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Standing Order and Rulemaking Statute: Possible Alternatives to the "Nuclear Option?"

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Abstract. Concern over the Senate's inability to reach a vote on certain pending nominations has led some Senators to express an interest in amending or bypassing the supermajority requirement to limit consideration now required by Senate rules. Such an approach to ending filibusters, dubbed the nuclear' or constitutional' parliamentary option, might be accomplished in several ways, some of which, opponents argue, could violate Senate rules or precedents. It might also be possible to institute new consideration limits on nominations by establishing a new standing order or by statutory provisions having the force of rules. Action in either of these forms might have advantages over both standing rule amendments and precedential action, but might also present special obstacles. The purpose of this report is to examine advantages and disadvantages of limiting Senate consideration by these forms.

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Summary

Concern over the Senate's inability to reach a vote on certain pending nominations has led some Senators to express an interest in amending or bypassing the supermajority requirement to limit consideration now required by Senate rules. Such an approach to ending filibusters, dubbed the 'nuclear' or 'constitutional' parliamentary option, might be accomplished in several ways, some of which, opponents argue, could violate Senate rules or precedents.

It might also be possible to institute new consideration limits on nominations by establishing a new standing order or by statutory provisions having the force of rules. Action in either of these forms might have advantages over both standing rule amendments and precedential action, but might also present special obstacles.

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This report will be updated as needed.

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The "Nuclear" or "Constitutional" Option to Limit Debate

Paragraph 2 of Senate Rule XXII, commonly known as the "cloture rule," was adopted by the Senate in 1917. The rule, which has been amended six times over the intervening years, established a procedure by which the Senate might limit debate by supermajority vote and enable itself to reach a vote on a pending measure or matter.[1] Short of obtaining unanimous consent, invoking cloture is the only way the Senate can limit consideration and enable itself to reach a vote.

Recently, concern over the Senate's inability to reach a confirmation vote on certain pending nominations has led some Senators to express an interest in finding a way other than the supermajority requirements of Rule XXII to limit consideration and assure a vote on these nominations.[2] A proposal to strengthen consideration limits by amending the Standing Rules of the Senate would require a day's written notice and would be debatable. In addition, obtaining cloture on such a proposal would require a special higher supermajority of two-thirds present and voting, rather than the three-fifths of the body required for other matters including nominations. Due to this difficulty, some have sought other alternative means of altering the rules. The main one under discussion has been establishing the limitations through precedential procedural motion. Such an approach, dubbed by various parties the "nuclear option,"[3] the "constitutional option,"[4] and the "Byrd option,"[5] would seek to end debate by means other than the supermajority vote that Rule XXII requires.

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[1] U.S. Congress, Senate Committee on Rules and Administration, *Senate Cloture Rule, Limitation of Debate in the Congress of the United States and Legislative History of Paragraph 2 of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule)*, committee print, 99th Cong. 1st sess. (Washington: GPO, 1985).

[2] CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule*, by Christopher M. Davis and Betsy Palmer.

[3] Charles Hurt, GOP Senators Keep 'Nuclear Option' In Reserve For Judges, *Washington Times*, May 7, 2003, p. A6.

[4] Charles Hurt, "Support Falters for the 'Nuclear Option'," *The Washington Times*, Mar. 23, 2005, p. A1.

[5] Sen. McConnell (R-KY), remarks on *Fox News Sunday*, Mar. 27, 2005: "[t]here is on the table what could best be described as the 'Byrd option,' because when Senator Byrd [D-WV] was majority leader of the Senate, he, too, had several occasions upon which there were rulings from the chair that changed precedents that had seeped into common use in the Senate that he thought should be reversed, and a majority of the Senate decided to do that."

