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BACKGROUNDER

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A Rules-Based Strategy for Overcoming Minority Obstruction of a Supreme Court Nomination

James I. Wallner, PhD, and Ed Corrigan

Abstract

The current Standing Rules of the Senate empower a majority of the institution's members to overcome a filibuster and confirm a nominee to serve on the U.S. Supreme Court. Specifically, persistent minority obstruction may be curtailed by strictly enforcing Rule XIX (the two-speech rule) on the Senate floor. Doing so simply requires the Senate to remain in the same legislative day until the filibustering members have exhausted their ability to speak on the nominee in question. This is the point at which those members who are committed to blocking that nominee's confirmation have given the two floor speeches allotted to them under Rule XIX. Once this point is reached, the Presiding Officer may put the question (call for a vote) on confirmation. The support of a simple majority of the members present and voting is sufficient for confirmation.

On November 21, 2013, Senate Democrats used the so-called nuclear option to end a Republican filibuster of one of President Barack Obama's judicial nominees.[1] Using the nuclear option enabled the Democratic majority to overcome minority obstruction by unilaterally lowering the required number of votes to invoke cloture (end debate) on all executive and almost all judicial nominations to a simple majority.[2] This action clearly demonstrated the ability of a Senate majority to determine the rules of procedure in a legislative body that traditionally has been considered a supermajoritarian institution.

But the nuclear option did not affect the ability of Senate minorities to filibuster Supreme Court nominations. Debate on such nominations can be limited only by an affirmative vote of a supermajority

Key Points

- The Senate should employ the two-speech rule instead of the "nuclear option" to overcome a filibuster of a nominee to serve on the Supreme Court.
- A rules-based strategy to limit minority obstruction in this context does not jeopardize the legislative filibuster or unduly empower the majority to limit the rights of individual Senators more broadly.
- The Senate's current rules empower a majority to overcome a filibuster of a Supreme Court nomination.
- Rule XIX prohibits Senators from giving more than two speeches on any one question during the same legislative day. Once a Senator has given two speeches, he or she may not speak again.
- The Senate votes when there are no members remaining on the floor who both wish to and are allowed to speak.
- Strictly enforcing Rule XIX while keeping the Senate in the same legislative day limits the amount of time Senators can filibuster a nominee.

This paper, in its entirety, can be found at **http://report.heritage.org/bg3187**

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214 Massachusetts Avenue, NE
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of the Senate's members. As a result, a determined majority confronted with persistent obstruction of a President's pick to serve on the Supreme Court may contemplate employing the nuclear option again in the future to eliminate the minority's ability to filibuster nominations altogether.

While such action would certainly be consistent with the November 2013 nuclear option, entirely eliminating the judicial filibuster in this way could have significant consequences for the ability of Senators to filibuster legislation. Notwithstanding some important differences between judicial and legislative filibusters, successful utilization of the nuclear option in this scenario is likely to affect both in the same way. As the ability of a majority to change the Senate's Standing Rules at will becomes institutionalized, the remaining supermajoritarian provisions that periodically frustrate majorities are placed in greater jeopardy.

Put simply, the risk that the legislative filibuster will be eliminated through the nuclear option grows concurrently with the bipartisan ambivalence of Senate majorities and minorities to the use of the nuclear option to eliminate filibusters for nominations altogether. As a consequence, both the normative barriers defending the legislative filibuster and the entire rules regime represented by the Standing Rules more broadly will be undermined gradually as future majorities are frustrated by those rules.

Given this, it is important to note that the nuclear option is not the only way Senate majorities can overcome minority obstruction. The current Standing Rules of the Senate empower a majority of the institution's members to overcome a filibuster and confirm a nominee to the U.S. Supreme Court without utilizing the nuclear option and, therefore, without jeopardizing the legislative filibuster.

Specifically, minority obstruction may be curtailed by strictly enforcing Rule XIX (the two-speech rule) on the Senate floor.[3] Doing so simply requires the Senate to remain in the same legislative day until the filibustering members have exhausted their ability to speak on the nominee in question. This is the point at which those members who are committed to blocking that nominee's confirmation have given the two floor speeches allotted to them under Rule XIX. Once this point is reached, the Presiding Officer may put the question (call for a vote) on confirmation. The support of a simple majority of the members present and voting is sufficient for confirmation.

