

## Articles

# Going Nuclear, Senate Style

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Conflict within and beyond the United States Senate has refocused scholarly and public attention on “advice and consent,” the constitutional provision that governs the Senate’s role in confirming presidential appointments. Despite intense and salient partisan and ideological disputes about the rules of the game that govern the Senate confirmation process for judicial appointees, reformers have had little success in limiting the ability of a minority to block contentious nominees. In this paper, we explore the Senate’s brush with the so-called “nuclear option” that would eliminate filibusters of judicial nominees, and evaluate competing accounts of why the Senate appears to be so impervious to significant institutional reform. The past and present politics of the nuclear option, we conclude, have broad implications for how we construct theories of institutional change.

The United States Senate stepped back from the brink of parliamentary war in May 2005. Having forged a bipartisan agreement, the “Gang of 14”—a group of “moderates, mavericks, and institutionalists”<sup>1</sup>—defused tensions in the Senate over the so-called “nuclear option.” Precipitated by Democrats’ obstruction of ten of President George W. Bush’s nominees for the federal courts of appeals, Senate Majority Leader Bill Frist (R-TN) had threatened to circumvent the Senate’s formal rules and to allow a simple majority to ban judicial filibusters. Dubbed the “nuclear option” in part because it would have invited massive retaliation by Democrats, Frist’s proposal would have imposed an historic restriction on the rights of the minority to filibuster—a move at odds with the Senate’s long-standing rule that requires a supermajority vote to limit debate.<sup>2</sup>

Most observers of the Senate suspected that the truce would be temporary, since debates about how to balance the majority’s capacity to act with the minority’s right to obstruct recur throughout Senate history.<sup>3</sup> Still, the 2005 episode over the right to filibuster judicial nominations generates critical questions for scholars of the Senate and of political institutions more generally. How can we account

for the Senate’s seeming stability in face of considerable pressure to rein in the filibuster? The 2005 episode offers an important opportunity to explore alternative views about the dynamics of Senate institutional development and institutional change more broadly construed. In previous work, we have argued that Senate majorities have periodically been blocked by minority obstructionism from reforming chamber rules.<sup>4</sup> Thus, the modern Senate is not entirely what majorities have wanted and instead is what majorities are stuck with. An alternative view suggests that the nuclear option—or more generally “reform-by-ruling”—has always been a viable tactic for majorities wishing to rein in minority obstructionism.<sup>5</sup> This view holds that if a Senate majority has not imposed majority rule in the past, it is because minorities have exercised self-restraint—reining in their obstructionism to avoid retaliation by majorities. Thus, if the rules have not been changed to empower majorities, it is because majorities have not wanted to change them.

Examining in greater detail the Senate’s brush with all-out parliamentary war, we explore these competing accounts of the Senate’s resistance to change—with an eye to explaining the ways in which inherited rules may shape future battles over the rules of procedure in legislative and other political bodies. We conclude by exploring the broader implications of the 2005 nuclear option episode. The nuclear option debate illustrates the difficulties of identifying path-dependent processes within political institutions, of sorting out the players’ intentions, and of interpreting the meaning of “non-action” in an institutional setting.

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## The Constitutional Option(s)

Between 1806 and 1917, the Senate lacked a motion that would have allowed the chamber to end debate on motions to its rules by any form of majority vote. Since

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1917, the Senate's Rule 22 has required a two-thirds majority to close debate on any matter related to the rules.<sup>6</sup> These basic parliamentary facts have frustrated reformers for nearly two centuries, and have led them at times to turn to constitutional grounds that, according to reformers, would allow a Senate majority to get a vote on a reform resolution. Indeed, Republicans in 2005 preferred the label "constitutional option," rather than "nuclear option"—for obvious reasons. Two constitutional provisions have been invoked repeatedly by reformers seeking to make their case for circumventing the chamber's supermajority requirement.

### *The Original "Constitutional Option"*

The argument most frequently made by reformers is that the Constitution implies that a simple majority of the Senate in each new Congress may change Senate rules. The argument cites Clause 2 of Article I, Section 5, which provides that "each House may determine the Rules of its Proceedings." This provision cannot mean, the reformers insist, that Senate rules, once established, can only be changed if a supermajority can be mustered to cut off debate on motions to change them. A simple majority, which everyone seems to agree is implied by the Constitution for regular decision making, must be allowed to approve new rules at the beginning of each new Congress, as the House of Representatives does. This would be done under "general parliamentary law," which is said to be summarized in *Jefferson's Manual* and includes a simply-majority motion for the previous question—the motion used by House majorities to bring the chamber to a vote.

The "constitutional option," as Republicans now call the tactic, has been endorsed, or at least threatened, several times by leaders of both parties.<sup>7</sup> In 1891, before the Senate adopted its cloture rule in 1917, Senator Nelson Aldrich (R-RI), then advocating a cloture rule, faced the possibility of a filibuster. He argued (in a somewhat convoluted way):

If it becomes necessary, Mr. President, in order to change the rules of any body to have unanimous consent, and there is a member of that body who has the physical power to talk indefinitely, then he has the power to prevent action as to any change of its rules; and that can not be tolerated by any legislative body for a moment. . . . It is not within the competency of the Senate to establish a rule which will prevent our successors or the Senate at any time, under the Constitution, from changing its rules.<sup>8</sup>

Aldrich, according to newspaper accounts, hoped to persuade fellow Republican Vice President Levi Morton to rule that a simple majority could close debate on his resolution but Morton did not at least initially cooperate.<sup>9</sup>

Since 1891, three vice presidents and several leading senators have argued, at least implicitly, for the constitutional option. As majority leader in 1979, Senator Robert

Byrd (D-WV) confronted opposition to a reform proposal that he advocated by observing:

It is my belief—which has been supported by rulings of Vice Presidents of both parties and by votes of the Senate—in essence upholding the power and right of a majority of the Senate to change the rule of the Senate at the beginning of a new Congress.<sup>10</sup>

As in several other cases, this interpretation served as a threat that this more radical step would be taken if the minority obstructed action on reform. The threat appeared to play a role in getting votes on the 1975 reform that lowered the threshold from two-thirds of senators present and voting to three-fifths of senators duly elected.<sup>11</sup> Byrd's statement preceded a unanimous consent agreement that provided for a vote on his proposal to limit post-cloture debate.

