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Changing Senate Rules or Procedures: The "Constitutional" or "Nuclear" Option

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name redacted
Analyst in American National Government
Government and Finance Division

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Summary

Reports indicate possible attempts to curtail the use of filibusters in the Senate, perhaps in the 109th Congress. Some have suggested that proponents of this idea may invoke something called the "nuclear" or "constitutional" option in Senate floor procedure to try to end a filibuster without the need for 60 votes or to amend the cloture rule (Rule XXII) itself. No set definition exists for the term "nuclear" or "constitutional" in this context. Because the point of using such an option is to achieve a goal by means lying outside the Senate's normal rules of procedure, it would be impossible to list all the different permutations such maneuvers could encompass. Several likely scenarios that fall into this category are described in this report, followed by a discussion of the possible advantages and disadvantages of using such an approach.

Opponents (and some supporters) of this kind of plan typically refer to it as the "nuclear" option because of the potentially significant result for Senate operations that could follow from its use. The Senate relies heavily on unanimous consent to get its legislative work accomplished. It may be more difficult to achieve unanimous consent in an environment where the minority feels it has lost some of its traditional rights. Supporters of the concept of majority cloture argue that it is a "constitutional" option because they will be making their argument based on a constitutional prerogative or duty of the Senate.

One method for changing Senate procedures might involve declaring extended debate on nominations dilatory, and thus, out of order. Another possibility is based on the argument that, on the first day of a new Congress, Senate rules, including Rule XXII, the cloture rule, do not yet apply, and thus can be changed by majority vote. Under this argument, debate could be stopped by majority vote. A Senator would move the adoption of a new rule or set of rules. The new rule or rules would be subject to a majority vote, supporters argue, because the mechanics of cloture as set out in Rule XXII, which requires a supermajority to invoke cloture and end debate, would not yet apply and the Senate would be operating under general parliamentary law. One variation would be a claim that on the opening day of a Congress a simple majority could invoke cloture on the motion to take up a resolution that proposed a rules change, or on the resolution itself. Again, this scenario would rest on the proposition that Rule XXII was not yet in force and did not control action. Senators also could seek to have the 60-vote threshold declared unconstitutional, either for cloture in general, or only as it applies to Senate consideration of presidential nominations, or perhaps a subset of such nominations, such as of federal judges. This scenario might take place in at least two different ways. The presiding officer might make a ruling from the chair, or a Senator could make a point of order from the floor that the supermajority requirement for cloture is unconstitutional.

All these possible scenarios would require that one or more of the Senate's precedents be overturned or interpreted otherwise than in the past.

This report will be updated as events warrant.

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Introduction

The Senate is governed by the Constitution, the Standing Rules of the Senate, permanent Standing Orders of the Senate (adopted in prior Congresses), temporary Standing Orders of the Senate (adopted at the beginning of each Congress), and statutes. It is also governed by precedents, which are decisions made by the presiding officer of the Senate, or the body itself, concerning how its rules operate in practice. The precedents tend to elaborate the Senate's understanding of its own rules. The Standing Rules, for example, can be printed in 78 pages, while the most recent collection of Senate precedents is 1,564 pages long. Precedents have tremendous weight in deciding parliamentary questions in the Senate, and the presiding officer, whether the Vice President or a majority party Senator, is expected to be guided by these precedents when ruling on a pending question.

The Standing Rules of the Senate would seem to be the obvious place to start if a Senator desired to change that chamber's procedures. If there is no substantial opposition, the Standing Rules of the Senate can be changed by a simple majority vote; there is no supermajority requirement for changing the rules. If, however, there is opposition to the proposed rules change and if opponents seek to prevent a final vote on the proposal by extended debate and amendment, known as a filibuster, a supermajority requirement does exist for invoking cloture, or ending debate, on a rules change. Senate Rule XXII, which sets out the process for invoking cloture, requires that two-thirds of those present and voting (67 if all Senators participate) vote to invoke cloture on a rules change.

This is a difficult threshold to meet; invoking cloture on all other measures or matters requires a three-fifths vote of all Senators chosen and sworn (60 votes, if no vacancies exist). Cloture on a proposal to change an existing Standing Order, or to establish a new Standing Order, also requires this lower threshold. It should be noted that the Senate uses Standing Orders to modify or set aside its standing rules without doing so directly. S.Res. 445, in the 108th Congress, for example, inherently superceded portions of Senate Rule XXV and Senate Rule XXVI, to establish a committee on Homeland Security and Governmental Affairs without directly amending the rules. A similar approach might be used to alter Rule XXII without directly amending it.

