

## Memorandum

November 5, 2014

To: Senate Republicans

From: Conservative Leaders

Re: Reviving the Judicial Filibuster

We the undersigned are strongly committed to the appointment of judges who put the law and the Constitution ahead of their own political and policy preferences. The integrity of the judicial confirmation process and the function of the Senate are essential for the appointment of such judges, which is why we strongly oppose efforts to revive the judicial filibuster.

The decision by Senator Reid and his Democratic colleagues to deploy the so-called “nuclear option” was transparently designed to facilitate the confirmation of judicial nominees who would insulate Obamacare and other aspects of President Obama’s agenda from meaningful judicial review. Regardless of their motives, we see very little upside – and significant downside – in reviving the judicial filibuster.

- I. The net result of a Republican effort to revive the judicial filibuster would be a self-imposed 60-vote threshold for nominations by Republican presidents and a 50-vote threshold for nominations by Democratic presidents.**

Some hope that reviving the judicial filibuster would foster a more civil environment in the Senate. But Democratic Senators have shown no interest in being consistent on this issue, or in showing respect for their colleagues across the aisle. When they engaged in an unprecedented level of obstruction of nominees during the Bush Administration, Democratic Senators waxed poetic about minority rights and the need for a check on majority control. When the shoe was on the other foot, Democratic leaders like Harry Reid and Patrick Leahy abruptly changed positions.

When it comes to the rules of the Senate, as well as Senate history and tradition, Democratic Senators have demonstrated that they care only about three things: (1) obstructing nominees who are committed to originalism and the rule of law; (2) confirming liberal nominees; and (3) obtaining and exercising the requisite power to achieve these ends. Unilaterally disarming in this environment – while simultaneously relying on reciprocal goodwill to keep the newly reinstated filibuster intact – turns a

blind eye to Senate history. That history is marked by repeated episodes of bad behavior by Senate Democrats in the confirmation process.

Upon regaining the majority, Senate Democrats would undoubtedly once again gut the judicial filibuster if there were any political benefit whatsoever in doing so. Similarly, in any future Republican administration, it is a virtual certainty that Senate Democrats would once again use the judicial filibuster to obstruct the appointment of Republican nominees. The inevitable net result of reviving the judicial filibuster, therefore, would be a regime under which nominees submitted by a Republican President would be subject to a 60-vote threshold, whereas a Democrat President's nominees would be subject to a 50-vote threshold.

**II. Reviving the judicial filibuster would significantly undermine the legislative filibuster.**

The legislative filibuster remains intact, at least in part, because Senate Democrats recognize the potential damage to their own interests if the process were changed to permit passage of significant legislation on a simple majority vote. But a move by Republicans to revive the judicial filibuster would remove this consideration by reassuring Senate Democrats that they could safely eliminate the legislative filibuster when they are in the majority because, after they retake the majority, Republicans will dutifully revive the filibuster even when it is against their own interests. Doing so would establish an even more troubling environment, under which both legislation and nominations would be subject to higher thresholds for Republicans and lower thresholds for Democrats.

**III. Reviving the judicial filibuster would empower Senate Democrats to use the judicial filibuster to obstruct conservative judicial nominees in the future.**

During the Bush Administration, Republicans were able to confirm key judicial nominees only after threatening the so-called "nuclear option," and ultimately confirmed around half of President Bush's nominees. We see no sense in handing Democrats the tools they need to once again obstruct judges who adhere to the rule of law. Such a move would constitute unilateral disarmament on the part of Republicans and give Senator Reid and his left-wing allies yet another victory in their battle to tilt the confirmation process in favor of liberal nominees. *Make no mistake, reviving the filibuster for nominations would significantly reduce, if not eliminate, the probability that the most qualified and most committed constitutionalists would be nominated or confirmed in a future Republican administration.*

#### **IV. Conclusion**

The virtue of the current confirmation process is that it provides a clear, consistent standard for confirmation of nominees from both parties. The Presidents and the Senators who nominate and support those nominees can be held accountable for their decisions, elevating the profile and importance of judicial nominations, giving the public more meaningful insight into the composition of the judicial branch. For the foregoing reasons, we strongly oppose efforts to revive the judicial filibuster.

Respectfully,

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