The primary argument offered in response to the constitutional option is the claim that the Senate is a continuing body owing to the overlapping terms of its members. As a continuing body, the argument continues, the Senate need not re-adopt its rules at the start of a new Congress and so the provisions of Rule 22 that require supermajority votes to invoke cloture always apply to any resolution or motion to change the rules. Senators argued the matter for decades in the twentieth century. In 1959, however, as a part of the compromise that reduced the cloture threshold from two-thirds of elected senators to two-thirds of senators present and voting, the Senate adopted paragraph 2 of Rule 5, providing that "the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."

Reformers have insisted that the constitutional mandate for open consideration of the rules at the start of each Congress supersedes the 1959 rule. Reformers managed to get majority votes in 1967 and 1975 for motions that would have allowed a simple majority to change the rules at the start of a Congress, but those efforts were ultimately unsuccessful. Still, the constitutional option has been opposed by at least a few prominent senators—Robert Taft (R-OH), Mike Mansfield (D-MT), and others—who favored some cloture reform but did not approve of undermining the theory that the Senate was a continuing body.

### *New Grounds for the "Constitutional Option"*

In 2005, Senate Majority Leader Bill Frist (R-TN) and his Republican colleagues did not invoke the old constitutional option by seeking to change the rules by a simple majority at the start of a new Congress. They passed up that opportunity at the beginning of the 109th Congress in 2005 and instead made a new constitutional argument. They asserted that the Senate is obligated to vote on judicial nominations under Article II, Section 2, Clause 2, which provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make

Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.” Because the Constitution does not stipulate a supermajority vote for confirmation, Republicans contended that requiring any threshold greater than a majority to get a vote on a judicial nomination is unconstitutional. Filibusters of judicial nominations, Frist declared, “can’t be tolerated by the American people.”<sup>12</sup>

As justification for pursuing the new constitutional option, Republicans argued that the Senate observed the practice of voting on nominations until the very recent past. They argued that no judicial nomination was killed by a filibuster before the Republicans regained a Senate majority in the 2002 elections. Republicans were required to go to extraordinary means to get votes on judicial nominations, they insisted, because Democrats had gone to extraordinary means to obstruct action on those nominations.

How would the revised version of the constitutional option be implemented in the Senate? The parliamentary machinery would have looked something like this. A Republican would make a point of order that the Constitution’s “advice and consent” clauses imply an obligation on the Senate to vote on judicial nominations. The presiding officer, potentially the Vice President, would rule in favor of the point of order. Democrats—opposing any effort to limit the right to extended debate on judicial nominations—would appeal the ruling. Under Senate rules, appeals of rulings in this context are debatable—meaning that Democrats could filibuster their own appeal. But Senate rules also include a non-debatable motion to table—meaning that a motion to table cannot be filibustered. Once the ruling is appealed to the Senate for debate, a Republican would be recognized to offer a motion to table to quash debate on the appeal. Because it takes just a simple majority vote to adopt the motion to table, the result would be cloture—the termination of debate—by fiat of a simple majority, at least for the range of matters addressed in the ruling. In other words, Vice President Dick Cheney or another friendly presiding officer could impose a new limit on debate by a simple majority vote creating a new precedent banning judicial filibusters if backed by a simple majority on the motion to table an appeal. Rather than changing the formal rules of the chamber, the constitutional option in this context would allow for the creation of a new chamber precedent—one that reinterprets the language of the Senate’s Rule 22, the chamber’s formal cloture rule. The new constitutional option was swiftly deemed to be “nuclear” by Democrats opposed to limiting the right to filibuster. If the Republicans pulled the nuclear option, Democrats threatened to avail themselves of every opportunity to obstruct the rest of the Republicans’ agenda.<sup>13</sup>

### *Compromise and the Gang of 14*

Unable to secure cloture with just a 55-seat majority and decrying the Democrats’ tactics as unconstitutional and unprecedented, the Republican drive to ban judicial filibusters via the nuclear option came to a head in May 2005. With the nomination of Priscilla Owen to the 5th Circuit Court of Appeals pending before the Senate, Senator John Cornyn (R-TX) filed a cloture motion. Given that Democrats had filibustered Owen’s nomination in the previous Congress, close observers widely expected that Frist would be unable to secure the necessary 60 votes to adopt cloture and thus to bring the nomination to a vote. Not surprisingly, then, Frist made it clear that he intended to use a failed cloture vote on the Owen nomination to make a point of order that cloture on a judicial nomination should be decided by a simple majority and trigger the nuclear option.

A group of seven Democrats and seven Republicans, probably with mixed motives, averted the showdown by signing a “memorandum of understanding on judicial nominations” on May 23 before the cloture vote took place.<sup>14</sup> Without the seven Democrats, the Democratic leadership could not prevent cloture; without the seven Republicans, the Republican leadership could not secure the majority vote necessary to table an appeal of the Vice President’s ruling. The “Gang of 14” promised, for the duration of the 109th Congress (2005–2006), to oppose a reinterpretation of Rule 22, to allow three of the ten contested judicial nominees to receive confirmation votes, and to filibuster judicial nominees only under “extraordinary circumstances.” Throughout the 109th Congress, Senator Frist maintained that the constitutional option remained viable. Republicans lost their Senate majority in the next elections.

### **Explaining Senate Stability**

Why was the Senate able to step back from the brink of parliamentary nuclear war? Political and legal scholars suggest two alternative accounts of the Senate’s reluctance to alter its rules of debate. One account argues that the ability of a simple majority to vote to create new precedents has historically “tamed” the minority.<sup>15</sup> Minority coalitions—partisan or otherwise—have been loathe to excessively exploit their rights of obstruction, as they understand that an intense majority will simply retaliate by banning the filibuster or otherwise reining in the minority by creating a “nuclear” precedent by majority vote. The credibility of minority threats to retaliate against the majority party is limited by the majority’s counter threat of going nuclear. In other words, according to this account, the Senate is essentially as Senate majorities have always wanted. Because Senate majorities have used the threat of going nuclear to rein in minority obstructionism, we can conclude that the stability of Senate rules reflects the preferences of successive Senate majorities.