The potential difficulty the elevated requirement for invoking cloture poses for changing the Standing Rules, has led some to look at making changes in Senate practice through proceedings that alter existing precedents or establish new ones. Proceedings of this kind, it is argued, would both break old precedent and establish new Senate precedents, and could have the effect of changing Senate practice.

Eventually such a plan might even result in changes in Senate rules, while circumventing the procedures prescribed by Senate rules for changing the rules.

Some have recently referred to such actions as the "nuclear option" for bringing about change in Senate rules or practice, referring to the possible problems that could result in the Senate from the use of such tactics. No set definition exists for the term "nuclear option"; indeed, this term has been used to refer to many kinds of possible proceedings. One set of possibilities, however, involves appealing to constitutional requirements as an authority superior to that of the Senate's own rules, and supporters of such an approach have accordingly preferred to describe such an approach as a "constitutional option."[1]

Nominations and the Filibuster

Much of the discussion of the "nuclear" or "constitutional" option has involved presidential nominations, particularly those for the federal judiciary. Fights over the confirmation of judicial nominees are not a new phenomena, but the intensity and frequency of the confrontations have increased in the last decade or so, which has led some to question how the Senate considers such nominations.[2] During the Presidency of Bill Clinton and that of his successor, George W. Bush, groups in the Senate have been able to block confirmation of nominations, either because the nominee was never considered by the chamber (during the Clinton presidency) or by use of the filibuster to prevent a final vote on some nominees (during the Bush presidency).[3]

The levels of frustration became very intense in the 108th and 109th Congresses, and the majority party publicly denounced its inability to end filibusters to secure votes to confirm some federal judges.[4] To that end, Majority Leader Bill Frist announced that he was prepared to try and change the Senate's rules to make it easier for a majority to overcome a filibuster of a judicial nominee. First, in the 108th Congress, he introduced a resolution (S.Res. 138) that would have changed the procedure for invoking cloture, the only way to end a filibuster, by imposing an ever-decreasing threshold for successive votes to invoke cloture on a nomination, until it could be achieved by a majority vote of the full Senate. The resolution was reported out of the Senate Rules Committee, but not considered on the Senate floor. This has

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[1] See CRS Report RL32843, *'Entrenchment' of Senate Procedure and the 'Nuclear Option' for Change: Possible Proceedings and Their Implications*, by (name redacted).

[2] Sheldon Goldman, "Assessing the Senate judicial confirmation process: The Index of Obstruction and Delay," *Judicature*, March-April 2005, vol. 86, no. 5, pp. 251-257.

[3] Ibid, and Keith Perine, "Fiercest Fight in Partisan War May Be Over Supreme Court," *CQ Weekly*, Jan. 10, 2005, p. 58.

[4] Julie Hirschfeld Davis, "GOP acts to break deadlock on judges; Senate rules panel backs 51 votes to halt debate, force confirmation vote," *The Baltimore Sun*, June 25, 2003, p. A1; Sarita Chourney, "Senate GOP retreats from all-night filibuster plans," *The Hill*, Sept. 9, 2003, p. 1.

been attributed to the fact that, if filibustered, a two-thirds vote of those Senators present and voting would have been needed to invoke cloture on it.[5]

On the first day of the 109th Congress, Senator Frist stated on the Senate floor that he wanted to ensure that each judicial nomination received an up or down vote by the full Senate, and he noted that he might seek a change of Senate procedures to do this. On May 18, the Senate began consideration of a controversial nominee for the federal bench, and Majority Leader Frist said he wanted to obtain an up-or-down vote on that nomination, which had been previously filibustered. On May 20, a cloture petition was filed, with the vote set to occur on May 24. The media reported that the motion was not expected to receive the necessary 60 votes to cut off debate, and that Senator Frist would employ a version of the "nuclear" or "constitutional" option in order to reach an up-or-down vote on the nominee. Late on May 23, however, a bipartisan group of 14 Senators announced an agreement that appeared to ensure a final vote on the pending nomination and several others, and reduced the likelihood that the Senate would change its rules or procedures through the use of a "constitutional" or "nuclear" option.[6]

On October 31, 2005, President Bush nominated federal appellate court judge Samuel Alito to the Supreme Court. Within hours of the announcement, there was again talk of a possible filibuster of his nomination, and the issue of the "nuclear" or "constitutional" option had been rejoined.[7]

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[5] The higher threshold for invoking cloture applies because the resolution would change Senate rules. For a more detailed explanation of the Frist resolution, see CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule*, by (name redacted) and (name redacted).

