

Senate Invokes 'Nuclear Option' to Confirm Judge Gorsuch

In a way, Democrats have finished what they started during the Obama administration by fully politicizing the federal judiciary—especially the U.S. Supreme Court.

Thursday afternoon, senators voted 55-45 to invoke cloture, limiting debate to no more than 30 hours on the nomination of 10th Circuit Court of Appeals Judge Neil Gorsuch. They did so after the Senate also voted 52-48 along strict party lines to engage the so-called “Nuclear Option.”

In essence, senators created a precedent to ignore Rule XXII of the *Rules of the Senate*, known as the Cloture Rule, which requires 60 votes to limit debate. This precedent is permanent, and undoing it would be the parliamentary equivalent of trying to put toothpaste back in the tube.

With Republicans in charge of the Senate and President Donald Trump—also a Republican—in the White House, this works out well for putting conservatives in the federal judiciary, but it also has a dangerous side effect. From now on, all federal elections will include a component regarding what kind of judges presidential candidates will appoint, and what kind of judges senatorial candidates will confirm—furthering the politicization of the courts.

Democrats began this process in 2013, when they were in charge of the White House and the Senate and invoked a partial “nuclear option” on lower federal court nominations. Senate Majority Leader Mitch McConnell reminded the senate of that during his remarks:

The Senate has considered the nomination of Judge Neil

Gorsuch for many weeks now. We've seen his impressive credentials. We've reviewed his incredible record. We've heard glowing praise on a near daily basis too: from colleagues and students, from judges and newspaper editorials, from Democrats and Republicans.

Judge Gorsuch is independent and fair, he's beyond qualified, and he'll make a stellar addition to the Supreme Court. Hardly anyone in the legal community seems to argue otherwise. And yet, our Democratic colleagues appear poised to block this incredible nominee with the first successful partisan filibuster in American history. It would be a radical move, something completely unprecedented in the history of the Senate and out of all proportion to the eminently qualified judge actually before us.

But, then again, this isn't really about the nominee anyway. The opposition to this particular nominee is more about the man that nominated him, and the party he represents, than the nominee himself. It's part of a much larger story, another extreme escalation in the Left's never-ending drive to politicize the courts and the confirmation process. It's a fight they, and Democrats, have waged for decades with a singular aim: securing raw power, no matter the cost to country or institution.

It underlines why this threatened filibuster cannot be allowed to succeed or to continue: for the sake of the Senate, for the sake of the Court, and for the sake of our country. I think a look back through history will help every colleague understand why.

I've always had a particular interest in the history of judicial nominations. It's an interest that predates my service as a Senator. I remember serving on the staff of a senator on the Judiciary Committee during a time when two different judicial nominees were being considered. One, Harrold Carswell, was voted down on the Senate

floor—correctly in my view. Another, Clement Haynsworth, also failed to receive the necessary support for confirmation—but in error, I thought.

It piqued my interest in what advice and consent should mean in the Senate, and what it actually meant in practice. I would learn later that I was witnessing the nascent stirrings of what would soon become the so-called “Judicial Wars”—the left’s efforts to transform judicial confirmations from constructive debates over qualifications into raw ideological struggles with no rules or limits. It’s a struggle that escalated in earnest when Democrats and left-wing special interests decided to wage war on President Reagan’s nominee in 1987, Robert Bork. Polite comity went out the window as Democrats launched one vicious personal attack after another—not because Bork lacked qualifications or suffered some ethical failing, but because his views were not theirs.

As *The Washington Post* described at the time, ‘there has been an intellectual vulgarization and personal savagery to elements of the attack, profoundly distorting the record and the nature of the man.’ As NPR would later observe, the Left’s ‘all-out campaign to defeat the nomination ... legitimized scorched-earth ideological wars over nominations at the Supreme Court.’

I was there. I remember the viciousness of it. I also remember feeling that the Senate was reaching a turning point where judicial nominees would no longer be evaluated on their credentials but on their ideology. That observation, unfortunately, has proven correct—with Democrats raising the stakes and moving the goalposts each step of the way.

They certainly did so under the next Republican President, George H.W. Bush. We all know what happened to Clarence Thomas. If the gloves were off for Bork, the brass knuckles

came on for Thomas. Here's how left-leaning columnist Juan Williams described the situation: 'To listen to or read some news reports on Thomas over the past month is to discover a monster of a man, totally unlike the human being full of sincerity, confusion, and struggles whom I saw as a reporter who watched him for some 10 years.'

'He has been conveniently transformed into a monster about whom it is fair to say anything, to whom it is fair to do anything,' Williams said. By the time Bill Clinton won the presidency, 'Bork' had become a verb and 'high-tech lynching' was on the lips of a nation. Wounds were fresh and deep when this Democratic president had the chance to name two justices of his own to the Court. Republicans could have responded in-kind to his nominees.

