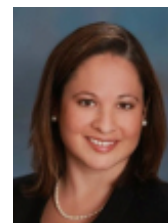


Nuclear fallout: limiting the filibuster has led to more delays

This week is the two-year anniversary of the introduction of the 'nuclear option' into the US Senate by the then Majority Leader, Harry Reid. [John D. Rackey](#) and [Lauren C. Bell](#) reflect on the elimination of the filibuster for federal judicial nominations, writing that divided partisan control of the Senate and White House has made the former less efficient. Since the Republican Party retook the Senate in January, the number of civilian nominees has hit a five-year low, and nominees have had to wait much longer for confirmation. Gridlock in the chamber more generally has also increased.



News that Republican Senate Majority Leader Mitch McConnell (R-KY) has appointed a task force to study potential rules changes in the Senate—coupled with the current [calls from junior Republicans in the chamber to reduce the 60-vote cloture threshold](#) on motions to proceed to Appropriations bills—is a little bit of déjà-vu all over again. Almost exactly two years ago, on November 21, 2013 the then US Senate Majority Leader Harry Reid went to the floor of the Senate and exploited the Senate's rules of procedure to effectively eliminate filibusters on presidential nominations to the federal judiciary by creating a simple-majority cloture threshold on nominations to the federal courts below the US Supreme Court. The procedural change, and the method required to institute it, were so controversial that they had long been referred to as the “nuclear option.”



Reaction from the Republican minority to Reid's parliamentary maneuver was swift, and harshly critical. Minority Leader Mitch McConnell took to the Senate floor to declare that the Democrats would rue the day they changed the rules. Outside the Senate, however, many journalists and congressional watchdogs suggested that Reid's action was long overdue; they declared that Senate action on judicial nominations was likely to ramp up, now that the Democrats could prevent Republicans from filibustering President Obama's nominees.

Few pundits or scholars considered what the broader impact of the rules change might be. While the minority could no longer delay indefinitely the confirmation of a judicial nominee, the change to the rules took away any incentive the minority had to cooperate with the majority on judicial confirmations—or, really, on any other item of pending business. And so while President Obama's nominees began to be confirmed, *Politico* noted that each judicial nomination had begun to require “an hour or more” of floor time. Often it was much more. Furthermore, the Senate's legislative business ground to a halt. The delays in processing nominations began to anger Senator Reid and other Democratic senators.

In mid-June 2014, Maryland Democratic Senator Ben Cardin's Twitter account posted several tweets [lambasting Senate Republicans over their obstructionism](#). On July 7, 2014, almost eight months after invoking the nuclear option, then-Majority Leader Reid tweeted: “Senate Republicans WASTED almost 10 full days to ‘debate’ President's nominees.” The tweet included a graphic to suggest that by forcing cloture votes and using up permitted post-cloture debate time, Republicans had wasted 236 hours of floor time. What Reid didn't say was that Republicans were insisting on consuming every bit of time available in retaliation for Reid's own nuclear act. Senator McConnell's prediction that Democrats would rue the day they changed the rules seemed to be coming true. As [Sarah Binder has noted](#), in the post-nuclear Senate: “[W]e are left with a Senate unable to deliberate over the big issues of the day, let alone the small ones.”

Our analysis confirms that in the two years since the Senate went nuclear, the number of civilian nominations that were confirmed did increase—by more than twice its 2013 rate—during the period of time (through 2014) that the Senate continued to be controlled by Democrats. And, the number of those nominees that were subject to filibuster fell from 3.3 percent in the months leading up to Reid's nuclear rules change, to just 0.4 percent after. But since Republicans retook control of the Senate in January 2015, the number of civilian nominations confirmed has fallen to

its lowest level, by far, in the last five years. Of course, some of the explanation is the change in party control; it is not a surprise that Republicans are less inclined to move President Obama's nominations forward. Still, only nine judicial nominations have been confirmed in the 114th Congress, compared with 116 judicial nominations that were confirmed during the 113th Congress—38 of which took place prior to the rules change. All nine confirmed this year were brought to the floor using unanimous consent agreements and did not require a cloture motion to ripen and be approved in order to proceed. By comparison, during the post-nuclear 113th Congress Majority Leader Reid filed a cloture petition along with calling up each judicial nomination.

