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Will Democrats Nuke the Filibuster?

If Democrats win the Senate and the White House, the Republicans' favorite obstructionist tool could be wiped out.

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The real nuclear issue in the 2016 campaign isn't, as Senator Ted Cruz warned in February, the danger of waking up one morning to find that a President Donald Trump had nuked Denmark. It's much closer than Copenhagen.

In November 2013, a pile of judicial nominations filibustered by Republicans were clogging up the Senate, creating emergency shortages in federal courts across the country. So Democratic senators exercised their majority power and pushed the button on the “nuclear option,” enabling a simple majority to bring presidential nominations up for a confirmation vote—except for the Supreme Court.

If banning the filibuster on federal district and appeals courts was the nuclear option, banning it on Supreme Court nominations would be the hydrogen bomb. But that may be necessary next year if Hillary Clinton wins the White House and Democrats narrowly recapture the Senate, which they lost in the 2014 midterms. (There's no chance that Democrats will do so well next month as to have the 60 votes necessary to break a filibuster and force a confirmation vote.)

“If these guys think they're going to stonewall the filling of that vacancy or other vacancies,” Senator Tim Kaine, Clinton's running mate, told the Huffington Post on Thursday, “then a Democratic Senate majority will say, ‘We're not going to let you thwart the law.’” Democrats, he added, “will change the Senate rules to uphold the law.”

But the Democrats' longtime point man on rules reform is slightly more cautious.

“A rule change should be a last resort,” Senator Jeff Merkley told me from New Hampshire, where he was campaigning for Maggie Hassan. On the other hand, “If there's deep abuse, we're going to have to consider rules changes. I'm hoping it doesn't come to that.”

In memory, no Supreme Court nominee has been denied a confirmation vote by a filibuster, and a nominee has never been denied a hearing and ignored by the Senate—until this year. Merrick Garland's nomination has been in limbo since President Barack Obama picked him in March to fill the seat of the late Justice Antonin Scalia.

There's an outside chance that a lame-duck Senate, fearing that a President Clinton would nominate a more liberal justice, will hold hearings and confirm Garland. Senator Jeff Flake, a Republican from Arizona, said recently, "If Hillary Clinton wins the election, I will be actively trying to round up votes to have hearings for him in a lame-duck session." Senate Majority Leader Mitch McConnell, meanwhile, has vowed that "a nomination for the Supreme Court by this president will not be filled this year." (Merkley thinks a lame-duck confirmation is unlikely.)

This year, Republican candidates for the Senate have run on guarding the Supreme Court, especially as Hillary Clinton's victory has become more likely. Senator John McCain, seeking to keep his seat from Arizona, pledged that Senate Republicans "will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up." (McCain's staff quickly put out a statement walking back the position, but McCain himself has been very quiet on the subject.) Campaigning for a candidate in Colorado, Cruz declared, "There is certainly long historical precedent for a Supreme Court with fewer justices."

Merkley has been arguing for rules changes in the Senate since he arrived there from Oregon in 2009. As the new sessions began in 2011 and 2013, Merkley and Tom Udall of New Mexico gathered support for limitations on the filibuster, only to be turned away due both times due to "gentlemen's agreements" between Majority Leader Harry Reid and Minority Leader Mitch McConnell that were supposed to ease legislative gridlock. Reid clung to this effort even after apologizing to Merkley and Udall in a floor speech for the failure of the strategy, before finally pushing the nuclear button in late 2013.

Now, after nearly eight months of an empty Supreme Court seat gaping like a missing tooth, would a Democratic Senate go nuclear on the highest court?

First, Merkley has ideas for other reforms—such as a "talking filibuster" requiring senators preventing a vote to actually stay on the floor arguing against it (as opposed to today's "virtual filibuster," which allows senators to oppose legislation in absentia). He'd like to consider the changes at the outset of a Democratic-controlled Senate session, but pointed out, "There is no first-day legislative rule. You can bring up rules changes at any time."

He said that in Senate conversations, "a number of Republicans were very interested, then they reported that Mitch McConnell had told them to stop talking about rules changes." After the treatment of Garland, "I think that many of my Republican colleagues are deeply embarrassed by being strong-armed into ignoring their responsibilities."

Yet Senate Republicans had blocked Obama appointments to three vacancies on the Court of Appeals for the D.C. Circuit, often called the second-highest court, for more than a year, arguing it would be better to reduce the size of the court. They may feel pressures besides embarrassment; as Ian Millhiser has noted in ThinkProgress, one reason Indiana Senator Dick Lugar was bounced in a Republican primary in 2012, after six terms, was his support of Obama's first two Supreme Court appointments, justices Sonia Sotomayor and Elena Kagan.

The experience of the last five years caused Reid, who is retiring at the end of the year, to tell Talking Points Memo in August, "I really do believe that I have set the Senate so when I leave, we're going to be able to get judges done with a majority. It takes only a simple majority anymore. And, it's clear to me that if the Republicans try to filibuster another circuit court judge,

but especially a Supreme Court justice, I've told 'em how and I've done it, not just talking about it. I did it in changing the rules of the Senate. It'll have to be done again.

“They mess with the Supreme Court, it'll be changed just like that in my opinion.”

The expected incoming Democratic leader of the Senate, Charles Schumer of New York, has carefully said nothing about further changes. But he said in September, “A progressive majority on the Supreme Court is an imperative, and if I become majority leader, I will make it happen. I will make it happen.”

As Donald Trump's prospects have dwindled, arguments for a hardline GOP court blockade have become louder. Writing in *National Review*, Minnesota law professor Michael Stokes Paulsen urged that the Supreme Court be reduced to six justices, explaining, “A smaller court means diminished judicial activism,” and Ilya Shapiro, of the Cato Institute, argued at *The Federalist*, “As a matter of constitutional law, the Senate is fully within its powers to let the Supreme Court die out, literally.”

Merkley says he hopes changing the rules of Supreme Court nominations isn't necessary. But “To refuse to debate someone at all, and just say a position should be left open, that is a constitutional crisis... It would be absolute warfare if their real object is to bring the court to eight or seven people. It would be very bad news for our constitutional republic.”

Oliver Wendell Holmes said of the Supreme Court, “We are very quiet there, but it is the quiet of a storm center.” Today's stormclouds might give way to a mushroom cloud tomorrow.