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Senate

(Legislative day of Tuesday, April 4, 2017)

The Senate met at 10 a.m., on the expiration of the recess, and was called to order by the Honorable LUTHER STRANGE, a Senator from the State of Alabama.

PRAYER

The Chaplain, Dr. Barry C. Black, offered the following prayer:

Let us pray.

O God, our help in ages past, our hope for years to come, throughout life's seasons moments of decision arrive. As our lawmakers prepare to make critical decisions, give them the wisdom to choose the more challenging right that brings the greatest glory to Your Name. Supply their needs according to Your riches in glory. Purify their thoughts as they strive to do Your will. Remind them that those who are faithful with little will be faithful with much. May they seek simply to be faithful in whatever You assign their hands to do, striving to please You with their work.

We pray in Your great Name. Amen.

PLEDGE OF ALLEGIANCE

The Presiding Officer led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. HATCH).

The senior assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, April 6, 2017.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable LUTHER STRANGE, a Senator from the State of Alabama, to perform the duties of the Chair.

ORRIN G. HATCH,
President pro tempore.

Mr. STRANGE thereupon assumed the Chair as Acting President pro tempore.

EXECUTIVE CALENDAR—Continued

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The majority leader is recognized.

Mr. MCCONNELL. Mr. President, the Senate has considered the nomination of Judge Neil Gorsuch for many weeks now. We have seen his impressive credentials. We have reviewed his incredible record. We have heard glowing praise on a nearly daily basis from colleagues and students, from judges and newspaper editorials, from Democrats and from Republicans.

Judge Gorsuch is independent, and he is fair. He is beyond qualified, and he will make a stellar addition to the Supreme Court.

Hardly anyone in the legal community seems to argue otherwise, and yet, our Democratic colleagues appear poised to block this incredible nominee with the first successful partisan filibuster in American history. It would be a radical move, something completely unprecedented in the history of our Senate and out of all proportion to the eminently qualified judge who is actually before us. But then again, this isn't really about the nominee anyway. The opposition to this particular nominee is more about the man who nominated him and the party he represents than the nominee himself. It is part of

a much larger story, another extreme escalation in the left's never-ending drive to politicize the courts and the confirmation process.

It is a fight they have waged for decades with a singular aim: securing raw power, no matter the cost to country or institution. It underlies why this threatening filibuster cannot be allowed to succeed or continue—for the sake of the Senate, for the sake of the Court, and for the sake of our country.

I think a look back through history will help every colleague understand why. I always had a particular interest in the history of judicial nominations. It is an interest that predates my service here as a Senator. I remember serving on the staff of a Senator on the Judiciary Committee during a time when two different judicial nominees were being considered. One, Harrold Carswell, was voted down on the Senate floor—correctly, in my view. Another, Clement Haynesworth, also failed to receive the necessary support for confirmation—but in error, I thought.

It piqued my interest on what advice and consent should mean in the Senate, and what it actually meant in practice. I would learn later that I was witnessing the nascent stirrings of what would soon become the so-called judicial wars—the left's efforts to transform confirmations from constructive debates over qualifications into raw ideological struggles with no rules or limits.

It is a struggle that escalated in earnest when Democrats and leftwing special interests decided to wage war on President Reagan's nominee in 1987, Robert Bork. Polite comity went out the window as Democrats launched one vicious personal attack after another—not because Bork lacked qualifications or suffered some ethical failing, but because his views were not theirs. The Washington Post described it at the

• This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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time: "It's not just that there has been an intellectual vulgarization and personal savagery to elements of the attack, profoundly distorting the record and the nature of the man."

As NPR would later observe, the left's "all-out campaign to defeat the nomination . . . legitimized scorched-earth ideological wars over nominations at the Supreme Court."

I was there. I saw it all. I remember the viciousness of it. I also remember feeling that the Senate was reaching a turning point where a judicial nominee would no longer be evaluated on their credentials but on their ideology. That observation, unfortunately, has proven correct, with Democrats raising the stakes and moving the goalposts each step of the way.

