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Campaign Finance and the Filibuster 'Nuclear Option'

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By JEFF BRINDLE Eliminating the filibuster rule applicable to federal judicial nominations will result in fresh challenges to campaign finance law.

These challenges, however, will come from reformist groups seeking to overturn Citizens United rather than from conservative groups looking to loosen regulations.

Last week, Senate Majority Leader Harry Reid broke with nearly two centuries of tradition by invoking the nuclear option to end the practice of filibustering.

The filibuster is a device employed by senators to delay or derail nominations and legislation.

Senator Reid resorted to the “nuclear option” to break the deadlock over President Obama’s nominees for the federal bench and other executive branch appointments.

In truth, the filibuster has been increasingly used by both parties recently, as Democrats used it to block numerous Bush era nominees.

The origin of the filibuster rule is murky at best. It has been said by some that Thomas Jefferson introduced it when he presided over the senate as President Adams Vice President.

But this appears to be incorrect as statements by Jefferson indicate that he supported majority rule. Perhaps they have confused Thomas Jefferson with Jimmy Stewart’s character Jefferson Smith in “Mr. Smith Goes to Washington.”

The more plausible explanation for the genesis of the filibuster is that it came about inadvertently.

According to the Brookings Institute, a rule existed in the Senate in 1789 termed the “previous question” motion. This rule allowed for a majority to cut off debate.

In testimony before the U.S. Senate Committee on rules and administration in 2010, Sarah Binder stated the following:

“In 1805, Vice President Aaron Burr was presiding over the Senate . . . . He said something like this. You are a great deliberative body. But a truly great senate would have a cleaner rule book.”

Because of the house cleaning that followed, the “previous question” rule was eliminated. Without this rule, there was no way for the Senate to cut off debate with a simple majority.

While it took time for minority delegations to take advantage of this oversight, the filibuster became a tactic used by senators starting in 1837.

Ending the filibuster rule, which had required 60 votes to close debate, means that 51 senators, or a simple majority, can now confirm nominations to the bench and other executive branch offices.

Currently, there are three vacancies on the D.C. 9th Circuit Court of Appeals. This court has been very influential with cases involving campaign finance law. In its recent decisions, it has generally taken a conservative approach in upholding first amendment rights of political speech and disclosure.

In SpeechNow, a decision rendered in 2010, the court allowed unlimited contributions to PACs, unlimited spending, and disclosure and registration.

A year later, the D.C. court opened the door to Super PACs in Carey v. FEC. This decision allows corporations and unions to make unlimited contributions to PACs, as long as the funds are segregated. It allows unlimited spending as long as the spending is independent and permits disclosure.

While the trend has been in the direction of loosening up campaign finance rules, the end to the filibuster rule may change the climate and usher in an era of reformist counter attack.

President Obama will have an easy road nominating three, presumably liberal judges to the D.C. court. This, in and of itself, will change the ideological blend on the court.

It is a pretty good guess that reformist groups will note this and begin their own campaign to change campaign finance law, with the ultimate aim of dismantling Citizens United.

With a newly constituted D.C. court, reformers may have an ally in their cause. While the U.S. Supreme Court is not likely to reverse course on campaign finance laws, decisions to the contrary by the D.C. court will place campaign finance reform squarely in the public eye.

The next few years will continue to be a turbulent time in the field of campaign finance law. Conservative groups will surely continue their quest for an end to contribution limits and regulatory activity in this area. But at the same time these efforts will be counter balanced by re-energized reformists who seek greater restrictions over campaign finance law.

The end to the filibuster rule will prove to be an ally to reformers who seek to redress what they consider to be ill-informed decisions by the U.S. Supreme Court in the field of campaign finance.

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The opinions presented here are his own and not necessarily those of the Commission.