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We are partial to an alternative account, based on our earlier work on the politics of Senate reform.<sup>16</sup> In this account, the relative stability of Senate rules reflects repeated failed efforts of majorities to change the rules under which measures and nominations are considered. Given formal rules that all but require supermajority votes to change and given the Senate's treatment of itself as a continuing body, this account suggests that minorities have periodically exploited the Senate's institutional rules to thwart even cohesive and intense majorities intent on reining in minority obstructionism. In this view, the threat of minority retaliation is sufficient to derail majority efforts to significantly curtail the filibuster: The modern Senate is what Senate majorities have been forced to accept, not what they have always preferred.

To arbitrate between these accounts, we review the Senate's previous brushes with the nuclear option—episodes of what are sometimes called “reform-by-ruling.”<sup>17</sup> In a law review article prominently cited by Republicans during debates over the nuclear option in 2005, Martin Gold and Dimple Gupta argued that these episodes are direct precedents for the Senate's most recent tangle with the nuclear option.<sup>18</sup> We differ significantly from these observers in our interpretation of these events—both in terms of their relevance to recent events in the Senate and in terms of their fit with the view that majority threats of going nuclear are sufficient to deter obstructionist minorities.

### *Precedents for the Nuclear Option*

Gregory Wawro and Eric Schickler observe that several important precedents involving Senate debate were established by rulings of the Senate's presiding officers in the nineteenth century, although we would observe that none of them were as drastic as to impose majority rule *de jure*.<sup>19</sup> We do not question that reform-by-ruling is *technically* feasible, and thus do not evaluate the precedents on that basis. Rather, we argue that the lesson of the 2005 episode concerns the *political* feasibility of reform-by-ruling. Thus, we ask the following questions. Is reform-by-ruling that imposes *de jure* majority rule politically feasible? If it often is not, can it have the claimed effect of taming minorities and creating the kind of Senate that majorities have always wanted? In other words, is the choice of supermajority rules for the Senate truly a matter of “remote majoritarianism” as Wawro and Schickler have argued?<sup>20</sup>

Political feasibility involves the transaction and opportunity costs entailed in employing the technically feasible mechanism of reform-by-ruling. Because minorities can increase those costs to the majority, it may be that in practice the reform-by-ruling possibility is seldom a viable threat. And when it is *not* a viable threat, as we are inclined to believe is the case much of the time, it cannot explain either minority restraint or the absence of majority action to adopt a new formal rule limiting obstruction. Much

rides then on interpreting the historical record to determine the political feasibility of significant reform-by-ruling. In the Wawro and Schickler account, and all other accounts with which we are familiar, we do not find such persuasive evidence. First, we do not find evidence that the reform-by-ruling approach is generally a politically viable way to overcome obstructionism and gain a vote on a bill. Second, we find little evidence that minorities were cowered into limiting their obstructionism by the threat of reform-by-ruling, and thus little evidence that a norm of restraint against filibustering was enforced by the threat of such a reform strategy. And third, we find persuasive evidence that majorities believed that a formal change in Senate rules—rather than imposing a new precedent via reform-by-ruling—was the only politically effective way to impose majority rule in the chamber and thus to effectively limit minority obstructionism.

Two sets of precedents warrant consideration. One set is a group of episodes from the 1970s and 1980s.<sup>21</sup> These episodes are offered to demonstrate the precedent for reform-by-ruling—its technical feasibility and previous use—which we do not contest. Wawro and Schickler offer a second set of episodes to advance the argument that the reform-by-ruling threat causes minorities to avoid pushing the majority too far. Thus, the threat of reform-by-ruling is said to underlie the small number of filibusters until late in the nineteenth century.<sup>22</sup> These arguments deserve careful attention, as we find them less persuasive.

Before turning to the precedents, we offer three general observations about Senate precedents. First, the occasional use of reform-by-ruling never went so far as to prevent the minority from killing a measure by filibuster. One might argue that majorities never wanted to go so far as to eliminate effective obstructionism altogether (that is, majorities got the Senate they wanted), but, in fact, majorities have been stymied in efforts to create or modify the cloture rule from time to time.<sup>23</sup> An alternative interpretation might be that a majority never dared to go so far. Second, opportunity costs, for a minority as well as the majority, are frequently central to the calculations of senators in pursuing or tolerating filibusters and in favoring or opposing reform by ruling or rule. Norms and threatened reform-by-ruling may be less critical to explaining the outcome of stable Senate rules than Wawro and Schickler contend. Third, senators have repeatedly pushed for formal changes in Senate rules to prevent effective filibusters even though reform-by-ruling was technically feasible. This suggests that reform-by-ruling was often viewed as ineffective, too costly, or lacking durability.

As suggested above, the 1970s and 1980s precedents are of limited value in testing the hypothesis that significant reform-by-ruling is politically feasible. The problem is that these precedents allowed the majority to limit obstructionism in some way, but did not prohibit or intend to prohibit a killer-filibuster altogether.