They certainly did so under the next Republican President, George H.W. Bush. We all know what happened to Clarence Thomas. If the gloves were off for Bork, the brass knuckles came out for Thomas. Here is how left-leaning columnist Juan Williams described the situation: "To listen or read some news reports on Thomas over the past month is to discover a monster of a man, totally unlike the human being full of sincerity, confusion, and struggles whom I saw as a reporter who watched him for some 10 years."

That is Juan Williams speaking on Clarence Thomas. Williams said:

He has been conveniently transformed into a monster about whom it is fair to say anything, to whom it is fair to do anything.

By the time Bill Clinton won the Presidency, "Bork" had become a verb and "high-tech lynching" was on the lips of the Nation. Wounds were fresh and deep when this Democratic President had the chance to name two Justices of his own to the Court.

Republicans could have responded in kind to these nominees, but that is not what happened. When President Clinton nominated Ruth Bader Ginsburg, the Senate confirmed her 96 to 3. When President Clinton nominated Stephen Breyer, the Senate confirmed him 87 to 9. I, like the vast majority of Republicans, voted for both of them. We did so in full knowledge of the considerable ideological differences between these nominees and ourselves. Ginsburg, in particular, had expressed notably extreme views—even advocating for the abolition of Mother's Day. A nominee for the Supreme Court who advocated the abolition of Mother's Day was confirmed 96 to 3.

Could we have Borked these nominees? Could we have tried to filibuster them? Sure, but we didn't.

We resisted the calls for retribution and did our level best to halt the Senate's slide after the Bork and Thomas episodes. We respected the Senate's tradition against filibustering Supreme Court nominees.

Now, the tradition not to filibuster extended beyond just the Supreme Court. When President Clinton named two highly controversial nominees from California to the Ninth Circuit,

some on my side wanted to defeat their nominations with a filibuster. The Republican leadership said: Let's not do that. To their great credit, Majority Leader Lott and Judiciary Chairman HATCH implored our confidence not to do that. Senator Lott filed cloture on these nominees to advance the nomination. He, Senator HATCH, and I and a vast majority of the Republican Conference voted for cloture to give them an up-or-down vote. We didn't do this because we supported the nominees. In fact, most of us voted against their actual confirmation, but we thought they deserved an up-or-down vote. That, after all, was the tradition of the Senate.

Given that we were in the majority and these nominations were highly controversial, our determination not to filibuster but instead advance them to an up-or-down vote was not, as you might imagine, popular with our base. But we resisted the political pressure. Again, we respected the Senate's tradition against filibustering judicial nominees.

But it would matter little to our Democratic friends.

Less than a year later, President Bush 43 comes to office. Before he had submitted a single judicial nominee, our Democratic colleagues held a retreat in Farmington, PA. There, according to participants, they determined to change the ground rules for how they would handle judicial nominees.

As the New York Times reported, Democrats apparently decided "there was no obligation to confirm someone just because they are scholarly." Our friend the Democratic leader said at the time that what he and his colleagues were "trying to do was set the stage" for yet another escalation in the left's judicial wars.

Senate Democrats soon became the majority in the Senate due to then-Senator Jeffords' party switch. To help implement the imperative from their retreat "to change the ground rules," the current Democratic leader used his position on the Judiciary Committee to hold a hearing on whether ideology should matter in the confirmation process.

Now, it won't surprise you that the conclusion he and his colleagues reached was that it should. So they killed in committee, either through inaction or via committee vote, qualified judicial nominees who did not fit their preferred ideology. I know, because I was on the committee then. Eighteen months later, our Democratic colleagues lost control of the Senate, and, therefore, control of the Judiciary Committee. Our colleague, the current Democratic leader, again took center stage.

The New York Times noted that "over the last two years, Mr. Schumer has used almost every maneuver available to a Senate Judiciary Committee member to block the appointment" of the Bush administration judicial nomi-

nees. Then, in 2003, according to the New York Times, he "recommended using an extreme tactic, the filibuster," to block them.

"Mr. Schumer," it said, "urged Democratic colleagues in the Senate to use a tactic that some were initially reluctant to pursue, and that has roiled the Senate: a filibuster on the floor of the chamber to block votes on nominees that he and other Democrats had decided to oppose."

