

FIFTH ANNUAL KELLEY INSTITUTE LECTURE

*Carl Levin**

2014 MICH. ST. L. REV. 139

Dean, thank you so much for the introduction. Even though I'm not going to be in Indianapolis, I will be watching Michigan State win tomorrow. You can bet on it. I'm not even a betting man, but I am going to bet on this one, so it's an exception to my usual rule. It's great to be here with Frank Kelley. It's not quite correct that my first job was with Frank Kelley; it was my first *legal* job. Some of you law students may have a similar experience when you get out of law school—that you have a number of jobs for a couple of years and then kind of settle into something. I settled into the Attorney General's office to become their first general counsel of the Michigan Civil Rights Commission, and it was a very significant time in my life. And I'm glad you mentioned Nelson Mandela because I think he's on all of our minds today, as he has been for decades, as to what one human being can do in an impossible position. If he can do what he did from the position that he was in for twenty-seven years, that surely inspires those of us who are in very much more open and accessible places to make changes for our lives. I owe a big debt to Frank Kelley, actually, more than just for a steady job. He ran against the same man that I ran against in 1978, and he lost a close race, Frank did, but he softened up my opponent so I could have a little, "bare" win. Six years later, Frank also, I think, taught us about the role of humor in life and in politics. That's critically important that you have a sense of humor, particularly if you're in politics, but other professions as well. I think he probably was the only Democrat in Alpena when he became their City Attorney, and he was told by, I guess by the leaders in Alpena at that time, not to worry about that fact.¹ He should "'take care of the law,'" don't "'take care of the politics.'"² He took care of the law for

* United States Senator for Michigan. This piece was slightly adapted from the author's speech given during the Frank J. Kelley Institute of Ethics and the Legal Profession lecture series at Michigan State University College of Law on December 6, 2013.

1. John Minnis, *Friday Feature: The Eternal General: State Legend Still Offers His Share of Opinions*, LEGAL NEWS (Jan. 14, 2011), <http://www.legalnews.com/detroit/1004433>.

2. *Id.* (quoting former Michigan Attorney General Frank Kelley).

thirty-seven-and-a-half years.³ I'll be in the Senate position for only thirty-six years by the time I'm done next year, so I'm still chasing Frank Kelley; that's been the story of my life.

I'm glad to be able to have a place where I can talk about a subject as obscure and dry and boring as the filibuster of the United States Senate. There are not too many places where I can get away with a talk like this. It's a subject that recently has had a huge ethical dimension to it, this question of the filibuster in the Senate, not just whether we should change the rules because that really was not so much the issue. The question is *how* we change the rule, and that's what I want to talk to you about. It is not just a question of a Senate rule, which has a long history, a checkered history—a history where people are totally inconsistent as to their view on it depending upon what's being filibustered at the moment—but also because it involves “process.” It is a history that very, very few people can focus on. Most people are interested in outcomes and results, and don't focus on process, but as lawyers, and in this particular institute named after Frank Kelley, which focuses on ethics, the question of how you accomplish something becomes very, very critical—not just whether you do it, but how you achieve it. So that's what I want to spend my time on here today.

As I think most of you know, the Senate recently voted to effectively change the rules of the United States Senate about how to end debate and how to prevent filibusters.⁴ Now, the focus on this particular moment in our Senate history was on the question of the confirmation of not only judges—district court judges and court of appeals judges, not Supreme Court justices—but also presidential executive nominees.⁵ The Senate rules (and I use the word “rules” in a way that has an impact in this place) provide that in order to end debate, it takes sixty votes of the United States Senate, and in order to change the rules of the United States Senate, it takes two-thirds of the Senators.⁶ Those are our rules. Those are our laws; those are laws that we live by, presumably. And when we talked about using a “nuclear” option, which is a word you may have heard in the Senate,

3. *Id.*

4. 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013).

5. *Id.* at S8414 (statement of Sen. Reid).

6. Rule XXII of the Standing Rules of the Senate requires a vote of “three-fifths of [all] Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting.” S. COMM. ON RULES & ADMIN., 112TH CONG., SENATE CLOTURE RULE 8 (Comm. Print 2011).

what that means is changing the rules by violating the rules: that's why it's nuclear. The rules say sixty votes to end debate; the rules say two-thirds vote to change the rules. But, the U.S. Senate did it— it changed the rules with a majority instead of two-thirds of the Senate voting.