For example, the target of the 1980 precedent concerned the process by which a majority could go into executive session to call up a particular nominee. In this case, the precedent was set by a Senate vote that overturned a ruling of the presiding officer, rather than a vote to uphold a ruling of the chair. The presiding officer ruled in favor of the traditional interpretation of the Senate's rule on executive session proceedings that a motion to go into executive session to consider a specific nomination requires an intervening and debatable motion to proceed to consider the nomination calendar. Such a debatable motion of course could be filibustered, subject to cloture under Rule 22, meaning that a filibuster could occur on the motion to proceed to the nomination calendar. As Republicans repeatedly pointed out in 2005, Senator Byrd successfully moved in 1980 to secure a majority vote to overturn the ruling, thereby allowing a motion to go into executive session to consider a specific nomination without an intervening, debatable motion. However, as in every other case in the group of precedents from the 1970s and 1980s when a precedent was set to limit debate that otherwise would take place, the ability to conduct debate on the issue itself—in this case, the nomination in question—was not challenged.<sup>24</sup>

We turn now to the nineteenth-century precedents noted by Wawro and Schickler as evidence that the threat of going nuclear has long tamed the minority. Senate action on the 1848 Oregon Territory Bill illustrates the importance of opportunity costs and thus the potential limits of Wawro and Schickler's explanation. The episode is noteworthy because it is the case with which Wawro and Schickler begin their book and call a puzzle to be explained by a Senate norm. In our view, it is a puzzle better solved by accounting for the opportunity costs for the minority than by reference to an anti-obstructionist norm. The 1848 Oregon Territory Bill was considered near the end of a session under some pressure to authorize a territorial government. A provision that prohibited slavery stimulated a filibuster led by Southerners. Wawro and Schickler argue that the minority relented by letting the bill come to a vote despite the fact that the minority cared greatly about the outcome, could have prevented a vote, and perceived minimal costs for blocking action.<sup>25</sup> They go further to claim that the minority's action reflected willing observance of a norm proscribing minority obstructionism, citing three Southern senators who indicated that they were bowing to the will of the Senate and public majority.<sup>26</sup>

The Wawro-Schickler argument that an anti-filibuster norm limited Southerners' obstructionism would be unnecessary if it can be shown either that banning slavery in Oregon was not too vital to Southern interests or that Southerners perceived considerable costs to extending the debate on the bill. There is evidence for both that is as credible as the Southerners' claims that they were observing a norm. At least one prominent Southerner,

John C. Calhoun, observed that slavery was unlikely to be transported to Oregon and another prominent senator indicated that the bill was of only symbolic interest to Southerners.<sup>27</sup> Moreover, minority senators recognized and articulated the costs of obstructionism. They noted in floor debate that further obstructionism on the Oregon bill would delay action on other bills important to them. Killing the bill, they also observed, would delay the overdue formation of a territorial government that was considered important, even by Southerners, to managing violent conflicts with Native Americans and addressing other issues.<sup>28</sup> These credible and articulated reasons for the minority to give way seem at least as strongly motivating as a norm against obstructionism. At a minimum, they create the possibility that the articulated norm was a public rationalization of behavior that was motivated by other concerns. Opportunity costs—other favored provisions of the bill, the resentment of Westerners, and other favored legislation—were recognized by the minority and stand as a tangible alternative explanation.

Equally important, Wawro and Schickler do not associate their argument about norm-driven behavior in the Oregon bill episode with a majority threat of reform-by-ruling. No mention of reform-by-ruling occurred on the Senate floor, as best we can determine, no mention can be found in secondary accounts, and the Wawro-Schickler account of the Oregon episode is appropriately silent on the matter. In fact, the majority bill sponsors feared the bill would die. Opportunity costs to the minority may be a sufficient explanation for the observed behavior. The alternative argument that a norm was backed by a threat (which is emphasized in the conclusion of the chapter detailing the Oregon bill episode) may not be necessary.

Finally, the Oregon bill episode raises doubts about Wawro and Schickler's argument that the desire for good interpersonal relations underpinned the norm of limited obstructionism, particularly in this case. Wawro and Schickler argue that a senator is constrained

by concerns about his relations with other legislators and how his actions today will affect interactions with them in the future. These relationships encompass shared understandings about appropriate behavior toward one another and what would constitute unacceptable behavior, without being formally specified in the Senate's standing rules.<sup>29</sup>

We wonder whether sufficient evidence exists to pin down the existence of such inter-personal relations. Alabama's Rufus King, for example, is one of the three Southerners cited by Wawro and Schickler as endorsing the norm against obstructionism and illustrating the importance of collegiality. King, in fact, had challenged Henry Clay to a duel just a few months earlier. The two senators were arrested by the Sergeant-at-Arms and placed under a magistrate's peace bond. And three weeks after the Oregon bill died, King protested Clay's bill to set new limits on debate by

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promising a long filibuster—if Clay pushed for his bill again, King said, he would “make his arrangements at his boarding house for the winter.”<sup>30</sup> The bounds of acceptable behavior in 1848 are perhaps an open question. We suspect, however, that the interpersonal ties-that-bind were not much stronger at mid-nineteenth century than they were in the twentieth century.

While the 1848 Oregon bill suggests that senators in the minority often have good reasons of their own to limit obstructionism, the 1890 Federal Elections Bill, termed the “Force bill” by Southern opponents, demonstrates that senators in the majority may contemplate both formal reforms and reform-by-ruling and still relent by withdrawing a bill to avoid more severe opportunity costs of their own. The bill, which passed the House in 1890 on a party-line vote, was the last major effort for many decades to impose federal enforcement of voting rights in the South. It was taken up in the short session before the mandatory adjournment in March, 1891, and at a time when other major bills were pending.<sup>31</sup>

Several basic facts about the 1890–1891 episode are readily established: The bill was initially favored by a majority, then filibustered by Southerners for two months, and eventually set aside in favor of another bill.<sup>32</sup> Republican leaders threatened both a forced end to the filibuster by reform-by-ruling and action to create a cloture rule, but neither materialized. Instead, the bill was ultimately withdrawn after silverite Westerners, who initially favored the elections bill, eventually concluded the filibuster was preventing action on currency legislation of vital interest to their region. The effect of the filibuster was to produce increasing opportunity costs with delay for senators in the majority. Delay was effective, a norm of limited obstructionism was not articulated, and the possibility of reform-by-ruling was protested but little fear of it was expressed in debate or shown in the actions of the minority.

As a tangent, let us mention an illuminating exchange that occurred during the weeks of debate on the elections bill. Colorado’s Silver Republican Henry Moore Teller, citing a newspaper account, accused the Republican leadership of planning reform-by-ruling to pass both the elections bill and a resolution to create a cloture process in the standing rules, prompting a response from Louisiana Democrat Randall Lee Gibson:

Mr. Teller. I ask the question because I suppose it is pretty thoroughly understood, at least that has been the rumor and I suppose it has reached everyone, that there is to be a stage in the discussion on this resolution when debate will be cut off arbitrarily, and there will be no opportunity to proceed beyond that, and without probably very much notice to Senators who desire to speak, and I desire to speak myself. . . .

