

A Brief History of the Cloture Vote on Judicial Nominations

Prepared by the Judicial Crisis Network

- Prior to Senator Schumer's 2003 orchestration of the filibuster against Circuit Court nominee Miguel Estrada, no judicial nominee with clear majority support had even been denied confirmation due to a filibuster. On seven cloture votes, Estrada received majority support each time, but never enough votes for cloture.
- The successful and strictly partisan filibusters of ten Bush appellate nominees shattered Senate traditions. The principle of self-restraint was discarded. While the right to filibuster existed throughout Senate history, it was not exercised to block nominees brought to the Floor from receiving confirmation votes.
- Prior to 1949, filibusters of nominations would theoretically have been possible, because the cloture rule applied only to legislation. Nevertheless, no nomination was ever filibustered. A 1949 broadening of the cloture rule swept in nominations, but before 2003, filibusters were rarely attempted and did not succeed in blocking nominees.
- From 1949 until 2002, cloture motions were filed on only 17 judicial nominees. Cloture was successful on the first attempt in 11 cases. With the exception of Abe Fortas in 1968, all were confirmed.
- In the six instances where cloture was not invoked on the first try, no more than two attempts were necessary, and those nominees were ultimately confirmed. The one exception was the 1968 nomination of Abe Fortas to be Chief Justice of the Supreme Court. The coalition opposing him was bipartisan and broad. Of the two-thirds vote then needed for cloture, Fortas received only 45. He lacked support from a majority of Senators for several reasons, including ethical concerns.
- A 1971 cloture vote on William Rehnquist to be Associate Justice of the Supreme Court failed. A second cloture motion was rendered moot because the nominee was confirmed before it ripened.
- Until 2003, the Fortas case was aberrational. Many judicial confirmations occurred during the ensuing 35 years, almost always without attempted filibusters. These included Justice Clarence Thomas, who was confirmed 52-48 on an up-or-down vote and appellate nominees who had majority support but significant minority opposition. In these decades, the principle of self-restraining the filibuster on judicial appointments was revived.

Exercising the constitutional option on the Gorsuch nomination would reinforce Senate tradition that judicial appointments brought to the Floor are not blocked by filibuster and receive a confirmation vote.