[6] Senator Bill Frist,"Delivering Solutions to the Nation's Problems," remarks in Senate, *Congressional Record*, daily edition, Jan. 4, 2005, vol. 151, pp. S13-S14. Martha Angle, "Senate Launches Debate on Owen Nomination as 'Nuclear Option' Looms," *CQ Today*, May 18, 2005, database online, available from Congressional Quarterly at [http://www.cq.com/search.do]; Gwyneth K. Shaw, "Frist Driving Toward Senate Rules Showdown; Centrists Might Hold Key to Compromise in Judicial Fight; Senate Moderates Seek a Compromise," *Baltimore Sun*, May 18, 2005, p. A1; Charles Babington and Shailagh Murray, "A Last-Minute Deal on Judicial Nominees; Senators Agree on Votes for 3; 2 Could Still Face Filibusters," *Washington Post*, May 24, 2005, p. A1; Carl Hulse, "Bipartisan Group in Senate Averts Judge Showdown," *New York Times*, May 24, 2005, p. A1. The agreement, called the Memorandum of Understanding on Judicial Nominations, is available online at Congressional Quarterly at [http://www.cq.com/graphics/monitor/2005/05/24/mon20050524-24judges-deal-text.pdf]. See also CRS Report RS22208, *The "Memorandum of Understanding": A Senate Compromise on Judicial Filibusters*, by (name redacted).

[7] Keith Perine, "Bush Taps Conservative Judge to Succeed O'Connor on Supreme Court," available on *CQ.com* at [http://www.cq.com/display.do?docid=1940095&sourcetype=], visited on October 31, 2005; Fred Barbash and Peter Baker, "Bush Selects Alito For Supreme Court," at Washingtonpost.com, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100180.html], visited on October 31, 2005.

Possible Courses of Action

Exactly because the point of a "nuclear" or "constitutional" option is to achieve changes in Senate procedure by using means that lie outside the Senate's normal rules of procedure, it would be impossible to list all the different permutations such maneuvers could encompass. The following, nevertheless, represent several different approaches or scenarios that have been discussed as possible methods to achieve this goal. These are just a sampling of the options available to Senators; they are not an exhaustive list.

Dilatory Debate

One scenario would have the effect of creating, within Senate procedure, a new precedent that extended debate of a nomination was dilatory, and, therefore, out of order. The following is one way such a precedent could be set.

Under this scenario, a nomination would be called up and debated on the Senate floor. After some time, a cloture motion to cut off debate would be filed. If the cloture motion did not get 60 votes and failed, a Senator could then raise a point of order that continued debate on the nomination would be dilatory and must end, perhaps within a specified time frame. The Presiding Officer, perhaps the Vice President, would then be expected to rule in support of the Senator's point of order. An opposing Senator would be expected to appeal the ruling of the presiding officer. Although an appeal would be debatable, it would likely be met by a non-debatable motion to table the appeal of the ruling of the chair. The Senate could table the motion by a simple majority vote, thus establishing a new precedent that extended debate on a nomination can be ruled out of order as dilatory.

This scenario would appear to broaden the Senate's concept of what can be considered to be dilatory. Under current Senate rules and precedents, the concept of dilatory, meaning intended to delay, has not been applied to debate by a Senator or a group of Senators. Repeated motions to ascertain the presence of a quorum, for example, have been considered dilatory by the Senate, and after the body has invoked cloture on a measure or matter, the chair has the authority to declare motions or amendments to be dilatory, but debate has not been included in that.[8]

Opening Day[9] Scenario One – Majority Rules Change

The Senate has long considered itself a continuing body. Consistent with this premise, the practice of the Senate has been not to re-adopt rules in a new Congress.

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[8] *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 800-801 and 282-334.

[9] Opening day would not necessarily mean a single calendar day. In the past, the Senate has counted the opening day as a legislative day, not as a calendar day. A legislative day lasts until the Senate adjourns at the end of a day of business; if the Senate recesses daily instead of adjourning, the same legislative day continues, no matter how many calendar days pass. So, in theory, the opening day of the Senate could last any number of calendar days, until the Senate adjourned for the first time at the end of a daily session.