Mr. Gibson. I wish to ask the Senator from Colorado a question. If, as the Senator from Colorado suggests, it is within the power of the Senator from Rhode Island, supported by a bare majority of the Senate, to arbitrarily cut off further debate, I ask what is the necessity for this rule of cloture or gag law, because a major-

ity may at any time, through the Senator from Rhode Island, stop debate arbitrarily. Why, therefore, establish a rule?

Mr. Teller. I will say to the Senator from Louisiana [MR. GIBSON] that I am unable to answer.<sup>33</sup>

The exchange is instructive in two ways. First, consistent with the behavior of Senate leaders in the twentieth century, it indicates that Aldrich and other Republicans believed a formal rules change was desirable even if they thought reform-by-ruling was technically feasible and necessary for getting the rules change. Second, senators, like many outside observers, were perplexed by the need for a formal rules change if the majority could gain reform by a ruling of the presiding officer.

In the 1890–1891 episode, we cannot know whether a reform-by-ruling effort—which, in the end, was not attempted—to impose majority cloture would have garnered a majority. It might be argued that the majority knew that a minority could create chaos in response at a time when so much vital legislation was still pending. It also is plausible that such an effort was not attempted because it would have failed to acquire the support of the presiding officer or a majority of senators, perhaps because of the opportunity costs. We can be sure that in 1890 a bill favored by a majority eventually did not pass, obstructionism played a central role, and reform-by-ruling was not a viable threat.

If a threat to impose reform-by-ruling often had been politically viable as a general rule, then formal adoption and amendment of a cloture rule would serve little purpose. Yet, at least some serious attempts to create a previous question or cloture rule in the nineteenth-century Senate were thwarted by minorities, as have twentieth-century efforts to lower the cloture threshold. Because filibusters usually block votes on filibuster reform, we seldom observe direct votes on reform. But behind-the-scenes accounts clearly suggest that majority will has been stymied by minority obstructionism on reform proposals from time to time.<sup>34</sup>

Why would the threat of minority obstruction outweigh the majority party’s threat to reform-by-ruling? The minority is not helpless. If the ruling is limited to judicial nominations, as former Majority Leader Frist insisted in 2005 that it would be, the minority could filibuster any other debatable measure in anticipation of a Republican move to bring up a controversial judicial nomination. They could object to routine unanimous consent requests, which would require the majority instead to adopt a routine motion or even force the majority to secure sixty votes to impose cloture. If used widely, such moves could radically slow Senate action on all matters, a majority leader’s worst nightmare. The minority’s leverage under existing Senate rules and practices seems to counter the majority’s technical ability to go nuclear by reinterpreting existing chamber rules via new precedents.

Would a minority party engage in such massive retaliation against the new constitutional option? So far, only Senator Frist and the Republicans in 2005 seemed ready to find out (although a number of their fellow partisans were not). Colossal damage could have been done to the majority party's, and perhaps the president's, agenda at a time when the majority was seeking to exploit the momentum of election victories. Nor would the public necessarily blame the minority party for outrageous obstructionism. Historically, minorities have shown reasonably good judgment about when they can get away with obstructionism, as suggested by the lack of a filibuster against recent Supreme Court nominee Samuel Alito in 2006. Despite strong opposition from Democrats, Alito was confirmed 58–42. This suggests that Democrats could have blocked Alito's confirmation vote by opposing cloture, but opted against paying the perceived costs of opposing the president's nominee. At least, or more, likely, the majority party risks blame for its incompetence at governing. And presidents have a tendency to cut their losses and move on to something else. Their legacies depend on it.

### *Limitations on the Nuclear Option*

The difficulties faced by Senate majorities seeking to follow a reform-by-ruling strategy suggest that multiple forces typically suppress the use of the nuclear option by Senate majorities. It is worthwhile to review these several limiting factors: Understanding the conditions that limit the viability of the reform by ruling strategy can shed light on the broader hurdles faced by majorities seeking to bend Senate rules to the will of the majority. If institutional and electoral constraints limit the procedural options of would-be Senate reformers, the threat of going nuclear might not be sufficient to tame obstructive minorities.

A credible threat by the Senate majority to go nuclear requires the existence of a non-debatable motion to table. As outlined above, such a non-debatable motion is required to set aside a filibuster of the presiding officer's ruling once the nuclear option is set into motion. Without recourse to a non-debatable motion to kill the pending appeal, the presiding officer's ruling imposing debate limits would be filibustered by the minority. Using the *Senate Journal*, which records floor action, it is clear that the motion to table was made debatable in 1828. It was not until the 1840s and 1850s that rulings addressed the issue of debate on the motion to table and not until 1868 that the Senate adopted a standing rule to make the motion to table non-debatable.<sup>35</sup> In other words, for about 60 years, the nuclear option could not have been a viable threat imposed by the majority to tame obstructive minorities. And it took 80 years (over a third of the history of the Senate) for a standing rule to clarify the matter. The institutional machinery necessary to circumvent an obstructive minority did not exist over that long period.<sup>36</sup> Granted, some of the reform-

by-ruling episodes noted by Wawro and Schickler entailed overturning a ruling of the presiding officer, rather than upholding a ruling by tabling an appeal of the ruling. As such, a majority might have pursued a reform-by-ruling strategy in the absence of a non-debatable motion to table. Still majority leaders pursuing such strategies before the 1930s did not typically target wholesale limits on the basic right to filibuster.

