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By Jennifer Rubin

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Posted at 9:31 AM ET, 12/29/2010

Won't liberals need the filibuster?

By Jennifer Rubin

Liberals are all abuzz with suggestions for filibuster "reform." They were not in evidence, of course, when Republicans were proposing filibuster reform to end Democratic obstructionism on judicial nominees during the Bush administration. Aside from the sheer hypocrisy, there are constitutional and practical considerations the Democrats might want to consider.

Let's start with the practical. The Democrats may want to hold on to the filibuster in all its glory. After all, Senate Minority Leader Mitch McConnell will have a healthy 47-member caucus. You add in some of the moderate Democratic senators who will be on the ballot in 2012 -- Claire McCaskill, Ben Nelson, Bill Nelson, James Webb, Kent Conrad and Jon Tester, to name a few -- and you quickly get to 53 votes or so on many measures that the left will not be so enamored of. There may be votes on a major renovation of ObamaCare, permanent extension of Bush tax cuts, pro-growth energy legislation, scaling back on government regulation, and limits on the EPA's power. Does the left really want to take the filibuster from the grasp of liberal Sens. John Kerry, Barbara Boxer, et. al.? (Wait, now I am beginning to fancy the idea.)

As for the constitutional issue, there isn't really one. Roger Pilon, CATO's vice president for legal affairs, tells me, "The Senate filibuster isn't recognized as such by the Constitution, but it arose early in our history under the Article I, section 5 power of each House 'to determine the Rules of its Proceedings.' And it's gone through several iterations over the years." Yet there is good reason to keep it, and to make sure that, as the Founders intended, the Senate remains a different sort of legislative body than the House.

David Bernstein, a law professor at George Mason University, e-mails me:

I think it does violate the spirit of the Constitution to filibuster nominees or treaties, because I think these should be subject to an up or down vote because of the Senate's special constitutional role.

Beyond that, it's obvious that the filibuster has a "conservative" bias, but not in the political sense. Rather, it's conservative in the sense that it makes it harder for the

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ABOUT JENNIFER RUBIN

I'm a labor-lawyer-turned-blogger who believes in limited government, in free markets and that nearly all wisdom can be found in the Godfather movies and the Torah.

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Senate to do stuff. This obviously suits liberals when conservatives are in power, and vice versa. I don't recall many liberals calling for filibuster reform when Republicans controlled the Senate. The filibuster is basically neutral ideologically -- it makes it harder to pass Obamacare, but also harder to repeal it, or, for that matter, harder to privatize parts of Social Security if there is a Republican House, Senate, and president. So, putting partisan politics aside, the question for filibuster reform is, "do you want to make it easier for the Senate to do things, and especially to do things with narrow partisan majorities."... Finally, as for the objection that the filibuster magnifies the advantage that small states already have in the Senate, I would note that the constitutional design of the Senate is precisely to ensure that small states have disproportionate power.

Others raise a related but distinct point. Steven Calabresi, law professor at Northwestern law school and co-founder of the Federalist Society, argues, "The most important reform that is needed is to get rid of holds. The current practice whereby one Senator can tie up a nomination for months is highly dysfunctional."

Those planning on tinkering with Senate rules are well advised to do some serious thinking about the unintended consequences of their desire to give the Senate majority more power. So long as McConnell, 46 other Republicans and a slew of nervous red state Democrats are there, they might want to leave well enough alone. And for those who find wisdom in the Founders' design of the Senate, it would be wise to retain a filibuster rule that, as Todd Gaziano of the Heritage Foundation, succinctly put it, "makes it harder for the politicians that cater to rent-seeking special interests to enact more laws that are generally unconstitutional, fiscally irresponsible and/or undermine our liberty." Well, you can understand why the left would be on the other side in that debate.

By Jennifer Rubin | December 29, 2010; 9:31 AM ET
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I take it from your post that Republicans will work to protect the filibuster from reform. Am I getting you correctly?

Posted by: rgray | December 29, 2010 10:32 AM | [Report abuse](#)

Jennifer is teasing us with her little neo-chutzpah filibuster blag. You know, the guy who killed his parents asking for mercy because he is an orphan. Whatever the pros and cons for current Senate filibuster rules, those arguments have been corrupted and perverted by the actions of Republicans since Obama took office. So

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Right Wing Jennifer, who supports the Republicans prostituting the rules at every turn, now whines that the new Congress shouldn't change the rules not, she implies, to end corrupt Republican abuse, but to protect Democrat's rights she finds so compelling.

Chutzpah.

Posted by: Lazarus40 | December 29, 2010 10:33 AM | [Report abuse](#)

It would be simply delicious for the Democrats to remove their only tool to stop the Republicans.

Posted by: Adder | December 29, 2010 11:01 AM | [Report abuse](#)

Oh please, like there's a chance in the world of the Republicans putting up with the kind of obstruction they've put the Democrats through for the last two years.

They might as well reform the rules now because if they don't and then try to actually filibuster a Republican majority the rules will be changed so quickly your head will spin.

Posted by: koreth | December 29, 2010 11:12 AM | [Report abuse](#)

No one is suggesting getting rid of the filibuster. Rather, they are suggesting that when senators want to filibuster, they do it the old fashion way, on the floor of the senate so such efforts of obstruction have a face(s).

They should also change the rule that allows the senate to deal with other business while a motion is being filibustered. If a group of senators want to stop the extension of unemployment benefits, let them stand on the floor of the senate for days at a time and prevent such a bill or any other bill to be considered.

