

Testimony of

The Honorable Russ Feingold

March 27, 2003

Mr. Chairman, I will again vote NO on the nomination of Priscilla Owen to be a judge on the U.S. Court of Appeals for the Fifth Circuit.

I must say that I am sorry we are having this vote. I think it shows disrespect for the Senate and the committee process for a nominee to be resubmitted for the same position for which he or she was unable to secure committee approval at an earlier time.

We had a fair process in the last Congress on this nominee - an extensive hearing, adequate time for deliberation and debate, and a fair vote. The nomination was defeated. The committee's consideration of this nomination was thorough and fair. Obviously, some did not like the result, but I do not think they can in good faith find fault the process.

So the fact that Justice Owen will be approved by the committee today doesn't show that the decision we reached last year was wrong. No minds were changed by the additional hearing that was held on Justice Owen. The only thing that has changed is the composition and the leadership of this Committee.

Judicial nominations should not be like legislation that can be reintroduced and reconsidered by a succeeding Congress. The Senate, acting through this Committee, and exercising its constitutional responsibility, refused to give its consent to this nomination last year. I believe it is wrong for the majority on this committee to take this step. I will vote No. I ask that my statement opposing this nomination from last September be placed in the record.

Thank you Mr. Chairman.

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Statement on Judiciary Committee Rules and Consideration of Judges

MR. FEINGOLD: Mr. Chairman, last week we readopted the Committee's rules. I had no problem with us taking that action, although as I said at our meeting, I think we need to have an opportunity to discuss that agenda item rather than acting off the floor without anytime for consideration. But with the understanding that we would have the opportunity to have a discussion and debate, I was fine with readopting the rules for this Congress.

As I understand it, the rules have been in effect throughout the year I have no problem readopting those rules, which as I understand it, have been in effect this year in the debates we have had so far. But having done that, I want to make some comments on what happened in our meeting on February 27. I believe that a clear violation of the committee rules occurred on that day, and we really need to discuss this as a committee before proceeding with further business.

What happened on February 27 was a sad moment for our Committee and does not bode well for the harmonious functioning of the Committee this year. Indeed, since that day we have been in a free fall it seems to me. Communications have broken down among us and among our staffs. On the Democratic side, we feel unfairly taken advantage of, and I know there are bad feelings on your side as well. I am very sorry about this because we have much work to do for the country, and we can do that work much more efficiently and much more successfully if we work together with respect and good will than if we are constantly fighting with each other.

Mr. Chairman, you have the votes in this Committee to do pretty much whatever you want. But that does not mean that you should ignore the rights of those who disagree with you. That is what occurred at the February 27 meeting.

Let me quickly review the background of this dispute. The Chairman sought to have votes on circuit court nominees Justice Deborah Cook and Mr. John Roberts. A number of us on the Democratic side believed that those votes should not occur because those two nominees had not received an adequate hearing in this Committee. I'm not going to take the time to review our position on that score in any detail, but I do want to point out that we have not engaged in a policy of blanket obstruction of nominees in this Committee. We voted on Miguel Estrada. We voted on Jeffrey Sutton. We voted on Jay Bybee. We voted on Timothy Tymkovich. We will soon vote on Priscilla Owen.

Many of us voted against some or all of those nominations, but we agreed to have a vote because we thought that the Committee's consideration of the nominees had been sufficient for us to make up our minds. We have not sought to use Rule IV to obstruct the functioning of the Committee.

In the case of Justice Cook and Mr. Roberts, however, we had asked repeatedly for another hearing. We had asked, as an alternative, for a public meeting with the nominees. Having been rebuffed at every turn, we simply did not feel ready to proceed with votes on their nominations. We did not believe the Committee has been given adequate opportunity to assess the qualifications and examine the record of Justice Cook and Mr. Roberts.

But when we objected to a vote on February 27, the Chairman overruled the objection and forced a vote, in clear violation of Rule IV. This was an astonishing act in a body that functions in large part because all members respect the rules and abide by them.