But that's not what happened. When President Clinton nominated Ruth Bader Ginsburg, the Senate confirmed her 96 to 3-96-3. When President Clinton nominated Stephen Breyer, the Senate confirmed him 87 to 9. I, like the vast majority of Republicans, voted for both of them. We did so in full knowledge of the considerable ideological differences between these nominees and ourselves. Ginsburg, in particular, had expressed notably extreme views – even advocating for the abolition of Mother's Day. A nominee for the Supreme Court advocating for the abolition of Mother's Day, and yet confirmed 96-3.

Could we have 'Borked' these nominees? Could we have tried to filibuster them? Sure. But we did not. We resisted the calls for retribution and did our level best instead to halt the Senate's slide after the Bork and Thomas episodes. We respected the Senate's tradition against filibustering Supreme Court nominees. Now, the tradition not to filibuster extended beyond just the Supreme Court.

When President Clinton named two highly controversial nominees from California to the Ninth Circuit, some on my

side wanted to defeat their nomination with a filibuster. The Republican leadership said let's not do that. To their great credit, Majority Leader Lott and Chairman Hatch implored our Conference not to do that. Senator Lott filed cloture on these nominees to advance their nomination. He, and Senator Hatch, and I, and the vast majority of the Republican Conference voted for cloture to give them an up or down vote. We didn't do this because we supported these nominees—in fact, most of us voted against their actual confirmation—but we thought they deserved an up-or-down vote.

'Given that we were in the majority, and that these nominations were highly controversial, our determination not to filibuster but to instead advance them to an up or down vote was not—as you might imagine—popular with our base. But we resisted the political pressure. Again, we respected the Senate's tradition against filibustering judicial nominees. But it would matter little to our Democratic friends.

Less than a year later, President Bush 43 comes to office. Before he had submitted a single judicial nominee, our Democratic colleagues held a retreat in Farmington, Pennsylvania. There, according to participants, they determined to “change the ground rules” for how they would handle judicial nominees. As the New York Times reported, Democrats apparently decided “there was no obligation to confirm someone just because they are scholarly.” Our friend the Democratic leader said at the time that what he and his colleagues were “trying to do is set the stage” for yet another escalation in the Left's judicial wars.

Senate Democrats soon became the majority in the Senate due to then-Senator Jeffords' party-switch. To help implement the imperative from their retreat ‘to change the ground rules,’ the current Democratic Leader used his position on the Judiciary Committee to hold a hearing on whether ideology should matter in the confirmation process.

It won't surprise you that the conclusion he and his colleagues reached was that it should. So they killed in committee, either through inaction or via committee vote, qualified judicial nominees who did not fit their preferred ideology. I know because I was on the committee then. Eighteen months later, our Democratic colleagues lost control of the Senate, and therefore control of the Judiciary Committee. Our colleague, the current Democrat Leader, again took center stage.

The New York Times noted then that 'over the last two years, Mr. Schumer has used almost every maneuver available to a Senate Judiciary Committee member to block the appointment' of Bush Administration judicial nominees. Then, in 2003, according again to *The New York Times*, he "recommended using an extreme tactic, the filibuster" to block them.

"Mr. Schumer," it said, "urged Democratic colleagues in the Senate to use a tactic that some were initially reluctant to pursue, and that has roiled the Senate: a filibuster on the floor of the chamber to block votes on nominees that he and other Democrats had decided to oppose."

It's hard to express how radical of a move that was at that time, because it completely changed the way the Senate had handled these nominations for our entire history. Even filing cloture on a judicial nominee had been rare before then, and defeating any judicial nominee by filibuster—other than the bipartisan opposition to the nomination of Abe Fortas—was simply unheard of. No longer.

Democrats blocked cloture 21 times on 10 different circuit court nominees—including on outstanding lawyers like Miguel Estrada, whose nomination was filibustered an incredible seven times. Now these aren't inflated statistics, like the supposed 78 filibusters Democrat colleagues are now alleging occurred during the Obama Administration—which includes numerous instances where the prior Democratic Leader

unnecessarily filed cloture petitions—no, what I’m talking about are the real and repeated filibusters used by Democrats to defeat nominations.

In the face of this wholly unprecedented change in the norms and traditions of the Senate, we Republicans contemplated using the “nuclear option.” We decided against it. Fourteen colleagues, three of whom still serve in this body, reached an accord where filibusters would be overcome for five of the 10 nominees in question. Regretfully, Miguel Estrada was not one of them. He had withdrawn his nomination after being put through an unprecedented ordeal.

And yet, the ink was barely dry on the accord I mentioned when Senate Democrats, led in part by our friend the Democratic Leader, again did something exceedingly rare in the nominations process: they tried to filibuster Samuel Alito’s nomination to the Supreme Court. No member of this Republican Conference, by the way, has ever voted to filibuster a Supreme Court nominee. Ever. Nobody on this side of the aisle has ever done that.

Again, it would have been easy for Republicans to retaliate when President Obama took office. But, just like under Clinton, that’s not what happened. How did we treat Obama’s lower-court nominees? Well, at the time our Democratic colleagues decided to “fill up the D.C. Circuit one way or the other,” as the Democratic Leader put it, Senate Republicans had defeated a grand total of two of President Obama’s judicial nominees. So Mr. President, at the time they decided to employ the “nuclear option” and fill up the D.C. Circuit. Senate Republicans had confirmed 215 Obama judges and defeated just 2.

