WASHINGTON Examiner

Nobody wins when you go nuclear on filibusters

By: Gene Healy – November 25, 2013

Man, I'm so old, I remember when conservatives used to call what Senate Majority Leader Harry Reid, D-Nev., just did the "constitutional option." By a vote of 52 to 48, with only three Democrats defecting, on Thursday, the Senate, led by Reid, changed the rules to prevent filibusters of virtually all presidential nominees except Supreme Court justices.

By a simple majority vote -- rather than the two-thirds that Senate rules require -- Reid changed the rules mid-game, to prevent minority-party "obstruction" of the president's nominees. Back in spring 2005, when President George W. Bush had just won re-election, and Karl Rove-ian triumphalism was in the air, Republicans came close to banning judicial filibusters. Though irate Democrats preferred the term "nuclear option," the GOP called the majority-vote rule change "the constitutional option." (Oddly, the Senate Republican Policy Committee report adopting that moniker seems to have vanished from the RPC's website).

This time around, the Democrats have adopted Republican messaging to gain support for the rule change, and there's nothing but wailing and gnashing of teeth from Republicans who once considered "an up-or-down vote" on presidential nominees a matter of high principle.

There's plenty of hypocrisy on both sides of the aisle here. But as the constitutional scholars John O. McGinnis and Michael B. Rappaport argued in a 2010 article, "In Praise of Supreme Court Filibusters," to "avoid obvious partisanship," we should look at confirmation rules as if behind "a veil of ignorance" about whether the Red Team or Blue Team currently holds the levers of power.

From that perspective, where the Senate drew the line on Thursday — eliminating the judicial filibuster for executive branch posts and lower federal courts, but preserving it for the Supreme Court — is nothing to celebrate, but it could be a lot worse.

Given life tenure and the Court's de facto ability to "legislate from the bench," it's important to preserve the option to filibuster Supreme Court nominees. But as McGinnis and Rappaport point out, "inferior federal courts by themselves ordinarily cannot entrench new constitutional norms against the democratic process," thus here the problem presented by unelected judges' power to reshape the law "is far less acute."

When it comes to executive-branch nominees, the argument that the president, with advice and consent of the Senate, gets to pick the people who work for him, has some merit. More "up-or-down votes" here might check abuse of recess appointments and help encourage the Supreme Court to restore limits on presidential power to do an end run around Senate confirmation.

But there's a real danger that the Senate's nuclear brinksmanship ends up eliminating the legislative filibuster as well. As James Madison explained in Federalist 62, the Senate itself was designed in part to curb "the facility and excess of lawmaking."

As I warned back in 2005, a nuclear “second strike' from a future Democratic majority could be used to prevent minorities from filibustering legislation that the majority favors.”

That option is on the table, apparently. “For a lot of us,” says freshman senator Chris Murphy, D-Conn., “this is only halfway to the finish line: We should get rid of the filibuster for legislation as well as nominations.”

In fact, Senate Republican leader Mitch McConnell of Kentucky has (regretfully, to be sure) threatened to do just that should the GOP recapture the Senate. "Let them do it," Reid remarked. "Why in the world would we care?"

Serious political movements shouldn’t try to knock down all the barriers to power whenever they temporarily enjoy it, because nothing is permanent in politics save the drive for more federal power, and the weapons you forge may someday be detonated by the other side.

Play with nukes, and sometimes you get burned.