There has been debate about whether the rules that govern the Senate in one Congress should continue in effect in the next Congress. Supporters of this position argue that, because only one-third of the membership of the Senate changes at any one time, and a quorum of the Senate is always in existence, the body does not need to reconstitute itself at the beginning of each Congress and, thus, the existing rules continue in effect from one Congress to the next. Opponents of this position, however, point out that under these conditions, any change in rules must be considered under the existing rules, which can make changing the rules extremely difficult. They contend that this "entrenchment" of the rules unconstitutionally inhibits the Senate from exercising its constitutional authority to determine its own rules.

Those who would seek to amend Senate rules to end a filibuster by a majority vote might use the first day of a new Congress to advance their proposal, arguing that Senate rules, particularly the cloture rule, Rule XXII, did not apply yet, and thus that debate could be ended by majority vote. Under this scenario, a Senator would move the adoption of a new rule or set of rules, which could contain changes to Rule XXII — or any other rule the Senator wanted to change. Debate on the new rule or rules could be limited, subject to a majority vote, supporters argue, because the mechanics of cloture as set out in Rule XXII would not yet apply, and the Senate would be operating under general parliamentary law. Senate acceptance of these conditions would allow decisions to be made by majority vote and could permit the use of parliamentary devices to end debate, such as calling for the previous question, that would be decided by majority vote.[10] In order for this situation to prevail, the presiding officer would have to rule that the previously existing rules did not govern consideration of a motion to change the rules offered under these conditions, and the Senate would have to endorse that ruling, most likely by tabling an appeal of the ruling, which requires a simple majority vote to succeed.

This was the situation on the opening day of the 85th Congress, on January 3, 1957, when Senator Clinton Anderson moved to consider a new package of rules. Vice President Richard Nixon, as presiding officer, said during debate that he believed that the Senate could adopt new rules "under whatever procedures the majority of the Senate approves." Vice President Nixon added that he did not believe the Senate was bound by any previous rule "which denies the membership of the Senate the power to exercise its constitutional right to make its own rules." Vice President Nixon made it clear that this was his personal opinion, not a ruling from the chair. The Senate, however, tabled Senator Anderson's motion. Senator Anderson made a similar attempt at the beginning of the 86th Congress. This time,

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[10] In current American parliamentary practice, the previous question is a nondebatable motion to close consideration and bring a pending matter to an immediate vote, used extensively in the House of Representatives. If the motion is agreed to by a majority vote, it generally cuts off further debate and prevents the offering of additional amendments or motions. In its early history, the Senate used a motion for the previous question as a way to avoid consideration of controversial subjects. It was not the same motion as understood today. It was deleted from Senate rules in 1806. Neither version of the previous question is permitted under current Senate rules.

the Senate voted to send the proposed rules changes to committee, not reaching any conclusion about changing rules on the first day.[11]

In 1967, at the start of the 90th Congress, however, Senator George McGovern proposed that the Senate vote on a motion to consider a resolution lowering the threshold for invoking cloture. He said that under the Constitution, the Senate has the right to adopt new rules by majority vote. Senator Everett Dirksen then raised a point of order that Senator McGovern's motion would circumvent existing Senate rules. The presiding officer, Vice President Hubert Humphrey, ruled that, because Senator Dirksen's point of order raised a constitutional issue, the Senate itself should rule on whether the point of order should be sustained. Under Senate precedents, the presiding officer may not rule on a constitutional point of order and instead must submit the point of order to the full Senate for a vote.[12] Humphrey also ruled that the point of order was subject to a tabling motion, which was not debatable. Senator McGovern moved to table the point of order, and by a vote of 37-61 the Senate refused to table it. The Senate then voted 59-37 to sustain the point of order.[13]

In sum, Vice President Hubert Humphrey submitted the constitutional point of order to the Senate, and Senator McGovern moved to table it. The Senate failed to table, or kill, the point of order. The Senate then voted 59-37 to sustain the point of order that Senator McGovern's motion would circumvent existing Senate rules. With that vote, the Senate declined to allow the original motion to change the rules made by Senator McGovern.

To employ the "nuclear" or "constitutional" option in this scenario, the Senate would have to overturn these two precedents, perhaps among others.