When we did this, the presiding officer was Pat Leahy. He's the President pro tempore of the Senate, which means he's in the majority party, as I am, the Democrats. He has the longest seniority in the Senate, and so he is the presiding officer of the Senate in the absence of the Vice President of the United States.⁷ Now, what had happened here was that we had a nomination of a court of appeals judge whose name was Patricia Millett, and her nomination was in front of the Senate.⁸ The Republicans opposed her and were filibustering, or at least what we call filibustering these days, which is not really filibustering, it's threatening to filibuster, but that amounts to the same thing. I'll get into a little more of that later. So, we democrats tried to end the debate on her nomination. The Republicans didn't raise any substantive question against her at all; they didn't claim she was too anything. They acknowledged she was qualified, but they said there were too many judges on the court of appeals, so they wanted to eliminate some of the judicial positions. They were "filibustering" her for that reason.⁹ We tried to end debate, needing sixty votes, but we didn't have success; we had fifty-five votes, as few Republicans joined us.¹⁰

And so, what happened then was that the majority leader, Harry Reid, moved to basically reconsider the vote, to be very technical,¹¹ and he also moved that this vote to end debate be adopted by a majority instead of by a sixty-vote margin.¹² He just moved to do it. Now the presiding officer, Pat Leahy, on the consultation of the Parliamentarian, said that the motion of the majority leader is out of

7. Article I, Section 3 of the Constitution provides that "[t]he Vice President . . . shall be President of the Senate" and that the Senate shall choose officers, including a President pro tempore, to preside in the absence of the Vice President. U.S. CONST. art. I, § 3, cls. 4, 5. Since 1890, the Senate habitually has elected the most senior Senator as its President pro tempore. See CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RL30960, THE PRESIDENT PRO TEMPORE OF THE SENATE: HISTORY AND AUTHORITY OF THE OFFICE I (2012).

8. See 159 CONG. REC. S8418 (daily ed. Nov. 21, 2013).

9. *Id.* at S8422 (statement of Sen. Levin).

10. 159 CONG. REC. S7708 (daily ed. Oct. 31, 2013).

11. *Id.* (statement of Sen. Reid).

12. 159 CONG. REC. S8417 (daily ed. Nov. 21, 2013) (statement of Sen. Reid).

order under our rules.¹³ That is the ruling of the Chair following advice of the umpire, the Parliamentarian. At that point, the majority leader then, in a moment of great, high drama from the Senate perspective, at least, appealed the ruling of the Chair.¹⁴

So, that's the stage; that's the way it's set up. The Chair rules your majority-vote motion is out of order. The majority leader says, "I now move to overrule the ruling of the Chair." And that is not debatable because the whole issue here is that this is really process inside of process, and again there are not too many audiences where I would dare talk about process, much less process within a process. But what technically is involved here isn't whether you change the rule; it's whether you end the debate on whether to change the rule. So, in this case, there's now a motion to override the Chair, who has already ruled that it takes sixty votes to end debate, and the Senate voted to override the ruling of the Chair. There were only three Democrats, and I was one of them, who voted to sustain the ruling of the Chair and the Parliamentarian.¹⁵ Now I did that although I favored changing the rule, and that's always the hardest position to take when you favor something, but vote against it because the way in which it is being accomplished is unacceptable; that's always the toughest thing to do. Most of my Democrats—in fact, all of the Democrats when the same issue arose a few years back, when the Republicans were threatening to do exactly this—gave very eloquent speeches against the Republicans doing this.

Long before any of us were around, a similar incident occurred in the Senate, not exactly the same way, but approximately. The question was whether or not the majority, basically, could change the rules to bring to a close debate on civil rights legislation.¹⁶ Senator Vandenberg favored bringing debate to a close, but in order to do so, the Senate would have had to override a rule of the Senate. And what Vandenberg said was that if a majority can change the rules at will, "there are no rules, except the [trenchant], unregulated wishes of a majority of whatever quorum is temporarily in control of the Senate."¹⁷ And that's a quote I used frequently against a Republican

13. *Id.* (statement of Sen. Leahy).

14. *Id.* (statement of Sen. Reid).

15. *Id.* at S8418; *see also U.S. Senate Roll Call Votes 113th Congress—1st Session*, SENATE.GOV (Nov. 21, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00242.

16. 95 CONG. REC. 2228 (1949) (statement of Sen. Vandenberg).