There is no single definition of the "nuclear" or "constitutional" option. Most observers suggest that it refers to the use of a ruling by the Senate's presiding officer, perhaps coupled with a majority vote of the chamber affirming the ruling, that debate could be brought to a close by majority vote, rather than the supermajority called for in Rule XXII.[6] This ruling might be made in response to a point of order that the supermajority cloture threshold of Rule XXII is unconstitutional, or that further debate on a given measure or motion is dilatory.[7] Others have suggested that such a proceeding might involve breaking a filibuster using elements of general parliamentary law not in Senate rules, such as the previous question motion, whereby debate ends by simple majority decision.[8]

The term "nuclear" was first coined by Senate supporters of such action to emphasize the drastic nature of their proposed filibuster-breaking tactic.[9] Subsequently, opponents have embraced the term to describe what they characterize as the likely negative fallout from the unprecedented use of such proceedings in a body that traditionally has processed much of its work by unanimous consent and with an eye toward Senatorial comity. The proposed action would be "nuclear," opponents argue, because it would upset the foundation of Senate rules and precedents that permit the chamber to maintain regularity in its proceedings.

It might also, however, be possible to institute new consideration limits on nominations by establishing a new standing order or by statutory provisions having the force of rules ("rulemaking provisions"). Action in either of these forms could establish a form of majority cloture for entire classes of nominations, thereby enabling the Senate to reach a vote on them. These approaches might have advantages over both standing rule amendments and precedential action, but might also present special obstacles. This report examines the advantages and disadvantages of limiting Senate debate by rulemaking statute or standing order and poses arguments in favor of, and in opposition to, these forms.

Standing Orders

Standing orders are regulations that have the force and effect of a rule, but are not contained in Standing Rules. Senate standing orders continue in force until they are altered or repealed, and may be adopted by simple resolution or by unanimous consent. Existing Senate standing orders govern a wide range of chamber business from the simple (the annual public reading of George Washington's farewell

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[6] CRS Report RL32684, *Changing Senate Rules: The 'Constitutional' or 'Nuclear' Option*, by Betsy Palmer.

[7] For additional information, see CRS Report RL32843, *'Entrenchment' of Senate Procedure and the 'Nuclear Option' for Change: Possible Proceedings and Their Implications*, by Richard S. Beth.

[8] CRS Report RL32149, *Proposals to Amend the Senate Cloture Rule*, by Christopher M. Davis and Betsy Palmer.

[9] Charles Hurt, "GOP Senators Keep 'Nuclear Option' In Reserve For Judges," *The Washington Times*, May 7, 2003, p. A6.

address)[10] to the complex (the creation and operation of the Senate Committees on Ethics and Intelligence).[11] Senate standing orders are printed in a specific section of the *Senate Manual*.[12]

Some standing orders relate to the consideration of nominations. The referral of certain Department of Energy nominations to committees, for example, is governed in part by the terms of special orders adopted by the Senate in 1990.[13] Some of these standing orders already mandate expedited consideration of specific nominations. For example, on January 15, 2003, the Senate adopted a standing order relating to nominations to the position of Inspector General at certain federal agencies. Majority Leader Bill Frist proposed the standing order in the following terms:

> Mr. President, I ask unanimous consent that nominations to the Office of Inspector General ... be referred in each case to the committee having primary jurisdiction over the Department, Agency, or entity, and if and when reported in each case, then to the Committee on Governmental Affairs *for not to exceed 20 calendar days ... I ask unanimous consent that if the nomination is not reported after the expiration of that period, the nomination be automatically discharged and placed on the Executive Calendar.*[14]

While this standing order placed time limits only on a sequential referral of a nomination, a standing order might be adopted by unanimous consent or simple resolution that sets more or less stringent terms of consideration for classes of nominations both in a primary committee and on the Senate floor.

