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Why Mitch McConnell Should Eliminate The Judicial Filibuster

Filibustering nominations has long been considered illegitimate. Senate Majority Leader Mitch McConnell should move now, before Trump's inauguration.

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Senate Majority Leader Mitch McConnell (R-KY) has won plaudits for successfully executing the #NoHearingsNoVotes plan on the Supreme Court vacancy left by Justice Antonin Scalia's death. It was a risky political maneuver: there was no guarantee that the GOP caucus would hold together, as left-wing activists and the media (but I repeat myself) cried "obstruction." But the move paid off once Hillary Clinton lost the election.

Perhaps even more impressively, the gutsy stance didn't prevent Republicans from maintaining their Senate majority, essentially fighting the Democrats to a draw on unfavorable terrain. The highly targeted Judiciary Committee Chairman Chuck Grassley (R-IA) won his own reelection by nearly 25 points, taking all but one of his state's 99 counties.

But what's next? Incoming Senate Minority Leader Chuck Schumer (D-NY) has already threatened to filibuster any nominees if they're not "mainstream." Who knows if any of the stellar group of geographically and educationally diverse jurists (plus Utah Senator Mike Lee) on President-Elect Donald Trump's list pass Schumer's test, but both Trump and McConnell should ignore that posturing.

The Strangeness of Judicial Filibusters

While it's senators' prerogative to vote against any nominee they think would be bad for the country—I previously argued that Republicans should vote against essentially all judges Hillary Clinton names—judicial filibusters have always struck me as strange and sordid. Until Democrats began a systematic blockade of George W. Bush's judicial nominees in 2003 (most notoriously Miguel Estrada, because of his ethnicity), the only judicial filibuster was the *bipartisan* opposition to Lyndon Johnson's attempt to elevate Abe Fortas to chief justice in 1968.

The Senate runs largely on tradition and precedent, and while the idea that a super-majority is needed to allow *legislation* to proceed to a final vote is seen as part of the body's "cooling off" function, filibustering nominations has long been considered illegitimate. Accordingly, when

Harry Reid (D-NV) abolished the filibuster for executive and lower-court nominations in November 2013, he ironically restored Senate practice to what it was before his own machinations of a decade earlier. (Would that Bill Frist (R-TN) had acted so boldly then.)

There's no reason not to extend that "nuclear option" to the Supreme Court as well, as progressive legal scholar Erwin Chemerinsky argued three years ago. The one wrinkle is that such a move must wait until an actual nominee is actually filibustered.

I had been arguing to colleagues that McConnell should preemptively use his majority to eliminate the judicial filibuster, maybe even before Trump is inaugurated. The main argument against that position seemed to be tactical: why not hold that "thermonuclear option" in reserve until needed, extracting political concessions in the meantime? But a friend with intimate knowledge of Senate procedure informed me that it couldn't be done in the abstract regardless.

That's because eliminating judicial filibusters isn't a matter of changing the Senate rule on "cloture," which says that 60 votes are needed to proceed to any final vote (short of "reconciliation"—see Obamacare—and other special situations). This rule has never been changed: Reid simply had the Senate majority adopt a "precedent," in the context of D.C. Circuit nominee Patricia Millett, that cloture shall mean 51 votes for non-Supreme Court nominees. (See page 8417 of the relevant Congressional Record.)

Republicans Should Use the 'Thermonuclear Option'

So okay, once President Trump nominates Diane Sykes/Bill Pryor/Don Willett/Amul Thapar/Neil Gorsuch (or whomever from his truly excellent list), and Schumer initiates his filibuster because reading the Constitution as written is "extreme," that's when Republicans should get rid of the SCOTUS filibuster.

The Left will scream and howl. But the *New York Times*, *New Yorker*, Slate, and the rest of the progressive echo chamber have no leg to stand on, after attacking those of us who argued before the election that the Senate doesn't have to confirm anyone. Former White House counsel Kathryn Ruemmler herself would have recommended the Republican strategy on the Scalia vacancy, had the tables been turned.

In politics, you use the tools you have to achieve the goals you set—which is why I don't necessarily blame Clinton, Obama, Reid, Schumer, and 21 of their colleagues for filibustering Sam Alito's nomination in 2005. I'd just rather that senators not have such a tool going forward.

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