11/17/99
S. David Fineman	Eastern District of Pennsylvania	03/09/00
Linda B. Riegle	District of Nevada	04/25/00
Ricardo Morado	Southern District of Texas	05/11/00
K. Gary Sebelius	District of Kansas	06/06/00
Kenneth O. Simon	Northern District of Alabama	06/06/00
John S. W. Lim	District of Hawaii	06/08/00
David S. Cercone	Western District of Pennsylvania	07/27/00
Harry P. Litman	Western District of Pennsylvania	07/27/00
Valerie K. Couch	Western District of Oklahoma	09/07/00
Marian M. Johnston	Eastern District of California	09/07/00

Steven E. Achelpohl	District of Nebraska	09/12/00
Richard W. Anderson	District of Montana	09/13/00
Stephen B. Lieberman	Eastern District of Pennsylvania	09/14/00
Melvin C. Hall	Western District of Oklahoma	10/03/00

Mr. President, the overwhelming question I have -- and let me ask everybody here -- is the public interest better served by 41 Senators stating on the floor of the Senate why they are filibustering a nominee, as Senator Schumer did, as others have done earlier, and the reasons hang out in public? Everybody can hear the reasons; they can be refuted. There are reasons given with specificity. They are based on opinions, they are based on speeches, they are based on writings, and they are discussed right on the floor in public. Or is the public interest better served by one Senator, in secret, putting a hold on a nominee or blue-slipping the nominee and preventing that nominee from ever having a hearing, from ever having a markup, from ever having a vote in the Senate, and it is all done on the QT, no discussion, no debate. It is, as I said, the epitome of blackballs that exists in the Senate.

All during the Clinton years, Republicans did not argue that checks and balances had gone too far. In fact, the opposite occurred. Republicans went to the floor to defend their right to block nominations. Senator Hatch is a good friend of mine, but nonetheless here is his 1994 statement about the filibuster:

It is one of the few tools that the minority has to protect itself and those the minority represents.

That was on judges. That was the chairman of the Judiciary Committee.

In 1996, Senator Lott, then the leader, stated:

The reason for the lack of action on the backlog of Clinton nominations -- That is an admission there were backlogs of Clinton nominations -- was his steadily ringing office phones saying "No more Clinton Federal judges."

Also, in 1996, Senator Craig said:

There is a general feeling that no more nominations should move. I think you'll see a progressive shutdown.

Now there are crocodile tears and people are upset because 41 of us -- not 1 -- 41 want to debate in public. We have voted no on cloture because we believe our views are strong enough, that our rationale is strong enough and substantive enough to face public scrutiny and warrant an extended debate in the true tradition of the Senate.

We may not all agree. Our country is based on a foundation that protects the freedom to disagree, to debate, to require compromise.

Neither party will always be right when it comes to the best policies for our country, and neither party will always be in power. So, as I said initially, it is important to put this political

posturing in context. I believe filibusters should be far apart and few, and should be reserved for the rare instances for judicial nominations that raise significant concerns.

I voted against cloture in my Senate career of 12 years on only 11 judicial nominations and voted to confirm 573. I believe judicial nominees must be treated fairly and evenhandedly. I also believe it is the duty of the Senate to raise concerns or objections when there are legitimate issues that need to be discussed.

Discharging our obligation to advise and consent is not an easy task, especially when it involves making a choice to oppose a nomination. As I discussed earlier, I strongly believe the use of the blue slip and anonymous holds has been abused in previous Congresses. During the reorganization of the Senate in 2000, Senators Daschle and Leahy worked to make the process more fair and public. At that time, a blue slip was no longer allowed to be anonymous and instead became a public document. This refining forced Senators opposed to a nominee to be held accountable for their positions. They could not hide behind a cloak of secrecy. This step also wiped out many of the hurdles that had been used to defeat nominations, so many of the tools used by Republicans in the past, and referred to as a way to draw distinctions with a public cloture vote, are no longer available.

Today the blue slip is still used. However, with each chairmanship, its effectiveness and its role has been modified. Each chair of the Judiciary Committee says they are going to adhere to the blue slip in a different way. That is the anomaly in this process. One person in Judiciary decides what the rules are going to be. This is what we ought to change.