Opening Day Scenario Two – Majority Cloture

A variation on the first proposition would rest on a claim by proponents of changing Senate rules that on the opening day of a Congress a simple majority could invoke cloture on the motion to take up a resolution that proposed a rules change, or on the resolution itself. As in the first opening day scenario, this action would be based on the premise that even if, in contrast to the previous option, Senate rules were regarded as continuing in effect, the Senate must, at the start of a new Congress in particular, be able to exercise effectively its constitutional power over its own rules. Therefore, supporters of this approach argue, the Senate must be able to reach a vote on questions of adopting or amending these rules.

At the start of the 91st Congress (1969-1971), this approach was attempted, and the presiding officer, Vice President Hubert Humphrey, ruled that a majority of those

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[11] U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule: Limitation of Debate in the Congress of the United States*, committee print, prepared by the Congressional Research Service, 94th Cong., 1st sess. (Washington: GPO, 1975), p. 24.

[12] *Riddick's Senate Procedure*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 685.

[13] Committee on Rules and Administration, *Senate Cloture Rule*, p. 27.

Senators present and voting could invoke cloture. The question before the Senate when Humphrey made this ruling was a motion to consider a resolution to change the threshold for invoking cloture from two-thirds to three-fifths of those present and voting. In this case, the Senator who sought to change the rules by majority vote, Senator Frank Church, asked the presiding officer to make the determination, and the Vice President then ruled. The Senate voted 51-47 to invoke cloture, and the chair ruled that the motion had succeeded by majority vote. Later the same day, the Vice President's ruling was appealed, and the Senate voted 45-53 to overrule it, thus overturning the decision to permit majority cloture.[14]

In 1975, at the start of the 94th Congress, proponents of the proposition that a majority of Senators could invoke cloture on a rules change at the opening of a Congress had a short-lived victory. Senator James Pearson submitted a resolution changing the threshold for invoking cloture from two-thirds of those present and voting to three-fifths of those present and voting. The Senator offered a lengthy motion, which included as a given that a majority vote of the Senate could invoke cloture on his proposal. Senator Mike Mansfield objected and raised a point of order that Senator Pearson's motion violated the rules of the Senate. The presiding officer, Vice President Nelson Rockefeller, declined to rule, on the same ground cited by Vice-President Humphrey in 1967, instead putting the question before the Senate to decide. By a vote of 51-42, the Senate agreed to a motion to table the Mansfield point of order, thus implicitly agreeing to the majority cloture proposition. Because Senator Pearson's motion was so lengthy, however, the chair ruled that it could be divided into individual pieces for debate. This debate occupied the Senate for several days, preventing Members from reaching a final vote on the rules change, which could have had the effect of settling whether a majority could invoke cloture.[15]

Less than two weeks later, the Senate reconsidered the vote by which it tabled Senator Mansfield's point of order, and then voted 53-43 to sustain it. That same day, as a part of the compromise by which the Senate reversed itself on the point of order, Senator Robert C. Byrd offered a series of motions that ended with the Senate adopting a change to the cloture rule, altering the required vote to the present standard of a three-fifths majority of those chosen and sworn (except on propositions to change the Standing Rules).[16]

Thus, the Senate briefly endorsed majority cloture, but later reversed itself and re-established the precedent that the rules are continuous.

Disagreements remain about whether the Senate obliterated the precedent of majority cloture with its subsequent actions. Senator Byrd has said he believes the vote "erased the precedent."[17] Former Vice President Walter Mondale, however,

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[14] Ibid., p. 28; Vice President Hubert Humphrey, remarks in Senate, *Congressional Record*, vol. 115, Jan. 16, 1969, pp. 994-995.

[15] Committee on Rules and Administration, *Senate Cloture Rule*, p. 30.

[16] Ibid., pp. 30-32.

[17] Robert C. Byrd, *The Senate, 1789-1989, Addresses on the History of the United States* (continued...)

who was involved in the debate as a Senator, has said he believes "the Rule XXII experience was significant because for the first time in history, the Vice President and a clear majority of the Senate established that the Senate may, at the beginning of a new Congress and unencumbered by the rules of previous Senates, adopt its own rules by majority vote as a constitutional right. The last minute votes attempting to undo that precedent in no way undermine that right."[18]

Successful employment of this scenario would involve the Senate overriding its later 1975 decision sustaining the point of order against majority cloture, and instead reaffirming its initial implicit decision of that year in favor of majority cloture.

