Written by **Joe Wolverton, II, J.D.** on November 22, 2013

Reid's "Nuclear Option" Limits Power to Filibuster Presidential Nominees

On Thursday, November 21, Senate Majority Leader Harry Reid (D-Nev.), shown, pushed through a measure that altered rules of the Senate that have been in effect for nearly 225 years.

The action, dubbed the "nuclear option" for its likelihood to invoke a violent reaction from the party out of power and purported permanent impact on the way the upper chamber does its business, was passed 52-48, nearly along partisan lines. Notably, three Democrats joined 45 Republicans in voting to retain the power to filibuster presidential nominees. The Democrats voting with the GOP were Carl Levin (D-Mich.), Joe Manchin (D-W.V.), and Mark Pryor (D-Ark.).

Briefly, as a result of Reid's successful seizure of power, the use of the filibuster against all executive and judicial presidential nominees (other than to the Supreme Court) has been abolished. Those nominees will need a simple majority vote to be confirmed to the posts to which the president has appointed them.

"The American people believe Congress is broken. The American people believe the Senate is broken. And I believe they are right," Reid declared from the Senate floor during deliberation. "The need for change is so very, very obvious."

Senator Rand Paul, appearing on CNN just minutes after the historic vote, told Wolf Blitzer, "I think what we really need is an anti-bullying ordinance in the Senate. Now we've got a big bully — Harry Reid says he's just going to break the rules and make new rules. It's never been done this way before."

Paul accused Reid of abandoning tradition and "breaking the rules to get his way."

Strangely, the railings of Republicans against Reid's rewriting of the rules echo sentiments made in favor of a similar alteration attempted during the George W. Bush administration in response to similar obstructionist tactics of key Senate Democrats.

While there have admittedly been moments of rare references to the Constitution, enumerated powers, and checks and balances during recent filibusters (and quasi-filibusters), the history of the tactic is little understood.

Article I, Section 5 of the U.S. Constitution reads: "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." This is the portion of the Constitution used by filibuster proponents to justify their right to

hinder debate and vote by the full Senate on any measure, including executive judicial nominations.

Filibusters, or unlimited debate used to block votes, were unknown to both the Continental Congress and the British House of Commons, which was used as a sort of template for our own House of Representatives. As a matter of fact, filibusters are not possible in the modern House of Representatives because a simple majority can call for "the previous question to be put," thus ending debate and causing a measure to be brought before the entire House for a vote. The rules of the Senate have no corresponding procedure to put the previous question, and thus debate can go on seemingly ad infinitum, or until 60 senators (the so-called "super majority") vote to end debate and bring a motion to a vote.

This oversight was codified into the Senate rules in 1806 by Vice President Aaron Burr. Burr's failure to restrict unlimited debate by inclusion of a motion to "put the previous question" was manipulated by a few wily senators who introduced the modern variety of filibuster to the Senate during the debate on the Bank of the United States in the 1830s.

On Thursday, Harry Reid and 51 of his colleagues changed the rules, providing a solution to the filibuster dilemma. A majority of senators could unite to vote to restore the power to filibuster to Standing Rules, and there's already talk of doing just that should Republicans gain control of the Senate after the 2014 elections.

As with most things in the Senate, the answer is just not that easy. The Senate cloture rule provides that "for any change to the Senate rules (including the rules governing debate), one-third of members present and voting plus one can prevent the Senate from resolving a filibuster and taking a vote." Further muddying the waters is Senate Rule V which states that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules." This maze seems contrary to the simple and uniform system of government created by our Founding Fathers.

There have been numerous instances since the debates on the national bank when filibusters have been used to thwart presidential action. The gap in the Senate rules will continue to allow a minority of like-minded senators to take control of the helm of the ship of state. This type of rule by the minority certainly contradicts the mind and will of the Framers of our glorious Constitution.

These were men who were taught by history to fear as dreadfully a despotic minority as a tyrannical majority. The solution, the "parchment barrier" that protects citizens from an autocratic and authoritarian regime, is the separation of power and the precise balance of those separate and distinct powers incorporated in our Constitution. For this very fundamental reason, the Senate must have a say in the president's exercise of control over the executive branch.

In fact, in *The Federalist*, no. 76, Alexander Hamilton presents three reasons for Senate involvement in the process of filling judicial vacancies. First, as a "check on the spirit of favoritism in the President." Second, to "prevent appointment of unfit characters," and finally, to act as an efficacious source of stability in the administration." That is to say, the requisite advice and consent of the Senate acts as a check on the power of the president.

That said, there is nothing in Hamilton's survey of the executive's nominating power that suggests that the Senate be permitted to do anything other than vote on the fitness of the proposed candidate. If the Senate, in its collective wisdom, finds the nominee unworthy of the office for which he has been nominated, then they may vote against his placement.

Hamilton repeatedly asserts that the nomination process as set forth in Article 2, Section 2 of the

Constitution is to promote a good and stable administration and to prevent "infinite delays and embarrassments." It would seem, then, that any attempt to obstruct a vote on the president's nominations would fall short of that constitutional standard.

For additional insight on the intent of the Founders, one may look to the record of the debates on the Constitution at the Convention of 1787. While hammering out a workable government that would achieve the goals of the preamble, the father of the Constitution, James Madison, argued that the advice and consent requirement was a crucial balance to the executive power and that if the president's choice for a particular office was "incautious or corrupt," then two-thirds of the Senate would "join in putting a negative on" that power and preventing such a man from sitting on the bench.

Hamilton echoed that later in *The Federalist*, no. 77, writing, "There would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature." Note the understanding by Madison (and by Hamilton in the *Federalist*) is that two-thirds of the Senate could unite and oppose a candidate of questionable propriety, not a fractious faction of less than one-seventh of the Senate that was able to do so until Thursday's rule change.

The real lesson from Thursday's defusing of the filibuster is that party loyalty is once again trumping fidelity to the oath of office, as the same people who argued in favor of the nuclear option during the Bush administration, now describe it as "foolish." As a review of very recent history demonstrates, the majority seems to find justification for the deployment of any number of weapons, the use of which it considers unconscionable when they are later found in the minority.

Such changes in opinion represent partisanship, not principle, and that is the true destructive force in the government today.

Joe A. Wolverton, II, J.D. is a correspondent for The New American *and travels frequently nationwide speaking on topics of nullification, the NDAA, and the surveillance state. He is the host of* The New American Review *radio show that is simulcast on YouTube every Monday. Follow him on Twitter @TNAJoeWolverton and he can be reached at jwolverton@thenewamerican.com*