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## Here's the surprising twist in Supreme Court filibuster battle

by JOSHUA SPIVAK

After the recent collapse of his healthcare plan in the House, Donald Trump is looking for a win that will show that he retains sway on Capitol Hill. Fortunately for Trump, the upcoming Supreme Court nomination fight over Neil Gorsuch is the perfect opportunity for a victory.

Democrats tried to get in the way, launching a short-lived filibuster.

Of course, Democrats lost the battle as Senate leader Mitch McConnell invoked the 'nuclear option' to kill the filibuster and remove the 60-vote threshold for confirming Supreme Court nominees. The move clears the path for a straight majority vote. That doesn't mean Democrats will lose the war.

A very public "death of the filibuster" will allow Democrats to show their base that they are taking a stand against Trump. On the more important long-term front, killing the filibuster will allow the Democrats to bypass the de-facto supermajority rule that has prevented them from passing legislation whenever they have control of congress. If the Democrats win control in 2018, the Senate will not be what Robert Caro called "the dam" blocking Democrats from taking action on their legislative priorities.

For the moment, the Democrats have a tough pill to swallow. If there is one issue that unites the Republican base, and at this point there may only be one, it is that the party should do everything in its power to keep a conservative majority on the Supreme Court.

Republicans in the Senate have good reason to think they will not pay an electoral penalty for forcing the issue. The party buried the nomination of Merrick Garland to save the seat and it only helped their cause in the November election. In fact, the GOP is more worried that the base will turn on them if the party does not get Gorsuch on the court.

So, the Democratic filibuster failed in its primary objective of stopping Gorsuch and depriving Trump and McConnell of a badly needed victory. But it has succeeded by pushing the device's most prominent cheerleader into effectively killing it. That means the tool that helped McConnell foil Democrats at every turn when they held power will be out of reach when the tables turn.

The Democrats have only had control of the presidency and both Houses of Congress for four of the last 37 years. When they had this control, they discovered that the filibuster was a gigantic thorn in their side. Some of the legal challenges that occurred against the Affordable Care Act arose from the fact that the Democrats had 59 Senate seats during passage, not the magic 60 votes.

While the filibuster is an old weapon — going back all the way to 1806 — it was rarely used in the past. Though it featured prominently in southern attempts to kill Civil Rights legislation in the 1960s, it has only been since 1990 that the filibuster has been used constantly as the standard for obstruction.

At this point, the filibuster does not help the Senate in its role as the great deliberative body. It's just a way for each party to make sure nothing goes forward. As neither party has

managed to keep control of the Senate for more than eight years straight since 1980, both can hope to pass significant laws during their times in office if the filibuster is neutered or killed outright.

Of course, politically neither party wants to be seen as unilaterally disarming against their rival. The Gorsuch nomination provides a perfect way for the filibuster to die. A filibuster against Gorsuch has the strong support of the Democratic base, and the decision to crack it has the overwhelming assent from Republicans.

The Republicans may end up claiming that this is a one-time event, or that it should only be used in the case of Supreme Court judges. But that's not how precedent is made. After seeing the lack of punishment from voters for killing a filibuster, Senators will look to break policy-focused filibusters in the future.

Any Senator worth their salt wants to write substantive laws into the books — and many have found that the filibuster is a major reason they can't do it. By using a filibuster now, the Democrats are sure to both please their base and lose in the ultimate battle to stop the Gorsuch nomination.

But future Democrats may be very glad that the party launched the fight now. By forcing the Republicans to take the actions necessary to destroy the filibuster, Democrats may be able to be more active when they are next in power.

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