Overview of Senate Rules and Practices

The overall structure of Senate procedure is derived from five primary sources: the Constitution, the Standing Rules of the Senate, standing orders, statutory rules passed by Congress, and informal precedents.[4]

Constitutional Basis. The Constitution contains a few provisions regarding the internal operation of the Senate. For example:

- The Senate Composition Clause sets membership qualifications, specifies term lengths, and gives each state two Senators who vote per capita;[5]
- Article I, section 3, clauses 4 and 5 designate the Vice President as President of the Senate (the Presiding Officer or Chair) and authorize the Senate to choose a President Pro Tempore to serve as Presiding Officer in the Vice President's absence;[6]
- The Presentment Clause establishes a process for considering presidential veto messages;[7] and

1. The nominee was Patricia Ann Millett, nominated to be United States Circuit Judge for the District of Columbia Circuit. Millett was eventually confirmed on December 10, 2013, by a vote of 56 to 38. The nuclear option is defined in this report as ignoring, circumventing, or changing the Standing Rules of the Senate with a simple majority vote in direct violation of those rules.
2. The minimum number of Senators required to end debate and confirm nominees (the Supreme Court excepted) under the new precedent is 26 (a majority of a quorum, which is 51 members). *See* Cong. Rec. S8417 (2013) (Statement of Sen. Reid).
3. "Rule XIX: Debate," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 14.
4. While it is the interaction of each of these component parts that forms the procedural architecture within which the decision-making process unfolds in the Senate on a daily basis, an analysis of standing orders and statutory rules is beyond the scope of this report.
5. U.S. Const. art. I, § 3, cl. 1, 3.
6. U.S. Const. art. I, § 3, cl. 4–5.
7. U.S. Const. art. I, § 7, cl. 2.

- The Appointments Clause stipulates that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[8]

Of the constitutional provisions affecting the internal operation of the Senate, the Rules of Proceedings Clause is the most important because it gives the institution plenary power over its rules of procedure. The clause stipulates, "Each House [of Congress] may determine the Rules of its Proceedings."[9] With this authority, the Senate establishes both the formal Standing Rules and informal precedents that together govern its proceedings.

Standing Rules. There are 44 Standing Rules of the Senate that govern everything from noncontroversial issues like the oath of office (Rule III) to more controversial issues like the cloture process to end debate (Rule XXII). For the most part, the Senate's Standing Rules are very general and do not address circumstances that may arise in specific parliamentary situations. Illustrative of this is the fact that the institution's official rule book totals only 70 pages in length.

These Standing Rules remain in effect from one Congress to the next according to the concept that the Senate is a continuing body. Rule V stipulates, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[10] To that end, Rule XXII requires an affirmative vote of "three-fifths of the senators duly chosen and sworn" to invoke cloture, or end debate, on any "measure, motion, or other matter pending before the Senate...except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the senators present and voting...."[11] It is thus difficult to change the Senate's rules because the threshold to invoke cloture on proposals that would do so is higher (two-thirds, typically 67) than the threshold required to end debate on other measures (three-fifths, typically 60).

Today, Rule XXII's supermajoritarian requirements for ending debate are generally viewed as making minority obstruction possible. Senate minorities can use the right to filibuster, or debate, Supreme Court nominations to effectively prevent their confirmation. The filibuster thus gives Senate minorities significant leverage vis-à-vis the majority because it takes more votes to end a filibuster (three-fifths, typically 60) than it does to confirm a nominee (a simple majority, typically 51). As a consequence, the minority has often been able to use the filibuster to prevent the majority from confirming nominees over its objections. Senate majorities have constituted a supermajority of the institution's membership only rarely and have thus been unable to muster the required votes to invoke cloture without some degree of minority cooperation.

Precedents. The Senate operates on a daily basis largely according to informal rules established pursuant to a collection of precedents. According to the late Senator Robert C. Byrd (D–WV), "Precedents reflect the application of the Constitution, statutes, the Senate rules, and common sense reasoning to specific past parliamentary situations."[12] Former Senate Parliamentarian Floyd M. Riddick argued that precedents embody the practices of the Senate pursuant to the Constitution, its Standing Rules, and any relevant rule-making statutes. These practices serve to "fill in the gaps" contained in those procedural authorities when they fail to address specific parliamentary situations.[13] In this sense, the impact of precedents on Senate procedures is similar to that of judicial decisions in case law. Both have the force of formal laws and are thus binding in the same way on future action.

