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These Five Senators Know Better Than to Go Nuclear. Don't They?

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By Norman J. Ornstein

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ARTICLES

Roll Call

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The fate of the Senate now rests in the hands of a handful of Republicans who have been great figures of the Senate, custodians of its traditions and its essence. They will soon come to a crossroads on the "nuclear" option and the filibuster.

A few are uncommitted on the question; others are presumed to be aligned with Senate Majority Leader Bill Frist (R-Tenn.). All, I believe, know better, and each will be judged by history on their choice in this matter. They include Dick Lugar of Indiana, Ted Stevens of Alaska, John Warner of Virginia, Thad Cochran of Mississippi and Pete Domenici of New Mexico.

In 1976 and 1977, I served on the staff of a Senate select committee charged with reorganizing the Senate's committee system. Following the customary practice, the 12 Senators on the panel were evenly divided between the two parties. The assignment was the fifth or sixth committee for each of the members, ensuring that few of the 12 spent any time at all on the panel's work. But one who did was Domenici, then a freshman.

One late evening as we worked, I turned to

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Domenici and asked him why he was spending so many hours on a thankless task like ours. After all, his constituents would never notice, and any changes we recommended for committee numbers and jurisdictions were likely to be opposed vigorously by the committee chairmen and other power-brokers. He replied that service in the Senate was the highest honor he could receive, and he was determined to leave the place a better institution than when he arrived.

Through most of his 32 years in the body, Domenici has fulfilled that promise of being an institutionalist. But now comes the real test.

The Senate is on the verge of meltdown over the nuclear option, an unprecedented step that would shatter 200 years of precedent over rules changes and open up a Pandora's box of problems in the years ahead. The shaky bipartisanship that holds the Senate together--in a way that is virtually absent in the House--could be erased. Major policy problems could be caught up in the conflict. The Senate itself would never be the same.

Let us put aside for now the puerile arguments over whether judicial filibusters are unprecedented: They clearly, flatly, are not. Instead, let's look at the means used to achieve the goal of altering Senate procedures to block filibusters on judicial nominations.

Without getting into the parliamentary minutiae--the options are dizzying, including whether points of order are "nested"--one reality is clear. To get to a point where the Senate decides by majority that judicial filibusters are dilatory and/or unconstitutional, the Senate will have to do something it has never done before.

Richard Beth of the Congressional Research Service, in a detailed report on the options for changing Senate procedures, refers to it with typical understatement as "an extraordinary proceeding at variance with established procedure."

To make this happen, the Senate will have to get around the clear rules and precedents, set and regularly reaffirmed over 200 years, that allow debate on questions of constitutional interpretation--debate which itself can be filibustered. It will have to do this in a peremptory fashion, ignoring or overruling the Parliamentarian. And it will establish, beyond question, a new precedent. Namely, that whatever the Senate rules say--regardless of the view held since the Senate's beginnings that it is a continuing body with continuing rules and precedents--they can be ignored or reversed at any given moment on the whim of the current majority.

There have been times in the past when Senate leaders and presidents have been frustrated by inaction in the Senate and have contemplated action like this. Each time, the leaders and presidents drew back from the precipice. They knew that the short-term gain of breaking minority obstruction would come at the price of enormous long-term damage--turning a deliberative process into something akin to government by the Queen of Hearts in "Alice in Wonderland."

Rule XXII is clear about extended debate and cloture requirements, both for changing Senate rules (two-thirds required) and any other action by the Senate, nominations or legislation (60 Senators required). Ignored in this argument has been Senate Rule XXXI, which makes clear that there is neither guarantee nor expectation that nominations made by the president get an up-or-down vote, or indeed any action at all.

It reads: "Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."

By invoking their self-described nuclear

option without changing the rules, a Senate majority will effectively erase them. A new precedent will be in order--one making it easy and tempting to erase future filibusters on executive nominations and bills. Make no mistake about that.

The precedent set--a majority ignoring its own rules to override longstanding practice in one area--would almost inexorably make the Senate a mirror image of the House, moving the American system several steps closer to a plebiscitary model of government, and the Senate closer to the unfortunate House model of a cesspool of partisan rancor.

I know that Lugar, Stevens, Cochran, Warner and Domenici know better. (I know that Orrin Hatch (Utah), Bob Bennett (Utah), Lamar Alexander (Tenn.) and Elizabeth Dole (N.C.) know better as well, but they are lost causes.) I also know that any of these five can withstand the heat that would come if they bucked their party leaders on this issue. Pete, remember what you said to me in 1977. Leave the Senate a better place. Please.

Norman J. Ornstein is a resident scholar at AEI.

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