Table I – Pre- and Post-Nuclear Productivity and Obstruction

Year	Measures Passed	Measures Filibustered (%)	Civilian Nominations Confirmed	Civilian Nominations Filibustered (%)
2011	402	7 (1.7)	285	5 (1.8)
2012	479	7 (1.5)	294	1 (.3)
2013	Pre- 325 Post- 31	Pre- 7 (2.2) Post- 0	Pre-213 Post- 16	Pre- 7 (3.3) Post-0
2014	501	14 (2.8)	474	2 (.4)
2015	358*	11 (3.1)	115*	0 (0)

***As of Oct. 31, 2015**

Beyond using filibusters to obstruct on matters of pending legislative business, the delays that occurred given Reid's extensive use of the cloture procedure actually led to an increase in the amount of time that nominees waited for confirmation in the post-nuclear 113th Congress. Prior to the rules change, the average number of days a nominee waited for confirmation once his or her nomination was placed on the Senate's executive calendar was 9.7 days. That number increased to 10.4 days following the rules change. But whereas the longest a nominee waited for confirmation prior to the change in rules was 39 days, in the post-nuclear 113th Congress, the longest a nominee waited was 56 days. These data suggest that Republicans were cooperating less in the post-nuclear Senate and dragging the process out longer, simply because they had no incentives to cooperate with Democrats in moving nominees forward.

That invoking the nuclear option did not improve Senate efficiency is not surprising. Every time the Senate has made it easier to end debate, delay and gridlock within the chamber has increased. Throughout the nineteenth century, when there was virtually no way to force an end to debate, senators typically self-limited with regard to their obstructionist behaviors. But, over time, as the Senate developed procedures intended to make it easier to cut off debate, legislative gridlock ultimately increased. Indeed, the number of filibusters in the Senate exploded in the early 1970s, around the time that double-tracking (allowing other legislation to be called up even while a bill was being filibustered) was instituted and the cloture threshold was lowered to 60 senators from 67. By making it easier to overcome obstructive tactics, senators had less to lose by engaging in them.

As incentives to cooperate have declined, many of the internal chamber norms that once facilitated legislative work have gone by the wayside. In his 1960 landmark study, *U.S. Senators and their World*, Donald Matthews noted that

the Senate was governed in large part through norms and folkways that functioned as informal rules. One of the most important Senate folkways Matthews identified is *reciprocity*, and while much has changed in the Senate since Matthews' writing, this norm remains significant to day-to-day operations of the Senate. Reciprocity, whether in the form of logrolling (vote trading) or providing help to fellow senators, means that senators can usually expect assistance from their colleagues when they need it. But it also means that senators antagonize their colleagues at their own peril. A breakdown in others of Matthews' norms (for example, comity and apprenticeship) has heightened the impact of the reciprocity norm, with senators believing that they are entitled to exact revenge for any perceived slight that has occurred.

In short, the Reid rules change had the predictable effect of reducing filibusters on nominations and increasing the number of President Obama's nominees that were confirmed —indeed, it neutralized even the threat of a filibuster, since a simple majority would be able to invoke cloture. But the change increased the wait for confirmation for many nominees, and it raised Republicans' ire. This anger spilled into the legislative process, where during the second session of the 113th Congress, Republicans increased the number of filibusters they waged against pending legislation. Once Republicans regained control of the Senate in January 2015, Democrats began to filibuster many legislative proposals they deemed too conservative, while Republican presidential hopefuls Ted Cruz (R-TX) and Rand Paul (R-KY) ramped up their obstructive behavior on legislation relating to national security and defense spending. Meanwhile, angry House and Senate Republicans called upon the Senate to reduce the cloture threshold to 51 votes so that a motion to disapprove of the Obama Administration's deal with Iran concerning nuclear weapons could overcome a [Democratic filibuster](#).

At the end of the first session of the 114th Congress it is clear that Reid's 2013 rules change quite likely made no lasting difference in the efficiency of the confirmation process; rather, any improvement in the process was vitiated by divided partisan control of the Senate and White House following the 2014 congressional midterm elections.

Indeed, it may be that the most significant consequence of the use of the nuclear option in 2013 is increased delay and gridlock in the Senate. Changing the rules can work in the short term, breaking the logjam on a particular item of pending business, for example, but in the long run, such changes—particularly when they are forced by a partisan majority—engender hostility and retaliation. If Republicans expand such debate-limiting techniques along the lines they are considering, especially if Democrats are left out of the discussions, history would predict that gridlock will continue to increase.

Featured [image credit](#): [Martha Soukup](#) (Flickr, [CC-BY-2.0](#))

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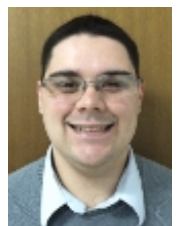
Note: This article gives the views of the author, and not the position of USAPP – American Politics and Policy, nor the London School of Economics.

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