8. U.S. Const. art. II, § 2, cl. 2.
9. U.S. Const. art. I, § 5, cl. 2.
10. "Rule V: Suspension and Amendment of the Rules," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), at 4.
11. "Rule XXII: Precedence of Motions," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), at 16.
12. Robert C. Byrd, *The Senate, 1789–1989: Addresses on the History of the United States Senate* (Washington: Government Printing Office, 1991), 52.
13. Floyd M. Riddick, Senate Parliamentarian, oral history interviews, Senate Historical Office, Washington, DC, *available at* http://www.senate.gov/artandhistory/history/oral_history/Floyd_M_Riddick.htm.

The first collection of Senate precedents, *A Compilation of Questions of Order and Decisions Thereon,* was prepared in 1881 by Chief Clerk of the Senate William J. McDonald. The compilation was organized alphabetically by topic and briefly covered the procedures governing issues such as offering amendments, floor debate, and voting. It was a short 25 pages in length. Another compilation, *Precedents Related to the Privileges of the Senate,* followed in 1893. This 350-page volume was compiled by Clerk of the Senate Committee on Privileges and Elections George P. Ferber. Ferber's compilation was augmented in 1894 by Henry H. Smith, Clerk of the Special Committee to Investigate Attempts at Bribery, Etc. This expanded collection totaled 975 pages and was titled *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States.*

The first collection of precedents that resembled the volume used in the contemporary Senate was published in 1908 by Chief Senate Clerk Henry H. Gilfry. Gilfry's compilation, *Precedents: Decisions on Points of Order with Phraseology in the United States Senate,* was updated in 1914, 1915, and 1919. These volumes averaged around 700 pages in length. Like McDonald's earlier compilation, Gilfry's was organized alphabetically and served as a useful reference work for Senators.

Senate Parliamentarian Charles L. Watkins and Assistant Parliamentarian Floyd M. Riddick prepared the most recent compilation of Senate precedents in 1954. Their collection, *Senate Procedure: Precedents and Practice,* was updated in 1964, 1974, and 1981. Its most recent edition, *Riddick's Senate Procedure,* was updated in 1992 by Alan Frumin and is over 1,600 pages in length. Riddick himself estimated that this lengthy tome was based on over a million precedents that govern the legislative process in the Senate today.[14]

The Senate may curtail minority filibusters by creating a new precedent that is inconsistent with the Senate's Standing Rules. Using precedent in this manner is referred to here as the nuclear option because it enables a simple majority of the Senate to act in explicit violation of the Standing Rules in order to pass legislation and confirm nominations unencumbered by the minority's opposition.

Precedents can be created by one of three methods in the Senate.

- Precedents can be established pursuant to rulings of the Presiding Officer, or Chair, on points of order against violations of the Senate's rules. These rules are not self-enforcing, and violations that do not elicit points of order do not necessarily create new precedents.

  The abortive attempt by Senate Republicans to go nuclear in 2005 to change the institution's Standing Rules to end the minority's ability to filibuster judicial nominations provides an illustrative example of what establishing a precedent pursuant to a ruling of the Presiding Officer would look like. In that particular case, a Senator would have made a point of order that any further debate on a judicial nomination was dilatory and moved that a final vote should be taken on the underlying question: whether or not the nominee should be confirmed. Despite the fact that such a point of order is explicitly not supported by the Standing Rules (specifically, Rule XXII), the Presiding Officer would sustain it, and a simple majority of the Senate would then vote to table any appeal of the Chair's ruling. Such action would have established a new precedent in direct violation of Rule XXII that debate on a judicial nomination can be brought to a close by a simple majority vote.