The credibility of the threat also is likely to be affected by several forces that vary considerably over time. These include the size of the majority party agenda, the cohesiveness of its members, and the degree of cooperation elicited from the presiding officer and the majority leader himself. Even if the presiding officer and the Senate majority leader are willing to cooperate in pursuing reform via the nuclear option, a divided majority party is unlikely to cooperate. Even a marginally divided majority can throw a wrench in the way of the nuclear option, given that some majority party members may be unwilling to limit their own procedural rights by imposing a debate limit. That certainly seems to have been the case in 2005 when Republican senators in the Gang of 14 refused to provide the votes necessary for the majority party to go nuclear. The majority leader is also likely to face steep hurdles when the majority party has a large issue agenda. Given that minority reaction to the nuclear option is likely to tie the chamber in knots, majorities with extensive policy agendas appear to be especially wary of attempting to invoke the nuclear option. These additional constraints—before and after creation of preferential recognition and a non-debatable tabling motion—are likely to limit the credibility of the majority party's threat to go nuclear. Again, absent a credible threat, the reform-by-ruling strategy is unlikely to tame the minority party.

### *Interpreting the 2005 Episode*

In 2005, it appears that a Senate majority preferred to avoid the disruption that invoking the nuclear option may have caused. We might infer from the episode that the modern Senate's debate practices are what a majority of all senators always have wanted. We have addressed the historical record, in which majorities sought to change the formal rules to limit debate, appeared to have been blocked by minorities, and failed to credibly threaten reform-by-ruling to impose majority cloture. But is the 2005 episode an instance of the exercise of majority will?

It is important to begin with a clarification of the precedent that Senator Frist hoped to establish. Taken literally, the principle that the Senate is obligated to vote on judicial nominations implies a motion to confirm must be one of the highest privileges. If even a simple-majority cloture rule could be used to block a vote on confirmation, Senator Frist's principle would not be implemented. Thus, unlike the far more common efforts to adopt a new

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previous question motion or lower cloture thresholds, the Frist principle implied more than merely allowing a Senate majority to bring a matter to a vote. It implied a guaranteed vote. Because Senator Frist did not proceed with the point of order, we cannot be sure that he would have gone that far. He may have been willing to accept simple majority cloture on the grounds that the same majority is likely to materialize on the confirmation vote itself even if such a precedent did not fully implement the articulated principle.

Moreover, Senator Frist insisted that his proposal applied only to judicial nominations. Perhaps fearing that even fewer senators would support a precedent that applied to executive nominations, treaties, or legislative matters, Frist and his staff repeatedly emphasized that the effort was limited to judicial nominations. Although Frist lacked a sound constitutional reason for arguing that judicial nominations could and should be distinguished from executive branch nominations—given that both are subject to the same advice-and-consent clause in Article 2—it appeared that Frist believed that a narrow precedent was more likely to be supported.

Not unusual for cases in which reform is blocked by obstruction, the episode in 2005 ended without a direct roll-call vote on any proposal related to Rule 22 or its application to judicial nominations. We may assume that Democrats who were not signatories to the Gang of 14's agreement would have voted against a new precedent and the non-signing Republicans would have voted for it. That much is consistent with the historical pattern of senators evaluating cloture reform through the lens of majority and minority status.<sup>37</sup>

Whether or not a majority existed for the new precedent turned on the preferences of the fourteen signatories to the memorandum. We know that all fourteen preferred their agreement (to allow votes on some of the contested appellate bench nominees while foreclosing a vote to invoke the nuclear option) over Frist's new precedent. Several of the Republican signatories (Senators Susan Collins and Olympia Snowe of Maine, Lindsey Graham of South Carolina, John McCain of Arizona and John Warner of Virginia) publicly expressed doubts about the wisdom of Frist's proposed precedent, as did Arlen Specter, the Judiciary Committee chair who did not sign the memorandum. No Democratic signatory of the memorandum indicated support for a new precedent, although Senator Ben Nelson's (D-NE) stance was subject to speculation. Forty-eight senators seemed poised to support Frist, but little more can be inferred with certainty. The fair inference is that no majority for Frist's precedent had emerged, but a majority for avoiding a confrontation on the issue existed.

For at least the 109th Congress, we believe that the most accurate inference is that no credible majority existed for the constitutional option or for creating a broad pre-

cedent to eliminate some types of filibusters by use of a ruling-appeal-tabling approach. Contrary to the argument that the threat of going nuclear is sufficient to tame minority obstruction, the events of 2005 suggest to us an alternative interpretation: The minority had no reason to restrain its use of filibusters generally out of fear of the constitutional option. Reform-by-ruling was not a viable threat in this instance due to the lack of a majority to impose it.

### Implications

Our reading of the Constitution and the Senate's parliamentary history leads us to two conclusions about the 2005 episode. First, contrary to recent Democratic rhetoric, the kind of procedural move the Republicans threaten has precedent. The history of the Senate is one of procedural opportunism with both parties' leadership guilty of flip-flops on parliamentary rules and practices. Second, majorities should be careful what they wish for. Republicans claimed that they could launch a surgical strike against Democrats by banning only judicial filibusters. But the move would likely have been nuclear—with harmful consequences for both political parties and for the Senate as a deliberative body—and in the future could be replicated on other procedural matters, including the filibuster generally.

For congressional scholars, the episode has implications for interpretations of Senate procedural development. One view is that path dependency, initialized by a decision in 1806 to eliminate the previous question motion from the rules (thereby eliminating majority cloture), characterizes Senate—and other political institutions'—procedural development.<sup>38</sup> In the absence of a rule limiting debate before 1917 and a supermajority cloture motion since 1917, minorities have generally been able to block majorities that sought to impose stricter limits on debate or lower thresholds for cloture. In the one major instance of cloture reform in 1975, the minority was still able to extract a significant concession from the majority, as senators agreed to leave in place a higher threshold for cloture on measures or motions to change the rules. The alternative view is that the constitutional option always has been available.<sup>39</sup> If the rules have not been changed, it is because majorities have not wanted to change them.

We have argued that while the first view cannot be fully confirmed by the 2005 episode, we find little support for the second view. A pivotal group prevented a vote that would have given us a measure of support and opposition to simple-majority cloture on judicial nominations. Nevertheless, no viable threat for simple-majority cloture or any other reduced threshold emerged for debate on legislation generally in 2005. To the contrary, even the proposal for simple-majority cloture on judicial nominations did not materialize. Thus, the episode provides little



support for the argument that the constitutional option is an ever-present threat to the minority that serves as a disincentive to filibuster. Public opinion may provide a disincentive, and both parties mounted large public relations campaigns on the issue, but the threat of procedural retaliation with a new and general precedent was not present and was explicitly set aside by the majority leader.