It is hard to express how radical a move that was at that time because it completely changed the way the Senate had handled these nominations for our entire history. Even filing cloture on a judicial nominee had been rare before then, and actually defeating any judicial nominee by filibuster, other than the bipartisan opposition to the nomination of Abe Fortas back in 1968, in a Presidential election year was simply unheard of.

No longer.

Democrats blocked cloture 21 times on 10 different circuit court nominees, including on outstanding lawyers like Miguel Estrada, whose nomination was filibustered an incredible 7 times.

These are not inflated statistics like the supposed 78 filibusters our Democratic colleagues are now alleging occurred during the Obama administration, which include numerous instances in which the prior Democratic leader unnecessarily filed cloture petitions. No, what I am talking about are real and repeated filibusters used by Democrats to defeat nominations.

In the face of this wholly unprecedented change in the norms and traditions of the Senate, we Republicans contemplated using the nuclear option. We decided against it. Fourteen colleagues—three of whom still serve in this body—reached an accord whereby filibusters would be overcome for 5 of the 10 nominees in question. Regrettably, Miguel Estrada was not one of them. He had withdrawn his nomination after being put through an unprecedented ordeal.

Yet, the ink was barely dry on the accord I mentioned when Senate Democrats, led, in part, by our friend the Democratic leader, again did something exceedingly rare in the nominations process: They tried to filibuster Samuel Alito's nomination to the Supreme Court. No member of the Republican Conference, by the way, has ever voted to filibuster a Supreme Court nominee—ever. Nobody on this side of the aisle has ever done that.

Again, it would have been easy for Republicans to have retaliated when President Obama took office, but just like under Clinton, that is not what happened. How did we treat Obama's lower court nominees?

At the time, our Democratic colleagues decided to "fill up the DC Circuit one way or the other," as the Democratic leader put it. Senate Republicans had defeated a grand total of two of President Obama's judicial nominees. At the time that they decided to employ the nuclear option and

fill up the DC Circuit, Senate Republicans had confirmed 215 Obama judges and had defeated just 2.

So our Democratic colleagues' decision to employ the nuclear option in 2013 was not in response to rampant obstruction but was, in the words of the Washington Post, a "power play." By the way, at the time, I don't recall the Democratic leader or any other of our Democratic colleagues repeating the refrain: If there are not 60 votes for a nominee, you don't change the rules; you change the nominee.

They were not saying that then.

What did they do? They changed the rules. It was a power play, but it was also something else. It was a tacit admission by our Democratic colleagues that the Senate tradition of up-or-down votes of judicial nominees that they had first upset back in 2003 by starting the practice of filibustering judicial nominees was a tradition they should have respected. Unfortunately, it took them 10 years to realize this and only after they captured the White House and only after Republicans also used, on a smaller scale, the tool that they, themselves, inaugurated a decade earlier.

And how did we treat President Obama's Supreme Court nominees? Did we try to filibuster them like our Democratic colleagues tried with Justice Alito? Of course not.

When President Obama nominated Sonia Sotomayor and Elena Kagan, we treated both nominees fairly, as they would later say themselves, and we secured an up-or-down vote for both. Most Republicans had significant misgivings about these nominees. Many of us voted no on the confirmations, but we did not think it would be right to deny them up-or-down votes.

I and the ranking member of the Judiciary Committee at the time, Jeff Sessions, even protested when then-Democratic Leader Reid tried to file cloture on the Kagan nomination because we were determined to prevent even the hint of a filibuster. Again, we respected the Senate's tradition against filibustering Supreme Court nominees.

I know our friends on the Democratic side will be quick to interject with a predictable protest about last year, though they seem to forget their own position on the issue. When Justice Scalia passed away, the Senate chose to follow a standard that was first set forth by then-Senator Biden, when he was chairman of the Judiciary Committee, and then was expanded upon by the current Democratic leader, himself. The Senate exercised its constitutional advice and consent role by withholding its consent until after the election so that the next President, regardless of party, could select a nominee. It is a standard I held to even when it seemed inevitable that our next President was going to be Hillary Clinton. It is also a standard that President Obama's own legal counsel admitted that Democrats would have followed

themselves had the shoe been on the other foot.

The majority of the Senate expressed itself then by withholding consent.