- A precedent can be created pursuant to a vote of the full Senate on an appeal of the Presiding Officer's ruling on a point of order. Senate Democrats successfully employed this method in 2013 when they used the nuclear option to reduce the threshold for invoking cloture on all nominations, other than for the Supreme Court, from three-fifths of Senators duly chosen and sworn to a simple majority. In so doing, they circumvented the requirement of Rule XXII that debate on such nominations can be brought to a close only by a three-fifths vote. They also circumvented the rule's requirement that debate on proposals to change those rules can be brought

14. *See* James I. Wallner, "Parliamentary Rule: The U.S. Senate Parliamentarian and Institutional Constraints on Legislator Behavior," *The Journal of Legislative Studies,* Vol. 20(3) (2014), 380–405.

to a close only by a vote of two-thirds of Senators present and voting.[15]

- Responses by the Presiding Officer to parliamentary inquiries may also create new precedents.[16] While such responses are generally treated as non-binding by the Senate, they do gain precedential value over time to the extent that parliamentary inquiries provide future Senators with insight into how members understood past parliamentary practice.

In sum, the Senate establishes its internal decision-making procedures pursuant to the Rules of Proceeding Clause of the Constitution (Article I, section 5). Precedents provide structure to the chamber's daily deliberations. They are more detailed and voluminous than the institution's Standing Rules. A precedent can be created or changed by a simple majority vote, whereas a supermajority is effectively required to create or change new Standing Rules.[17] As a consequence, Senate majorities have the technical ability to overcome the constraints imposed by the institution's Standing Rules simply by going nuclear so long as the new precedent created does not violate other constitutional provisions.[18]

The Two-Speech Rule

With the exception of the cloture process outlined in Rule XXII, there is no existing Standing Rule to forcibly limit debate and vote on the pending question over the objections of a Senate minority. Under the institution's Standing Rules, the Presiding Officer may put the question to a vote only when no Senator seeks recognition, and the institution's precedents clearly state that "there is no motion in the Senate to bring a matter to a vote. In the absence of either cloture or a statutory limitation of debate or a unanimous consent agreement, debate may continue indefinitely if there is a Senator or group of Senators who wish to exercise the right of debate."[19]

But this does not then mean that the nuclear option is the only way Senate majorities can overcome a filibuster of a Supreme Court nomination. Alternatively, a majority may use the existing rules to shorten the amount of time Senators are able to filibuster by limiting the number of speeches a member may give on the Senate floor on any given question. Specifically, paragraph 1(a) of Rule XIX of the Standing Rules of the Senate states, "No Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate."[20] Paragraph 4 of the rule stipulates:

> If any Senator, in speaking or otherwise, in the opinion of the Presiding Officer transgresses the rules of the Senate the Presiding Officer shall, either on his own motion or at the request of any other Senator, call him to order; and when a Senator shall be called to order he shall take his seat, and may not proceed without leave of the Senate.[21]

While the rule permits any member so directed to appeal the ruling of the Chair, that appeal can be tabled without debate by a simple majority of the members present and voting.

15. Majority Leader Harry Reid (D–NV) asserted on the Senate floor "that the vote on cloture under Rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote." The Presiding Officer ruled against Reid's point of order. "Under the rules, the point of order is not sustained." *See* Cong. Rec. S8417 (2013) (Statement of Sen. Reid). Reid subsequently appealed the ruling of the Chair. The vote was on whether the decision of the Chair shall stand as the judgment of the Senate. The Senate voted 48 to 52 to overturn the decision of the Chair, and thus in support of Reid's appeal. Three Democrats joined every Republican in voting to sustain the ruling of the Chair. They were Carl Levin (D–MI); Joe Manchin (D–WV); and Mark Pryor (D–AR).
16. The word *see* in *Riddick's Senate Procedure* designates precedents resulting from parliamentary inquiries.
17. Technically, a simple majority is required to approve any new rule in the Senate. However, the controversial nature of rules reform coupled with the ability to filibuster such proposals creates in practice a supermajority threshold to approve any new rule.
18. *United States v. Ballin*, 144 U.S. 1 (1892). Writing for the Court, Justice David Brewer acknowledged that while "the Constitution empowers each house to determine its rules of proceedings," the House and Senate could not by their rules "ignore constitutional restraints or violate fundamental rights."
19. *Riddick's Senate Procedure*, at 717.
20. "Rule XIX: Debate," at 14.
21. *Id.*

The utility of the two-speech rule in curtailing filibusters ultimately depends on the technical term "legislative day." It would not be particularly helpful in limiting such obstruction if a legislative day were synonymous with the concept of a calendar day. If that were the case, a minority could easily sustain a filibuster in any given 24-hour period because the allotment of speeches its members receive under the two-speech rule is refreshed at the beginning of each new calendar day.