Posted by: blpeyton | December 29, 2010 11:13 AM | [Report abuse](#)

Jennifer--what are you smoking? NOBODY has called for the end of the filibuster. They are only proposing that the senators filibustering be required to actually do so, and that filibusters not be allowed on motions to proceed (which effectively give a double filibuster which can eat up a week of the Senate's time), and on motions to form conference committees. That's it. As a Dem, I would be happy if those reforms were in place even if the Republicans were in control.

Posted by: mts2 | December 29, 2010 11:35 AM | [Report abuse](#)

Democrats may be dumb enough to cut their own throats by changing the Rules after the Republicans have taken over the House.

But Again?

Democrats won't use the filibuster like Republicans did to shut down Congress for the last 6 years; they love Compromising with Brick walls!

Posted by: ddoiron1 | December 29, 2010 11:37 AM | [Report abuse](#)

If Rubin is against filibuster reform, then obviously it's a good idea & Dems should go ahead with it.

Now, all of a sudden, she's worried about the Dem majority? Give me a break! Rubin's concern is every bit as transparently bogus as McConnell's concern about HCR being a political problem for the Dems.

koreth has it right: if the shoe were on the other foot & Dems were obstructing a Rep majority, Reps would change the rules so fast it would make your head spin! Dems should go ahead with this next month.

Posted by: nyskinsdiehard | December 29, 2010 12:06 PM | [Report abuse](#)

I think Rubin would be more at home on Fox than at the Post, & encourage her to go there as quickly as her little brain can carry her.

Posted by: nyskinsdiehard | December 29, 2010 12:08 PM | [Report abuse](#)

The Dem idea to 'reform' the filibuster at this time is extremely odd and another indication that the hard left core of the party is out of touch with the voters. They simply do not have the support they seem to believe is there.

As JR points out above there are several Dem Senators who are not likely to go along with the hard left agenda because they are up for election in 2012 in right leaning states. On many issues therefore it's likely that the initiative will rest with McConnell not Reid.

On all major issues the House will check the hard left agenda. For judges etc, any filibuster rule changes now will also be adopted by the Republicans in 2013 who may well be in control by then and will be in a position to utilize the changes to far greater effect than anything the Dems can do over the next two years.

The circumstances dictate that the Dems either need to move to the center, or more likely, pretend to move to the center and bide their time, because it's going to be a long time before they can spring another Obama on the country.

Posted by: Otiose1 | December 29, 2010 12:31 PM | [Report abuse](#)

Nobody's proposing doing away with the filibuster--let's just make them ACTUALLY filibuster. Saying the word ain't the same thing at all! Faced with the prospect of actually taking to the floor and speaking for hours on end, I predict many senators will find their objections much diminished.

Posted by: lizgwiz | December 29, 2010 12:45 PM | [Report abuse](#)

The time for the Democrats to get rid of the filibuster was the opening of the last Congress.

Eliminating it now does them relatively little good now, with the house in Republican hands. Even if it's a good idea in principle, they won't give up protection they know they might need after 2012 for the sake of confirmations and treaties.

Posted by: Itzajob | December 29, 2010 12:46 PM | [Report abuse](#)

" if the shoe were on the other foot & Dems were obstructing a Rep majority, Reps would change the rules so fast it would make your head spin!"
=====

The shoe was on the other foot when the Dems were filibustering Bush's judicial appointments, a more constitutionally questionable use of the tactic. Yet the GOP did not change the rule. Don't let the facts get in your way.

Posted by: alexandria6351 | December 29, 2010 1:14 PM | [Report abuse](#)

The framers of the Constitution must be turning over in their graves about how dysfunctional the Senate has become. Nowadays most measures adopted by the House never even come up for a vote in the Senate. And even if they are scheduled for a vote the filibuster rule requires no less than 60 votes to close off debate.

Thus, a supermajority is required for approval of just about anything the Senate does which gives the minority position on an issue an inordinate amount of power to influence and shape the legislation (the tyranny of the minority). Nothing in the Federalist Papers or anything else written at the time that the Constitution was adopted suggests that it could be interpreted to allow the Senate to proceed in such an undemocratic manner

I am sick and tired of this nonsense. The filibuster rule has all too long allowed Senators to avoid taking difficult votes while receiving their more than ample salaries. If Senators don't adopt meaningful changes to the rule when it comes up for consideration on January 5 they won't be able to count on my vote when they come up for reelection in 2012.

Posted by: billeisen1 | December 29, 2010 7:45 PM | [Report abuse](#)

The most likely suggestions would not kill the filibuster or really do anything to change the underlying math; they would shift the burden to make the obstructionist minority more responsible. The two best ones are mandating 41 votes to continue debate once cloture is called for (as opposed to 60 to cut it off, see how many cloture votes have been in the area of 59-30...), or to make it 3/5 of members voting rather than the whole body. IOW, no more passive filibusters by just not showing up or through procedural objections. Stand up and be counted that you oppose this going forward. The burden should be on that group, not the ones who want to vote.

Posted by: kreuz_missile | December 30, 2010 4:11 PM | [Report abuse](#)

"The shoe was on the other foot when the Dems were filibustering Bush's judicial appointments, a more constitutionally questionable use of the tactic. Yet the GOP

did not change the rule. Don't let the facts get in your way."

They informally did with the whole "Gang of 14" nonsense. They also couldn't "Reform" it in the middle of session without 60 votes to do so, they could only eliminate it wholesale, which is what was threatened. At the beginning of a session, each house must adopt their own rules, which are unique to the session per the Constituion and not bound by prior precedence. Traditionally they just adopt the previous Congress' rules, but can in fact adopt whatever rules they want with a simple majority vote, not subject to a filibuster (US v. Ballin, 1892).

Posted by: kreuz_missile | December 30, 2010 4:26 PM | [Report abuse](#)

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