Rulemaking Statutes

Rulemaking statutes are laws that establish special procedures for the consideration of specific measures or types of measures in one or both chambers of Congress. Many of these laws are called "fast track" or "expedited procedure" statutes because they include provisions mandating timely floor scheduling of legislation and limiting committee consideration, floor debate, and amendment.[15] Congress sometimes chooses to apply expedited procedures to specific measures because the regular legislative procedures of Congress are time-consuming and do

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[10] U.S. Congress, Senate Committee on Rules and Administration, *Senate Manual*, S. Doc. 107-1, 107th Cong., 1st sess. (Washington: GPO, 2002), Sec. 69.

[11] Ibid., sec. 94.

[12] Ibid., secs. 60-114.

[13] Sen. Mitchell, remarks in the Senate, *Congressional Record*, vol. 136, Jun. 28, 1990, pp. 16573-16574. For further information, see CRS Report RL30959, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, by Henry Hogue.

[14] Sen. Frist, remarks in the Senate, *Congressional Record*, daily edition, vol. 149, Jan. 15, 2003, p. S994 (emphasis added).

[15] CRS Report 98-888, *"Fast Track" or Expedited Procedures: Their Purposes, Elements and Implications*, by Christopher M. Davis.

not guarantee that a given measure will be considered quickly or at all. Numerous expedited procedure statutes are now in effect, including well-known examples such as the Congressional Budget Act of 1974 [2 U.S.C. 682-84 and 688], the Trade Act of 1974 [19 U.S.C. 2101], and the Defense Base Closure and Realignment Act [10 U.S.C. 2903, 2904 and 2908].[16]

While existing rulemaking statutes deal with the consideration of legislation, if Congress chose, it could use this device to regulate nominations. A rulemaking statute, could, for example, set time limits on Senate committee consideration of a nomination, create devices to ensure that the Senate can discharge a committee from further consideration of a nomination, and mandate an automatic floor vote on it after a specified period of debate. Such terms could apply to just one nomination, or entire classes of nominations, such as those to judicial or national security positions.

Most rulemaking statutes contain language declaring them to be enacted pursuant to the constitutional rulemaking power of Congress contained in Article I, Section 5, and reserving the right of the chamber affected to change them on its own authority, the same as any other rule, without requiring another enactment of a statute.

Potential Advantages and Arguments in Favor

Using either a rulemaking statute or standing order to limit Senate consideration of nominations would likely have advantages and disadvantages for both individual Senators and the Senate as an institution. This section discusses possible advantages and the next section of this report identifies possible disadvantages.

Not "Nuclear." As has been noted, the term "nuclear" has been used by observers to describe the severity of the tactic and its potential effect on Senatorial comity. A rulemaking statute or standing order could not be considered "nuclear" in either of these ways; rulemaking statutes are laws and are enacted in the same procedural manner as all laws. Standing orders also follow the regular order. Mandating limits on consideration of nominations in either form would violate no rule or precedent. For this reason, proposals in these forms might be less likely seen as departures from Senate norms.

Lower Cloture Threshold, No Notice Required. A potential advantage of using a rulemaking statute or standing order over some other parliamentary approaches to limiting consideration is that invoking cloture on these measures would require the votes of only three-fifths' of those chosen and sworn (60 Senators if there are no vacancies), rather than the two-thirds present and voting (67, if all Senators vote) needed to get cloture on amendments to the Senate's standing rules. The higher threshold for invoking cloture on rules changes is understood to apply only to direct amendments to the Senate's Standing Rules, not to other measures

[16] Ibid.

having the effect of rules.[17] In addition, in contrast to proposals to amend standing rules, consideration of a bill creating an expedited procedure statute or of a simple resolution creating a standing order would not require a day's written notice.[18]

Facilitates Coalitions. It might be easier for supporters to build legislative coalitions in favor of a rulemaking statute or standing order. Members can cosponsor (and be lobbied to cosponsor) legislation. Interest groups can rate support of legislation, and the public can rally behind it. This is not possible with a procedural ruling or other parliamentary mechanism that establishes precedent. Setting consideration limits on nominations by means of legislation may also be an easier concept for the press and general public to understand.

