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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
To: Colleen M. Carroll (CN=Colleen M. Carroll/OU=WHO/O=EOP@EOP [WHO])
Subject: : The Hill story on Senate's "nuclear" option on filibusters of judges

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This is story I referenced. Thanks.

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Brett M. Kavanaugh
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To: [P6/b6]
cc:
Subject: The Hill story on Senate's "nuclear" option on filibusters
of judges

Hatch group may go +nuclear , on judges
Plan would limit use of Rule XXII in Dem filibusters
By Alexander Bolton and Geoff Earle
Several senior Republican senators are seeking wider party backing for a
bold plan that would break the Democrats , filibuster of President Bush ,s
judicial nominees.
Their approach calls for employing a rarely used parliamentary tactic to
overturn current Senate procedures.
Under the strategy envisioned by Senate Judiciary Chairman Orrin Hatch
(R-Utah), among others, the Republicans would strip any Senate minority *
currently the Democrats * of their ability to filibuster presidential
nominees.

Approval by Senate Majority Leader Bill Frist (Tenn.), which is being sought, would all but assure that the plan would go forward.

Under the most likely scenario now under discussion, they would secure a ruling from the chair that Senate Rule XXII does not apply to executive submissions to the Senate * and that includes judicial nominees. Rule XXII provides for unlimited debate on all legislative issues that reach the floor unless three-fifths of the Senate calls a halt.

With such an approach, a favorable ruling from the chair on limiting the scope of Rule XXII could stand after only a simple majority approved it.

Anticipating these moves, Democrats have already asked the Senate parliamentarian to weigh in on the issue in their defense.

From the standpoint of the proponents, the appeal of this &silver-bullet 8 strategy is that it would quash the Democratic blockade without requiring 60 votes, the number needed by current rules to halt such delaying tactics, or 67 votes, the number needed to change a filibustered Senate rule.

One drawback of this proposed tactic is that it might destroy whatever is left of the working relationship between Democrats and Republicans. That is why some legislative experts liken the parliamentary tool to a legislative nuclear bomb.

Under the most likely scenario, the presiding officer of the Senate * perhaps Vice President Dick Cheney * would rule that a filibuster of presidential nominees is unprotected by Rule XXII.

Democrats would need 51 votes to overturn that ruling. In practical terms, that means they would need the help of two GOP defectors * three if Sen. Zell Miller (D-Ga.) votes with Republicans, as he often has.

Another alternative would be to change the rule through the Senate Rules Committee. But that process would entail extensive hearings and negotiations, and would be unlikely to attract Democratic support.

Democrats would view any change of Senate rules that circumscribed the rights of the minority party and was not approved by two-thirds of the chamber as an abuse of majority power.

However, with few exceptions, Senate Republicans view the filibuster of circuit court nominees, a tactic that until recently was rarely used, as an abuse of minority power.

Democrats are filibustering Bush's nominations of Miguel Estrada and Priscilla Owen to the U.S. Court of Appeals for the D.C. Circuit and the 5th Circuit Court of Appeals, respectively. This has prompted an outcry from conservatives in Congress and around the country.

And Republicans on the Judiciary Committee expect Democrats soon to filibuster two more Bush nominees: Bill Pryor, nominated to the 11th Circuit Court, and Carolyn Kuhl, nominated to the 9th Circuit Court, said Margarita Tapia, spokeswoman for the panel.

However, what may be really at stake is the future makeup of the Supreme Court. The justices on the high tribunal have now served together for nearly a decade. Three of the nine justices are over 70 years old.

Although Senate Republican leaders have kept their parliamentary strategy close to the vest, Hatch offered an insight into it in during an interview Friday with The Hill.

Hatch said the Democratic filibuster is "violative of the Constitution" and "totally politicizing of the judicial selection process," adding: "I know how to break it, and I will when the time comes."

When asked how he would break the Democratic blockade, Hatch said: "You've got to deny Rule XXII on the executive calendar. I think you'll see this in the not-too-distant future because the process is broken and it can't continue like this."

All regular Senate business "that is to say all public and private bills" is placed on the legislative calendar. Business sent to the Senate from the White House, such as treaties, executive branch nominees and judicial branch nominees, are placed on the executive calendar.

Hatch believes the Senate has a right to set its own rules "in this case the right to filibuster" for the legislative calendar but not for the executive calendar because that would entail imposing Senate rules on the executive branch and would violate the Constitution's separation of powers.

"The executive branch and the judicial branch are co-equal [with the legislative branch]," Hatch said.

However, when pressed later about how specifically he would curtail Rule XXII, Hatch said: "Rule XXII should not apply to the executive calendar. I'm not going to go into the plan. There are a variety of methodologies we're looking at."

The current Senate stalemate over nominees is the culmination of the increasingly intense battle over the ideological makeup of the federal judiciary, and a sign, many GOP lawmakers say, that the judicial nominating process is "broken."

"I think it's a big problem," said Sen. Trent Lott (R-Miss.), the chairman of the Senate Rules Committee. "I think it's unconstitutional, but I would defer to Senator Hatch about what is the best way to deal with the problem. I don't think we can let this stand. We cannot let the Democrats set this [precedent] in perpetuity for them and for us, requiring 60 votes to confirm a judge."

Lott said the Senate Republican leadership "has to make the final call, but there are a number of us who think we've got to take some further action." "I think Ted Stevens [of Alaska], Orrin Hatch and a number of others."

Lott said that there are ways to change how the Senate does business without enlisting the support of 67 senators, the number needed for a filibustered rule change, but he would not reveal any specific details: "I don't want to get into it right now. I don't want to reveal our hand because if we say what exactly we are entertaining, the Democrats will try to find a way to block it."

One GOP leadership aide said Frist is open to the suggestions of Hatch and others but will not make any hasty decisions.

"We're not going to rule out any rules changes," said the aide. "Mr. Frist may do something later but he's not going to tear up the rules book. He is going to proceed in a very slow and deliberative way."

"We've learned in the past just because a member or aide says he knows the way to do something that may not be what the parliamentarian says," the aide added.

However, when asked if he has solicited the parliamentarian about curbing Rule XXII, Hatch said: "I know what the parliamentarian is going to say." "A Senate Democratic leadership aide warned against an attempt by Hatch to

exempt judicial nominees from the Senate's filibuster rules. Rule XXII obviously does apply to nominees, no matter how he wants to parse it. If Republicans were able to force a change by jamming through a procedural ruling, it would be a nuclear winter in the Senate, said the aide. This place would fall apart. It would be dire consequences if that happened, in my opinion.

The aide said that Hatch doesn't have the case he thinks he has to win a ruling of the chair, based on the Senate's precedents, because Republicans have in effect already acknowledged the Democratic filibuster of Miguel Estrada.

He's got a precedent of five cloture votes on Estrada, so he doesn't have a very good precedent, said the aide.

The aide also pointed to other times when there have been filibusters and cloture votes on judicial nominees. He called ludicrous GOP claims that the ongoing Democratic filibusters of Estrada and Owen were unprecedented. Cloture was filed to end a filibuster against Abe Fortas's elevation to chief justice of the Supreme Court. Cloture was also filed and invoked on Stephen Breyer when he was a federal appeals court nominee in 1980. Those arguments aside, the aide conceded that it might be possible for Republicans to force a rules change by moving that Rule XXII does not apply to judicial nominees and then getting a favorable ruling from the chair.

Then the key question would be, How would the chair rule, and how would the parliamentarian rule, and would the chair listen to his ruling? said the aide. The chair would not necessarily have to hew to that advice, although the aide said it would be extraordinary to ignore the parliamentarian's ruling.