When an objection to proceeding to a vote was made, the proper course under our Committee's longstanding Rule IV was to hold a vote on a motion to end debate on the matter. The Rule provides that debate will be ended if that motion carries by a majority vote, including one member of the minority. In this case, our side was united in opposing ending debate, so the motion would have failed. It is, in effect, as the Chairman himself recognized in 1997 when the Rule was invoked in connection with the Bill Lann Lee nomination, a kind of filibuster rule in the Committee. The vote to end debate is like a cloture vote, and it cannot succeed unless at least one member of the minority assents.

Now Mr. Chairman, I have read your letter to Senator Daschle in which you attempt to justify your actions. With respect, Mr. Chairman, your interpretation of the rule is erroneous. In fact, it is clearly erroneous, and I don't use that term lightly.

Your position is that the Chairman of this Committee has unfettered power to call for a vote on a matter and that Rule IV is only designed to allow a majority of the committee to force what you call an "obstreperous Chairman" to hold a vote on a matter on the agenda when he doesn't want to. That interpretation conflicts with text of the rule, the practice of the Committee for 24 years under five separate Chairmen, including the current Chairman, and with the history of the rule itself.

I want to start with the history because I think it so plainly shows what the rule is designed to do. The rule was adopted in 1979 when Sen. Kennedy chaired the Committee. The Committee at that time had 10 Democrats and 7 Republicans. You were on the Committee at the time, as was Senator Leahy.

At that time, there was no way at all to end debate in Committee if even one member wanted to continue debate. Senator Thurmond, who was the ranking member at the time, stated during the committee meeting: "The present rule is the Senator can talk as long as he wants to."

Recent years had seen controversial matters such as the Equal Rights Amendment stalled for long periods of time in Committee. The Civil Rights era had seen the Committee headed by a segregationist Chairman block civil rights legislation. Chairman Kennedy sought a new committee rule to allow him to bring a matter to a vote. His original proposal was simply to let the Chairman call a vote when he believed there had been sufficient debate. This is how the original proposal read, from the transcript of the Committee's meeting on January 24, 1979:

"If the Chairman determines that a motion or amendment has been adequately debated, he may call for a vote on such motion or amendment, and the vote shall then be taken, unless the Committee votes to continue debate on such motion or amendment, as the case may be. The vote on a motion to continue debate on any motion or amendment shall be taken without debate."

That was the original proposal to change the right of unlimited debate. And if that rule had been adopted, and remained in effect until the present, what happened on February 27 would have been just fine because a majority of the committee would not have supported our request to continue debate.

But Chairman Kennedy's proposed rule was not adopted. Sen. Thurmond noted that the minority on the committee were opposed to the change. He stated: "We feel it would be a mistake, if there is going to be a change we do think there ought to be some compromise between the unlimited debate maybe and a majority. That is what I was discussing with Senator DeConcini. I felt maybe 12 members could cut off debate. Senator DeConcini suggested 11."

Mr. Chairman, during this 1979 markup - and I have to say that the transcript makes for fascinating reading -- Democratic members like Sen. Howard Metzenbaum, Sen. Kennedy, and even Sen. Biden spoke about the need for the Committee to be able to conduct business and not be thwarted by what Sen. Metzenbaum called a "talkathon." On the other hand, Republican

members of the Committee were wary of a rule change. And Mr. Chairman, you spoke against the rule that Sen. Kennedy proposed. You said the following:

"I would be personally upset. There are not a lot of rights that each individual Senator has, but at least two of them are that he can present any amendments which he wants and receive a vote on it and number two, he can talk as long as he want to as long as he can stand, as long as he feels strongly about an issue. I think these rights are far superior to the right of this Committee to rubber stamp legislation out on the floor.

Later you continued:

I think it is a real mistake, Joe, and Mr. Chairman. I see the advantages of being able to expedite legislation and try to balance that. I think it is a real mistake to take away these rights.

Senator Thad Cochran was then a member of the Committee and at the end of the meeting, he, echoing Sen. Thurmond, suggested a compromise. He said:

"Mr. Chairman, I don't have anything to add other than except I do support writing into the rule the requirement that there be an extraordinary majority to shut off debate in our Committee. I think we can arrive at some number agreeable to everyone.