Pre-enactment Flexibility. Legislation proposing a rulemaking statute or standing order might either be considered as a freestanding measure or attached to another vehicle as a committee or floor amendment. By contrast, "nuclear" or "constitutional" options that rely on points of order and rulings of the chair can only be raised under specific parliamentary circumstances. As with any legislative provision, the proposals might even originate in the House, where a majority has the ability through the adoption of a special rule reported by the Committee on Rules to incorporate such language in any or every bill considered. Such an approach, however, while technically permissible under the rules, might be viewed as an infringement on the prerogatives of each chamber to determine its own rules.

Post-enactment Flexibility. If provisions of a statute or standing order established a default set of ground rules for consideration of nominations, these provisions could still be tailored to meet specific situations. As previously noted, these provisions, like all Senate rules, could be altered, added to, or laid aside in whole or in part at any time by unanimous consent.[19] It is unclear that such flexibility would exist with a Senate precedent.

Clarity. Utilizing a rulemaking statute or standing order would also limit confusion by clearly specifying which business is meant to be considered in an expedited way. By contrast, changing the terms of Senate consideration of nominations by setting a new precedent might lead to doubt whether precedent would apply to shutting off debate on all nominations, on just certain nominations, or on all matters before of the Senate? This is particularly true of a "nuclear" or "constitutional" option whose mechanism is a point of order that continued consideration of a nomination was "dilatory." If a point of order were made that the provisions of Rule XXII are an unconstitutional bar on the Senate's duty to advise and consent, could the same argument be made about debate on measures dealing

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[17] Sen. Ford, remarks in the Senate, *Congressional Record,* vol. 131, July 25, 1985, pp. 20447-20448.

[18] U.S. Congress, Senate, *Riddick's Senate Procedure: Precedents and Practices,* S.Doc.101-28, 101st Cong., 2nd sess., by Floyd M. Riddick, Parliamentarian Emeritus, and Alan S. Frumin, Parliamentarian, rev. and ed. by Alan S. Frumin (Washington: GPO, 1992).

[19] William Holmes Brown and Charles W. Johnson, *House Practice, A Guide to the Rules, Precedents, and Procedures of the House,* 108th Cong., 1st sess. (Washington: GPO, 2003), ch. 6, sec. 5.

with other constitutional powers, such as raising revenue or even recording the Yeas and Nays on a question?

Lasting Fix. Fixing the terms of consideration for nominations by rulemaking statute or standing order would provide a permanent set of ground rules for the Senate's consideration of nominations that would need not be invoked from the floor each time a nomination was considered. By contrast, setting a new precedent by ruling of the chair, for example, that further debate was dilatory, might need to be repeated with every nomination and would be subject to appeal by opponents on each occasion.

Potential Disadvantages and Arguments in Opposition

Debatable. Legislation proposing statutory debate limits on nominations or a simple resolution proposing a standing order would both be debatable propositions, as would motions to proceed to their consideration. Reaching a vote on these questions would almost certainly require supporters to obtain the same cloture level required to limit debate on a nomination itself. If the proposal were brought up as an amendment, no motion to proceed to its consideration would be required, but it might still become necessary to obtain a supermajority for cloture on the proposition itself.

Limits Discretion of Committees and Leadership. The Senate does not usually require its committees to act on specific measures or kinds of measures, or place deadlines on their action. Committees, as policy experts and agents of the Senate, generally have discretion to choose what measures they will consider and whether to report them. Codifying the terms of consideration for nominations by way of rulemaking statute or special order could undermine this discretionary power of committees and put the consideration of nominations on 'autopilot.' Longstanding Senate tradition, such as that of blue slips for the consideration of nominations,[20] would be erased. Such an approach could also encroach on the traditional prerogative of Senate leadership to control the scheduling of questions for consideration.