The episode, like reform episodes of the past, left much in doubt about senators' preferences regarding the threshold for cloture, but it yielded an outcome that disappointed many majority party senators and few minority party senators. As in the past, most of the majority party members with reservations about a new precedent were those senators who more frequently sided with the minority. Their interests, surely evaluated and taken into account by the minority, prevented implementation of the constitutional option. Three judicial nominations were cleared for action by the agreement forged by the Gang of 14, but other nominees were blocked and the ability to filibuster remained formally untouched. In short, conservatives' demand for a guaranteed up or down vote on all of the president's judicial nominees was foreclosed by the Gang of 14 agreement. As such, and in the view of most observers, including the majority and minority leaders, the minority came out better than the majority.<sup>40</sup> The outcome is more consistent with the view the Senate majorities often are stuck with rules they dislike than the view that Senate majorities have the Senate that they want.

The difficulties associated with interpreting the political motivations of key players, the intended and unintended consequences, and the meaning of non-action in the 2005 episode are typical of analyses of institutional choice and have broader implications for the study of institutional change. The roots of path dependent processes are strongly implicated in the debates among congressional scholars and bear close attention.

The Senate's history appears to share features of path dependent processes identified by Arthur and reviewed by Pierson.<sup>41</sup> The initial event (removing the little used previous question motion from the rules in 1806) seemed unimportant at the time, but it had lasting and unintended effects. The effects were unintended because they depended on many unpredictable events, institutional change proved difficult to reverse, and a consequence was inefficiency for an institution in which the initial, constitutionally-specified decision-making process was identical to that of its institutional sibling, the House of Representatives. Because reform of debate-closing rules can be filibustered, this feature of Senate procedural history surely is a self-reinforcing process that can be characterized as path dependent.

In our view, the story of path dependency in Senate procedure is special and cautions against broad application of the increasing returns perspective suggested by Arthur and Pierson. Many of the factors—collective-action hurdles, transaction costs, vested interests, accumu-

lated social capital, and so on—cited by Pierson and others that contribute to institutional persistency do not appear to be the primary forces underlying the path-dependency of Senate procedure. In contrast to the increasing returns process, the Senate's basic decision rule has not been changed even under conditions of dramatically *decreasing* returns for the majority of senators.<sup>42</sup> On only rare occasions (such as the Senate's formal reform of Rule 22 in 1975) have the costs of the inherited rules proved so high for a large enough number of senators to produce reform that reduced the threshold for cloture and even then the reforms have been modest.<sup>43</sup> This is the product of the threshold itself and the infrequency with which large majorities arise that may find their enduring interests subverted by the threshold.

Supermajority thresholds are common in democracies, of course. They serve to protect minorities, make certain policy objectives more difficult to achieve, and, often, are self-preserving. This is widely appreciated in the study of constitutions but warrants more attention in other domains of institutional development. Institutional persistence sometimes proves to be more than the byproduct of the costs of change. It can be the direct product of institutional arrangements themselves.

## Notes

- 1 Nather 2005.
- 2 Frist's procedural move earned its name both because of the procedural consequences that Democrats warned would follow and because of the manner in which it would impose a change in Senate practice (see Chaddock 2003, Hulse 2003).
- 3 Binder and Smith 1997.
- 4 Binder and Smith 1997, Roberts and Smith forthcoming.
- 5 Koger 2002, Wawro and Schickler 2006.
- 6 For the period 1949–1959, the threshold for invoking cloture on a motion to change the rules was raised to two-thirds of the entire Senate membership.
- 7 See for example the range of historical examples offered in Gold and Gupta 2005.
- 8 *Congressional Record*, January 22, 1891, p. 1653.
- 9 "The Obstinate Radicals," *New York Times*, January 24, 1891, 111; *New York Herald*, January 24, 1891; *New York Herald*, January 27, 1891.
- 10 *Congressional Record*, 1979, 144.
- 11 Binder and Smith 1997, ch. 6.
- 12 Frist made many such comments. See for example Babington 2005, A15.
- 13 See for example coverage of Democrats' intended response were Republicans to "go nuclear" as reported in Victor 2004 and Toobin 2005.
- 14 The seven Democrats were Robert Byrd (WV), Joseph Lieberman (CT), Benjamin Nelson (NE),

