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Commentary

Don't Go Nuclear

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The United States Senate is heading toward a crisis of sorts over the Democratic minority's use of extended debate to prevent votes on many of President Bush's most important judicial nominations. Together -- and as Republicans -- we served a combined 36 years in the Senate. We are no strangers to the filibuster and, in the past, did not hesitate to employ or to support that instrument on extraordinary occasions. Even so, we have been appalled by the way Senate Democrats have turned the filibuster from a last-resort means of making the Senate take another look at a bill or a nominee into a first-resort tactic of wholesale partisan obstructionism. In short, barring some extraordinary circumstances, we believe the Senate should be able to vote on almost all of any president's judicial appointments.

The current abuse of the filibuster requires a strong response, and we need positive action from the president. It is, after all, his prerogative which Senate Democrats have attempted to nullify. We need from George Bush more than a few lines in his stump speech, more than a paragraph or two in his State of the Union Address. The situation calls for forceful, and even outraged, presidential leadership.

But it does not call for what is being referred to as a "nuclear option" from the Senate majority leader.

Over the past year, that "option" has been variously, and vaguely, defined. In his opening remarks to the Senate on Jan. 4, however, Sen. Bill Frist made things suddenly clear. Read carefully: "I reserve the right to propose amendments to Senate Rule XXII [concerning extended debate] and do not acquiesce to carrying over all the rules from the last Congress." The first clause is innocuous; every senator has the right to propose rules changes. But the second clause is dynamite, capable of blowing out the foundations of the Senate itself. It means the majority leader will eventually propose, against history and common sense, that the Senate is not a "continuing body." Or, to be precise, a continuing body with continuing rules, for there is the heart of the matter.

Some of the public may need to be reminded that, when the 109th Congress convened in January, only about one-third of the Senate was sworn in, namely, those members elected or re-elected last November. The other two-thirds of the membership did not stop being senators after last year's adjournment, and they

did not mysteriously lose the body of rules and precedents under which the Senate operates from year to year and, ultimately, from generation to generation.

Sen. Frist's carefully crafted remarks suggest an intention to ignore all that by implying that his acquiescence is needed to "carry over all the rules from the last Congress." Without those rules, how does the Senate decide anything? How does it change the rules? How does it cut off a judicial filibuster? By simple majority vote.

Conservatives, in and out of the Senate, are now being assured that this extraordinary approach will not be applied to the legislative filibuster, which, in the not-so-distant past, was our only defense against the excesses of a bipartisan liberalism. There are several problems with that argument. First and foremost, as a matter of principle, we should not accept the contrary-to-fact assertion that the Senate and its rules do not continue from election to election.

Second, setting aside principle -- ouch! -- it is naive to think that what is done to the judicial filibuster will not later be done to its legislative counterpart, whether by a majority leader named Reid, or Clinton, or Kennedy.

Third, even if a senator were that naive, he or she should take a broader look at Senate procedure. The very reasons being given for allowing a 51-vote majority to shut off debate on judges apply equally well -- in fact, they apply more aptly -- to the rest of the executive calendar, of which judicial nominations are only one part. That includes all executive branch nominations, even military promotions.

Treaties, too, go on the executive calendar, and the arguments in favor of a 51-vote cloture on judicial nominations apply to those diplomatic agreements as well. It is little comfort that treaty ratification requires a two-thirds vote. Without the possibility of a filibuster, a future majority leader could bring up objectionable international commitments with only an hour or two for debate, hardly enough time for opponents to inform the public and rally the citizenry against ratification. Conservatives should consider that possibility in the context of the Law of the Sea Treaty or the U.N. Convention on the Rights of the Child or another version of the Kyoto Protocol.

All this -- in effect, turning the Senate into a high-end version of the House of Representatives -- is too high a price to pay in order to stop Senate Democrats' abuse of the filibuster on judicial nominations. It is disheartening to think that those entrusted with the Senate's history and future would consider damaging it in this manner. And it is not as if there are no other options.

For starters, the president can "go to the country," barnstorming the home states of certain members to force a change of heart. Within the Senate itself, there is the two-speech rule limiting the number of times a member may speak on the same topic within a "legislative day," which could continue indefinitely. Like all the other Senate rules, the two-speech rule has been carried over from the last Congress, no matter what anyone asserts to the contrary. It could eventually strangle an initial judicial filibuster, and it would make subsequent ones far less likely.

The alternate "nuclear" strategies under discussion are also problematic. A Constitutional point of order, for example, would, according to Senate tradition, be referred to the full Senate, where it is debatable (i.e., filibusterable). The only other option is for the chairman to rule, without citing the Constitution, that judicial nominations cannot be filibustered. That course would have no basis in either law or Senate rules.

At this point, no one knows how the "nuclear option" drama will play out, but we would respectfully offer to senators, both Republican and Democratic, a bit of back-country wisdom: When you find a bear in your cabin, it's not smart to try to burn him out.

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