17. *Id.*

effort to do the same thing a few years back when they withdrew that effort because there had been a compromise reached, quoting Vandenberg in a position where he was voting against himself on substance and he was a presiding officer, I believe, at the time. And he just, he couldn't do it; he just couldn't say that the Senate is going to be a body where the majority can do whatever it wants; the House is a body where the majority can do whatever it wants, and does. They have a Rules Committee, which adopts rules almost every day, and they can change the "permanent" rules at any time by a majority vote.¹⁸ The House is a place where the majority rules; the Senate is not a place, until now, where the majority rules because the Senate is a place that protects the minority—frequently too much so, by the way, in my judgment, depending on whether I'm in the minority, of course. But at times where the minority has abused the rules (it did it in the Civil Rights days) they kept us from moving towards a fair, more equitable union for decades by using the rules, and recently the Republicans have abused our rules. They have abused our rules by threatening to filibuster almost everything in order to extract concessions on things that they want. It may be that they want to vote on a particular bill; it may be that they want to vote on a particular amendment; whatever it is they are trying to achieve, by filibustering or even just threatening to filibuster, they have been able to tie up the United States Senate.

Now, there's a lot of evidence that the rules have been abused recently, just to give you one data point here. The four presidents before President Obama have faced cloture motions, which are motions to end debate, in other words, threats of filibuster.¹⁹ All together, four presidents on sixty-three nominees; President Obama already has faced eighty-one.²⁰ So, the previous four presidents, sixty-three; this President in his first five years, eighty-one. Now, at the end of the day, most of those nominees have been confirmed; not all, but most have been confirmed. But the amount of time that is used up on each of those confirmations is three to five days. Many of them ending up with unanimous votes, by the way, but the threat of

18. JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 4 (2008), available at <http://www.senate.gov/reference/resources/pdf/RL30945.pdf>.

19. See Domenico Montanaro, Mark Murray & Carrie Dann, *Hypocrisy All Around in 'Nuclear Option' Debate*, NBC NEWS (Nov. 21, 2013, 4:20 PM), <http://www.nbcnews.com/news/other/hypocrisy-all-around-nuclear-option-debate-f2D11637414>.

20. *Id.*

the filibuster used to extract concessions legislatively, procedurally, whatever, has led to this. And it's not because of the qualifications usually of the nominees, but again, to see if they can't obtain some other goal. And the final straw for the majority leader, which caused him to do what he did or brought him over the cliff, was the filibuster of three circuit court of appeals nominees for the Circuit Court for the District of Columbia. Those positions had been vacant for years, and the unwillingness of the Republicans to allow a vote—because that's what a filibuster does, it prevents a vote—on any of those nominees finally moved the majority leader to do what he did. The American people obviously sensed this obstruction; they wanted it to end; they hate the gridlock of which the whole filibuster issue is a big part. But, nonetheless, I decided, again, that . . . I could not vote to override the umpire because of mistakes that are involved once you break the rules in order to change the rules. We've used it; we Democrats have used it. We've stopped what we consider to be Judges who are ideologically extreme. We've used it to protect women's reproductive rights. We've used it to protect the estate tax. We have filibustered. So, we have not taken, believe me, consistent positions on this as Democrats. And, as a matter of fact, as I mentioned a few years ago when the Republicans threatened to do the same thing, every Democrat opposed it and here's what a few Democrats said at the time. Senator Biden, then a Senator, now Vice President, this is what he said during this battle when the Republicans threatened to do this in 2005:

The nuclear option abandons America's sense of fair play. It is the . . . thing this country stands for: Not tilting the playing field on the side of those who control and [who] own the field.

I say to my friends on the Republican side: You may own the field right now, but you won't own it forever. [And] I pray [to] God when the Democrats take back control, we don't make the kind of naked power grab [that] you are doing.²¹

That was only eight years ago. My speech was similar, not as eloquent, but similar. Senator Kennedy called the Republican plan a “pre-emptive . . . nuclear strike,”²² and so forth. Including Senator Leahy, by the way, who was then the presiding officer.

And so, I couldn't ignore history, including my own. I could not take a position diametrically opposed to what I believe is right, particularly within such a short time period; maybe with age comes

21. 151 CONG. REC. 10,820 (2005) (statement of Sen. Biden).