The Constitution and Cloture

Another set of options for altering the requirement for cloture would involve addressing the matter not on the opening day of a new Congress, but in the course of the session. The intent of this set of options would be to have the 60-vote threshold for cloture declared unconstitutional, either for cloture in general, or only as it applied to Senate consideration of presidential nominations, or perhaps a subset of such nominations such as of federal judges.

Under Senate precedents, the presiding officer does not rule on a hypothetical situation, so it is likely that for options of this kind to be used, a nomination would have to be before the Senate, and the Senate would have to have failed to invoke cloture on the nomination.

At this point, the scenario could play out in at least two different ways. It has been suggested that the presiding officer, probably the Vice President or the President pro tempore, could declare Rule XXII unconstitutional, set the supermajority threshold aside, and rule that cloture could be invoked by a simple majority. This ruling itself would constitute a break with Senate precedents, which, as discussed above, rely on the Senate as a whole to decide constitutional issues. If the chair issued such a ruling, opponents would likely appeal, and the appeal would ordinarily be debatable.[19] Another Senator, however, could move to table the appeal, which is a non-debatable motion. If the Senate voted to table the appeal of the ruling, a question which would be decided by a simple majority, the appeal would fail and the new precedent would appear to be confirmed, permitting cloture to be invoked by simple majority, if the majority could get to that vote.

Under a second scenario, following a vote in which the Senate failed to invoke cloture on a pending measure or matter, a Senator would, from the chamber floor, make a constitutional point of order that the supermajority requirement for cloture is unconstitutional. The presiding officer might then, in keeping with precedent, submit the constitutional question to the Senate for its decision. Because a

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[17] (...continued)
Senate, vol. 2 (Washington: GPO, 1991), p. 132.

[18] Walter F. Mondale, "The Filibuster Fight," *The Washington Post*, Mar. 18, 1975, p. A16.

[19] Riddick, *Senate Procedure*, p. 148.

procedural question submitted to the Senate traditionally is debatable, and the point of the exercise according to its supporters is to find a way to limit debate, however, the presiding officer could break with precedent by ruling that the motion would not be debatable. It is likely that a Senator would appeal the decision of the chair that the question would not be debatable, and this appeal probably would be met with a counter motion to table the appeal. If the tabling motion were successful, the appeal would fall, with the effect of sustaining the ruling of the chair. Pursuant to the ruling that the submitted point of order was not debatable, the Senate would then proceed to vote, without debate, on the constitutional question, which would be decided by a simple majority vote.

Employment of either of these versions of the "constitutional option" would require the chair to overturn previous precedent, either by ruling on a question that by precedent has been submitted to the Senate, or by ruling non-debatable a question that by precedent has been treated as debatable.

Considerations

Any version of the "nuclear" option would carry with it risks and rewards. The most obvious direct benefit would be for those judges who could be confirmed by majority vote if debate could be stopped by a simple majority as well. It would also strengthen the executive branch's hand in the selection of federal judges, if the Administration could be assured of confirmation with the votes of 51 Senators. It also might make the Administration less likely to use its recess appointment power to install judges on the federal bench, an issue that raised serious concerns in the Senate in 2004.[20]

Potential Implications for the Senate

Opponents of using any of these parliamentary maneuvers argue that the ability to confirm nominations, even those with significant opposition, by a simple majority could make an Administration less willing to negotiate with the Senate and weaken the role of the Senate in the nomination and confirmation of presidential nominees. Furthermore, they note that the Senate confirmed 207 of President Bush's judicial nominations and failed to confirm 10. In the 108th Congress, roughly 3% of federal judgeships were vacant at any time, not creating a significant impediment to the operations of the federal courts, they say. [21]

Supporters of using a "nuclear" or "constitutional" option to change the cloture process argue that it could protect a Senate majority's ability to act, particularly when it came to an issue of such vital interest as ensuring a sufficient number of federal judges to operate the courts, the third branch of the federal government. There is a serious concern among some that a constitutional responsibility of the Senate, to

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[20] Sheryl Gay Stolberg, "Democrats Issue Threat to Block Court Nominees," *New York Times*, Mar. 27, 2004, p. 1.