The majority of the Senate wishes now to express itself by providing consent to Judge Gorsuch.

The bipartisan majority that supports him cannot do so if a partisan minority filibusters. They are prepared to do so for the first time in American history, and the Democratic leader has mused openly about holding this seat vacant for an entire Presidential term.

We will not allow their latest unprecedented act on judicial nominations to take hold. This will be the first and last partisan filibuster of a Supreme Court nomination.

All of this history matters. I know the Democratic leader would rather not revisit the circumstances that brought us to this moment. I know the Democratic leader would rather not talk about it. Of course, he doesn't want to talk about it. He and his party decided to change the ground rules for handling judicial nominations.

He and his party pioneered the practice of filibustering lower court judicial nominees. He and his party launched the first partisan filibuster of a Supreme Court nominee. He and his party deployed the nuclear option in 2013. Now they are threatening to do something else that has never been done in the history of the Senate: successfully filibuster a Supreme Court nominee on a purely partisan basis.

For what reason—because he is not qualified or because he is not fit for the job? No, it is because he was nominated by a Republican President.

This is the latest escalation in the left's never-ending judicial war—the most audacious yet. It cannot and it will not stand.

There cannot be two sets of standards—one for the nominees of Democratic Presidents and another for the nominee of a Republican President. The Democratic leader, essentially, claimed yesterday that Democratic Presidents nominate Justices who are near the mainstream but that Republican Presidents nominate Justices who are far outside the mainstream.

In what universe are we talking about here?

I would say to my friend from New York that few outside of Manhattan or San Francisco believe that Ruth Bader Ginsburg is in the mainstream but that Neil Gorsuch is not.

To quote a long-time Democrat and member of the left-leaning American Constitution Society, there is simply no principled reason—none—to vote no on Judge Gorsuch's nomination, even less of one to block that vote from occurring at all.

Let me say this to my Democratic colleagues: If you truly cannot support the nomination of this eminently qualified nominee, then at least allow the bipartisan majority of the Senate who supports Gorsuch to take an up-or-down vote. You already deployed the

nuclear option in 2013. Do not trigger it again in 2017.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

The ACTING PRESIDENT pro tempore. Under the previous order, the time until the cloture vote on the Gorsuch nomination will be equally divided between Senators GRASSLEY and FEINSTEIN or their designees.

The Senator from Iowa.

Mr. GRASSLEY. Mr. President, I was going to ask unanimous consent to that extent. I guess you have already announced that it is in place; is that right? I am going to add something to what the Acting President pro tempore just said, so let me start over again.

I ask unanimous consent that the time until 10:45 a.m. be equally divided between Senator FEINSTEIN or her designee and myself or my designee and that the time from 10:45 a.m. to 11 o'clock be reserved for Senator SCHUMER's leader remarks.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Illinois.

Mr. DURBIN. Mr. President, I ask for a clarification. Is the remaining 17 or 18 minutes equally divided?

The ACTING PRESIDENT pro tempore. The Senator is correct.

Mr. GRASSLEY. Mr. President, that is what my unanimous consent request said.

Mr. DURBIN. Mr. President, I just wanted to get more specific. I am not questioning what the Senator asked for.

Do we have 9 minutes each or 8 minutes each?

Mr. GRASSLEY. I will probably need more than 9 minutes, but I will put the rest of my statement in the RECORD.

Mr. DURBIN. So will I.

Mr. President, I defer to the chairman of the committee if he would like to speak first.

Mr. GRASSLEY. Mr. President, within the next hour or so, we will learn whether the minority will come to their senses or whether they will engage in the very first partisan filibuster of a Supreme Court nominee. All indications are that they are committed to their course. That is unfortunate. It truly is.

The question one has to ask is this: What, exactly, is so objectionable about this nominee that he should be subjected to the first partisan filibuster in U.S. history? Is he, really, not well qualified?

He attended Columbia for his bachelor's, Harvard for law school, Oxford for his doctorate. He clerked for not one—but two—Supreme Court Justices. He has spent over 10 years on the circuit court and has heard 2,700 cases. It is clear, then, that he is extremely well qualified.

So what is it? What makes this nominee so objectionable?

The truth is, throughout this process, the minority, led by their leader, has