Could Alter the Senate's Nature. The right of extended debate is a longstanding tradition in a Senate whose deliberative nature was designed by the Founders as a check on the House to ensure that hastily considered measures did not become law and as a protection for small states and other minorities. Limiting consideration of whole classes of nominations by statute or standing order undermines this deliberative tradition and arguably alters the nature of the Senate, making it more of a majoritarian chamber like the contemporary House of Representatives.

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[20] CRS Report RS21674, *The Blue-Slip Process in the Senate Committee on the Judiciary: Background, Issues, and Options*, by Mitchel A. Sollenberger. See also, CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer, and CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

Tilts Constitutional Checks and Balances. Article II, Section 2 of the Constitution grants the President power, "by and with the Advice and Consent of the Senate," to make treaties and propose nominations. A well-established line of argument states that the Founders intended these powers to be divided between the Senate and the President. To the extent that it assured the occurrence of a Senate vote on any nomination the President submits in specified classes, a standing order or rulemaking statute mandating limits on consideration would diminish the effective discretion of the Senate in the confirmation process, and correspondingly tend to increase the power of the chief executive. In this way, a statute or standing order approach could tilt this division of power toward the President. Placing the terms of consideration for nominations in law or standing order could restrict how the Senate exercises its advice function and undermine a constitutional check on executive authority. One might argue that ensuring an automatic vote on every nomination could make it less likely that Presidents will seek the Senate's advice before proposing them.

Perception That Change is Unwarranted. It appears that filibusters on nominations were less common in previous eras because nominations that faced substantial opposition often did not reach the floor in the first place, or were never submitted due to prior consultation between the President and interested Senators. In addition, for large parts of history, certain nominations were considered "patronage" positions that Senators were given wide latitude to influence in their state.[21] Some observers might argue that the Senate's present inability to reach a vote on certain nominations arises more from a lack of presidential consultation with the Senate on nominees, or from changes in Senate policies relating to blue slips and senatorial prerogatives,[22] than it does from abuse of extended debate.

Senators Might Lose Power. Limiting debate by statute or standing order might result in a diminishment of the power of every Senator. An examination of measures blocked over the last several Congresses because the Senate could not obtain cloture suggests that Senators from both parties have utilized extended debate on bills and nominations. All Senators, and the states they represent, may, at times, be members of a minority and in need of the protections of unlimited debate. Since 1789, the Senate has rejected countless attempts to establish majority cloture in the body.[23] Limiting debate on whole classes of nominations by legislation is, in effect, a form of majority cloture.

Unclear Outcome. While standing orders have the same authority as standing rules of the Senate, it is not clear whether they are always followed in the same way. For example, on October 9, 2004, the Senate adopted S.Res. 445, a standing order making numerous changes in the way the chamber deals with intelligence and homeland security matters. The standing order directed the

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[21] David Margolick, "Stalled Federal Court Nomination Raises Concern," *New York Times*, June 24, 1984, p. 25.

[22] Sen. Levin, remarks in the Senate, *Congressional Record*, daily edition, vol. 149, July 21, 2004, p. S8522.

[23] Senate Committee on Rules and Administration, *Senate Cloture Rule*, pp. 11-36.

Committee on Appropriations to "reorganize into 13 subcommittees as soon as possible after the convening of the 109th Congress."[24] When it organized, however, the Appropriations Committee did not follow the terms of the standing order, choosing instead to establish 12 subcommittees, none of which was a Subcommittee on Intelligence.[25] In the case of a standing order governing the consideration of nominations, however, it presumably would be possible for a Senator to try to enforce the terms of the standing order by point of order on the floor.

[24] S.Res. 445, 108th Cong., 2nd sess.

[25] U.S. Congress, Senate Committee on Appropriations, *Chairman Cochran Announces New Structure for Senate Appropriations Committee*, press release, Mar. 2, 2005, available at [http://appropriations.senate.gov/releases/record.cfm?id=232718], visited Apr. 1, 2005.