[21] Ferraro, "Frist throws down a gauntlet on filibusters."

advise and consent to presidential nominations, is being weakened with the repeated, successful filibusters of certain federal judicial nominations.[22]

Because the Senate has not utilized the "nuclear" or "constitutional" option before, the consequences of doing so are unclear. The potential exists for significant repercussions. In describing the Senate, most modern congressional scholars now refer to it as a "unanimous consent body." By far the greatest share of the chamber's business is conducted, one way or another, by agreement among all Senators. In part, the reason is that Senators have learned to agree on how to proceed, knowing that such procedural agreement does not necessarily predetermine the outcome of policy decisions. The use of a plan which would intentionally use a procedural tool to force a final decision on a policy option could make it dramatically more difficult to obtain unanimous consent for anything else that followed.

Both sides of the debate seem to be concerned about the possible results. In the opinion of one Democratic Senator, the use of the "nuclear" option "… would be a dagger at the heart of what the Senate is all about, and Democrats would take very strong action."[23] A Republican Senator told *The Hill* that damage from the use of the "nuclear" or "constitutional" option could level the Senate, making it very difficult for work to get done. "The nuclear option on judges, it rather clears the landscape," the Senator said.[24]

The procedural maneuver also could change the nature of the Senate, in which it is difficult to override the rights of the minority. It would raise fundamental and significant questions about how the institution would function, the answers to which would become clear only as time passed. If the power of the filibuster were broken, for example, would the Senate become more like the House of Representatives, in which debate and deliberation can be terminated at the option of the majority? Or would it become a chaotic environment in which a temporary majority could change precedents any time it wanted to?

Another concern would be consequences for other rules of the Senate. Because it is so difficult to change the Senate's rules, they have remained fairly stable, and therefore the basic structure of Senate procedure has remained fairly constant. If, however, a change to the rules were accomplished by a majority vote, nothing would prevent other changes to the rules from being proposed, which could then conceivably be accomplished with a majority vote to end debate on them as well.

In addition, even if a "constitutional" or "nuclear" option were used, opponents still might be able to delay a final vote on whatever measure or matter was pending. Existing Senate precedents would seem to allow an endless series of amendments to a proposed rules change, even if no debate were allowed. The Senate routinely does this each year when it considers the annual budget resolution. Therefore, it is unclear that the "constitutional" or "nuclear" option by itself could bring about a vote on a

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[22] Davis, "GOP acts to break deadlock on judges."

[23] Davis, "GOP acts to break deadlock on judges."

[24] Geoff Earle, "Nuclear Option Out," *The Hill*, July 29, 2003, p. 1.

rule change. Further, even if the use of this option resulted in a lower cloture vote threshold, other portions of the rule would presumably remain untouched, in which case the post-cloture process still would provide delaying possibilities for opponents.

Additional questions arise if the Senate used an opening day gambit. Would successful action in this form change the understanding of the Senate as a continuing body? Would this change mean that the Senate would have to elect its officers and adopt its rules at the start of each Congress?

Alternative Proposal

One potential alternative would be to modify other Senate practices (instead of changing the cloture rule) or to enforce existing Senate rules more stringently. A number of possible approaches could be used to bring debate to a close absent any formal change to Rule XXII.

For example, the Two-Speech Rule does not apply to executive business in the same way it does to legislative business. Limiting senators to two speeches during the consideration of any nomination, regardless of how many session days the nomination was pending, would bring about a vote on a nomination without the need to invoke cloture, or to consider amendments to the cloture rule.

Another alternative might be to require Senators who wish to filibuster a measure or matter (such as a nomination) to hold the floor and talk to maintain their filibuster. In the modern Senate, such displays are rare. Instead, the Senate routinely permits Senators to "suggest the absence of a quorum" as a means to delay action without the need to debate. The Senate, by precedent, has ruled such quorum calls dilatory, after cloture. By precedent, the Senate could make such quorum calls dilatory at any time, if no substantive business had intervened since a quorum had been previously established.

The two-track system allows other business to come before the Senate even as the pending business remains unresolved. As a result, time on the Senate floor is more often used to conduct business on which there has already been agreement, rather than to debate or amend measures, or filibuster them. Removing a contentious measure from active consideration allows the threat of a filibuster to halt a measure, instead of requiring opposition Senators to openly debate the measure and explain their concerns publicly.

The Senate no longer relies on extended continuous session to put pressure on opposition Senators. Such late-night or multiple day sessions were common until a generation ago. The disuse of a traditionally effective strategy to end debate or to encourage policy compromise has led, in the opinion of some, to the consideration of ill-advised rule changes when less drastic changes to Senate tradition could achieve the desired result.