Significantly, "legislative day" and "calendar day" are not synonymous terms; they have two very different meanings. Senate precedents define a legislative day as lasting "from the beginning of a day's session following an adjournment until another adjournment."[22] A legislative day ends only when the Senate adjourns. It "is not affected in any way by a recess of the Senate."[23] Because a simple majority of the Senate decides when to adjourn and when to break temporarily for a recess, a legislative day has no predetermined length. As a consequence, a legislative day may last much longer than the 24 hours that define a calendar day. One legislative day in 1922 lasted for 105 calendar days, running from April 20 until August 2. In 1980, the Senate remained in the same legislative day for 162 calendar days, from January 3 until June 12.[24]

An objection might be raised that Rule XIX's prohibition on members giving more than two speeches in the same legislative day does not apply to debate on a Supreme Court nomination because the Senate considers presidential nominations in executive session rather than legislative session.[25] The basis of this objection is that according to *Riddick's Senate Procedure*, "the word 'day,' as applied to executive sessions, means a calendar and not a legislative day."[26]

Yet a closer look at the actual context of the rulings on which this particular precedent is based reveals that it does not concern the application of the two-speech rule to the regulation of debate during the Senate's consideration of nominations in executive session. Instead, the cases underpinning the precedent stipulate that the word "day" in the context of nominations awaiting Senate consideration means calendar day and not legislative day.[27] The Senate's decision in each case clarified that day means a calendar day when calculating the period of time that must transpire before a nomination can be considered on the Senate floor. In one case, the Chair stated that "the Parliamentarian is correct when he says that, as applied to an executive session, each calendar day, regardless of legislative days, is a 'day' within the purview of the rule requiring a nomination to lay over 1 day."[28] In other words, the precedent does not speak to the prohibition of members giving more than two speeches in the same legislative day in Rule XIX when the Senate is considering nominations in executive session.

The Senate has not recorded any precedents that would apply the debate restrictions in paragraph 1(a) of Rule XIX differently in executive and legislative sessions. There are thus no documented precedents that explicitly clarify that the term "legislative day" as used in paragraph 1(a) of Rule XIX does not apply to the terms of debate when the Senate is considering nominations in executive session.

In addition to the clear text of the rule, there is evidence that the two-speech rule has long been understood to apply to a legislative day in both executive and legislative sessions. For example, Mike Mansfield (D–MT) understood the two-speech rule to apply to the Senate's consideration of judicial nominations in executive session. During the weeklong debate on the nomination of Abe Fortas to serve as Chief Justice on the Supreme Court in 1968, the Senate remained in the same legislative day by recessing instead of adjourning at the end of each calendar day.[29] When measured in calendar days, the debate transpired over a period lasting from September 24 until October 1.

22. *Riddick's Senate Procedure*, at 714.
23. *Id.*
24. *Id.*, at 715.
25. The Senate conducts its legislative business in legislative session and its executive business (treaties and presidential nominations) in executive session. *See Riddick's Senate Procedure*, 832–842, 907–908.
26. *Id.*, at 714.
27. *See* June 16, 1938, 75-3, *Record*, pp. 9514–15, 9522; Aug. 21, 1937, 71-1, *Record*, pp. 9602–03.
28. Cong. Rec. S9515 (1938) (Statement of the Vice President).
29. The entire debate occurred on the legislative day of September 24.

Considering the Fortas nomination in this manner provided an opportunity for the majority to use the two-speech rule to overcome a minority filibuster of the nomination. However, the majority at the time decided not to use the rule in this way. Then-Majority Leader Mansfield reassured his colleagues that it was not his intention "to invoke the two speech rule, or in any way to hinder the functioning of the Senate as a responsible arm of the government." Instead, he merely hoped that there would "be no long speeches."[30]

Members understood that the two-speech rule also applied to the Senate's consideration of the nomination of Stephen Breyer to serve on the Court of Appeals for the First Circuit. As with the Fortas nomination, the entire debate on the Breyer nomination occurred on the same legislative day.[31] When measured in calendar days, the debate transpired over a period lasting from December 2 until December 9.

