

Filibuster tactic smacks of hypocrisy

I'm pretty cynical when it comes to Washington politics. But even I am shocked by the hypocrisy of the White House and certain senators when it comes to judicial nominees and the filibuster.

The conservatives claim to oppose "activist judges:" judges who read what they want into the Constitution instead of faithfully interpreting the text. But the Republicans are proposing a parliamentary move, the so-called "nuclear option," that involves an absurd reading of the Constitution, a reading designed to get what they want without concern for what the Constitution actually says. Let me explain.

In the normal process, the president nominates a potential judge; if the Judiciary Committee approves, the nomination is debated on the Senate floor and is either accepted or rejected on a majority vote.

As with other Senate business, debate is allowed to continue unless a supermajority of 60 senators votes to end debate.

Accordingly, a determined minority of 41 senators can prevent a vote by prolonging debate indefinitely, and this is called a filibuster. One might or might not like this aspect of Senate rules, but those are the rules, and nobody questions their constitutionality in general.

But when it comes to judicial nominees, the Republican leadership wants to disallow the filibuster. From superficial news coverage, one might well think that the Senate is contemplating a simple change in its own rules, but that is not at all the situation. Changing the rules requires a supermajority; since the Republicans don't have the votes for that, they are suggesting a much more devious tactic, a tactic that shows their lack of respect for the very Constitution they claim to be

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defending.

Here's how it would work, according to a story by Brian Naylor and Ron Elving of National Public Radio. When a judicial nomination is brought to the floor and a filibuster is under way, Majority Leader Bill Frist will "seek a ruling of the chair (meaning the Senate's presiding officer) as to the number of votes needed to end the debate."

Vice President Cheney will presumably be the presiding officer. Since the Senate rules are clear, one might assume that Cheney will be forced to inform Frist that 60 votes are needed. But Cheney plans to rule that only a simple majority is needed, for he will claim that the Senate rule requiring 60 votes is unconstitutional.

Cheney's ruling can be challenged by senators, but, and here's the crucial trick, it would only require a simple majority to uphold the presiding officer's ruling. Hence only 51 senators are needed to go through with the nuclear option.

But make no mistake: the 51 senators would not be voting simply to change the Senate rules. They would be voting to affirm the presiding officer's ruling that the normal Senate rule violates the Constitution.

So, if nobody has questioned the Senate rule before, why would anyone think that it is unconstitutional? The conservatives suggest that the filibuster is constitutional for legislation, but not for the approval of judicial nominees. In support of this view, they cite the "advice and consent" clause of Article II, which

says this: the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" judges.

Senate conservatives claim that this clause somehow precludes the Senate rule requiring a supermajority to end debate. This is an extremely adventurous reading of the Constitution. On the face of things, the "advice and consent" clause simply limits the president's power to appoint judges: He can appoint a judge



The Associated Press

If Vice President Dick Cheney rules that only a simple majority is needed to end a Senate filibuster, is that playing fast and loose with the rules?

only if the Senate consents. Article II says nothing about the rules for senatorial debate on the matter.

By claiming that the filibuster rule is unconstitutional, Senate conservatives will be engaging in exactly what they say they are trying to prevent: activist readings of the Constitution to get a desired result by being unfaithful to the text. Even the most jaded observer must be stunned by such brazen and open hypocrisy.

Sens. Olympia Snowe and Susan Collins are still publicly undecided about the nuclear option. You can call them at 202-224-5344 and 202-224-2523 respectively.