There was quite a lengthy discussion of the proposed rule change. One particularly significant remark was made by Senator Bob Dole, who was then on the Committee said: "[A]t least you could require the vote of one minority member to terminate debate. I'm sure you could always secure one vote over here."

The next week, the Committee reached agreement and adopted Rule IV, which has been in effect ever since. The transcript of the Committee's meeting indicates only that the rule change was acceptable to both sides. There is no further discussion or debate.

The text of the rule takes up Sen. Dole's idea, requiring at least one member of the minority to vote to end debate. The compromise ended the ability of one or a few Senators to tie up the Committee indefinitely. But it gave the majority the power to end debate over an objection if it could convince one member of the minority to agree. The Committee didn't adopt Sen. Thurmond's or Sen. Cochran's suggestion precisely, but it specified a super-majority to end debate, 10 out of the 17 members of the committee. Because ten of the 17 members of the Committee at the time were Democrats, the new rule made it even more difficult for the majority to end debate by taking up Sen. Dole's suggestion and specifying that at least one member of the minority had to agree. That was the compromise reached, and that is the rule we have had for over two decades.

Mr. Chairman, the argument that the rule places no limit on the Chairman's ability to end debate is clearly answered by this history. It is clearly wrong. The committee rule was violated when Justice Cook and Mr. Roberts were reported over the objection of some members without a vote in the Committee to end the debate. There is simply no question about this.

You have mentioned a number of times that the Parliamentarian agreed with your interpretation of the Committee's rules. I do not believe that is accurate. What the Parliamentarian has told us is that if a point of order is made on the floor he would only look to make sure the Senate rules were followed. Those rules simply require a majority vote of the committee when a quorum is present. No Senate rule was violated on February 27, but a Committee rule, Rule IV, clearly was.

During the February 27 meeting, a new member of our Committee, the Senator from South Carolina, stated that if our interpretation of Rule IV prevailed, "you could not ever do any business, have any votes, unless the other side totally agreed." I just want to point out that that is not the result we seek at all. There is a big difference between the other side "totally agreeing" and having one member of the minority voting to end debate. The Senator from South Carolina actually described the situation in this Committee before Rule IV was adopted, but not after.

I do want to point out to my colleagues once again that it is hardly the case that we on the Democratic side have tried to block all action on judges using Rule IV. We voted on Miguel Estrada. We voted on Jeffrey Sutton. We voted on Jay Bybee. We voted on Timothy Tymkovich. We will vote on Priscilla Owen. In the last Congress we approved 100 of President Bush's nominees. I voted against a few of them, but I never tried to hold up a vote.

We tried to invoke Rule IV on February 27 only because of the special circumstances surrounding the Cook and Roberts nominations. We felt, and we still feel, that the Committee's consideration of these two nominees was inadequate. That's why we objected to the votes.

Now Mr. Chairman, this might seem like a petty matter. But it isn't. Honoring the rules of the Senate and the rules of the committees gives credibility and legitimacy to the work we do here. Rules that survive changing tides of political power are the hallmark of a democracy. In many ways our committee rules are analogous to the rule of law in our society. We have to respect those rules or we have nothing left.

Mr. Chairman, it is clear from the history of Rule IV that it was insisted on in 1979 by Republican Senators then in the minority to preserve their rights in Committee to debate matters fully and not just, in your own words at that time, "rubber stamp legislation out to the floor." The justification for ignoring the rule given in the letter to Sen. Daschle simply doesn't hold water when you look at the history and practice in this Committee. This kind of results-oriented approach to the rules of the Committee does not serve us well. The rules of this body, like the laws of this country, protect all of us. We must stand up to efforts to ignore them.

What happened in the Committee on February 27 with respect to Rule IV did not reflect well on the Committee or the Senate. I sincerely hope that these rulings will be reconsidered. The Committee must enforce its rules, not run roughshod over them. And if that means that we consider and discuss certain nominations a little longer before reporting them to the floor, so be it. That is what happens in a deliberative body governed by rules not fiat.

Thank you Mr. Chairman.