Recently, Senator Specter, for example, has indicated he will honor negative blue slips. It is a piece of paper that Senators from a nominee's home state send in. If you do not send them in or if you say you do not favor the nominee, that nominee does not proceed. So Senator Specter has said he will honor negative blue slips when they are applied to district court nominees and that even one negative blue slip will be considered dispositive. However, when it comes to circuit court, blue slips will be given great weight but will not be dispositive on a nomination.

Given that the meaning and effect of a blue slip has changed, and I suspect will continue to change depending on which party controls the Senate and which party is in the White House, I believe the blue slip process should be eliminated altogether. In reality, its usefulness has already been lost.

Instead, I have long supported the creation of a specific timeline for how judicial nominations should be considered. Three months after nominations are submitted by the President, they should be given a hearing in the Judiciary Committee. In 6 months they should be given a vote in the committee. And in 9 months, floor action should be taken on the nomination. But the filibuster should remain the basic right of this institution. I believe implementing this timeframe would go a long way toward alleviating the tension that has plagued the consideration of judicial nominees.

I would like to spend a few moments, since I believe I have the time, on one nominee. It is the nominee who comes from California. Of course I represent California. This is very hard for me to do, but I believe this nominee clearly indicates the legitimacy of our position. I would

like to turn to the President's choice for a seat on the most powerful appellate court in the Nation, the DC Circuit, Janice Rogers Brown.

In the case of this particular nominee, out of all the nominations, Justice Brown, in my view, is the clearest cut. She has given numerous speeches over the years that express an extreme ideology, I believe an out-of-the-mainstream ideology. In those speeches she has used stark hyperbole, startlingly vitriolic language. That has been surprising, especially for a judge, let alone a State Supreme Court justice from my State. But statements alone would not be enough for me to oppose her nomination, because there are many nominees whose opinions I have strongly disagreed with and voted to confirm. Jeffrey Sutton and Thomas Griffith immediately come to mind.

Rather, my concern is that these views expressed in Justice Brown's speeches also drive her legal decisionmaking. On far too many occasions she has issued legal opinions based on her personal political beliefs, rather than existing legal precedent. Let me give some instances.

In a speech to the Institute for Justice on August 12, 2000, Justice Brown stated this:

Today, senior citizens blithely cannibalize their grandchildren because they have a right to get as much free stuff as the political system will permit them to extract.

From the context of the speech, it is clear Justice Brown is referring to Social Security and Medicare, two essential programs that protect individuals in their retirement, and two programs that today's senior citizens have been contributing to financially for decades.

Unfortunately, her legal decisions reflect the same visceral hostility toward the rights of America's seniors. Let me give you an example.

In *Stevenson v. Superior Court*, Justice Brown wrote a dissenting opinion that would have changed California law to make it more difficult for senior citizens to demonstrate age discrimination. A Republican justice, writing for the majority of the California Supreme Court, criticized Justice Brown's opinion and he stated this:

The dissent's real quarrel is not with our holding in this case, [meaning the majority] but with this court's previous decision... and even more fundamentally with the legislature itself.... The dissent [of Justice Brown] refuses to accept and scarcely acknowledges these holdings.

"These holdings" being the law of the State of California.

Justice Brown's open disdain toward Government is also disturbing, especially in light of her nomination to the District of Columbia Circuit. Let me explain why this is so important. The DC Circuit is the most prestigious and powerful appellate court below the Supreme Court because of its exclusive jurisdiction over critical Federal constitutional rights and Government regulations. Given this exclusive role, the judges serving on this court play a special role in evaluating Government actions.

Janice Brown's statements on the Federal Government raise serious concerns about how she would perform on the DC Circuit if given a lifetime position. Let me illustrate.

At a 2000 Federalist Society event, Justice Brown stated:

Where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies. The result is: families under siege, war in the streets, unapologetic expropriation of property, the precipitous decline of the rule of law, the rapid rise of corruption, the loss of civility and the triumph of deceit. The result is a debased, debauched culture which finds moral depravity entertaining and virtue contemptible.

We asked her about these statements in the Judiciary Committee. Her answer was, "Well, I write my own speeches." So these are her words. These are her words, of somebody going on the DC Circuit with enormous hostility to virtually anything the Government would do, and saying the Government is responsible for the loss of civility, the triumph of deceit.

Justice Brown's statements and actions demonstrate that she is an activist judge with an unfortunate tendency to replace the law as written with her own extreme personal beliefs. This is not the kind of judge who should be on the nation's second most powerful court."

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