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Here's the unexpected twist in Supreme Court fight

By JOSHUA SPIVAKC

With Donald Trump's nomination of Neil Gorsuch to replace Antonin Scalia on the Supreme Court, Senate Democrats are debating how far they should take their threat of using the filibuster against the nominee. Recent reports have some Democrats backing off the threat in order to preserve use of the tactic for other legislative actions later in the year or for a future Supreme Court pick.

However, even if the Democrats hold the line and demand 60 votes for approval of the new justice, they are unlikely to stop Gorsuch's eventual ascension. Instead, they would likely force Senate Republicans, and the filibuster's biggest proponent, Senate Majority Leader Mitch McConnell, to deal a potential fatal blow to the obstructionist device.

The immediate death of the filibuster rule may not seem like an obvious benefit for Democrats. They would be turning over one of their most powerful weapons as a Senate minority at a time when their ability to filibuster represents the party's last strand of power in the federal government. But the Senate Democrats should embrace this action – both for political reasons and ideological ones. The filibuster has been a deterrent to good government, and when the party finally regains power, they will be happy to see it gone.

At the moment, the Democrats will be severely limited in their ability to stop Republican legislation and appointments without a filibuster. But its value for the Democrats may be overrated. Past presidents have shown that the filibuster has limited value in stopping a president determined to act. Trump has already revealed that he is willing to use executive orders to bypass Congress and much of his proposed changes wouldn't be focused on legislative drafting.

But if a party is really intent on rewriting laws, the filibuster presents an obstacle, as the Democrats found out in the early years of both the Obama and Clinton administrations. Despite having control of both houses of Congress, the party continually met problems getting laws through the Senate. During Obama's term, Democrats had the magic 60 votes in the Senate, but they struggled to pass legislation, especially Obama's signature Affordable Care Act. For the party that prides itself on taking action more than conserving past law, the filibuster has proven a uniquely difficult barrier.

The problem is a relatively new one. While the filibuster is an old device going back to 1806, outside of its use by Southern Senators to kill Civil Rights legislation during the Jim Crow era, it was more of a peculiarity than a regularly used weapon for much of the Senate's history. Yet since 1990, the filibuster has become the norm. Stats on the filibuster are so open to interpretation that they are almost impossible to state without massive caveats. But one thing is clear: Over the last two decades, the filibuster has been used constantly in the Senate, with more being pushed each year than occurred over the course of decades.

The filibuster may be a major wrench in the legislative process, but the two parties have managed to keep it alive despite criticism and potential law changes. Each side assumes that the other likes having the weapon of the filibuster in hand when they are in the minority – and there

has been no bigger proponent of the law than Senate Majority Leader Mitch McConnell. Many members of both parties have been on the other side of the fence on filibusters, as change in control of the Senate is now a regular feature. Since 1980 neither party has controlled the Senate for as much as eight straight years.

The result has been that not much gets done. Democrats should ask themselves if they would rather focus on temporarily stopping Republicans during this time in the minority, or whether they should hope to pass significant laws when the wheel turns and the Democrats are back in power.

The problem is that no party is willing to sacrifice the power of the filibuster without some political gain. Most voters don't care about legislative procedure, and those that do are exactly the type to run primary campaigns against members of their party for disarming their biggest weapon.

But the nomination of a conservative Supreme Court judge presents a perfect opportunity for the Democrats to use the filibuster and force the Republicans to kill it. A filibuster against Gorsuch will ward off any intra-party complaints that the Senate Democrats are not taking a strong enough stand against Trump. Right now, there is a very vocal wing of the party that is criticizing any perceived weakness by the party members. A filibuster will be another rallying opportunity for the Democratic Party base and it will force McConnell to use the so-called "nuclear option" of changing Senate rules to allow Republicans to invoke cloture, which would kill the filibuster, without 60 votes.

McConnell may claim that he is only invoking this change for Supreme Court judges, but in the future, senators could easily take a more expansive view of any filibuster-busting plan and use it to prevent filibusters on other legislative votes.

Most Senators come to DC looking to make substantive changes – getting rid of the filibuster would help that. If the Democratic Senators want to be able to act once they get in power, then they should make some moves now to make it happen. A filibuster fight over a Supreme Court pick is exactly the moment that the party can accomplish this. Forcing the Republicans to destroy the filibuster during a Republican term is a perfect way to help set the Senate on a course for action in the future.

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