During the debate, Edward M. Kennedy (D–MA) and Gordon J. Humphrey (R–NH) propounded unanimous consent requests on the Senate floor that their remarks not count against them for the purposes of enforcing the two-speech rule. While it could be argued that both Kennedy and Humphrey were concerned that a second speech would preclude them from giving further remarks later during that same calendar day, Humphrey propounded an additional unanimous consent request that clarified his understanding regarding the application of the two-speech rule in executive session. Specifically, he was worried about being able to speak again in the same legislative day instead of the same calendar day, stating, "I ask unanimous consent that my next speech be considered a continuation of the first speech on the legislative day."[32]

It is important to note that even granting the calendar day–legislative day distinction does not preclude a majority from limiting minority obstruction by using the two-speech rule. The Senate can legitimately change the precedents governing the application of Rule XIX in the specific instance of a Supreme Court nomination without employing the nuclear option. This is because the Senate's precedents can be changed in a manner consistent with its Standing Rules by a simple majority vote as long as doing so does not change, circumvent, contradict, or otherwise ignore the specific provisions of those rules.

Adjudicating precedent in this way is not inherently destructive of the Senate's Standing Rules. Historically, the institution's members challenged precedent with much greater frequency than in the contemporary environment. For example, the Senate conducted 238 recorded votes in relation to 213 appeals of the Chairs' rulings between 1965 and 1986. These votes represent 2.4 percent of all recorded votes during this 22-year period. During seven of the 11 Congresses observed, a question of order was adjudicated by a recorded vote for every 5.9 amendments that the Senate adopted by recorded vote.[33]

On average, a Senator appealed the ruling of the Chair and requested a recorded vote at a rate of one for every 113 hours or one for every 17 days of session. The Senate thus regularly decided questions of order on an appeal after the Presiding Officer ruled. During this period, the Senate adjudicated 127 appeals by a recorded vote. The decision of the Chair was upheld 82.7 percent of the time. Of these 127 appeals, 86 challenged rulings that decided whether or not particular amendments were in order. The Senate upheld the decision of the Chair 81.4 percent of the time. Put another way, the Senate has rejected the ruling of the Chair and instead decided that amendments should be allowed, contrary to past precedent, approximately 20 percent of the time from the 89th through the 99th Congresses.[34]

A Confirmation Strategy

The two-speech rule empowers a Senate majority to confirm a Supreme Court nominee in a timely and orderly manner without violating the Standing Rules by employing the nuclear option. In short, it would allow the Senate to confirm nominees on a simple majority vote without first having to invoke cloture to end

30. Cong. Rec. S28113 (1968) (Statement of Sen. Mansfield).
31. The entire debate occurred on the legislative day of November 20.
32. Cong. Rec. S31456 (1980) (Statement of Sen. Humphrey).
33. Stanley Bach, "The Appeal of Order: The Senate's Compliance with its Legislative Rules," Paper presented at the 1989 *Annual Meeting of the Midwest Political Science Association* (April 13–15, 1989), 14; *see also* Stanley Bach, "Points of Order and Appeals in the Senate," *Congressional Research Service* (January 27, 1989), 1–90.
34. *Id.*

debate. It does so by increasing the costs (both physical and political) on individual Senators for obstructing a nominee's confirmation. Strictly enforcing the rule forces members to bear the burden of blocking specific nominees and increases the salience of minority obstruction for the American people. This might ultimately make sustaining a filibuster of a Supreme Court nominee even more costly for particular Senators.

First, the majority would move to proceed to consideration of a nominee. Motions to proceed to executive session to consider a particular nomination are not debatable.[35] As a consequence, Senate consideration of a Supreme Court nomination can begin as soon as a majority is ready. Unlike with legislation, the minority cannot filibuster the motion to proceed to the nominee's consideration.

The majority would then keep the Senate in the same legislative day by recessing instead of adjourning and would strictly enforce the two-speech rule on any filibustering Senators. Its members could also refrain from speaking on the floor in order to put added pressure on the minority to sustain the filibuster.

