Testimony of

The Honorable Zell Miller

May 6, 2003

Testimony of U.S. Senator Zell Miller (D-GA)
Senate Judiciary Subcommittee Hearing
"Judicial Nominations, Filibusters and the Constitution:
When A Majority Is Denied Its Right to Consent"
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The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it.

Try explaining that at your local Rotary Club or someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Poly Sci 101. You can't because this silly senate math stands democracy on its head.

Winston Churchill once said, "Democracy is based on reason and fair play." Well, there's nothing reasonable or fair about what's been happening in the Senate in recent years, especially in recent weeks. It's not just that it's an expensive waste of time and taxpayer money, but it's also a flagrant abuse of majority rule, the principle that Democracy operates on everywhere. Everywhere, that is, except in the U.S. Senate.

The word "filibuster" comes from a Spanish word for "pirate," and that is exactly what the filibuster does: it hijacks the democratic process. The way it is being used in the Senate gives the minority an absolute veto on everything.

James Madison, the Father of the Constitution, feared some future political leaders would pervert the legislative process in just this way. And he warned in Federalist Paper Number 58 that when it happened, "The Fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transformed to the minority." So what's happening today, I'm sure, has the man who wrote the Constitution spinning in his grave.

And Alexander Hamilton as well, because he agreed with Madison on this. He pointed out in his Federalist Paper #68 that the vice president was given a tie-breaking vote "to securing at all times the possibility of a definite resolution of that body." A "definite resolution, how well put. That's what we need around here: "a definite resolution."

For many years, I taught political science and history at four different colleges and universities, I don't think I ever taught a class without telling the old story about the origin of the Senate.

Thomas Jefferson was in France when the Constitutional Convention was being held and later, the story goes, he asked his friend George Washington, who presided over the convention, about the purpose of this upper chamber, the Senate.

Washington, according to the anecdote, then asked Jefferson "why do you pour coffee into your saucer?" "To cool it," Jefferson replied. And Washington responded, "Even so, we pour legislation into the senatorial saucer to cool it."

But there is nothing said in the Constitution at all about extended debate. Washington, I believe, thought the smaller size, longer and staggered terms, as well as chosen by state legislation, would provide more wisdom, hopefully.

Some constitutional lawyers have argued that any kind of super majority vote is unconstitutional, other than for those five areas specified in the Constitution itself: treaty ratification, impeachment, override of a presidential vote, constitutional amendments and expelling a member of Congress. Nowhere does it say it now should be a super majority on judicial nominations. But that is what we have going on today.

Perhaps it is time for someone to test its constitutionality. That's one possible remedy. Or, we could abolish Rule XXII that protects this travesty and let the U. S. Senate operate under rules like every other democratic legislative body in the world. I don't think that's very likely.

Or, we could modify what I call the Two-Track-Trick put in a few years ago where a "filibuster-lite" goes on without any heavy lifting while another piece of legislation is being considered at the same time.

With this devious device, you avoid the inconvenience and pain of a real filibuster, but it still can go on ad nauseam. It's just that the public doesn't notice it as much. And that's the point - public debate is turned down real low. I'd much rather have the old all night filibuster - a bunch of them - than this charade.

Over the years, many respected veterans of the Senate, not a newcomer like myself, have expressed dismay with this process. Henry Clay, selected as one of the greatest senators in the history of the body, condemned the first organized filibuster when it occurred in 1837. Even back then he thought there needed to be some workable limitation for endless debate. If only that "Great Compromiser" could have foreseen what it would become late in the 20th

Century. In the 19th Century, there were 23 filibusters. In the last 30 years of the 20th Century there were over 200. Both parties have used it time and time again. One is just as guilty as the other.

In 1995 - eight years ago - Democratic Senators Tom Harkin and Joe Lieberman introduced a rule change that I believe is the best that's been proposed. My resolution is modeled after theirs.

Two years before he introduced his rule change, Senator Harkin let a committee have it with both barrels, "There comes a time when tradition has to meet the realities of the modern age. The minority's rights must be protected. The majority should not be able to run roughshod over them, but neither should a vexatious minority be able to thwart the will of the majority and not even permit legislation to come up for a meaningful vote."

The Harkin-Lieberman plan was a four-step process that still kept 60 votes on the initial cloture vote, but decreased it by three votes with each of the next three cloture attempts until it got down to a majority of 51. There would be two-day intervals between each cloture vote, so the whole process would last less than two weeks. (Compare that to the ten weeks we've been filibustering the Miguel Estrada nomination.)

Harkin and Lieberman argued, logically I believe, that this would preserve the Senate tradition while still giving the minority plenty of time to plead its case without blocking the majority forever.

That is what my proposal, Senate Resolution 85, would do. In 1995, the Harkin-Lieberman bill won only 19 votes. I'm enough of a realist to know things haven't changed that much in eight years and my proposal probably wouldn't fare much better today. But at the very least, Mr. Chairman, I would hope we would consider applying my proposal to judicial nominations.

Thank you, Mr. Chairman.