22. *Id.* at 10,435 (statement of Sen. Kennedy).

wisdom, but eight years, as Frank Kelley will tell you, is not really aging; that's just a short period of time. And so, what we did was we adopted a precedent; it's a precedent, which is out there now, not just on judges, and we all ought to understand that. The precedent, which was set, referred to judges and referred to executive nominees, but the exact same precedent can, and, I predict, will, be used when the Republicans control. I'm not hoping to be around when that happens, but nonetheless, it will happen. Some day the Republicans will control environmental rights, reproductive rights, eliminate the EPA, and eliminate the Department of Education, all by majority vote that will then be in play. And some of you, many of you, will be around when that happens because that day will come. Tides shift in politics, and when that day comes, those who favored changing the rule by breaking the rule and setting the precedent, I hope they will then remember, "Hey, we put this in motion ourselves."

There is one other reason I opposed this. It is sort of a secondary reason, but I opposed it as well because there's another way to prevent filibusters from succeeding besides getting sixty votes, and that is to make them talk. And we have not done that; we have not done that because it's inconvenient. It means we've got to be there; we don't have to talk. The people who aren't filibustering don't have to talk, but we have got to be around in case the people who are talking make various kinds of motions, which require votes. It's inconvenient; it means we have got to be there weekends and nights, with no recesses. I'm in the middle of a two-week recess right now; and by the way, right at the beginning of this recess, we had a Defense Authorization Bill on the floor, and I'm Chairman of the Armed Services Committee. "It's my bill," as we say, sounds possessive, "it's my bill"; it's being filibustered, the Defense Authorization Bill. We could not get amendments considered because certain Republicans—Tea Party folks—insisted that they wanted amendments that weren't related to the defense of this country. Whatever the subjects are, whatever their particular momentary passion is—God knows it may have been to repeal Obamacare—whatever it is, they wanted to offer amendments totally unrelated to the defense of this country. And because they couldn't get their way, they wouldn't allow defense-related amendments to be offered, and so a motion to end debate, called cloture, on the Defense Authorization Bill was filibustered. And we couldn't get sixty votes, and there it sits. So, when I go back to Washington on Monday, that's the bill that'll be on the floor. And what will we do? We're going to, one way or another, have to persuade ten Republicans to

join us and end debate on that bill so we can get on paying our troops and protecting their families and their healthcare. So, you know, I know what this issue is all about, but I also know there's ways of breaking filibuster. And that's to make the people who are threatening—and that's what it's all about, threatening—to talk. And this is what Robert Byrd, who was our recent majority leader, who passed away now a couple of years ago, this is what he said about this subject:

Does the difficulty [and he's talking about these delays and gridlock] reside in the construction of our rules, or does it reside in the ease of circumventing them?

A true filibuster is a fight, not a threat, not a bluff. . . .

Now, unbelievably, just the whisper of opposition [and I can hear him say that] brings the "world's greatest deliberative body" to a grinding halt. . . .

. . . .

Forceful confrontation to a threat to filibuster is undoubtedly the antidote to the malady.²³

And he was right, but we're unwilling to force the people who want to bring this Senate to a halt to stand up and talk.

So, there's a temporary victory here for Democrats, some of the judges who should be confirmed are confirmed, and that's always good. But down the road, there's going to be a lot of hard-won protections and benefits for our people's health and welfare. They are going to be a lot less secure. So, it's an ends-and-means question. It's an ethics question for me; it's a question of what does the law, in this case the rule, mean, and how do you change those rules? Some people go to extremes; some of the Republicans, particularly dominated by the Tea Party element of the Republican Party recently, have shut down the federal government and threatened the credit rating of the United States in order to get their way. They didn't succeed; they did huge damage, however, in the process, and so what all of us have to do is now look for ways that we can, through justifiable means, try to achieve the ends of government, which is to govern. And I just hope that we can learn through these painful lessons, including not only the filibuster debate, but also the government shutdown debate and the credit rating debate. I hope we can learn enough from those painful lessons to bring about a more

23. *Examining the Filibuster: Hearings Before the S. Comm. on Rules & Admin.*, 111th Cong. 161-62 (2010) (opening statement of Sen. Robert C. Byrd).

civil, a more thoughtful, and a more restrained, approach to the problems that we must face together. And if we don't, if we don't find a way to compromise despite all of the challenges we get from people who refuse to compromise, we are going to see our beloved nation sapped of our vital strength.