The minority could make procedural motions in an effort to increase the burden on the majority for keeping the Senate in session. For example, if a filibustering Senator successfully moved to adjourn, a new legislative day would be created, and each member's allotment of two speeches under Rule XIX would be refreshed. Yet making procedural motions would terminate the filibustering Senator's speech, thus hastening the moment at which the minority would have exhausted its ability to delay confirmation by filibustering via debate. While the Senate has determined in the past that some motions can be made even when a Senator has exhausted both speeches, a majority can easily dispose of them using a non-debatable motion to table.[36]

The minority may also suggest the absence of a quorum in order to gain a temporary reprieve from speaking. However, the majority can prevent the filibustering Senators from delaying a vote on confirmation by immediately producing a quorum.

The majority may also enforce the requirement that debate be germane to the question before the Senate at the beginning of each day. Specifically, all debate must be germane to the specific question pending before the Senate for the first three hours of session after the Senate convenes.[37] Enforcing the requirement thus forces filibustering Senators to debate the nominee under consideration. They would be prohibited from using their floor time during the first three hours of session to discuss unrelated issues. On a point of order, the Chair may call the filibustering Senator to order and force the member to take his or her seat.[38] At that point, the member will have thus used one of his or her two speeches. While the Chair's ruling is subject to appeal, the appeal can be tabled by a simple majority vote.

Finally, the majority can further shorten the time that filibustering Senators may delay confirmation by increasing the burden associated with obstruction by using an additional tool provided in the existing Standing Rules in conjunction with the two-speech rule: The majority may file cloture on the contested nomination at the end of each day. Doing so guarantees that a minimum of two speeches will be used each calendar day. Specifically, the filibustering Senator is interrupted when cloture ripens one hour after the Senate convenes.[39] This tactic effectively limits the first speech of the day to one hour and requires filibustering Senators to use another speech after the cloture vote. Filing cloture each day thus reduces the time needed for a strategy based on the two-speech rule to work.

35. *See Riddick's Senate Procedure*, at 941–942.
36. "The two speech rule requires not a mechanical test, but the application of the rule of reason." *Riddick's Senate Procedure*, at 782–783. Precedents define floor actions that do not constitute speeches for the purposes of the two-speech rule. Specifically, the Senate determined by vote in 1986 that the following procedural motions and requests do not constitute speeches for the purposes of enforcing the two-speech rule: parliamentary inquiries, appeals from rulings of the Chair, points of order, suggesting the absence of a quorum, withdrawal of appeals, requests for the yeas and nays, requests for a division vote, requests for the reading of amendments, and requests for division of amendments.
37. Paragraph 1(b) of Rule XIX states, "At the conclusion of the morning hour at the beginning of a new legislative day or after the unfinished business or any pending business has first been laid before the Senate on any calendar day, and until after the duration of three hours of actual session after such business is laid down except as determined to the contrary by unanimous consent or on motion without debate, all debate shall be germane and confined to the specific question then pending before the Senate." "Rule XIX: Debate," at 14.
38. *Id.*
39. According to precedent, "When the time arrives for a cloture vote, a Senator who has the floor will lose the floor and that Senator is not entitled to the floor after the cloture vote." *Riddick's Senate Procedure*, at 329.

For example, assume that 10 Senators are willing to filibuster the nominee and that each Senator is physically capable of giving two five-hour speeches. The time needed to overcome the filibuster in this example totals 100 hours (10 Senators at 10 hours each). Now assume that 10 Senators are willing to filibuster the motion to proceed, that each Senator is capable of giving two five-hour speeches, and that cloture is filed on the motion at the end of each day. The time now needed to overcome the filibuster is 60 hours (10 Senators at six hours each).

Increasing the Costs of Obstruction

Strictly enforcing the two-speech rule is likely to overcome minority obstruction before every member uses the maximum number of speeches allotted under the rules. This is because continuing to filibuster in this context imposes significant costs on rank-and-file members of the minority. The strategy forces its members to demonstrate their commitment to filibustering the Supreme Court nomination. To have even the chance of success requires each member to hold the Senate floor for a prolonged period of time in an effort to outwait the majority. The only way for the minority to prevail in the parliamentary showdown is for the majority to relent and cease its efforts to overcome the filibuster. As a consequence, the minority leadership will be forced to turn to less-interested or disinterested Senators to sustain the filibuster once its most committed obstructionists have used their allotment of speeches.