So, our Democratic colleagues’ decision to employ the “nuclear option” in 2013 was not in response to rampant obstruction, but was, in the words of *The Washington Post*, a “power play.” By the way, at the time, I don’t recall the

Democrat Leader or any other of our Democratic colleagues repeating the refrain: If there aren't 60 votes for a nominee, you don't change the Rules; you change the nominee. They weren't saying that then. And what'd they do? They changed the Rules.

It was a power play, but it was also something else. It was a tacit admission by our Democratic colleagues that the Senate tradition of up-or-down votes for judicial nominees that they had first upset in 2003 by starting the practice of filibustering judicial nominees, was a tradition they should have respected. Unfortunately, it took them 10 years to realize this—and only after they captured the White House, and only after Republicans also used, on a smaller scale, the tool they themselves inaugurated a decade earlier.

How did we treat Obama's Supreme Court nominees? Did we try to filibuster them, like our Democratic colleagues tried with Justice Alito? Of course not. When President Obama nominated Sonia Sotomayor and Elena Kagan, we treated each nominee fairly—as they would later say themselves—and we secured an up-or-down vote for both. Most Republicans had significant misgivings about these nominees. Many of us voted 'no' in the confirmation votes. But we didn't think it would be right to deny them up or down votes.

Ranking Member Jeff Sessions of the Judiciary Committee and I even protested when then-Democratic Leader Reid tried to file cloture on the Kagan nomination, because we were determined to prevent even the hint of a filibuster. Again, we respected the Senate's tradition against filibustering Supreme Court nominees. I know our friends on the Democratic side will be quick to interject with a predictable protest about last year, though they seem to forget their own position on the issue.

When Justice Scalia passed, the Senate chose to follow the

standard first set forth by then-Senator Biden when he was Chairman of the Judiciary Committee and then expanded upon by the current Democratic Leader himself. The Senate exercised its constitutional advise-and-consent role by withholding its consent until after the election, so the next president— regardless of party—could select a nominee. It's a standard I held to even when it seemed inevitable that our next president was going to be Hillary Clinton. It's also a standard that President Obama's own legal counsel admitted Democrats would have followed themselves, had the shoe been on the other foot.

The majority of the Senate expressed itself then by withholding consent. The majority of the Senate wishes now to express itself by providing consent to Judge Gorsuch. But the bipartisan majority that supports him can't do so if a partisan minority filibusters. They're prepared to do so for the first time in American history, and the Democratic leader has mused openly about holding this seat vacant for an entire presidential term. We will not allow their latest unprecedented act on judicial nominations to take hold. This will be the first, and last, partisan filibuster of a Supreme Court nomination.

All this history matters. I know the Democratic leader would rather not revisit the circumstances that brought us to this moment. I know the Democratic leader would rather not talk about it. Well of course he doesn't want to. He and his party decided to 'change the ground rules' for handling judicial nominations. He and his party pioneered the practice of filibustering lower court judicial nominees. He and his party launched the first partisan filibuster of a Supreme Court nominee. He and his party deployed the 'nuclear option' in 2013.

Now they're threatening to do something else that has never been done in the history of the Senate—successfully filibuster a Supreme Court nominee on a purely partisan

basis. And for what reason? Because he isn't qualified? Because he isn't fit for the job? No, because he was nominated by a Republican president.

This is the latest escalation in the left's never-ending judicial war, the most audacious yet, and it cannot, and it will not stand. There cannot be two sets of standards, one for the nominees of Democratic presidents and another for the nominees of Republican presidents. The Democratic Leader essentially claimed yesterday that Democratic presidents nominate justices who are near the mainstream, but Republican presidents nominate justices who are far outside the mainstream. In what universe?

I would say to my friend from New York, few outside of Manhattan or San Francisco believe that Ruth Bader Ginsburg is in the mainstream but Neil Gorsuch is not. To quote a longtime Democrat and member of the left-leaning American Constitution Society, there is simply no principled reason to vote no on Judge Gorsuch's nomination—even less of one to block that vote from occurring at all.

So, let me say this to my Democratic colleagues. If you truly cannot support the nomination of this eminently qualified nominee, then at least allow the bipartisan majority of the Senate that supports Gorsuch to take an up-or-down vote. You already deployed the "nuclear option" in 2013, don't trigger it again in 2017.

Procedurally, there were a lot of hoops to jump through for both sides. McConnell had to first ask for two cloture votes, both of which failed to reach the 60-vote requirement, 55-45. Senate Minority Leader Chuck Schumer (D-N.Y.) also made every effort to stop the final vote, first by requesting a postponement of the vote to later this month, and then by asking the Senate to adjourn—both of which failed by strict party-line votes, as well.

Schumer also made several parliamentary questions to stall out the vote. In the end, however, all 52 Republicans and the three previously announced Democrats voted in favor of cloture, suggesting that will likely be the final tally when the Senate takes up Gorsuch's confirmation on Friday. {eo}