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- Mark Pryor (AR), Mary Landrieu (LA), Daniel Inouye (HA), and Ken Salazar (CO). The seven Republicans were Lincoln Chafee (RI), Susan Collins (ME), Mike DeWine (OH), Lindsey Graham (SC), John McCain (AZ), Olympia Snowe (ME), and John Warner (VA).
- 15 See Koger 2002, Wawro and Schickler 2006.
  - 16 Binder and Smith 1997.
  - 17 Most of the precedents cited in the recent debate were first noted in Bach 1991, who explores senators' willingness to secure rulings that suit their immediate convenience.
  - 18 Gold and Gupta 2005.
  - 19 Wawro and Schickler 2006, 36.
  - 20 See Wawro and Schickler 2006, 33. On the concept of remote majoritarianism, see Krehbiel 1991.
  - 21 For previous treatments of these precedents from the 1970s and 1980s, see Bach 1991, Gold and Gupta 2005, and Wawro and Schickler 2006.
  - 22 See Wawro and Schickler 2006.
  - 23 See note 16 and Binder and Smith 1997, ch. 6.
  - 24 A similar outcome is apparent in an 1859 episode in which it appears that the majority forced a reform-by-ruling. The case involved a Democratic bill to acquire Cuba, which Republicans opposed and were willing to filibuster. A majority overruled the presiding officer's decision that unlimited debate was allowed on a motion to postpone. Wawro and Schickler 2006 list this as an "important 19th century precedent restraining debate or curtailing obstruction" and claim that the episode "also indicates that an obstructive minority would not always try to capitalize on appeals for further delay, since the presiding officer was able to get the yeas and nays on his decision" (70). To be sure, Republicans did not filibuster the appeal. But neither did they abandon their filibuster of the bill itself. Frustrated, the Democratic majority eventually gave up and moved on to other legislation (*Congressional Globe*, February 26, 1859, 1385).
  - 25 Wawro and Schickler 2006, 2, 42.
  - 26 Wawro and Schickler 2006, 46.
  - 27 Calhoun admits that "it was universally admitted that the climate and soil of Oregon unfitted it for slave population (in Wilson and Cook 1999, Remarks at a Public Meeting at Charleston, August 19, 1848). He and other Southerners knew Oregon would never allow slavery. Smith 1953 uses Benton's own words to characterize his view of the dispute as one "over the 'abstract right of carrying slaves there without the exercise of the right,' thus reducing their difference to 'the difference between refusing and not asking'" (Benton Speech quoted in Smith 1953). Bell (D-TN) argues that talks of threats to the union are overstated when dealing with the issue of the Oregon Territory Bill, "When bills to organize California and New Mexico are taken up, then that talk might be more apt" (*Congressional Record*, August 12, 1848, 1076). Along these lines, President Polk claimed that he only signed the bill because the Oregon Territory was above the Missouri Compromise 36' 30" line (Quaife 1910).
  - 28 By blocking the Oregon bill, Southern senators would be forced to block nearly 20 to 30 other bills, including a key army appropriations bill. During the debate, numerous Southern senators cited this as a reason for allowing a vote on the bill. The bill to organize the territory had been pending for three years, and during that time Oregon settlers had been vulnerable to "devastating Indian wars," and a general "necessity of government" (Chambers 1956, 327). This is a point stressed by Senators Bell and Benton in speeches on the Senate floor, and by President Polk in both his diary and his statement to the House of Representatives (Quaife 1910). Such evidence of the real opportunity costs perceived by southern Senators stands in contrast to Wawro and Schickler's claim that the "costs of delay were minimal for the minority" (2006, 42, n31).
  - 29 Wawro and Schickler 2006, 39–40.
  - 30 Burdette 1940, 22, and *Congressional Globe*, July 15, 1841, 203. Further, in the case of the Oregon Bill, the situation between Thomas Hart Benton and other Southerners was described by a recent Calhoun biographer accordingly: "the debate raged, with Benton hurling epithets at Calhoun's dignified colleague, Andrew Butler, who so far lost his self-control to challenge the burly Missourian to a duel" (Niven 1998, 318). Butler's challenge was presented to Benton by Senator Henry Foote (D-MS). Nearly a year later, Foote pulled a revolver on Benton during a debate on the chamber floor. See Burdette 1940, Remini 1991, and Chambers 1956.
  - 31 Welch 1965, Upchurch 2004.
  - 32 Hoar 1903, Welch 1965, Upchurch 2004.
  - 33 *Congressional Record*, January 22, 1891, 1690–1691.
  - 34 See Binder and Smith 1995, 161–95.
  - 35 We thank the Senate historian for assistance in confirming the Senate's revision of the rules affecting debate on the motion to table (personal communication with Richard Baker, May 15, 2005). The 1806 codification of Senate rules did not include a motion to table. The 1820 rules included the motion for the first time. A resolution to make the motion to table non-debatable was introduced in 1820, but, as far as we can determine, the resolution was not considered. The 1820 rule was readopted in the 1828 rules reform. The Senate appears to have accepted a precedent that the motion to table an appeal of the ruling of the chair was non-debatable at some point after the 1828 rule was adopted and before the 1868 rule

- was adopted. In 1841, senators did not challenge a colleague's assertion that the motion to table a printing resolution was not debatable, but, in the same episode, overturned a ruling that a motion to table an appeal was in order. If the motion to table was not in order for an appeal, the modern nuclear option could not have been available. In 1847, the Senate considered but defeated a motion to table an appeal and, in 1854, the Senate adopted a motion to table an appeal, but in neither case did senators discuss whether a motion to table could be debated. In 1859, the presiding officer ruled that a motion to table a motion to set aside one bill and consider another was in order, and the ruling was not challenged. Moments later the Senate sustained a ruling that that motion to table was not debatable (it was a motion to table another motion, not to table an appeal). Thus, rulings in the 1840s and 1850s appear to have established that a motion to table was not debatable, but we have not been able to determine when, or for what reason, the precedent was established. The standing rule was silent on the matter until 1868. See *Congressional Globe*, August 17, 1841; *Congressional Globe*, February 11, 1847, 381–2; *Congressional Globe*, July 31, 1859, 2023; *Congressional Globe*, February 25, 1859, 1362–3.
- 36 Even after the creation of a non-debatable motion to table, the reform by ruling strategy would have been a more difficult tactic to pursue until the late 1930s. In order for the threat of going nuclear to be fully credible, the majority party leader must have the right of first recognition on the Senate floor. In the absence of the right of first recognition, Senate Rule 19 required the presiding officer to recognize the senator who first addressed him. The precedent establishing the leader's right of first recognition was established by Vice President John Nance Garner in 1937, a change that gave preferential recognition to the majority and minority party leaders.
- 37 Binder and Smith 1997, ch. 4.
- 38 Binder 1997.
- 39 Koger 2002, Wawro and Schickler 2006.
- 40 On the positions of the majority and minority party leaders on the Gang of 14's agreement, see "Senators Compromise on Filibusters" 2005. To be sure, the truce was seen as temporary, as both parties essentially agreed that the deal put off a potential row over the filibuster until a later date. As Tom Daschle, the former Democratic leader said at the time, "You keep it for a day, and you've got to fight again to keep it for the next day," as quoted in Stolberg 2005.
- 41 Arthur 1994, Pierson 2000.
- 42 On the ways in which decreasing returns seem to characterize at least majority party senators' experiences with Senate rules, see Binder and Smith 1995, Roberts and Smith forthcoming.
- 43 On the politics of the 1975 reform, see Binder and Smith 1997, ch. 5.

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