Such calls from the leadership for active participation in the filibuster by rank-and-file members is likely to precipitate internal dissent within the minority for two reasons.

- The majority's determination to prevail will become increasingly clear as the minority's committed obstructionists begin losing their ability to speak on the Senate floor. The near-inevitability of defeat will diminish the willingness of less-interested or disinterested Senators to sustain the filibuster due to the perceived futility of the effort.
- The novelty of the parliamentary showdown will attract considerable media attention. This attention will increase as the committed obstructionists lose their ability to filibuster and less-interested or disinterested Senators are called upon to sustain the effort. Media scrutiny thus has the potential to increase the political costs of filibustering for the members who are least willing to bear them.

It is also important to note that strictly enforcing the two-speech rule in the manner outlined here imposes costs on rank-and-file members of the majority as well. Specifically, it requires the majority to quickly produce a quorum in order to shorten the time necessary to outwait the minority. Additionally, the majority must ensure that it can produce a simple majority when the Senate is in session in order to table any procedural motions the minority may make.

Nevertheless, these costs can be managed in order to reduce the extent to which they would disrupt Senators' schedules. While recorded votes technically last for 15 minutes, majority leaders from both parties have routinely kept a vote open for longer when extra time was needed to allow a member to vote. Given this, the majority should be able to produce a simple majority of Senators on the floor to table any superfluous motions made by the minority with only minor inconveniences.

Forcing votes on superfluous procedural motions also inconveniences members of the minority who are not participating in the filibuster at that particular moment. As a consequence, any effort to exhaust the majority by making such motions will also impose costs on the minority. These costs are likely to exacerbate tensions within the minority between Senators who are committed obstructionists and those who are less enthusiastic about participating in the filibuster.

The majority can also determine how long the Senate will remain in session each day. Late-night and weekend sessions are not required to eventually overcome the filibuster. The majority may move to recess at the end of each calendar day if it so chooses.[40]

The costs of these requirements for rank-and-file members of the majority should be weighed against the near-inevitability of victory if the major-

40. Motions to recess are amendable, and the minority could attempt to offer amendments in order to keep the Senate in session. Yet offering such amendments, if not ruled dilatory by the Chair, imposes costs on its members as well. For example, forcing recorded votes on amendments to a motion to recess imposes physical costs on rank-and-file members. The physical costs rise during overnight and weekend sessions, thus making it less likely that the minority can sustain an effort to prevent the Senate from recessing.

ity is determined to prevail. In short, the only way the minority may prevent a simple majority vote on confirmation is for it to try to force recorded votes until such time as the majority breaks. However, the minority is unlikely to be able to sustain forcing votes in the face of a majority that is determined not to break, even if the Chair does not rule such efforts dilatory. Moreover, it is likely that the strategy will need to be implemented only once. The minority is unlikely to bear the costs associated with filibustering future Supreme Court nominations, regardless of its technical ability to do so, once it realizes that the majority is determined to prevail and that defeat is therefore practically inevitable.

Conclusion

The Senate should employ the two-speech rule instead of the nuclear option to overcome a filibuster of a nominee to serve on the Supreme Court. A rules-based strategy to limit minority obstruction in this context would not jeopardize the legislative filibuster or unduly empower the majority to limit the rights of individual Senators more broadly and would still accomplish the objective of confirming the President's nominee.

Rule XIX prohibits Senators from giving more than two speeches on any one question during the same legislative day. Once a Senator has given two speeches, he or she may not speak again. The Senate votes when there are no members remaining on the floor who both wish to and are allowed to speak. Strictly enforcing Rule XIX while keeping the Senate in the same legislative day limits the amount of time Senators can filibuster a nominee and signals to rank-and-file members of the minority that the majority is determined to prevail in similar parliamentary showdowns in the future.

*—**James I. Wallner, PhD,** is Group Vice President for Research, and **Ed Corrigan** is Group Vice President for Policy Promotion, at The Heritage Foundation.*